

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Petition for Declaratory Ruling that Clark) WT Docket No. 19-230
County, Nevada Ordinance No.4659 Is)
Unlawful Under Section 253 of the)
Communications Act as Interpreted by the)
Federal Communications Commission and Is)
Preempted)
)

ORDER

Adopted: January 14, 2021

Released: January 14, 2021

By the Chief, Wireless Telecommunications Bureau:

1. Introduction. In this Order, we address a petition for declaratory ruling filed by Verizon that asks the Commission to preempt certain recurring fees set forth in a Clark County, Nevada (Clark County), ordinance governing the placement of small wireless facilities in public rights-of-way.1 Specifically, we dismiss the Verizon Petition without prejudice and, given continued disagreement in the record, we remind the parties that certain of these issues were resolved by the 2018 Small Cell Declaratory Ruling, which was affirmed by the Ninth Circuit Court of Appeals in City of Portland.2

2. Background. Section 253 of the Communications Act provides that state and local governments may not "prohibit or have the effect of prohibiting the ability of any entity to provide any intrastate or interstate telecommunications service," though state and local governments retain the authority to "require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way."3 In the 2018 Small Cell Declaratory Ruling, the Commission concluded, among other things, that state or local fees for the use of public rights-of-way by small wireless facilities would violate Section 253 unless: (1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly situated competitors in similar situations.4 The Commission also established a "presumptively reasonable safe harbor" for state and local governments to charge certain rights-of-way fees for small wireless facilities.5

1 Petition for Declaratory Ruling of Verizon, WT Docket No. 19-230, at 1 (filed Aug. 8, 2019) (Verizon Petition).

2 See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al., WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9103, 9138 paras. 36, 97 (2018) (2018 Small Cell Declaratory Ruling), affirmed in pertinent part, City of Portland v. United States, 969 F.3d 1020, 1038 (9th Cir. Aug 12, 2020), en banc review denied City of Portland v. FCC, Case No. 18-72689 (9th Cir. Oct. 22, 2020) (City of Portland).

3 47 U.S.C. § 253(a), (c).

4 2018 Small Cell Declaratory Ruling, 33 FCC Rcd at 9112-13, para. 50.

5 Id. at 9129-30, paras. 79-80. These safe harbor levels include: "(a) \$500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond five, or \$1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to (continued....)

3. On August 8, 2019, Verizon filed a petition asserting that certain fees included in Clark County Ordinance 4659 effectively prohibit the provision of telecommunications services by Verizon in violation of Sections 253(a) and (c) of the Communications Act and that the Commission should preempt the fees under Section 253(d).⁶ Specifically, Verizon took issue with fees that required a provider of telecommunications services to pay: (1) a recurring Master Wireless Use License Fee of 5% of gross revenues collected each calendar quarter; (2) a Wireless Site License Fee (ranging from \$700/year/facility to \$3960/year/facility) for each Small Wireless Facility installed in the public rights-of-way, with an automatic annual fee increase of 2% per year; and (3) an Annual Inspection Fee of \$500 per Small Wireless Facility installed in a county rights-of-way.⁷ On August 29, 2019, the Wireless Telecommunications Bureau sought comment on the Verizon Petition,⁸ and local governments and providers of telecommunications services filed comments, reply comments, and *ex parte* submissions.⁹

4. Among other disagreements reflected in the record, parties express competing views about certain threshold issues that are not necessarily specific to a particular ordinance: (1) who bears the burden of proof to demonstrate that a local regulation does or does not effectively prohibit the provision of telecommunications service in violation of Section 253;¹⁰ (2) whether effective prohibition can be demonstrated when the petitioner is providing telecommunications service within the local jurisdiction;¹¹ and (3) whether fees based on revenues can meet the Commission's conditions for permissible state or local fees for the use of public rights-of-way by small wireless facilities.¹²

support one or more Small Wireless Facilities; and (b) \$270 per Small Wireless Facility per year for all recurring fees, including any possible [right-of-way] access fee or fee for attachment to municipally-owned structures in the [rights-of-way].” *Id.* at 9129, para. 79.

⁶ Verizon Petition at 1. Section 253(d) requires the Commission, after public notice and comment, to preempt state and local regulations that violate Section 253(a). 47 U.S.C. § 253(d).

⁷ See Verizon Petition at 11-13.

⁸ *Wireless Telecommunications Bureau Seeks Comment on Verizon's Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, WT Docket No.19-230, Public Notice, 34 FCC Rcd 7711 (WTB 2019).

⁹ See, e.g., ExteNet Comments; City and County of San Francisco Comments; T-Mobile Comments; Victor K. Tervalo, on behalf of the City of Baltimore, Reply; Clark County Reply; Verizon Reply.

¹⁰ See Clark County Opposition at 2, 23-24 (arguing that “it is incumbent on a complainant [e.g., Verizon] to demonstrate, in making a case for relief from effective prohibition under Section 253(a), that a locality’s fees do not represent costs”); NATOA Reply at 4 (arguing that the Commission must “continue to require the Petitioner [Verizon] to bear the burden of proving local fees do not comply with the Small Cell Order”); Verizon Reply at 23 (arguing that “once the party challenging the fees establishes that the fees exceed the Commission’s presumptively reasonable level, then the burden of demonstrating that the fees [are cost-based] falls to the locality”).

¹¹ See Clark County Opposition at 9 (asserting that “[i]t logically follows, therefore, that where a provider is able to provide service, there can be no finding of a prohibition or effective prohibition under Section 253(a)"); Verizon Reply Comments at 11 (asserting that “[b]ecause the Commission ruled that an effective prohibition can occur when a provider is materially inhibited from improving existing services,[footnote omitted] the provision of some service in a location does not bar a finding of effective prohibition” and that “even if the high recurring fees do not effectively prohibit service in the County (but they do), the high fees effectively prohibit service elsewhere by exhausting finite capital resources”).

¹² See Clark County Opposition at 18-19 (arguing that the County’s gross-revenue fees are fees of general applicability and that “[n]either the Communications Act nor the [2018 *Small Cell Declaratory Ruling*] grant providers of telecommunications services blanket exemption from laws of general applicability”); Verizon Petition at 24 (arguing that the County’s gross-revenue fee does not “reasonably approximate[] the County’s actual and direct costs associated with a wireless provider’s use of the County’s public rights-of-way”).

5. On December 16, 2020, Clark County filed an *ex parte* letter stating that the County had adopted “a new small cell ordinance that is significantly different from Ordinance 4659.”¹³ Clark County requests that the Verizon Petition be dismissed as moot because the prior ordinance is “no longer enforceable law in Clark County.”¹⁴ In response, Verizon argues that “[s]ome, but not all, of the issues with Ordinance 4659 are addressed in the New Ordinance” and notes that areas of concern remain.¹⁵ At the same time, Verizon states that it takes no position on Clark County’s request to dismiss the Petition before the FCC, but it contends that any such dismissal should be without prejudice.¹⁶

6. *Discussion.* As an initial matter, we dismiss the Verizon Petition without prejudice, given that the subject of the petition, Clark County Ordinance 4659, is no longer enforceable law and, according to Clark County, was not applied to Verizon or any other service providers.¹⁷ In that regard, we do not address here whether Ordinance 4659 complies with the Commission’s prior interpretations of Section 253.¹⁸ For the benefit of parties to this proceeding and other interested entities, however, we take the opportunity to address the disagreement in the record regarding certain issues that the Commission has already resolved in its *2018 Small Cell Declaratory Ruling*, which was affirmed by the Ninth Circuit.¹⁹

7. First, the *2018 Small Cell Declaratory Ruling* explained that the locality, not the petitioner, has the burden of demonstrating to the Commission why fees above safe harbor levels should not be preempted (assuming that the petitioner has made a *prima facie* case that the fees in question do, in fact, exceed these safe harbor levels).²⁰ In particular, the Commission stated that, based on its review of the record, “there should be only very limited circumstances in which localities can charge higher fees [relative to the safe harbor levels] consistent with the requirements of Section 253.”²¹ The Commission further concluded that, in such limited circumstances, a locality could prevail in charging fees that are above the safe harbor “by showing that such fees nonetheless comply with the limits imposed by Section 253—that is, that they are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory.”²² This burden is met only to the extent that the state or locality has demonstrated that a fee that exceeds safe harbor levels meets these conditions.²³

8. Second, the *2018 Small Cell Declaratory Ruling* determined that a local government’s fees for the use of public rights-of-way by small wireless facilities can effectively prohibit the ability of an entity to provide telecommunications services, in violation of Section 253(a), even when the petitioner

¹³ Letter from Gerard Lavery Lederer, Counsel to Clark County, to Ajit Pai, Chairman, FCC, et al., WT Docket No. 19-230, at 1 (filed Dec. 16, 2020) (Clark County *Ex Parte*). Clark County also stated that, following the filing of the Verizon Petition, it stayed enforcement of Ordinance 4659. *Id.* at 2.

¹⁴ *Id.* at 1.

¹⁵ Letter from Andre J. Lachance, Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-230, at 2 (filed Dec. 23, 2020).

¹⁶ *Id.* at 1.

¹⁷ Clark County *Ex Parte* at 1-2.

¹⁸ We also do not address whether Clark County’s new ordinance complies with the Commission’s prior interpretations.

¹⁹ See *2018 Small Cell Declaratory Ruling*, 33 FCC Rcd 9088; *City of Portland*, 969 F.3d 1020.

²⁰ *2018 Small Cell Declaratory Ruling*, 33 FCC Rcd at 9130, para. 80; *City of Portland*, 969 F.3d at 1037, 39.

²¹ *2018 Small Cell Declaratory Ruling*, 33 FCC Rcd at 9129-30, paras. 79-80.

²² *Id.* at 9129-30, para. 80 (“Allowing localities to charge fees above these levels upon this showing recognizes local variances in costs.”).

²³ See *id.* at 9129, para. 79 & n.233 (“Any party may still charge fees above the levels we identify by demonstrating that the fee is a reasonable approximation of cost that itself is objectively reasonable.”).

is providing telecommunications service in that local jurisdiction. Specifically, the Commission clarified that “an effective prohibition occurs where a state or local legal requirement materially inhibits a provider’s ability to engage in any of a variety of activities related to its provision of a covered service,” such as “filling a coverage gap,” “densifying a wireless network,” “introducing new services,” or “otherwise improving existing services.”²⁴ Moreover, the Commission recognized that a fee imposed by one local jurisdiction for use of its public rights-of-way for small wireless facilities can effectively prohibit the provision of telecommunications service in another jurisdiction.²⁵ Therefore, the fact that entities have actually deployed small wireless facilities in the local jurisdiction that imposed the fee does not prevent the Commission from finding that the fee has the effect of prohibiting service. Rather, as the *2018 Small Cell Declaratory Ruling* made clear, and as the Ninth Circuit affirmed, “high fees in one jurisdiction can prevent deployment in other jurisdictions.”²⁶

9. Third, the *2018 Small Cell Declaratory Ruling* expressed doubt that local government fees based on providers’ gross revenues could meet the Commission’s criteria for justifying rights-of-way fees that exceed the safe harbor levels. In particular, the Commission expressed agreement “with courts that have recognized that fees based on gross revenues generally are not based on the costs associated with an entity’s use of the [right-of-way], and where that is the case, are preempted under Section 253(a).”²⁷ Indeed, revenue-based fees are not designed to reflect a locality’s costs; they are designed to reflect a provider’s revenues. Therefore, a particular revenue-based fee that exceeds the Commission’s safe harbor levels would violate Section 253 unless the locality can demonstrate that the fee nonetheless represents a reasonable approximation of the locality’s costs and meets the other Commission criteria.²⁸

10. Accordingly, **IT IS ORDERED** that, pursuant to Sections 253 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 253, 332, Sections 0.131, 0.331, and 1.2 of the Commission’s rules, 47 CFR §§ 0.131, 0.331, 1.2, and Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and effective upon release of this order, Verizon’s Petition for Declaratory Ruling dated August 8, 2019 **IS DISMISSED** without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Donald K. Stockdale, Jr.
Chief
Wireless Telecommunications Bureau

²⁴ *Id.* at 9104-05, para. 37.

²⁵ *Id.* at 9121, para. 62 (reasoning that “[t]he text of Section 253(a) is not limited by its terms only to effective prohibitions within the geographic area targeted by the state or local fee”). *See also id.* at 9118, para. 60 (finding that “fees imposed by localities, above and beyond the recovery of localities’ reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere”).

²⁶ *City of Portland*, 969 F.3d at 1039 (“The record also supports the FCC’s factual conclusion that high fees in one jurisdiction can prevent deployment in other jurisdictions.”); *2018 Small Cell Declaratory Ruling*, 33 FCC Rcd at 9118-23, paras. 60-65.

²⁷ *2018 Small Cell Declaratory Ruling*, 33 FCC Rcd at 9124-25, para. 70.

²⁸ *Id.* at 9124, 9129-30, paras. 79-80 & n.208.