Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934	)	WC Docket No. 20-46

COMMENTS OF INCOMPAS

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March 23, 2020

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COMMENTS OF INCOMPAS

INCOMPAS files these comments in response to the recent request of the Federal Communications Commission ("Commission" or "FCC") for comment[1] on the Petition for Preemption and Declaratory Ruling Pursuant to Section 253(d) filed by Uniti Leasing MW LLC ("Uniti Leasing") and Missouri Network Alliance, LLC d/b/a Bluebird Network ("Bluebird") on February 13, 2020 ("*Petition*").[2] INCOMPAS urges the Commission to grant the Petition expeditiously to send a signal that fiber deployment is critical to broadband networks of every kind and cannot be impeded by requirements that would subject multiple providers to payments on a single network.

[1] *Wireline Competition Bureau Seeks Comment On A Petition For Preemption And Declaratory Ruling Filed By Missouri Network Alliance, LLC d/b/a Bluebird Network And Uniti Leasing MW LLC*, Public Notice, DA 20-178, WC Docket No. 20-46 (rel. Feb. 20, 2020).

[2] *Petition For Preemption And Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934 Filed By Missouri Network Alliance, LLC d/b/a Bluebird Network And Uniti Leasing MW LLC*, WC Docket No. 20-46 (Feb. 13, 2020) ("*Petition*").

I. INTRODUCTION AND SUMMARY OF COMMENTS

A. Background on INCOMPAS

INCOMPAS, the Internet and competitive networks association, is the preeminent national industry association for providers of Internet and competitive communications networks. We represent companies that provide competitive residential broadband Internet access service ("BIAS"), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. Our members include small fiber providers that are building more fiber than and offering services competitive to large incumbents such as AT&T and Comcast. We also represent companies providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes. We have wireless and satellite members that are offering services to residential and business customers. Finally, we represent transit and backbone providers that carry broadband and Internet traffic, and online content and video distributors ("OVDs") that offer various content and communications services and video programming over BIAS to consumers.

INCOMPAS is active in promoting the growth of next-generation networks through pro-competition policies that have unleashed network investment, and will pave the way for the critical deployment of wired and wireless networks, including 5G service. INCOMPAS seeks to lower the barriers to broadband deployment by advancing policies that permit competitive access to poles, ducts, conduits, and rights-of-way. INCOMPAS members are advocates for maintaining critical, competitive statutory policies that promote the widespread deployment of broadband and the potential of next-generation networks to bridge the digital divide and bring faster speeds and more opportunities to consumers.

B. INCOMPAS Urges the Commission to Grant the Petition on an Expedited Basis

Regardless of their business plans—whether fiber transport, fixed wireless, or wireless—INCOMPAS members rely on the seamless and speedy deployment of fiber networks for their success. Uniti Leasing and Bluebird ("Petitioners") have filed the *Petition* because the Missouri cities of Cameron, Maryville, and St. Joseph[3] ("Cities" or "Missouri Cities") have demanded double payments by both Petitioners on a single network. Bluebird, through a series of transactions ("Transaction"), sold its fiber optic network ("Network") in the Cities to Uniti Leasing, which then leased that same Network back to Bluebird. The Petitioners made it clear to the Cities throughout negotiations for a rights-of-way agreement that Uniti Leasing would not access, operate, or maintain the Network, that only Bluebird would, and that the Transaction would effect no change to the Network whatsoever, other than a mere change in ownership.[4] The Cities, however, insisted that the Network operator (Bluebird) and Network owner (Uniti Leasing) both pay rights-of-way fees, even though there was no increase in the Cities' rights-of-way costs as a result of the Transaction.

While INCOMPAS believes that providers must pay their fair share to reimburse municipal rights-of-way costs, Section 253 of the Communications Act requires that municipal fees must be reasonable and based on the costs of deployment in the rights-of-way. The obstacles recounted in the *Petition* are representative of many other municipal rights-of-way

[3] The City of Joplin, Missouri also demanded double payments but has very recently settled with the Petitioners such that Petitioners dismissed the Petition against the City of Joplin. *Petition of Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934*, Notice of Settlement as to City of Joplin, WC Docket No. 20-46 (Mar. 19, 2020) ("*Notice of Joplin Settlement*").

[4] *See, e.g.*, *Petition*, Att. 1, Declaration of Michael C. Morey, ¶¶ 15-17.

obstacles that INCOMPAS members encounter on a daily basis that discourage, alter, or halt altogether fiber network deployment, and the Commission should consider the Petition in the context of the broader impact of such barriers to entry. Given the egregious facts presented in the *Petition*, it is critical that the Commission grant the *Petition* on an expedited basis. Protracted decision-making frustrates the purpose of carriers in need of speedy relief to continue broadband network construction. The Commission should, as it has in past proceedings, issue an expeditious decision to send a clear signal that Section 253 is an effective last resort for carriers faced with patently unreasonable municipal rights-of-way fee structures.

II. THERE IS INSUFFICIENT BROADBAND COMPETITION IN THE UNITED STATES AND THEREFORE THE COMMISSION SHOULD CONTINUE TO REMOVE BARRIERS TO ENTRY

Unfortunately, competition in the residential fixed BIAS marketplace and business marketplace is very limited at this time. Most Americans only have one high-speed provider at home and one BDS provider to their business location(s). They may have a second choice; however, very few Americans actually have a third, competitive fiber option. Of course, there are still too many areas where consumers and businesses have no high-speed fixed broadband choice because cable does not serve there, and incumbent telcos have not upgraded their copper. This is in part because it is expensive and time-consuming for competitive fiber providers to build, and there are significant barriers that they face when they can make the business case to do so.[5] Such barriers and delays are particularly problematic for providers building with borrowed

[5] *See* INCOMPAS Reply Comments, WC Docket No. 17-108 (Aug. 30, 2017), Exhibit B, David S. Evans, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, at 35-37 (Aug. 29, 2017), *available at* https://www.incompas.org/files/INCOMPAS%20RIF%20Reply%20Comments-30Aug%20FINAL.pdf (last visited March 23, 2020).

capital, which creates added pressure to deliver networks and revenues on a predictable, timely basis.

The FCC has taken a number of steps in recent years to address these barriers to entry. For instance, it has adopted policies that encourage more predictable and more reasonable costs to build, including promulgating a one-touch make-ready ("OTMR") policy for pole attachments that INCOMPAS and its members endorsed.[6] For wireless deployment, which always is reliant on wireline fiber networks, the FCC also has streamlined processes to encourage builds, including 5G network rollout—which is the next generation of wireless networks that companies have begun to deploy.[7] The need for dense fiber deployment across the country is more critical for the roll-out of 5G technology. With the introduction of 5G, the expectation is that more devices will be connected online. For example, the number of Internet of Things ("IoT") devices is expected to grow worldwide to 10 billion by 2020 and 22 billion by 2025.[8] Given the data demands, there will be a significant need for more wired backhaul—*i.e.*, fiber, to carry wireless traffic. As such, continued efforts to streamline both wired and wireless deployments, and maintaining network unbundling policies[9] is important to enable faster and more cost-effective

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[6] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (rel. Aug. 3, 2018).

[7] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79 (rel. March 30, 2018).

[8] *State of the IoT 2018: Number of IoT devices now at 7B – Market accelerating*, IOT ANALYTICS (Aug. 8, 2018), available at https://iot-analytics.com/state-of-the-iot-update-q1-q2-2018-number-of-iot-devices-now-7b/ (last visited Mar. 23, 2020).

[9] *See generally* Comments of INCOMPAS & NWTA, WC Docket No. 19-308 (filed Feb. 5, 2020) (opposing FCC's NPRM to repeal the 1996 Act's unbundling and avoided-cost resale requirements).

broadband networks to be built. The Commission's speedy consideration and granting of the *Petition* would represent another important step in the direction of eliminating barriers to entry to the rapid deployment of fiber networks nationwide.

III. INCOMPAS SUPPORTS COOPERATIVE PARTNERSHIP WITH STATES AND MUNICIPALITIES AND REGARDS FEDERAL PREEMPTION ONLY AS A LAST RESORT

INCOMPAS and its members are actively engaged in outreach to develop constructive partnerships and to build the case that expanding fiber networks is a win-win for municipalities and carriers alike, as leveraging gigabit-level Internet will allow these areas to attract new business and create jobs. INCOMPAS' members make every effort to understand the concerns of municipalities and to negotiate mutually beneficial rights-of-way agreements whenever possible.

Many cities, recognizing the value of fiber networks to business development, welcome fiber providers with reasonable rights-of-way agreements geared to recouping only the costs of managing the rights-of-way. INCOMPAS members routinely engage in negotiations with such cities to reach agreements, and collectively these companies pay substantial revenues to cities in the form of annual rights-of-way fees. By way of example, in their ongoing effort to work with the Cities, the Petitioners recently settled with the City of Joplin, Missouri and notified the Commission of the Settlement on March 19, 2020.[10] The worst disputes that INCOMPAS members face stem from moratoria or other efforts to bar the timely deployment of fiber, or from rates that are entirely unrelated to the cost of managing the public rights-of-way. Such policies cause carriers to defer deployments, build around cities, or abandon markets. Uniti Leasing and Bluebird negotiated with the Cities for over six months before realizing that the Cities duplicate

[10] *See Notice of Joplin Settlement*.

fees were nonnegotiable from the Cities' standpoint.[11] The double-charging policy of the Missouri Cities came to represent such an obstructive barrier to entry that Petitioners were left with no choice but to halt future network expansion in the Cities and file the *Petition*.

The Commission should also be aware that the *Petition* represents the proverbial tip of the iceberg when it comes to INCOMPAS member disputes with states and municipalities. For every dispute that makes it to the FCC in the form of a Section 253 petition, INCOMPAS members routinely encounter other delays and demands from municipalities that never see the light of day. These might be resolved by agreeing to an unusually high one-time or recurring payment, providing excessive in-kind network contributions, or often simply deciding to defer fiber deployment in that city. Few cities ever demonstrate that their rates are cost-based. Most simply produce a per mile number that seems consistent with what other, neighboring jurisdictions have managed to extract from carriers. Indeed, the rates charged by the Cities in this case were neither demonstrably cost-based nor particularly reasonable.[12] But when they were doubled they became completely unsupportable and unacceptable to Petitioners.

This landscape has a negative impact on consumers, carriers, and the Commission's programs, as well. Where there is less deployment, there is less competition, resulting in higher wholesale and retail prices. That means that potentially the Commission's USF programs such as E-Rate and Rural Health Care will also be spending more, with these subsidies not going as far as they otherwise would with more competitive options. Unreasonably high rights-of-way fees therefore have far-reaching, often unseen effects on the communications ecosystem.

[11] *See Petition* at 2, n.2 (referring to communications beginning in June and July 2019).

[12] *Id.* at 21, n.71.

When, as here, carriers are pressed to the point of requesting federal preemption, the Commission should take particular notice. INCOMPAS supports the *Petition* because it reflects two carriers that have exhausted all other possible negotiating alternatives (including very recently settling with one city, the City of Joplin) and have only filed a petition to invoke the Commission's preemption authority as a last resort. This particularly egregious double-charging imposed by the Cities crossed a line that made federal preemption necessary. INCOMPAS recognizes that the Commission has limited resources and myriad issues vying for its attention. But granting the *Petition* expeditiously would send a signal not only in this particular instance, but a broader deterrent signal that carriers have recourse to Commission relief in any case where municipalities demand non-cost-based compensation that represents a barrier to entry to further competitive fiber deployment.

IV. THE COMMISSION SHOULD ADHERE TO ITS HISTORICAL POLICY OF LIMITING MUNICIPALITIES TO REASONABLE, NONDISCRIMINATORY COST-BASED COMPENSATION

The Cities' proposed double-dipping fee structure defies common sense. As Chairman Pai said recently, albeit in a different context, "Paying somebody twice to do something once is something that everyone should oppose."[13] The rights-of-way fee structure also violates Section 253(a) under the Commission's decades-old policy established in the 1997 *California Payphone* case, a precedent recognized by every circuit court to address this issue. In *California Payphone*, the Commission found that a state or local law has the effect of prohibiting telecommunications services and, as such, violates Section 253(a) when "the ordinance *materially inhibits or limits* the ability of any competitor or potential competitor to compete in a fair and balanced regulatory

[13] Transcript for January 30, 2020 FCC Open Meeting.

environment."[14] As detailed in the *Petition*, the Cities proposal would materially inhibit Bluebird's services because it would double the approximately $100,000 currently paid by Bluebird, despite no increase in costs to the Cities.[15] This would impose an undue burden directly on Bluebird and, because other network owners are not subjected to the same ownership scrutiny and payments, would preclude Bluebird from competing in a "fair and balanced" regulatory environment as required by Section 253(a) and *California Payphone*.[16] Federal courts have previously found that excessive fee structures can violate Section 253(a),[17] and have considered the cumulative effect of excessive fees applied across multiple jurisdictions, as is the case here with the three Missouri Cities.[18]

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[14] *See California Payphone Ass'n*, Memorandum Opinion and Order, 12 FCC Rcd 14191, ¶ 31 (1997) ("*California Payphone*") (emphasis added); *see also Sprint Telephony PCS LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) ("*County of San Diego*"); *Level 3 Commc'ns v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007) ("*City of St. Louis*"); *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) ("*Municipality of Guayanilla*"); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) ("*City of Santa Fe*"); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) ("*City of White Plains*").

[15] *See Petition* at 10.

[16] *California Payphone*, 12 FCC Rcd 14191, ¶ 31.

[17] *See, e.g., Municipality of Guayanilla*, 450 F.3d at 18. The Commission underscored the importance of this principle in its recent Declaratory Ruling on Sections 253 and 332. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Declaratory Ruling and Report and Order, 33 FCC Rcd 9110-111, ¶¶ 43-46 (2018). *See also City of Santa Fe*, 380 F.3d at 1271.

[18] *See Municipality of Guayanilla*, 450 F.3d at 17 (court appropriately considered the effect of fees across multiple municipalities).

The Cities' fee structure is also not covered by the savings clause of Section 253(c)[19] because the courts have made it clear that, in order to constitute "fair and reasonable compensation," fees must only recover the costs of deployment: "fees charged by a municipality need to be related to the degree of actual use of the public rights-of-way" in order to constitute fair and reasonable compensation under Section 253(c).[20] The policy of dunning both owners and operators for the same network also does not meet the Section 253(c) requirement that compensation must be "competitively neutral and nondiscriminatory."[21] The Cities have singled out one network owner, Uniti Leasing, without inquiring into the ownership structure of any other carrier operating in the Cities.

This points to the folly of a system that attempts to apply fees to both owners and operators. Carriers have always exhibited complex ownership structures, as many, if not most Section 214 applications will confirm. Determining which AT&T, Verizon, CenturyLink, or Frontier entity actually owns a network would require a comprehensive inquiry up the corporate organization chart. There is no evidence the Cities have ever conducted such an inquiry with any

[19] Section 253(c) states that fees are not preempted that are "fair and reasonable" and imposed on a "competitively neutral and nondiscriminatory basis," for "use of public rights-of-way on a "nondiscriminatory basis," so long as they are "publicly disclosed" by the government. 47 U.S.C. § 253(c).

[20] *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 354 F. Supp. 2d 107, 114 (D.P.R. 2005) (Guayanilla District Ct. Opinion), aff'd, 450 F.3d 9 (1st Cir. 2006). *See also Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Declaratory Ruling and Report and Order, 33 FCC Rcd 9110-111, ¶ 50 & fn. 131 (2018) ("By costs, we mean those costs specifically related to and caused by the deployment. These include, for instance, the costs of processing applications or permits, maintaining the ROW, and maintaining a structure within the ROW.")

[21] *See City of White Plains*, 305 F.3d at 80 (striking down under Section 253 a fee structure that imposed significant fees on one carrier but none on others).

previous carrier requesting access to the public rights-of-way. More importantly, as noted above, there is no evidence that the mere act of owning a network imposes any deployment costs whatsoever on a municipality. That point is particularly apparent here where the change of ownership from Bluebird to Uniti Leasing was completely transparent to the Cities. If not for the routine legal notice sent by the two companies to the Cities, the Cities would have had no way of even knowing about the change of ownership embodied in the Transaction.

V. THE COMMISSION SHOULD GRANT THE PETITION WITH CLEAR DIRECTION THAT "ONE NETWORK PAYS"

The *Petition* also highlights the principle espoused by INCOMPAS that "one network pays." INCOMPAS members include not only fiber transport, fixed wireless, and wireless providers, but also direct broadcast satellite ("DBS") providers and online content and video distributors ("OVDs"). In myriad contexts, states and municipalities have proposed to assess OVDs franchise and/or rights-of-way fees for providing video programming that is delivered over broadband. Moreover, they also have sought to impose franchise fees on DBS even though DBS does not use public rights-of-way. INCOMPAS has opposed these efforts.

Franchise fees charged to cable or other network companies are assessed for the costs of accessing, operating, and maintaining their networks in the public rights-of-way. The content that traverses those networks does not access those rights-of-way and does not impose any costs on municipalities. The Commission, in deciding the *Petition*, should embrace the idea that "one network pays," such that government fees, pursuant to Section 253, must be based on the costs of network deployment in the public rights-of-way.[22] In other words, only the company that actually deploys, operates, and maintains the network in question pays the franchise/rights-of-

[22] Similarly, only one cable company should pay franchise fees pursuant to Section 621 for the cable network that is deployed, operated, and maintained in the public rights-of-way.

way fees. Embracing this concept would deter state and local governments from pursuing the increasingly popular trend of looking to third party content providers that impose no deployment costs whatsoever for new revenue through state and local franchise schemes that clearly violate Section 253.

Moreover, these franchise schemes, which seek to impose cable franchise fees on non-cable DBS providers and OVDs, run afoul of Title VI in the Communications Act of 1934, as amended (the "Act"). Under the Act, cable franchises must be construed to authorize a cable system over public rights-of-way and through easements,[23] while Section 624 places certain limits on the franchising authority.[24] The FCC has determined that franchising authorities do not have jurisdiction over non-cable services and franchise fees cannot be charged for non-cable services.[25] Moreover, Section 663(c)[26] preempts conflicting state law. Accordingly, any proposed imposition of franchise fees on DBS providers and OVDs is in conflict with Section 621 of the Act which states that franchises are only required for facilities of cable service that will be occupying public rights-of-way and easements.

[23] Section 621 provides that any franchise shall be construed to authorize construction "over public rights-of-way, and through easements, which is within the area to be served . . . ." 47 U.S.C. § 541(a)(2).

[24] Section 624 states that "any franchising authority may not regulate the services, facilities, and equipment . . . except to the extent consistent with this title." 47 U.S.C. § 544.

[25] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶¶ 98 & 121-22 (2007), *aff'd sub nom. Alliance for Community Media et al. v. FCC*, 529 F.3d 763 (6th Cir. 2008) (Alliance), *cert. denied*, 557 U.S. 904 (2009).

[26] 47 U.S.C. § 556(c).

The same "one network pays" principle that applies in the context of DBS providers and OVDs applies here to the *Petition*: the company that accesses the right-of-way and operates the network must pay the fees to access the public rights-of-way. The *Petition* represents a clear-cut case of the Cities double-charging two entities separately for the same network, even though only one of those carriers, Bluebird, will access and operate the network in the public rights-of-way. As such, the Commission should make a clear statement that "one network pays," grant the *Petition*, and preempt the Cities' efforts to charge two separate carriers the same fees for one set of costs associated with the Petitioners' single Network, resulting in double fees in this case.

VI. THE COMMISSION SHOULD GRANT THE PETITION EXPEDITIOUSLY

INCOMPAS urges the Commission to grant the *Petition* expeditiously. INCOMPAS recognizes the Commission is faced with many competing priorities but carriers that reach the point of filing a Section 253 petition are invariably under intense time pressure. This pressure can derive from many different sources: the pressure of working with borrowed capital where lenders are looking for a near-term return on investment; general investor pressure to deliver promised quarterly and annual results; and commitments made to wholesale and/or retail customers dependent on the new network to be built in that jurisdiction. Because of this intense pressure, carriers sometimes are forced to cut deals they do not like and to agree to payments that are not in their business plans. In addition, by the time a carrier reaches the last resort of filing for Section 253 or other legal relief, it has already spent some period of time—in this case over six months—trying to achieve a workable settlement.

In order for Section 253 to be more than a nullity, it must be enforced swiftly, particularly where, as here, the facts are relatively straightforward. This case does not involve complex cost calculations or comparisons between multiple carriers to determine discrimination. It involves the doubling of rights-of-way fees despite no change in the ongoing costs to manage the public

rights-of-way. If carriers in the future believe that Section 253 enforcement will add a year or more to their network deployment timelines, they will avoid the process and simply build around municipalities that present barriers to entry, as many have in the past. Justice delayed is justice denied. Municipalities that are either ignorant of the Commission's rules or unwilling to abide by them need to know that immediate Section 253 enforcement is an option for carriers to obtain relief from overreaching rights-of-way fees. That will not only provide discipline in specific cases where petitions are filed, but will also act as a deterrent when carriers raise the prospect of Section 253 enforcement in future negotiations.

The Commission has granted past Section 253 petitions in as little as five to seven months.[27] Granting relief in that time frame sends a clear signal that Section 253 is enforceable in a manner that will benefit carriers actively in the process of building out broadband networks. The Commission has acted promptly to date in noticing this *Petition* for public comment and, as noted, on recent petitions like *Sandwich Isles*. INCOMPAS urges the Commission's continuing diligence in this regard by granting the *Petition* expeditiously as part of its ongoing policies directed towards speedy and efficient broadband deployment nationwide.

Respectfully submitted,

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Dated: March 23, 2020

[27] *See, e.g., Sandwich Isles Communications, Inc.,* Memorandum Opinion and Order, 32 FCC Rcd 5878, 5882-83, ¶ 13 (2017) (filed on February 3, 2017 and granted on July 3, 2017) ("*Sandwich Isles*"); *California Payphone* (filed Dec. 23, 1996 and granted on July 17, 1997).