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

In the Matter of Petition of Missouri Network Alliance, LLC d/b/a Bluebird Network for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934	)	WC Docket No. 21-323

REPLY COMMENTS OF INCOMPAS

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INCOMPAS files these reply 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 Missouri Network Alliance, LLC d/b/a Bluebird Network ("Petitioner") on May 10, 2021 ("*Petition*").[2] INCOMPAS urges the Commission to find that fiber deployment is critical to broadband networks of every kind and should not be impeded by fee regimes that would subject competitive providers to unreasonable or discriminatory rights-of-way fees.

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

[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 Missouri Network Alliance, LLC d/b/a Bluebird Network for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934*, WC Docket No. 21-323 (May 10, 2021) ("*Petition*").

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. 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.

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. Petitioner has filed because the City of Columbia, Missouri ("City") has imposed a rights-of-way ("ROW") fee scheme—specifically, an uncapped per linear foot fee—that will have a "prohibitory effect"[3] on its ability to expand its fiber network. According to the *Petition*, the ROW fees in Columbia stand in stark contrast to other municipalities in Missouri

[3] *Petition* at 1.

that either do not charge ROW fees at all or cap per linear foot ROW fees at a reasonable dollar amount.[4]

While INCOMPAS believes that municipalities may impose fees that are compensatory based on the municipality's costs, Section 253 of the Communications Act requires that these municipal fees be *reasonable* and based on the *actual costs* of deployment in the rights-of-way. The obstacles recounted in the *Petition* are representative of numerous other municipal rights-of-way 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 across the nation. The record contains multiple, comparable examples of fiber providers, like Crown Castle and C Spire, that have faced unreasonable rights-of-way fees that materially inhibit their ability to compete in a fair and balanced regulatory environment.[5]

It is critical that the Commission address unreasonable and discriminatory fee regimes on an expedited basis. First, in the instant proceeding, the City in this dispute has failed to file a comment that would explain or defend its regulatory fee structure. Second, given the federal focus on broadband deployment through new funding financed by federal taxpayers, protracted decision-making frustrates the purpose of providers in need of speedy relief to continue broadband network construction—construction that will benefit the local citizens by bringing more competitive options and faster, next-generation networks. The Wireline Competition Bureau should, as it has in recent past proceedings, issue an expeditious decision to send a clear

[4] *Petition* at 7.

[5] *See* Comments of Crown Castle Fiber LLC, WC Docket No. 21-323 (filed Sep. 22, 2021), at 11 ("Crown Castle Comments"); Comments of Telepak Networks, Inc. D/B/A C Spire, WC Docket No. 21-323 (filed Sep. 22, 2021), at 6 ("C Spire Comments").

signal that Section 253 is an effective last resort for providers faced with unreasonable municipal rights-of-way fee structures.

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. While most Americans have one or two high-speed providers to serve their homes and business location(s), very few Americans actually have a third, competitive high-speed or fiber option.[6] Of course, there are still too many unserved and underserved 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 providers to build, and there are significant barriers that they face when they can make the business case to do so.[7] Such

[6] *See* Area Comparison | Fixed Broadband Deployment Data | Federal Communications Commission (fcc.gov) shows 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.

[7] *See* ANGIE KRONENBERG, INCOMPAS, BROADBAND BLUEPRINT: HOW TO ACHIEVE UNIVERSAL AVAILABILITY 3 (October 2020), *available at* https://www.incompas.org/Files/filings/2020/INCOMPAS%20Broadband%20Blueprint%20Paper.pdf.

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 to build, including promulgating a one-touch make-ready policy for pole attachments that INCOMPAS and its members endorsed.[8] 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.[9] 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, and 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

[8] *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).

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

has shown us the importance of broadband connectivity, and that the U.S. is in danger of falling 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 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 is important to enable faster and more cost-effective broadband networks to be built. The Commission's speedy consideration of the issues raised in the *Petition* and the comment record would represent another important step in the direction of eliminating barriers to entry to the rapid deployment of fiber networks nationwide.

[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.

[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. Enhanced Federal Funding Will Spur the Deployment of More Fiber and Other Technologies; Reasonable ROW Fees Are Critical to Successful and Fast Deployment

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 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. Barriers to broadband and fiber deployment, like the unreasonable ROW fee described in the record in this proceeding, will have the pernicious effect of diverting federal infrastructure spending from its intended purpose—to deploy broadband networks. INCOMPAS submits that this is contrary to Congress' intent, which is to maximize and expedite broadband infrastructure deployment. A Commission decision affirming that above-cost right-of-way fees violate Section 253 could have significant impact in ensuring that franchise and permitting costs for deployment are reasonable and cost-based, consistent with Section 253's requirements.

INCOMPAS members, when confronted by arbitrary, discriminatory or unreasonable ROW fee demands, have made the business decision to decline pursuing projects and new builds they otherwise would have pursued because of the expense associated with these fees. These are foregone opportunities to present consumers and businesses with additional broadband options and further close the Digital Divide. This not only has an immediate impact on the consumers

[12] INCOMPAS Comments at 4.

and businesses in the municipalities that go unserved or underserved, but on those in nearby areas that would eventually benefit from a provider's network expansion. Moreover, it also impacts the availability of additional options in the wholesale market, which are important for retail broadband providers in both the mobile and fixed markets.

Filing a petition for preemption often is foregone as a means to addressing unreasonable and discriminatory fees. The expense, time, and uncertain outcome typically outweigh the possibility of a favorable decision by the Commission. Taking the affirmative step to file a Section 253 petition is evidence that a dispute cannot be avoided and is a serious matter and warrants Commission intervention. INCOMPAS submits that in doing so, the Commission will be meeting the overall objectives of Section 253 to enable and promote more fiber and other communications infrastructure. Reasonable, cost-based ROW fees will promote network deployment which is critical to the nation's economy and ensuring that every resident and business has a robust broadband connection, but also competitive alternatives for such a connection, which will drive more affordable broadband service.

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 providers alike as leveraging gigabit level and beyond 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 municipalities, 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 public rights-of-way. INCOMPAS members routinely engage in negotiations with such municipalities to reach agreements, and collectively these companies pay substantial revenues to municipalities in the form of annual rights-of-way fees.[13] 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 and are significantly higher than other jurisdictions. Such policies cause providers to defer deployments, build around a municipality, or abandon markets.[14]

The Commission should also be aware that the issues raised in this proceeding represent the proverbial tip of the iceberg when it comes to INCOMPAS member experiences 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. In such situations, cities may not ever demonstrate that their rates are cost-based.[15] And some do not abide by what neighboring jurisdictions charge even when our members demonstrate that the charges are much higher than other locales. Indeed, the rates charged by the City in this instance were neither demonstrably cost-based nor reasonable.[16]

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[13] *See, e.g.*, Crown Castle Comments at 2 (describing the company's efforts to develop "positive relationships with local governments" on the deployment of competitive fiber optic networks).

[14] *See* C Spire Comments at 6.

[15] *See Petition* at 6 (indicating that despite a ROW fee schedule being referenced in the City Code, "no publicly available [fee] schedule exists").

[16] *See id.* at 7 (noting that the fees associated with the project would increase to over 30 percent of Bluebird's expected gross revenues by the end of 2022).

This landscape has a negative impact on consumers, businesses, providers, 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 spend more, the CARES Act, American Rescue Plan, and infrastructure funding also being diverted to these unreasonable fees, with these subsidies not going as far as they otherwise would towards investment in the infrastructure to close the network access gaps. Unreasonably high rights-of-way fees therefore have far-reaching, often unseen negative effects on the communications ecosystem, and in the end, the local citizens and local economy bear the brunt, but the whole nation is impacted by the failure to connect everyone and offer them sufficient choices for their network provider.

When, as here, providers are pressed to the point of requesting federal preemption, the Commission should take particular notice. Companies are under constant pressure to complete their network builds and expansions, and generally do not want to file a Section 253 complaint based on the amount of time and resources that need to expended making their case before the Commission. Additionally, providers have ongoing concerns that filing a Section 253 petition against a municipality will damage that relationship and potentially lead to further permitting delays in the future. Typically, providers have exhausted all other possible negotiating alternatives and only file a petition to invoke the Commission's preemption authority as a last resort.

INCOMPAS recognizes that the Commission has limited resources and myriad issues vying for its attention, but acting expeditiously on the issues raised in this proceeding would send a broader deterrent signal that Section 253 and precedent apply to preempt unreasonable, non-cost-based fees and that providers 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 INTERVENE AND ADHERE TO ITS HISTORICAL POLICY OF LIMITING MUNICIPALITIES TO REASONABLE, NONDISCRIMINATORY, AND COST-BASED COMPENSATION

a. ROW Fees Must Be Based on Reasonable and Actual Costs to Comply with Section 253

The City's ROW fee regime violates Section 253 of the Communications Act, a provision which is intended to reduce barriers to entry by preempting local regulations and requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[17] Pursuant to Section 253, the Commission must determine whether the legal requirements collect "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public-rights-of-way on a nondiscriminatory basis."[18] INCOMPAS agrees that, in accordance with the Commission's rules and judicial precedent, the fee scheme violates Section 253(a) because the excessive magnitude of the fee materially inhibits the provisions of service, because the discriminatory application of the fee creates an unbalanced legal and regulatory environment, and because the fee at issue bears no relationship to the City's costs.[19]

Unreasonable rights-of-way fee structures violate 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, and reaffirmed in a *2018 Declaratory Ruling and Report*

[17] 47 U.S.C. § 253(a).

[18] 47 U.S.C. § 253(c).

[19] *Petition* at 12.

and Order.[20] 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 environment."[21] Additionally, federal courts have previously found that excessive fee structures can violate Section 253(a).[22] Petitioners argue that, under the current structure, ROW fees will "swallow . . . more than 31 percent of its gross revenue in FY2022"[23] with the expectation they will increase by more than *630 percent* to $550,000 per year. Contributing a third of a project's revenues for local ROW fees would materially inhibit *any* provider's efforts to deploy high-speed broadband. Furthermore, unreasonable and discriminatory fees have significant implications on a providers' capital resources and future investments. Therefore, based on the facts presented and the Section 253 precedent, it is appropriate for the Commission to intervene.

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[20] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Declaratory Ruling and Report and Order, 33 FCC Rcd 9088, paras. 43-46 (2018) ("*2018 Declaratory Ruling and Report and Order*").

[21] *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*").

[22] *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. *2018 Declaratory Ruling and Report and Order* at paras. 43-46 (2018). *See also City of Santa Fe*, 380 F.3d at 1271.

[23] *Petition* at 2.

b. Per Linear Foot Fees That Are Not Tied to Objective and Reasonable Costs Are Inconsistent with Section 253

The City's fee structure is also not covered by the savings clause of Section 253(c)[24] because the courts have made it clear that, in order to constitute "fair and reasonable compensation," a municipality's 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).[25] In 2018, the Commission further interpreted the requirement that a state or local government's compensation can be considered "fair and reasonable" if the following conditions are met "(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."[26] Several commenters agree that the 2018 *Declaratory Ruling* applies here and that the Commission's cost-based interpretation of the statute applies to wireline installations on a technology neutral basis.[27] High, uncapped per

[24] 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).

[25] *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* 2018 Declaratory Ruling and Report and Order at 9110-111, para 50, n. 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.")

[26] *2018 Declaratory Ruling and Report and Order* at 9113, para. 50.

[27] *See, e.g.*, ExteNet Comments at 4 ("While the Commission wrote the above standard for Small Wireless Facilities, the interpreted statutory language of Section 253 also applies to fiber placed in the public right-of-way."); Crown Castle Comments at 7, n.18; WISPA Comments at 4-5; ACA Connects Comments at 5-6; C Spire Comments at 5-6.

linear foot ROW fees, like the one at issue here, violate Section 253 because there does not appear to be any connection to the *actual* costs to the City that are *directly associated* with this use of the rights-of-way.[28] If there are, the City has yet to file comments that would suggest its fee structure is a reasonable approximation of its costs based on objectively reasonable factors. Furthermore, the ROW fee does not meet the Section 253(c) requirement that compensation must be "competitively neutral and nondiscriminatory."[29] Following Commission precedent, including *California Payphone*, the Commission must find that there is no nexus between the City's reasonable costs to manage the ROW and its per linear foot fee.

In doing so, the Commission should find that fees that are not associated with a municipality's objective and reasonable costs for managing the ROW violate Section 253.[30] With respect to the management and oversight of ROW, costs do not rise based on the number of feet of fiber that are being deployed and certainly are not incurred by the jurisdiction on a recurring basis; indeed, the ongoing cost to the jurisdiction to maintain fiber in the ROW is likely de minimis or zero. Subjecting competitive providers to unreasonable per linear foot ROW fees places these companies at a clear disadvantage, particularly in instances where they are required to pay significantly more than incumbents for use of the same ROW. Once again, this tilts the balance of the legal and regulatory environment in incumbents' favor, and the Commission

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[28] *See* WISPA Comments at 4-5; C Spire Comments at 7-10.

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

[30] *See* C Spire Comments at 10 (describing the company's firsthand experience with linear foot ROW fee that "are unrelated to the cost to the locality").

should affirm that fees unrelated to a jurisdiction's actual, objectively reasonable costs effectively prohibit service in violation of Section 253.

Several parties claim that the Commission does not have the appropriate authority to adjudicate Section 253 disputes and that the courts may be better positioned to resolve controversies between the parties.[31] However, the Commission has addressed this issue in its *2020 Bluebird Declaratory Ruling* where the Wireline Competition Bureau determined "it is well within the authority of both the courts and the Commission to adjudicate" disputes brought under Section 253(d).[32] Given the ample case history interpreting these issues and record here, INCOMPAS urges the Commission to reject these arguments and find that the issues presented in this record which demonstrate the harm of unreasonable and discriminatory fees must be addressed.

c. Discriminatory Permitting Delays Are Inconsistent with Section 253

In addition to the exorbitant ROW fee agreement, the record also shows an "onerous permitting process" that requires "each permit application be heard at a minimum of two city council meetings."[33] Similarly, INCOMPAS members have experienced extensive permitting/franchise processing delays.[34] Like egregious ROW fees, these delays directly impact a competitor's ability to deploy the next generation of networks and compete for customers. In

[31] *See, e.g.,* Comments of the National Association of Telecommunications Officers and Advisors, et al., WC Docket No. 21-323 (filed September 22, 2021).

[32] *Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC Petition for Preemption and Declaratory Ruling*, Declaratory Ruling, 35 FCC Rcd 12811 para. 30 (2020) ("*2020 Bluebird Declaratory Ruling*").

[33] *Petition* at 3.

[34] Crown Castle Comments at 10-11 (highlighting a discriminatory requirement in which the company had to seek city council approval for any new fiber route).

instances where consideration of ROW agreements are having a discriminatory effect on competitors, the Commission must step in, using its authority under Section 253, and preempt the local requirements. Furthermore, the Commission should actively consider the use of a shot clock on local permitting proceedings for wireline facilities. The provision of competitive fiber networks should not be allowed to languish over the course of months in local permitting processes—especially given the need for more fiber deployment and densification as discussed earlier.

V. THE COMMISSION SHOULD TAKE ACTION ON THE ISSUES PRESENTED IN THIS RECORD

INCOMPAS urges the Commission—pursuant to its delegated authority to the Wireline Competition Bureau ("Bureau")—to take action on the issues presented in this record. This is not a new or novel issue, and the facts as presented, clearly violate Section 253 and may be decided by the Bureau. There is recent precedent for the Bureau to do so. Just last year, when presented with unreasonable requests by four Missouri cities to submit to unreasonable franchise fees by charging twice the fees for the same network, the Bureau found, *inter alia*, that the duplicative fee requirements were not fair and reasonable compensation for a provider's use of the ROW and that the fee scheme violated Section 253.[35]

INCOMPAS also urges the Bureau to act expeditiously on the issues presented in the record. We recognize the Commission and the Bureau are faced with many competing priorities but providers that reach the point of filing a Section 253 petition are invariably under intense time and financial pressure. This can derive from many different sources: the pressure of working with borrowed capital where lenders are looking for a near-term return on investment;

[35] *2020 Bluebird Declaratory Ruling* at 8.

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, providers 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 provider reaches the last resort of filing at the FCC requesting Section 253 relief, they have already spent considerable time trying to achieve a workable settlement with the local jurisdiction.

In order for Section 253 to be more than a nullity, it must be enforced swiftly. If providers 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. Municipalities that are either unaware of the statute (and relevant rulings) or unwilling to abide by them need to know that immediate Section 253 enforcement is an option for providers to obtain relief from overreaching rights-of-way fees and permitting delays. That will not only provide discipline in specific cases where petitions are filed, but will also act as a deterrent when providers raise the prospect of Section 253 enforcement in in response to unreasonable behavior.

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