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

COMMENTS OF ACA CONNECTS

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COMMENTS OF ACA CONNECTS

I. INTRODUCTION AND SUMMARY

ACA Connects – America's Communications Association ("ACA Connects") hereby comments on the Petition for Preemption and Declaratory Ruling filed by Missouri Network Alliance d/b/a Bluebird Network ("Bluebird").[1] The *Petition* asks the Federal Communications Commission ("Commission") "for a declaratory ruling preempting the . . . rights-of-way ('ROW') fee scheme employed by the City of Columbia, Missouri," because it allegedly and materially inhibits Bluebird's ability to provide broadband services to customers and discriminates against Bluebird, thus violating Section 253 of the Communications Act of 1934, as amended (the "Act").[2] The

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

2 *Id.* at 1. *See also* 47 U.S.C. § 253. The *Petition* (at 14) asserts that "the broadband facilities Bluebird is deploying in Columbia are used to provide

Petition alleges that Columbia's (the "City's") ROW fee, which requires that it "pay an annual fee of $1.91 per linear foot for all fiber optic facilities installed within the City ROW, with no cap or upper limit on amount,"[3] is unlawful because:

1. The ROW fee structure has no relation to the City's costs to manage the use and occupancy of the ROW by telecommunications providers;

2. The City discriminatorily requires Bluebird, but not other providers occupying the City's ROW, to pay ROW fees on a per-linear-foot basis, rather than a gross revenues basis; and

3. The ROW fees will result in Bluebird's annual fees increasing by more than 630 percent, or 24 percent of its projected gross revenues in fiscal year 2021 and more than 31 percent of projected gross revenues in fiscal year 2022.[4]

Bluebird also alleges that the City requires it to follow a permitting process that is so onerous and discriminatory that the process amounts to a violation of Section 253.

In these comments, ACA Connects proposes a framework for analyzing the *Petition* under Section 253. As explained below, Section 253 requires that State and local government ROW fees imposed on providers of telecommunications services be cost-based and non-discriminatory. To the extent the Commission finds that the City's fee scheme violates either of these tenets of Section 253, as explicated in Commission and Court precedent, it should preempt.[5] Determining whether the City's fee is unlawful

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'telecommunications services' within the meaning of the Act." For purposes of these comments, ACA Connects assumes this is correct.

3 Petition at 1.

4 *See id*. at 1-3.t

5 *See e.g., Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment et al.*, Declaratory Ruling and Third Report and Order, WT Docket Nos. 17-79 and 17-84, 33 FCC Rcd. 9088, ¶ 52 (2018) ("*2018 Infrastructure Order*").

requires, among other things, a consideration of a State or local government's relevant costs and any other fees that are assessed that recover a State or local government's ongoing costs to manage the use and occupancy of the ROW or whether the fee discriminates against similarly-situated providers of telecommunications services. However, the Commission should not find, as the *Petition* alleges, that an "uncapped" fee in and of itself constitutes a violation of Section 253. Whether a fee that is "uncapped" violates Section 253 can only be determined after the factual analysis discussed above.

The Commission also should not find a violation of Section 253 based on factors raised in the *Petition* that fall outside the permissible scope of a Section 253 analysis of allegedly unlawful ROW fees. For example, when analyzing whether the City's ROW fees are non-discriminatory, there is no legal basis for the Commission to compare fees assessed on providers of telecommunications services with franchise fees imposed on cable operators under the "5 percent of gross revenues" standard set forth in Section 622 of the Act.[6] In addition, the Commission should not find that the City's fee

[6] 47 U.S.C. § 542 ("For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."). We note that a local government may not charge cable operators an additional fee to access the public ROW when the operator also provides telecommunications or any other non-cable services. *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*, Third Report and Order, MB Docket No. 05-311, 34 FCC Rcd 6844, ¶ 91 (2019) ("Section 621 Remand Order") ("We therefore reject the claim of some commenters that this language permits localities to charge additional fees so long as the cable operator also acts as a telecommunications provider or Internet service provider, or so long as the state or locality can articulate some non-cable related rationale for its actions.").

framework violates Section 253 based solely on the fact that Bluebird's (or any other provider's) ROW fees would increase significantly when the provider expands its network and uses a commensurately greater portion of the public ROW. Further, the Commission should not, as the *Petition* proposes, assess the reasonableness of ROW fees based on a comparison of that fee with the provider's revenues. Such an assessment would be contrary to the Section 253's cost-based, non-discrimination standard under which ROW fees are to be assessed. In addition, that approach would be virtually impossible to administer and more likely to produce arbitrary results that would undermine, rather than foster, a competitive marketplace.

II. SECTION 253: SCOPE, INTERPRETATION, AND PREEMPTION

The Telecommunications Act of 1996 amending the Communications Act provides a legal framework to promote competition and deregulatory objectives.[7] Section 253, which was added by the 1996 law and which proscribes State and local government acts that prohibit or effectively prohibit the provision of telecommunications services, is central to achieving those aims. Over two decades, the Commission and various courts have interpreted the requirements of Section 253. In the *2018 Infrastructure Order*, the Commission exercised its authority to resolve or clarify its actions concerning the proper interpretation of Section 253, as well as rulings of the courts when applying Section 253, some of which were in conflict.[8] The *2018*

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7 H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. (100 Stat. 5) 124.

8 *See 2018 Infrastructure Order*, ¶¶ 98-102.

Infrastructure Order provided a series of authoritative rulings about the scope of Section 253's requirements and the Commission's preemption authority.[9] The *Order* was upheld by the U.S. Court of Appeals for the Ninth Circuit.[10]

Section 253(a) provides that "[n]o 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."[11] The *2018 Infrastructure Order* affirmed the Commission's *California Payphone* standard interpreting Section 253 that "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[12] Further, the Commission clarified Section 253(a)'s reach by ruling that –

> a state or local government could materially inhibit service in numerous ways – not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider in providing

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9 The *2018 Infrastructure Order* focused on State and local government actions that affect telecommunications service provided in small cell wireless deployments; however, as the Commission's rulings addressed the applicability of Section 253 to provision of telecommunications services, its rulings apply to any provider of telecommunications services, regardless of the mode of transmission. *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment*, Third Report and Order and Declaratory Ruling, WC Docket Nos. 17-84 and 17-79, 33 FCC Rcd. 7705, ¶ 142 (2018) ("*Wireline Infrastructure Order*") ("Section 253 applies to wireless and wireline telecommunications services.").

10 *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) ("City of Portland").

11 47 U.S.C. § 253(a).

12 *2018 Infrastructure Order*, ¶ 35.

> service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services[13]

and

> [a] regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the disfavored facilities will experience prohibition.[14]

The Commission also affirmed that it "has not applied a 'commercial viability' standard" – under which a State or local government would be in compliance with Section 253 if its ROW fees do not harm a provider's business prospects – and that such a standard is not part of Section 253's requirements.[15]

Section 253(c) permits State and local governments to impose fees for access to the public ROW and other infrastructure that are based on "fair and reasonable compensation from providers of telecommunications services, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis."[16] The *2018 Infrastructure Order* addressed the proper interpretation of Section 253(c),[17] finding that a state or local government ROW fee violates this provision unless:

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13 *Id.*, ¶ 37. The Commission, in rejecting several court decisions to the contrary, found (at ¶ 41) that an "'effective prohibition' does not require a showing of an insurmountable barrier to entry."

14 *Id*., ¶ 39.

15 *Id*., n.159.

16 47 U.S.C. § 253(c).

17 The Commission made clear that Section 253(a) is "expansive," broadly limiting the ability of state and local governments to regulate, and that Sections 253(b) and (c) "make clear that certain state or local laws, regulations, and legal

"(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."[18] The Commission then clarified that it would not find State or local governments' fees violate Section 253(a), posing an unreasonable barrier to entry, "when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market."[19] As such, the Commission found that where "gross revenue fees generally are not based on the costs associated with an entity's use of the ROW," such fees must be preempted.[20] Conversely, the Commission implied that fees that vary

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requirements are not preempted" under that expansive scope. *See 2018 Infrastructure Order*, ¶ 53.

18 *Id.*, ¶ 50 (the "three-part test") (footnotes omitted). *See also id*., ¶ 72 ("We interpret the ambiguous phrase "fair and reasonable compensation," within the statutory framework we outlined for Section 253, to allow state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs.").

19 *Id*., ¶ 56. The Commission further found state and local government fees "that recover the reasonable approximation of reasonable costs . . . enable localities to recover their necessary expenditures to provide a stable and predictable framework in which market participants can enter and compete." *Id.,* ¶ 57.

20 *Id*., ¶ 70. *See also id*., ¶43, citing *Municipality of Guayanilla*, ¶ 44, citing *City of White Plains*, and ¶ 58, stating that such fees would "treat one competitor materially different than other competitors in similar situations." The Commission affirmed this interpretation recently in *Petition for Declaratory Ruling that Clark County, Nevada Ordinance No.4659 Is Unlawful Under Section 253 of the Communications Act as Interpreted by the Federal Communications Commission and Is Preempted*, WT Docket No. 19-230, 36 FCC Rcd. 278, ¶ 9 (2021) ("revenue-based fees are not designed to reflect a locality's costs; they are designed to reflect a provider's revenues. Therefore, a particular revenue-based fee that exceeds the Commission's safe harbor levels would violate Section 253 unless the locality can demonstrate that the fee nonetheless represents a reasonable approximation of the locality's costs and meets the other Commission criteria.").

based on the amount of an entity's use of the ROW, provided they are cost-based and not discriminatory, may be permissible.

Section 253(d) both authorizes and requires preemption of State and local laws that contravene Sections 253(a) and (c) and inhibit competition in the telecommunications services marketplace.[21] Over the past twenty years, the Commission has acted pursuant to these provisions to preempt a wide range of state and local government actions that have prohibited directly or in effect the ability of an entity to provide telecommunications services.[22]

III. APPLICATION OF SECTION 253'S REQUIREMENTS TO THE VIOLATIONS ALLEGED IN THE *PETITION*

The *Petition* alleges that the per-linear-foot ROW fees imposed by the City on Bluebird violate Section 253(a), and are not saved by Section 253(c), in three ways: the fees are not cost-based, are discriminatory, and will result in a precipitous increase in Bluebird's fee payments, especially in comparison with its expected revenues. Without examining whether Bluebird's factual allegations are correct, we discuss the proper application of Section 253 to each putative violation.

As explained below, the City's ROW fee scheme would violate Section 253 to the extent it is not cost-based or it unfairly discriminates against Bluebird or any other provider. Yet, we disagree with Bluebird's suggestion that the Commission should take

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21 *See, e.g.*, *Wireline Infrastructure Order,* ¶ 163 ("There is no dispute that section 253(d) provides an express mechanism for the Commission to preempt specific state or local legal requirements.").

22 *Id*., ¶ 141.

into account franchise fees imposed on cable operators for access to the public ROW (whether or not they also provide telecommunications services over their cable networks) when assessing the legality of the City's ROW fees for providers of telecommunications services. Also, the Commission should not find that the City's fee structure violates Section 253 solely because Bluebird (or any other provider) would be subject to fees that constitute a higher percentage of its gross revenues the more extensively the provider uses and occupies the public ROW. Nor should the Commission endorse the approach, advocated by the *Petition,* that a State or local government be required to assess whether its ROW fees, that otherwise satisfy the cost-based and nondiscriminatory requirements of Section 253(c) as interpreted by the Commission, would harm or advantage a competitive provider of telecommunications services because it is new to the market or for other reasons has low revenues.

A. The Commission Should Find the City's Per-Linear-Foot Fee Violates Section 253 If It Does Not Comply with the "Cost-Based" Test Set forth in the *2018 Infrastructure Order*.

The *Petition* alleges that the City's per-linear-foot ROW fee, which is not subject to an annual limitation (or "cap") regardless of how much public ROW Bluebird occupies, has no relation to the City's costs to manage the ROW, and thus "the fee scheme constitutes an effective prohibition of Section 253."[23] As evidence, the *Petition* asserts that "all costs the City conceivably could incur in its management of the ROW" are recovered through other charges or requirements: for instance, Bluebird must pay

[23] Petition at 22.

fees, in addition to the $1.91 per-linear-foot fee, for permit review and inspections by the City and to protect existing structures, and Bluebird must repair or restore the ROW at its own expense and must obtain insurance and indemnify the City.[24] Further, the *Petition* alleges that Bluebird's agreement with the City refers to the "ROW fee as 'annual rent.'"[25] Finally, the *Petition* contends that "the mere fact that a per foot fee may be proportional to the amount of infrastructure a carrier has deployed does not mean the fee is based on costs, or even that it is a good or appropriate proxy for costs."[26]

As discussed above, State or local governments' fees for use and occupancy of the public ROW will not violate Section 253(a) "when they merely require providers to bear the direct and reasonable costs caused by their decision to enter the market,"[27] provided the fees are assessed on similarly-situated providers of telecommunications services in a non-discriminatory and competitively neutral fashion. As such, the fees imposed by the City must be limited to compensating it for the actual costs it reasonably and objectively incurs to manage Bluebird's use and occupancy of the public ROW.

It is unclear whether the City's per-linear-foot fee meets this standard based on the information in the *Petition*. A per-linear-foot fee in concept may be permissible if its level and application, in combination with other fees that ostensibly recover a State or

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24 *Id*. at 23-24.

25 *Id.* at 24. A fee based on the value of the public ROW would be contrary to the Commission's "three-part test."

26 *Id.*

27 *See supra*, n.19.

local government's costs for managing the public ROW, are tied to the actual and objective costs reasonably imposed on the government's management of a provider's use and occupancy of the public ROW. Indeed, many local governments assess per-linear-foot fees today that providers do not dispute. Bluebird seems to allege that fees that are "uncapped" are inherently suspect under Section 253,[28] but nowhere does the *Petition* discuss the basis for such a claim. In particular, Bluebird does not explain why Section 253 would require a State or local government to hold to a fee "cap" in situations where a provider's use of the ROW increases after it reaches the "cap."

As such, ACA Connects submits the Commission should find that a State or local government's use of a per-linear-foot fee by itself – with or without a "cap" – is not a *per se* violation of Section 253.[29] The Commission should then inquire whether, in applying such a fee structure, the total fee amount – including all direct and indirect assessments by the City for costs incurred on a recurring basis – is based on actual costs the City

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28 *See* Petition at 15-16 (contrasting the "uncapped" fee charged by the City with "capped" fees charged by other municipalities in Missouri). The *Petition* does not provide a basis related to the Commission's "three-part test" for capping the per-linear-foot fee. *See also Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC Petition for Preemption and Declaratory Ruling*, WC Docket No. 20-46, 35 FCC Rcd., at ¶ 9 (2020) ("Under its rights-of-way use agreement with Cameron, Bluebird is obligated to pay the city $0.16 per linear foot of fiber facilities in the rights-of-way each month, with a monthly cap of $4,000.") ("Bluebird Declaratory Ruling").

29 The *Petition* (at 24) suggests that a per-linear-foot annual fee does not reflect the costs the City incurs in the course of network deployment and other "variables," including "congestion in the ROW and the presence of other utilities." We will leave it to the Commission to determine whether these are in fact costs the City incurs to manage use and occupancy of its ROW, although we note that a recurring fee should reflect costs that a city incurs on a recurring basis to manage such use and occupancy. By contrast, a non-recurring fee should only reflect one-time events and costs.

reasonably and objectively incurs to manage a provider's use and occupancy of the public ROW. If the Commission finds that the City's fee structure fails this test, it should preempt the City as Bluebird requests.

B. The Commission Should Find the City's Per-Linear-Foot Fee and Permitting Process Violates Section 253 If It is Discriminatory, but Franchise Fees Paid by Cable Operators for Access to the Public ROW are Irrelevant to this Analysis

The *Petition* also alleges that the City's per-linear-foot fee is discriminatory because other broadband providers "pay fees based on telecommunications or video revenues," which it asserts violates Section 253's requirement that a provider must be permitted to compete in a fair and balanced regulatory environment.[30] The *Petition* further alleges that even if the fee amounts paid by Bluebird and other providers are comparable, Bluebird faces unlawful discrimination in the manner that fees are collected: Bluebird asserts that, as a recent entrant deploying additional facilities in the

[30] Petition at 20. The *Petition* (at 18) also alleges that the City charges fees to attach to its poles that discriminate against Bluebird. We note that rates to attach to the City's poles are not subject to Section 224 of the Act (47 U.S.C. § 224) as the City is not a utility. However, in *City of Portland* (at 57-59), the court upheld the Commission's conclusion that municipalities oversee and manage the public ROW as regulators and not in their proprietary capacity, and hence their actions are subject to the requirements of Section 253, including that rates to attach to their poles be cost-based. That said, the actual cost between access to a pole and access to underground ROW may differ significantly and thus different rates for these different types of access would not, on their face, be discriminatory in violation of Section 253. Under certain facts and circumstances, however, ACA Connects believes that such different rates could be discriminatory, for example if the rates for facilities occupying the public ROW on poles were below a local government's actual and objectively reasonable costs of managing such facilities whereas the rates for underground conduit were above the local government's actual and objectively reasonable costs of managing facilities in underground conduits in the public ROW.

public ROW, it would be required to pay its fees "before any customer revenue is collected, while other providers pay incrementally following the collection of revenue."[31]

Here, the Commission must analyze whether the per-linear-foot fees the City assesses Bluebird (combined with any other recurring fees for use and occupancy of the public ROW) are greater, relative to the costs that Bluebird's use and occupancy of the ROW imposes on the City, than ROW fees paid by other providers of telecommunications services relative to the costs they impose upon the City. Such disparity, if it exists, could be found to materially inhibit Bluebird's ability to compete in a fair and reasonably balanced environment. If the Commission makes such a finding, the Commission must preempt the fee for being unlawfully discriminatory. Conversely, if the fees that providers pay relative to the costs they impose on the local government are similar for similarly-situated providers, there is no discrimination addressable under Section 253.[32]

Where other providers of telecommunications services have access to public ROW by virtue of Section 253, the Commission's inquiry as to whether unlawful discrimination exists is relatively straightforward – a comparison of the rates, terms, and conditions by which the State or local government permits each similarly-situated

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31 Petition at 20.

32 *See e.g., 2018 Infrastructure Order*, ¶ 58 ("fees that treat one competitor materially differently than other competitors in similar situations are themselves grounds for finding an effective prohibition—even in the case of fees that are a reasonable approximation of the actual and reasonable costs incurred by the state or locality. Indeed, the Commission has previously recognized the potential for subsidies provided to one competitor to distort the marketplace and create a barrier to entry in violation of Section 253(a).").

provider of telecommunications services to use and occupy the public ROW. However, this Section 253 analysis should not include a comparison of the rates, terms, and conditions of a cable operator that is accessing the public ROW by virtue of Section 621 of the Act[33] and paying fees pursuant to Section 622. The latter section permits a franchising authority, either a State or local government, to charge for ROW access five percent of gross revenues from cable services – and the State and local government may not assess more, even if the cable operator provides telecommunications service on an ancillary basis.[34] As evidenced by the precedent interpreting Section 253, including the *2018 Infrastructure Order*, and the 2019 *Section 621 Remand Order*, Congress, in enacting Section 253 and Section 622, has provided two different benchmarks for what fees are permissible for use and occupancy of a State or local government's ROW, which turn on whether the provider obtains access as a provider of telecommunications services or as a cable operator, respectively. As such, a State or

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33 47 U.S.C. § 541.

34 *See supra*, n.6. In the *Section 621 Remand Order* (at 80), the Commission, using its authority under the cable provisions of the Act, decided to "preempt (1) any imposition of fees on a franchised cable operator or any affiliate using the same facilities franchised to the cable operator that exceeds the formula set forth in section 622(b) of the Act and the rulings we adopt in this document, whether styled as a ''franchise'' fee, ''right-of-access'' fee, or a fee on noncable (e.g., telecommunications or broadband) services, and (2) any requirement that a cable operator with a Title VI franchise secure an additional franchise or other authorization to provide non-cable services via its cable system." While the ROW fees charged cable operators are derived from Section 622 and cable operators can invoke the "mixed-use" rule to prevent governments from assessing additional ROW fees for provision of non-cable services, nothing prevents a cable operator providing telecommunications services from invoking Section 253(a) to allege, for instance, unlawful discriminatory conduct by a State or local government.

local government that applies both provisions lawfully may end up with fees for a provider of telecommunications services and for a cable operator that are materially different – but that difference would not constitute discrimination for purposes of Section 253.

As a separate matter concerning possible discrimination, the *Petition* alleges that the City's permitting process is discriminatory in violation of Section 253 because, unlike Bluebird, its competitors can "simply get a permit and file as-built maps after construction is complete."[35] The *Petition* cites the *City of White Plains* decision for the proposition that "extensive delays" prevent a provider from competing on a fair basis.[36] ACA Connects agrees with the *Petition* on the appropriate legal standard and its application. As such, if the Commission determines that the City imposes permitting requirements on Bluebird that discriminate against it relative to other communications providers such that they materially inhibit the provider's ability to compete in a fair and reasonably balanced manner, it should find the requirements violate Section 253 and preempt.

C. The Commission Should Not Find the City's Per-Linear-Foot Fee Violates Section 253 Just Because It Results in a Precipitous Increase in Fee Payments by Bluebird

The *Petition* alleges that the City's per-linear-foot fee is "plainly prohibitory" in contravention of Section 253(a) because it will result in Bluebird's annual fees

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35 Petition at 20-21.

36 *Id.* at 21.

increasing by more than 630 percent, amounting to 24 percent of its projected gross revenues in fiscal year 2021 and more than 31 percent of projected gross revenues in fiscal year 2022.[37] The *Petition* claims the annual aggregate amount of this fee is "more than twelve times larger than the gross revenue fee at issue in *Municipality of Guayanilla*, which the court found effectively prohibited service," and far surpasses "the quadruple increase in fees found to be unlawfully prohibitory in *City of Sante Fe* and the doubling of fees imposed by Missouri jurisdictions found to be preempted in the *Bluebird Order*."[38]

ACA Connects supports policies that facilitate competitive entry into markets, but a ROW fee does not violate Section 253, as the *Petition* suggests, based solely on the fact that a provider's ROW fee will increase significantly because the provider has expanded its network and uses a commensurately greater portion of the public ROW. Indeed, none of the cases that Bluebird cites stand for that proposition.[39] As a general

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37 *Id.* at 2, 15.

38 *Id*. at 15.

39 In *Municipality of Guayanilla* the court found that an increase in a municipal license tax on gross revenues from 0.5% to 5% violated Section 253. Under the ordinance at issue, a telecommunications company would have been required to pay a significantly higher tax even if it had no increase in gross revenues and did not impose additional costs on the city by virtue of its use and occupancy of the ROW. In *City of Santa Fe*, the court concluded that an expanded conduit capacity requirement (which would cause an increase in costs) violated Section 253. Under the applicable ordinance, a provider of telecommunications services would have incurred significantly higher costs even if it did not seek to install conduit along a greater length of the ROW. Thus, in both of those cases, providers of telecommunications services would have been subject to increased fees despite not making any changes to their operations or expanding their use of the ROW. In contrast, the *Petition* focuses on increased fees that are a direct result of a provider of telecommunications services' decision to occupy a larger portion of the ROW.

matter, when a provider occupies more of the public ROW, it is reasonable to expect that a city's actual costs in managing that use and occupancy of the public ROW also will increase. That said, the Commission should be suspect of a material fee increase where the provider does not impose significant additional costs on the government or where other factors suggest that the fee is not based on actual, objectively reasonable costs, is discriminatory, or is not competitively neutral.

We also do not agree with the *Petition* that there is a violation of Section 253 just because cost-based ROW fees increase as a result of greater use and occupancy of the public ROW and – by happenstance, not by design – those fees constitute a larger percentage of a provider's gross revenues.[40] This possibility is inherent in the structure of a per-linear-foot fee, which reflects the costs created by the extent of use and occupancy of the public ROW and makes no reference to a provider's actual revenues. The *Petition* proposes that the Commission assess the reasonableness of ROW fees based on a comparison of the total fee with the provider's revenues. Such an assessment would be contrary to the Commission's cost-based, non-discrimination standard under which ROW fees are to be assessed. Further it would subject fees that

[40] We note that in Cameron, Missouri, Bluebird appears to be paying and not disputing a per-linear-foot fee for access to the city's ROW that amounts to approximately 60 percent of its revenue. *See Bluebird Declaratory Ruling*, ¶ 9 ("Under its rights-of-way use agreement with Cameron, Bluebird is obligated to pay the city $0.16 per linear foot of fiber facilities in the rights-of-way each month, with a monthly cap of $4,000, a fee structure that results in a monthly payment from Bluebird of approximately $2,500, or approximately $30,000 annually. Bluebird states that it generates less than $50,000 in annual revenue from the services it provides in Cameron.").

pass statutory muster as cost-based and non-discriminatory to additional scrutiny with no basis in the language of Section 253(c).[41]

Sanctioning the approach suggested in the *Petition* would alter and expand the role of State and local governments beyond ensuring that the ROW fees they charge are cost-based and non-discriminator, rather than simply managing their ROW as the plain language of Section 253 contemplates. State and local governments would be enlisted as policymakers that must weigh whether assessing a cost-based or non-discriminatory fee on a provider would nonetheless disadvantage it in light of its revenues or other factors so as to jeopardize competition in the market.[42] The *Petition* in effect asks the Commission to adopt an approach that would remove the objectivity the Commission strove for in adopting its interpretation of Section 253(c). In its place, the *Petition* would impose a subjective analysis that would sanction government-authorized discrimination should the local government choose to accept less than cost-based rates from some providers because their revenues are low. Furthermore, the

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41 Although, pursuant to Section 253(a), State and local governments may not take actions that materially inhibit the provision of telecommunications service by a provider, they are entitled under Section 253(c) to recover their costs for managing the ROW in a non-discriminatory manner. *See e.g., 2018 Infrastructure Order*, ¶ 57 ("fees charged by a state or locality that recover the reasonable approximation of reasonable costs do not 'materially inhibit' a provider's ability to compete in a 'balanced' legal environment. To the contrary, those costs enable localities to recover their necessary expenditures to provide a stable and predictable framework in which market participants can enter and compete.").

42 *See id.*, n. 159, where the Commission addresses a similar issue – application of a "commercial viability" test ("We disagree with suggestions that the Commission applied an additional and more stringent "commercial viability" test in *California Payphone*.").

Petition would have the Commission evaluate the reasonableness of ROW fees in a manner that seeks to protect individual competitors, something in other contexts the Commission has been loath to do, rather than protect competition generally, as is its wont.

State and local governments should be counted on to guard against discrimination among similarly-situated carriers, not manufacture it.[43] Further, an approach that requires a State or local government to inquire about whether its fees harm or advantage a provider would be virtually impossible to administer. To make these determinations, State and local governments would be required to pry into and assess each provider's business operations, including whether the provider is a new entrant, its competency (or lack thereof) to generate revenues, and the level and intensity of competition it faces. There is no objective benchmark for State or local governments to follow in making these assessments, and in practice, they are likely to reach outcomes that distort competition in the marketplace. For instance, governments may end up imposing artificially low fees on some providers if, in implementing fee structures, they are required to offset the reality that a certain amount of upfront costs are necessary before a facilities-based carrier can finally realize positive net revenues. Exacerbating these problems, claims seeking review of any decisions adopted under this subjective approach would be extremely difficult to resolve in the absence of

[43] ACA Connects submits the Commission should read the discrimination and competitively neutral requirements to give meaning to both.

objective standards, making it more difficult to assess which State or local government actions are permissible and which are unlawful.

For all of these reasons, the Commission should reject the intractable and legally baseless approach suggested by the *Petition* that it evaluate whether a State or local government's ROW fees are consistent with Section 253 based on comparisons of the fee amounts imposed on providers occupying the ROW relative to providers' revenues.

* * *

IV. CONCLUSION

The *Petition* raises potential violations of Section 253 that warrant careful scrutiny by the Commission, and in these comments ACA Connects sets out a legal structure by which the Commission can evaluate Bluebird's principal claims.

Respectfully submitted,

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