

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

In the Matter of)	
)	
Petition of MCC Iowa LLC for Expedited)	WC Docket No. 21-217
Declaratory Ruling Pursuant to Section 253(d))	
of the Communications Act)	

COMMENTS OF INCOMPAS

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INCOMPAS files these comments in response to the recent request of the Federal Communications Commission (“Commission” or “FCC”) for comment¹ on the Petition for Expedited Declaratory Ruling Pursuant to Section 253(d) filed by MCC Iowa LLC, a subsidiary of Mediacom Communications Corporation (“Mediacom”) on May 12, 2021 (“*Petition*”).² INCOMPAS urges the Commission to deny the *Petition* as it fails to demonstrate that West Des Moines’ has violated Section 253 by making plans and agreements for an open conduit network that will lower the costs of network deployment in the City.

I. INTRODUCTION AND SUMMARY

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

¹ *Wireline Competition Bureau Seeks Comment On Petitions For Declaratory Ruling Filed Pursuant to Section 253 of the Communications Act*, Public Notice, DA 21-994, WC Docket No. 21-323 (rel. Aug. 13, 2021).

² *Petition of MCC Iowa LLC for Expedited Declaratory Ruling Pursuant to Section 253(d) of the Communications Act*, WC Docket No. 21-217 (May 12, 2021) (“*Petition*”).

fiber providers that are building more fiber than and offering services competitive to large incumbents. 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 unleash 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 and encouraging policies that permit competitive access to poles, ducts, conduits, and rights-of-way in a non-discriminatory and reasonable basis. INCOMPAS members are advocates for maintaining critical, competitive statutory policies that promote the widespread deployment of competitive broadband and the potential of next-generation networks to bridge the digital divide and bring faster speeds and more opportunities to consumers.

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 providers alike as leveraging fiber infrastructure will allow these areas to attract new business and create jobs, support 5G wireless networks, and deliver gigabit and beyond broadband internet access service. INCOMPAS’ members make every effort to understand the concerns of municipalities and to negotiate mutually beneficial rights-of-way agreements whenever possible.

Numerous cities, recognizing the value of fiber networks to business development, higher-speed broadband, and 5G wireless services, welcome fiber providers with reasonable rights-of-way agreements and open conduit networks that are geared to recouping *only* the costs of managing the public rights-of-way and recovering their costs for building this infrastructure. 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. On the other hand, INCOMPAS members sometimes face entry barriers stemming from moratoria or other efforts to bar the timely deployment of fiber, or from rates that are significantly higher than other municipalities and are entirely unrelated to the cost of managing the public rights-of-way or recouping the cities' costs. Such policies can and have caused competitive providers to defer deployments, build around cities, or abandon markets.

Regardless of their business plans—whether fiber transport, fixed or mobile wireless, or satellite—INCOMPAS members rely on the seamless and speedy deployment of fiber networks for their success. In the *Petition*, Mediacom (“Petitioner”) claims that it will be disadvantaged by the City of West Des Moines, Iowa’s (“City”) selection of Google Fiber as an anchor tenant for a recently announced underground, citywide conduit network that will, among other things, assure its residents’ access to high-speed broadband service and facilitate other fiber providers entering the West Des Moines market. Mediacom brings this complaint under Section 253 of the Communications Act of 1934, as amended, which requires state and local governments to manage the public rights-of-way on a competitively neutral and nondiscriminatory basis.³ However, the statute does not require the kind of technological neutrality that Mediacom seeks and certainly does not prohibit municipalities from enabling competitive broadband deployment

³ 47 U.S.C. § 253(c).

by building an open conduit network. Thus, INCOMPAS urges the Commission to deny the *Petition*.

Mediacom's *Petition* is representative of the efforts to discourage, alter, or halt altogether fiber network deployment that INCOMPAS members encounter on a daily basis, and the Commission should consider the *Petition* in the context of the broader impact of such barriers to entry across the nation. For example, INCOMPAS' members have faced broadband incumbents challenging in court municipal actions that enable competition, merely because they are threatened by new competitive entry. Mediacom's *Petition* follows this pattern. Indeed, Mediacom is challenging the City in court as well as at the FCC.⁴ It is threatened by Google Fiber's potentially superior service, and the Commission must keep that in mind as it considers the merits of Mediacom's claims.

Furthermore, granting the *Petition* likely would chill efforts by localities to promote and enable more fiber deployment and broadband competition by investing in their own open infrastructure. Mediacom's *Petition* wholly fails to demonstrate how the City's interest in expanding its residents' choices for competitive broadband services is contrary to Section 253. To the contrary, entry by Google Fiber and any other new operators will spur faster broadband and better service as has happened in cities throughout the U.S. where INCOMPAS' competitive broadband providers have entered. And residential and business customers will benefit. The Commission must deny Mediacom's *Petition*.

⁴ See Joint Request for Extension of Time of MCC Iowa LLC and City of West Des Moines, Iowa, WC Docket No. 21-217 (filed Sep. 10, 2021), at 1 (indicating that Mediacom "initiated a state court proceeding against the City alleging violations of state laws in connection with the City's plan to build a Conduit Network" and seeking a fifteen-day extension of the FCC pleading cycle so that the parties can "explore settlement prospects").

II. TO INCREASE BROADBAND COMPETITION IN THE UNITED STATES THE COMMISSION AND EVERY LEVEL OF GOVERNMENT MUST CONTINUE TO REMOVE BARRIERS TO ENTRY

a. More Fiber is Needed for Competitive Alternatives in the Wholesale and Retail Market, and Fiber Densification is Critical to the Broadband Marketplace, including 5G Deployment

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 to their business location(s). They may have a second choice; however, very few Americans actually have a third, competitive high-speed option.⁵ As the Commission is aware, it is expensive and time-consuming for new BIAS entrants, including competitive fiber providers to build, and there are significant barriers that they face even when they can make the business case to do so.⁶ Such barriers and delays are particularly problematic for providers building with borrowed 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

⁵ See [Area Comparison | Fixed Broadband Deployment Data | Federal Communications Commission \(fcc.gov\)](#) (showing that in urban areas, only 12.68% of the population has three or more providers offering 100/10 Mbps—which currently is the entry level of broadband cable BIAS providers offer). Indeed, just over a majority (53.18%) of Americans have two (or more) choices. This information, of course, reflects the overstated level of choice that the Commission’s current data gathering process has permitted, and the Commission during the last administration stopped heeding its own prior advice that its data should not be used for assessing where there actually is competitive choice given the significant limitations of its data. Competitors, especially a third fixed terrestrial BIAS competitor, make all the difference—they bring faster speeds, lower pricing, and much better customer service to the communities they serve.

⁶ See, e.g., Comments of INCOMPAS, GN Docket No. 20-60 (Apr. 27, 2020) at 27 (“INCOMPAS Comments”).

to build, including promulgating a one-touch make-ready (“OTMR”) policy for pole attachments that INCOMPAS and its members endorsed.⁷ For wireless deployment, which is reliant on 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.⁸ 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 22 billion by 2025.⁹ Given the data demands, there will be a significant need for more wired backhaul—*i.e.*, fiber, to carry wireless traffic.

Moreover, fiber is critical to the deployment of new fixed broadband options. Companies are deploying fiber to the premise networks, fiber to the fixed wireless network, and fiber to the satellite network. The need for fiber deployment to support the operations of *every* broadband network serving the U.S. is not surprising. Every aspect of the economy is becoming more reliant on fast, interconnected networks for their operations—from manufacturing to education—that has become even more evident during the COVID-19 pandemic. Specifically, the pandemic has shown us the importance of broadband connectivity, and that the U.S. is in danger of falling

⁷ 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).

⁸ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79 (rel. March 30, 2018).

⁹ *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).

behind other nations that, upon recognizing the need for faster broadband connectivity, have set fiber and/or gigabit goals.¹⁰

In addition, Commission policies during the last administration that removed the availability of wholesale access via regulated rates in order to promote more facilities-based competition means that competitors must deploy their own networks.¹¹ In order to achieve the Commission's goals in its *Unbundling and Resale Order* and its *2017 BDS Report and Order* to obtain more facilities-based competitive options, it is important that deployment policies at every level of government promote and enable such deployment, not deter it. As such, continued efforts to streamline both wired and wireless deployments are important to enable faster and more cost-effective broadband networks to be built. In this instance, in which the City is actively engaged in efforts to spur competitive deployment, the Commission should deny the *Petition* and ensure that incumbent providers cannot impede the ability of a municipality to promote and develop new fiber networks including decisions to build open conduit network that are made available to competitive fiber providers on a non-discriminatory basis.

¹⁰ See INCOMPAS/Broadland Report—*The Race to Faster Broadband Speeds: A Look at the Internet Speed Goals of Other Nations* (July 26, 2021), available at [https://www.incompas.org/Files/filings/2021/FINAL%201%20Gigabit%20and%20Fiber%20Goals%20in%20Other%20Nations%204%20\(2\).pdf](https://www.incompas.org/Files/filings/2021/FINAL%201%20Gigabit%20and%20Fiber%20Goals%20in%20Other%20Nations%204%20(2).pdf).

¹¹ See *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, WC Docket No. 19-308, Report and Order, FCC 20-152 (rel. Oct. 28, 2020) (“*Unbundling and Resale Order*”) (discontinuing certain unbundling and resale rules in order to promote facilities-based competition).

b. As More Fiber and Other Networks Are Built with Federal Funding Support, Streamlined Processes Including Open Conduit Will Be Critical to Successful and Fast Deployment

It is important that deployment policies at every level of government promote and enable competitive broadband deployment, not deter it. The aforementioned lack of competition means U.S. consumers have limited options for broadband service and typically end up paying more for slower speeds.¹² Furthermore, the ongoing COVID-19 pandemic has shown us not only the importance of broadband connectivity, but that there are significant gaps in broadband network access that need to be addressed. To meet this shortfall and to bridge the Digital Divide, Congress has provided for broadband network funding in the CARES Act and the American Rescue Plan and is considering additional infrastructure funding that would encourage more fiber deployment and the expansion of new wireless technologies, including fixed wireless services and 5G. Applying Section 253 or other federal laws as barriers to broadband and fiber deployment would limit the ability of federal infrastructure spending to serve its intended purpose of promoting construction of broadband networks. INCOMPAS submits that this is contrary to Congress' and the FCC's intent which is to maximize and expedite broadband infrastructure deployment.

For these reasons, it is encouraging to see cities like West Des Moines taking steps to lower barriers to entry. Cities that recognize that they need to align their policies and procedures to enable and promote fast, competitive broadband deployment should be encouraged, not sued. By initiating this open conduit network, the City is taking an affirmative step to bring more competition to its residents and ensure that it has the infrastructure in place for multiple, scalable

¹² INCOMPAS Comments at 4.

gigabit broadband services.¹³ Mediacom, like other incumbents, feel threatened by new competitive fiber providers and seek to use the courts and now the agency processes to stop competition. The Commission should not overlook the purpose of Mediacom’s request.

While Section 253 requires a state or local government authority to manage the public rights of way for use on a non-discriminatory basis, the statute does not require technological neutrality. Despite being served by other ISPs, the City identified a need for fiber infrastructure which will be used not only to offer network capacity to competitors, but to densify its networks in anticipation that providers will increasingly offer 5G service.¹⁴ This decision by the City should be commended.

The City’s decision is also not surprising. Typically, cities have only one high-speed broadband offering (cable), and often the incumbent telco has not upgraded its infrastructure to fiber. As a result, the cable incumbent may have a dominant monopoly position—especially for higher speed broadband services. This appears to be the case in West Des Moines. While Mediacom claims that there are up to seven choices in the City,¹⁵ a basic search on the Internet

¹³ See generally Shrihari Pandit, *States Can Enable Broadband Infrastructure Through Open Access Conduits*, BROADBAND BREAKFAST (Sep. 2, 2021), available at <https://broadbandbreakfast.com/2021/09/shrihari-pandit-states-can-enable-broadband-infrastructure-through-open-access-conduits/> (“An open-access conduit system can help create a more approachable marketplace for new ISPs to enter and help to fill coverage gaps left unserved by incumbent ISPs. . . . More competition also means that incumbent ISPs need to step up their game and offer the services they boast about – or they risk losing market share to private competition. In other words, a long-term, sustainable solution.”)

¹⁴ Brief of Defendant in Resistance to Motion for Temporary Injunction at 5-6, MCC Iowa LLC d/b/a Mediacom v. City of West Des Moines, et al., Case No. EQCE086347 (Iowa District Court for Polk County July 17, 2021).

¹⁵ See *Petition* at 4.

demonstrates that a fixed, high-speed service by more than two providers is not readily available to the whole city.¹⁶

Mediacom's claims that it is harmed because Google Fiber has a supposed first-mover advantage and the conduit network will not support hybrid technology is absurd, particularly given the extent of Mediacom's pre-existing network in West Des Moines.¹⁷ While the deployment of fiber, cable and wireless technologies have commonalities, these technologies are not the same and should not be treated as such. Designating the proposed open conduit network for fiber technology is not prohibited by Section 253, just as the statute would not prohibit the local government from allowing its government center rooftop to be used specifically for wireless antennae rather than IP switching or other communications equipment. To be in compliance with Section 253, the City's policies should permit other providers non-discriminatory access to the conduit network at reasonable rates, for installation of their fiber plant. Indeed, Mediacom's *Petition* concedes this point, and all of the public statements made by the City have indicated that the conduit network will be open access and available to other providers on a non-discriminatory basis.¹⁸

After making the decision to invest in its broadband infrastructure, the City was justified in looking for and contracting with an anchor tenant for its open conduit network to ensure that the project succeeds and that its citizens would benefit from a new competitive offering. Local

¹⁶ A search conducted by INCOMPAS using highspeedinternet.com of four prominent zip codes in and around West Des Moines showed the City has two fixed providers and two satellite providers. One fixed wireless provider was available in two of the four zip codes.

¹⁷ See *Petition* at 3 (claiming that Mediacom currently serves over 14,894 of the 35,000 serviceable locations in West Des Moines).

¹⁸ See *Petition* at 12.

governments and industry can benefit greatly from this type of public-private partnership, including the design and deployment expertise that fiber providers can offer in the early stages of such a large project.¹⁹ As an aggrieved party to the development of the City's new fiber build, Mediacom must not be allowed to derail these important public-private partnerships and the Commission should not use this *Petition* to set precedent that might chill providers' entry into these relationships in the future.

III. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to deny the *Petition* and preserve the City of West Des Moines' plans to develop and manage an open conduit network that will provide fast, competitive fiber to residents throughout the City.

Respectfully submitted,

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¹⁹ Pandit, *supra* note 13 (explaining why states and local governments embrace the public infrastructure-private service model).