

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

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

**COMMENTS OF NEXT CENTURY CITIES**

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**I. Introduction**

Next Century Cities (“NCC”)<sup>1</sup> respectfully submits these comments to the Wireline Competition Bureau’s (“WCB”) request for comment on petitions for a declaratory ruling filed pursuant to Section 253 of the Communications Act.<sup>2</sup> On August 13, 2021, WCB released a Public Notice seeking comment on a Petition for Declaratory Ruling filed by Mediacom asking the Commission to declare that the fiber deployment agreement entered into by the City of West Des Moines (“City” or “West Des Moines”) and Google Fiber effectively prohibit Mediacom from providing telecommunications services in violation of Section 253(a) of the Communications Act (“Section 253”).<sup>3</sup>

The Federal Communications Commission (“FCC” or “Commission”) relinquished its jurisdiction to rule on this petition when it reclassified broadband Internet service as a Title I

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<sup>1</sup> Next Century Cities is a nonprofit nonpartisan 501(c)(3) coalition of over 200 member municipalities that work collaboratively with local leaders to ensure reliable and affordable broadband access for every community.

<sup>2</sup> See *Wireline Competition Bureau Seeks Comment on Petitions for Declaratory Ruling Filed Pursuant to Section 253 of the Communications Act*, WC Docket No. 21-217, Public Notice, DA 21-994 (WCB 2021).

<sup>3</sup> *Id.*

information service.<sup>4</sup> Mediacom's complaint only pertains to the deployment and delivery of broadband Internet access service and does not affect the delivery of telecommunications services. Therefore, the Commission lacks authority to rule on this matter.

Further, a ruling that adopts Mediacom's arguments could create unintended precedential consequences that would further erode local authority over broadband deployment and, ultimately, sabotage local strategies to increase competition. New broadband infrastructure deployment funds are being made available and distributed with the purpose of increasing competition. More local governments than ever before are developing and implementing broadband deployment plans that spur multiple providers to serve their communities. An FCC ruling that tramples on local decision-making could undermine collaboration potential with new market entrants, particularly in similarly situated areas with an incumbent provider.

Finally, the Commission's stated goals are to bring universal, affordable, connectivity to every person in the United States.<sup>5</sup> The City is working to effectuate that goal for its residents. Ruling in favor of its incumbent provider could hinder broadband deployment and improvement efforts in municipalities across the nation.

## **II. The Commission Lacks the Jurisdiction to Rule on This Matter.**

The Commission does not have the jurisdiction to rule on Mediacom's petition for declaratory ruling under Section 253 of the Communications Act. Section 253 regulates interstate and intrastate telecommunications service. It pertains only to the deployment of

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<sup>4</sup> See generally *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 3 FCC Rcd 311 (2018) (RIF Order).

<sup>5</sup> 47 U.S.C. § 151.

telecommunications services.<sup>6</sup> Here, Mediacom has not argued the City's deployment plans will prohibit its provision of telecommunications services, only broadband Internet access service. Mediacom argues that it will be unable to expand or upgrade its existing network, an issue not addressed in Section 253.

By its own volition, the Commission currently lacks the jurisdiction to regulate broadband deployment. Under the 2018 Restoring Internet Freedom Order (“RIF Order”), the Commission reclassified broadband from a Telecommunications Service under Title II to a Title I information service.<sup>7</sup> The RIF Order highlights that while Internet usage has shifted over time, access continues to offer the information service capabilities consumers expect and rely on.<sup>8</sup> The Commission concluded that the basic nature of using the Internet via high-speed broadband is to “provide consumers with a comprehensive capability for manipulating information using the Internet. . . .”<sup>9</sup> Consequently, the Commission’s previous reclassification of broadband as a Title I information service disqualifies the Commission from making a ruling in this instance.

Notably, in its petition, Mediacom agrees that Section 253 applies only to telecommunications services, not information services.<sup>10</sup> As long as the Commission holds that broadband Internet should *not* be classified as a telecommunications service, it does not have the jurisdiction to offer a ruling on this matter.

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<sup>6</sup> 47 U.S.C. § 253(a) (“No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service* (emphasis added)).

<sup>7</sup> *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 3 FCC Rcd 311, 321, para. 28 (2018) (RIF Order).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Petition of MCC Iowa LLC for Expedited Declaratory Ruling Pursuant to Section 253(d) of the Communications Act, WC Docket No. 21-217, at 1 (filed May 12, 2021),

<https://ecfsapi.fcc.gov/file/1051284318481/MCC%20Iowa%20LLC%20Section%20253%20Petition.pdf> (Mediacom Petition).

### **III. Granting Mediacom’s Petition Could Disincentivize Public-Private Partnerships Across the Country.**

Although Mediacom’s petition is highly fact-specific, the Commission’s involvement could make an indelible mark on community-based initiatives that are currently being implemented as well as others in incubation. A ruling in Mediacom's favor would strike at the City’s autonomy, discouraging the thousands of local governments nationwide from exploring public-private partnerships in their own communities.

West Des Moines, like many cities across the United States, is seeking innovative solutions that reduce barriers to broadband competition and improve service quality while lowering prices. Maintaining a meaningful role in improving the local broadband market requires that municipalities have the authority to decide which broadband deployment models can most effectively address their community needs.

In order to take advantage of the billions of dollars in federal funding earmarked for communities to take ownership of broadband access and adoption challenges, local governments need flexibility. Flexibility is a key determinant of successful broadband funding programs for municipalities.

It is worth noting that local governments are particularly risk averse compared to private Internet service providers. That was evidenced in the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act and American Rescue Plan Act (“ARPA”) funding programs, which both offer flexible funding for communities seeking to improve broadband access and adoption for residents, businesses, and government services. Even though flexibility was built into the legislation, local governments remain skeptical that broadband investments will not invite other risks from regulators, legislators, and incumbent service providers. Here, after careful

consideration, the City embarked on a public-private partnership that has not offended any of the Commission's rules but threatens the market share of the incumbent provider.

Public-private partnerships enable local governments to minimize their own risk by sharing it with the private sector. Despite billions of dollars directed to the private sector over the past two decades, persistent gaps remain in the availability of high-quality, affordable broadband access. As a result of the COVID-19 pandemic, local officials are acutely aware of their role in ensuring their communities' access to equitable and ubiquitous broadband.

Many communities will soon have the financial support to make initial investments in digital infrastructure. The one-time nature of relief funding could necessitate collaboration with private partners to use the infrastructure for connectivity. In some cases, various public-private partnership models have emerged,<sup>11</sup> and may be the only way for a municipality to achieve its broadband goals. Limiting the models available to West Des Moines could undermine opportunities in other communities that rely on public-private partnerships to meaningfully influence broadband offerings.

#### **IV. A Ruling in Mediacom's Favor Could Compromise the Ways in Which Local Governments Are Able to Use New Funding.**

In addition to legislative flexibility, municipalities need regulatory flexibility to ensure their investments will not be thwarted once the money is spent. Local governments regularly face the looming threat of lawsuits from ISPs, particularly from those with market share and exponential resources. Increased risk translates into reluctance to spend scarce one-time dollars on broadband initiatives.

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<sup>11</sup> See Joanne Hovis, Jim Ballmer, & Cat Blake, *Public Infrastructure/Private Service: A Shared-Risk Partnership Model for 21st Century Broadband Infrastructure*, at 7 (2020), [https://www.benton.org/sites/default/files/PPP3\\_final.pdf](https://www.benton.org/sites/default/files/PPP3_final.pdf) (describing the various public-private partnership models).

This has been made exceptionally clear in the ways local authority has been challenged over pole attachments, small cell deployment, and rights of way regulations. In the past, the Commission has reviewed petitions and released declaratory orders that directly impacted how communities permit, collect fees for, and administer the utility poles in their communities.<sup>12</sup>

Additionally, municipalities have been stripped of much of the authority related to the deployment of small cells in their communities.<sup>13</sup> In 2020, the Court of Appeals for the Ninth Circuit issued a decision upholding many portions of the FCC's small cell order. The Ninth Circuit specifically upheld rules that included shorter shot clocks, stricter fee requirements, and a broader standard on when a locality has 'effectively prohibited' a wireless infrastructure deployment.<sup>14</sup>

The Commission has also restricted much of the control municipalities once had over their own public rights of way. In a 2019 order, the FCC preempted local fee requirements in connection with cable operators' access to public rights of way. This preemption applied even if the fee related to a non-cable service.<sup>15</sup> In addition, the FCC has concluded that Section 253(c) does not apply to moratoria when local activities preclude access to a public right of way.<sup>16</sup>

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<sup>12</sup> See Corian Zacher, *NCC Urges the FCC to Protest Local Authority Over Pole Attachment Costs* (Sept. 4, 2020), <https://nextcenturycities.org/ncc-urges-the-fcc-to-protect-local-authority-over-pole-attachment-costs/>; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, FCC Num. Doc-3525244 (2002).

<sup>13</sup> See generally, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, (2018).

<sup>14</sup> Mark Del Bianco & Next Century Cities, *Summary For Local Officials: City of Portland v. FCC*, Next Century Cities (Sept. 14, 2020), <https://nextcenturycities.org/wp-content/uploads/Small-Cell-Summary.pdf>.

<sup>15</sup> Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 34 FCC Rcd. 6844, 6892, para. 88 (2019)

<sup>16</sup> *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 7786, para. 160 (2018).

Still, the Commission failed to define when a local activity precluded access to the right of way and when certain management of the right of way was acceptable.<sup>17</sup>

While the Commission has taken a series of actions that limit local authority, at the same time it has imposed no buildout, service quality or other consumer protection obligations on the industry beneficiaries gaining valuable access to limited public assets and rights of way.

The threat of having a local decision dismantled in a federal tribunal ensures that incumbent service providers, who are repeat players at the FCC, have an advantage over local officials who are often under-resourced and unfamiliar to navigating the Commission's processes. Setting a precedent that incumbent providers can use Section 253(a) to preempt local authority unfairly disadvantages municipalities seeking locally appropriate solutions to improve broadband access and adoption in their communities.

Introducing the new risk of added federal intervention would simultaneously threaten the vitality of billions of dollars that could be invested in broadband projects nationwide. The Commission should preserve the local decision-making process by denying Mediacom's petition.

## **V. Conclusion**

The Commission lacks the requisite authority and jurisdiction to resolve Mediacom's complaint. Notwithstanding, Mediacom's petition should be denied. Until the Commission is willing to also protect the local community interests of universal buildout, service standards, and consumer protection for broadband customers, the Commission should defer to local broadband policy decisions and expertise to fill in deployment gaps. It should also avoid adding uncertainty

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<sup>17</sup> *Id.* at para. 159.



and risk of federal preemption to new public-private partnerships being explored to bring much-needed broadband competition and network capacity to underserved and underserved communities nationwide.