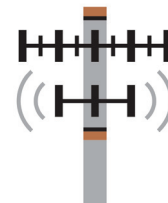




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TELECOMMUNICATIONS LAW



FEBRUARY 2021

Wireless Telecommunications Bureau Gives Wireless Infrastructure Another Win

On January 14, 2021, the Wireless Telecommunications Bureau (“Bureau”) of the Federal Communications Commission (“Commission”) issued an order (“*Bureau Order*”) addressing a Verizon petition for declaratory ruling seeking Commission preemption of a Clark County, Nevada ordinance imposing numerous fees on entities seeking to place small wireless facilities in the public rights-of-way (“PROW”).¹ Specifically, the County ordinance required such entities to pay:

1. A recurring Master Wireless Use License Fee equal to 5% of gross revenues collected each calendar quarter;
2. An annual Wireless Site License Fee for each Small Wireless Facility installed in the PROW, with an automatic 2% annual escalator; and
3. An Annual Inspection Fee.²

According to Verizon, the County fees exceeded the Commission’s “safe harbor” levels without proper justification and were therefore in violation of Section 253 of the Communications Act (“Act”).³

By way of background, Section 253 of the Act allows state and local governments to charge “fair and reasonable” fees to telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of the PROW.⁴ However, the Act precludes such state and local governments from

imposing fees that would “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁵ In the *2018 Small Cell Declaratory Ruling*, which was affirmed by the Ninth Circuit Court of Appeals, the Commission established “safe harbor” fee levels that state and local governments can charge entities seeking to install small wireless facilities in the PROW.⁶ The Commission stated it would presume any fees at or below the “safe harbor” levels to be in compliance with Section 253.⁷ For fees that were in excess of the “safe harbor” levels, the Commission stated that such fees could be found to be in compliance with Section 253 if a state and local government can show that:

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.⁸

Since the County ordinance was no longer enforceable law, the Bureau dismissed Verizon’s petition without prejudice.⁹ The Bureau, however, reiterated the following Commission’s

⁵ *Id.* at § 253(a).

⁶ 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, 9129-30, para. 78-80 (2018) (*2018 Small Cell Declaratory Ruling*), *aff’d in pertinent part*, *City of Portland v. United States*, 969 F.3d 1020, 1038 (9th Cir. 2020), *en banc review denied* *City of Portland v. United States*, Case No. 18-72689 (9th Cir. Oct. 22, 2020) (*City of Portland*).

⁷ *2018 Small Cell Declaratory Ruling*, 33 FCC Rcd 9129-30, para. 80.

⁸ *Id.*

⁹ *Bureau Order* at para. 6.

¹ *Petition for Declaratory Ruling That Clark County, Nevada Ordinance No. 4659 Is Unlawful Under Section 253 of the Communications Act as Interpreted by the Federal Communications Commission and Is Preempted*, WT Docket No. 19-230, Order, DA 21-59 (WTB Jan. 14, 2021) (*Bureau Order*).

² *Petition for Declaratory Ruling of Verizon*, WT Docket No. 19-230, at 11-13 (filed Aug. 8, 2019) (*Verizon Petition*).

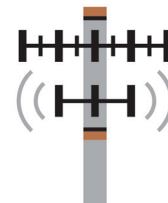
³ See *Verizon Petition* at 1.

⁴ 47 U.S.C. § 253(c).



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findings in the *2018 Small Cell Declaratory Ruling* when addressing several threshold questions that were raised in the record – effectively precluding state and local governments from raising such arguments in the future:

- State and local governments bear the burden of proof of demonstrating that fees in excess of the “safe harbor” levels do not prohibit or have the effect of prohibiting entities from providing telecommunications service in violation of Section 253.
- State or local fees can effectively prohibit an entity from providing telecommunications service in violation of Section 253 even though that entity is already providing telecommunications service in that jurisdiction.
- State and local fees based on an entity’s gross revenues will be considered to be in violation of Section 253 if they exceed the “safe harbor” levels, unless such fees satisfy the Commission’s conditions established in the *2018 Small Cell Declaratory Ruling* (referenced above).¹⁰

This declaratory ruling is a clear win for small cell wireless providers seeking access to the state or local PROW. While interested parties can still challenge the *Bureau Order* at the Commission level, the Commission will likely affirm the *Bureau Order* despite the change in party majority.

Additional Assistance

For further assistance, please contact a member of the [Telecommunications Practice Team](#) or the [Phillips Lytle attorney](#) with whom you have a relationship. ■

¹⁰ *Id.* at paras. 7-9.



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