

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 15, 2023

Christopher M. Wolpert
Clerk of Court

NMSURF,

Plaintiff - Appellant,

v.

ALAN WEBBER; RENEE VILLAREAL;
SIGNE I. LINDELL; CAROL ROMERO-
WIRTH; CHRIS RIVERA; MICHAEL
GARCIA; LEE GARCIA; JAMIE
CASSUT; AMANDA CHAVEZ, in their
official capacities as Mayor city councilors
of the City of Sante Fe,

Defendants - Appellees.

No. 22-2131
(D.C. No. 1:17-CV-00355-KG-SCY)
(D. N.M.)

USTELECOM-THE BROADBAND
ASSOCIATION; CTIA-THE WIRELESS
ASSOCIATION,

Amici Curiae.

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **PHILLIPS**, and **McHUGH**, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiff NMSurf, Inc.¹ filed an action against various officials of the City of Santa Fe, New Mexico (collectively, “Santa Fe”) asserting that Santa Fe’s telecommunications ordinance violates the Telecommunications Act of 1996, 47 U.S.C. § 253, and is therefore preempted. The district court granted summary judgment in favor of Santa Fe, and NMSurf appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. Background

Under Santa Fe’s Telecommunication Facilities in the Public Rights-of-Way Ordinance, companies using public rights-of-way to provide wired internet services in Santa Fe must apply for a franchise. Santa Fe Code of Ordinances § 27-2.4(A) (2022). If Santa Fe grants a franchise, the franchisee is then subject to a two percent fee on all gross revenues from the provision of those services. *See id.* § 27-2.5(A)(1).

In January 2015, NMSurf applied for a telecommunications franchise with Santa Fe to construct a wireline fiber optic network in a public right-of-way. Santa Fe granted NMSurf a franchise in 2018, thus subjecting it to the two percent fee. In late 2019, NMSurf had one wired internet customer in Santa Fe whom it

¹ NMSurf, Inc. was formerly known as CNSP, Inc., which was the name used in the proceedings below. The company changed its name during the pendency of this appeal, and we therefore directed the Clerk to substitute NMSurf, Inc. as the plaintiff-appellant.

charged \$49.99 per month. Thus, it owed Santa Fe \$12 in annual fees under its franchise agreement.

Cyber Mesa Telecom also provides wired internet service in Santa Fe, and it also received a franchise in 2018. Its franchise is virtually identical to NMSurf's. Before receiving its franchise, however, Cyber Mesa executed a professional services contract with Santa Fe in 2014 for the construction of a fiber optic network. For those services, Santa Fe agreed to (1) pay Cyber Mesa up to \$882,100 and (2) grant Cyber Mesa a license for access to the public right-of-way. The contract provided that Cyber Mesa's right-of-way access would be merged into any subsequent franchise agreement. Thus, when Cyber Mesa received its franchise in 2018, it replaced the licensed permission for right-of-way access Cyber Mesa had under the professional services contract. Cyber Mesa continues to operate and maintain Santa Fe's fiber optic network under the professional services contract.

NMSurf sued Santa Fe in 2017, alleging Santa Fe had impermissibly delayed action on its application in violation of 47 U.S.C. § 253, which requires open and non-discriminatory access to public rights-of-way for the provision of telecommunications services. It also asserted a claim under the Supremacy Clause that Santa Fe's ordinance is preempted by § 253. The district court granted Santa Fe's motion to dismiss, holding that § 253 does not provide a private right of action for damages and that only the Federal Communications Commission ("FCC") has the authority to preempt the enforcement of a state or local telecommunications provision.

On appeal, we affirmed the dismissal of NMSurf's § 253 damages claim but remanded with directions to determine whether it had stated an equitable preemption claim. *CNSP, Inc. v. City of Santa Fe*, 755 F. App'x 845, 851 (10th Cir. 2019).

On remand, NMSurf filed an amended complaint asserting that Santa Fe's ordinance runs afoul of § 253(a) in two ways. First, it claimed Santa Fe's ordinance was preempted because the two percent fee on gross revenues has "the effect of prohibiting [NMSurf's] ability . . . to provide . . . intrastate telecommunications service." 47 U.S.C. § 253(a). Second, it claimed that Cyber Mesa's professional services contract with Santa Fe gave it an unfair competitive advantage over competitors like NMSurf.

After the parties filed competing motions for summary judgment, the district court entered an order granting summary judgment in favor of Santa Fe on both claims. This appeal followed.

II. Discussion

NMSurf contends the district court erred in granting summary judgment in favor of Santa Fe. We review de novo a district court's granting of summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Burnett v. Sw. Bell Tel., L.P.*, 555 F.3d 906, 907 (10th Cir. 2009).

A. Revenue-Based Fees

NMSurf's first issue is whether the two percent fee on revenues violates § 253(a), which provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Thus, we must first determine whether Santa Fe's imposition of a two percent fee based on revenue is prohibitive in effect. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004). NMSurf bears the burden of making this showing. *See id.*

"[N]ot every increase in costs creates a prohibition within the meaning [of] § 253." *Qwest*, 380 F.3d at 1271. At the same time, a plaintiff need not show "an absolute bar on the provision of services." *Id.*; *see also RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) ("Nowhere does [§ 253(a)] require that a bar to entry be insurmountable . . ."). Instead, we held in *Qwest* that "[i]t is enough that the Ordinance would materially inhibit the provision of services." 380 F.3d at 1271 (internal quotation marks omitted).

Our decision in *Qwest* suggests two ways that an ordinance can materially inhibit the provision of services: (1) it causes a telecommunications provider a

“massive increase in cost,” or (2) it gives the city “unfettered discretion” to block providers. *Id.* at 1270-71. Here, NMSurf’s increase in costs—just \$12 in 2019—self-evidently does not qualify as a massive increase. And NMSurf does not contend that the ordinance gives Santa Fe “unfettered discretion” to prevent providers from providing wired internet services. Thus, under our reasoning in *Qwest*, Santa Fe’s ordinance does not materially inhibit NMSurf’s ability to provide services.

NMSurf argues Santa Fe’s ordinance violates § 253(a) because the fees it imposes are unrelated to the actual costs that Santa Fe incurs as the result of the use of the public right-of-way. In other words, NMSurf argues that *any* imposition of fees based on revenues rather than actual costs is a per se violation of § 253(a) warranting a finding of preemption. In support, NMSurf points to an FCC order holding that “fees are only permitted to the extent that they are nondiscriminatory and represent a reasonable approximation of the locality’s reasonable costs.” *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd. 9088, 9091 (F.C.C. 2018). That order, however, addresses small-scale wireless infrastructure, not the wired internet infrastructure at issue in this case.² *See id.* at 9089, 9100. Although NMSurf argues the FCC’s

² NMSurf filed a Notice of Supplemental Authority advising us of the Third Circuit’s decision in *Cellco Partnership v. White Deer Township Zoning Hearing Board*, --- F.4th ---, 2023 WL 4537717 (3d Cir. July 14, 2023). We find *Cellco Partnership* inapplicable for two reasons. First, although the decision cited the FCC’s order with approval, it did not even mention the FCC’s holding concerning permissible types of fees. Second, unlike the instant case, *Cellco Partnership* involved the provision of wireless services. *Id.* at *2.

reasoning is broad enough to apply to this case, we decline to adopt the reasoning of the order under the circumstances presented here.

In short, we agree with the district court that NMSurf did not carry its burden of showing that Santa Fe's ordinance is materially prohibitive. Accordingly, we need not determine the applicability of the safe harbor provision of § 253(c), which allows a local government to manage public rights-of-way and to require "fair and reasonable" compensation from telecommunications companies if it is "competitively neutral and nondiscriminatory." *See Qwest*, 380 F.3d at 1269 (holding § 253(c) need be addressed only if the regulation is prohibitive).

B. Cyber Mesa Contract

NMSurf's second claim is that Santa Fe's professional services contract with Cyber Mesa violates § 253(a). This claim requires NMSurf to show that Cyber Mesa's contract confers upon it advantages such that NMSurf is materially inhibited from providing services. *See Qwest*, 380 F.3d at 1271. The district court held that NMSurf failed to make such a showing, and we agree. The record reflects that Cyber Mesa and NMSurf received similar franchises on the same day and that they have the same access to Santa Fe's public right-of-way. Their respective franchise agreements impose the same two percent fee on revenues. This arrangement does not materially inhibit NMSurf's ability to provide wired internet services in Santa Fe.

Apart from access to the right-of-way, NMSurf contends that Cyber Mesa's professional services contract confers a competitive advantage because it affords

Cyber Mesa access to a fiber network that no other competitor has. Although NMSurf can lease the fiber network, it asserts that it would cost up to \$1 million to connect to it—a cost that Cyber Mesa did not incur. NMSurf argues this results in a “distortion to the marketplace,” Opening Br. at 28, and therefore violates § 253(a). It cites two FCC orders in support.

First, NMSurf cites the FCC’s opinion in *In re Western Wireless Corp.*, 15 FCC Rcd. 16227 (F.C.C. 2000). In that case, a telecommunications carrier challenged a Kansas statutory scheme that provided subsidies to incumbent local exchange carriers, to the exclusion of all other carriers. *Id.* at 16228-29. The FCC declared the challenge moot because Kansas changed its scheme during the pendency of the case, but it nonetheless offered an advisory opinion that such direct subsidies could violate § 253. *Id.* at 16230-31. The FCC surmised that a non-incumbent carrier “may be unable to secure financing or finalize business plans due to uncertainty surrounding its state government-imposed competitive disadvantage,” which “may well have the effect of prohibiting such [a] competitor[] from providing . . . service, in violation of section 253(a).” *Id.* at 16231. In contrast to the FCC’s hypothetical, there is no indication in the record that NMSurf faced any such barriers to entry.

Second, NMSurf cites the FCC’s opinion in *In the Matter of Sandwich Isles Communications, Inc.*, 31 FCC Rcd. 12999 (F.C.C. 2016). In that case the FCC concluded that a telecommunications provider received more than \$27 million in improper payments over a 13-year period from the Universal Service Fund. *Id.* at

12999-13000. The opinion never even mentions § 253, and we find it irrelevant to the issues presented in this case.

In short, we affirm the district court's dismissal of NMSurf's second claim premised on the Cyber Mesa professional services contract.

III. Conclusion

We affirm the summary judgment in favor of Santa Fe.

Entered for the Court

Jerome A. Holmes
Chief Judge