

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Missouri Network Alliance, LLC d/b/a Bluebird ) WC Docket No. 20-46
Network and Uniti Leasing MW LLC )
Petition for Preemption and Declaratory Ruling )

DECLARATORY RULING

Adopted: November 9, 2020

Released: November 9, 2020

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. Closing the digital divide and ensuring that all Americans have access to digital opportunity and the benefits of broadband remains the Commission’s top priority. The COVID-19 pandemic has served to highlight the essential nature of a robust communications infrastructure in promoting access to healthcare, employment, and social connectivity with educational, civic, and religious institutions, in addition to family and friends. To ensure a competitive market in the provision of these services, Congress more than two decades ago directed that if a state or local legal requirement effectively prohibits an entity from providing telecommunications services, the Commission must preempt that requirement.1 In this Declaratory Ruling, we fulfill Congress’ mandate by preempting a legal framework imposed by the cities of Cameron, Maryville, and St. Joseph, Missouri (collectively, the Cities) to the extent that it has been or may be used to require Missouri Network Alliance, LLC d/b/a Bluebird Network (Bluebird) to pay duplicative rights-of-way fees based solely on the passive ownership of the facilities it uses to provide telecommunications services (hereinafter, the Network) by Leasing MW, LLC (LMW).2

2. The Commission has long held that a state or local legal requirement that “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment” effectively prohibits the provision of telecommunications services,3 thereby contravening Congress’ intent to promote the deployment of lower cost, higher quality services to

1 47 U.S.C. § 253(a), (d); see Connect America Fund; Sandwich Isles Communications, Inc.; Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission’s Rules, WC Docket No. 10-90, CC Docket No. 96-45, Memorandum Opinion and Order, 32 FCC Rcd 5878, 5878, para. 1 (2017) (Sandwich Isles).

2 On August 18, 2020, Petitioners notified the Commission that Uniti Leasing MW LLC’s name has been changed to LMW. See Letter from Joshua S. Turner, Counsel, Missouri Network Alliance, LLC d/b/a Bluebird Network, to Marlene H. Dortch, Secretary, FCC, at 1 (filed Aug. 18, 2020) (Bluebird August 2020 Ex Parte Letter). For ease of reference, LMW will be used to refer to Bluebird’s co-petitioner when describing relevant events before and after the name change. Bluebird and LMW are referred to collectively herein as Petitioners.

3 California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934, CCB Pol 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206, para. 31 (1997) (California Payphone).

consumers by opening telecommunications markets to competition.<sup>4</sup> Based on our review of the record, we find that the Cities' have imposed such a material inhibition here to the extent that they construe their ordinances in a manner that allows them to effectively double-charge Bluebird for its single use of the public rights-of-way simply because another entity owns the Network—an entity that does not have any physical connection to the public rights-of-way itself. LMW does not use, maintain, or control the Network. It simply leases the Network to Bluebird to provide telecommunications services, which Bluebird does pursuant to existing rights-of-way agreements with the Cities. Nevertheless, the Cities seek to impose the same rights-of-way fees on LMW based on its passive ownership of the Network facilities, which the record indicates would ultimately increase Bluebird's rights-of-way costs by 100%. We find that such a dramatic increase in costs for Bluebird's use of the Network would impose a financial burden that effectively prohibits Bluebird from providing its services in violation of section 253(a) of the Telecommunications Act (the Act),<sup>5</sup> and for the reasons stated herein, the Cities' requirements must be preempted pursuant to section 253(d) to the extent they would require Bluebird to pay duplicative fees for the use of the Network.<sup>6</sup>

## II. BACKGROUND

3. *Section 253 of the Telecommunications Act of 1996.* Section 253(a) of the Act states that no state or local statute, regulation, or legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.<sup>7</sup> When determining whether a legal requirement effectively prohibits the provision of telecommunications services, the Commission must consider, consistent with its longstanding precedent under *California Payphone*, whether the requirement “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>8</sup> As the U.S. Court of Appeals for the Tenth Circuit has explained, section 253(a) “forbids any statute which prohibits or has ‘the effect of prohibiting’ entry. Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.”<sup>9</sup>

4. Section 253(b) provides an exception to section 253(a) for state requirements that are competitively neutral, consistent with section 254 of the Act, and “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of

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<sup>4</sup> See *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 575-76 (9th Cir. 2008).

<sup>5</sup> See 47 U.S.C. § 253(a).

<sup>6</sup> 47 U.S.C. § 253(d).

<sup>7</sup> 47 U.S.C. § 253(a).

<sup>8</sup> *California Payphone*, 12 FCC Rcd at 14206, para. 31; *TCG New York, Inc. v. City of White Plains, New York*, 305 F.3d 67, 76 (2d Cir. 2002) (*City of White Plains*) (quoting and stating agreement with the *California Payphone* standard adopted by the Commission). In August 2018 the Commission issued a Declaratory Ruling addressing whether state and local moratoria violate section 253(a). That item, however, “exclude[d] the imposition of fees from the definition of *de facto* moratoria” and thus did “not take up . . . the question of the circumstances in which the imposition of fees may violate section 253(a).” *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless 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, 33 FCC Rcd 7705, 7786 para. 159 & n.586 (2018) (*Moratoria Order*). The following month, in a Declaratory Ruling, the Commission addressed when wireless siting fees charged by state and local government prohibit or effectively prohibit, under section 253, the provision of telecommunications services. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline 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, 9110-9130, paras. 43-80 (2018).

<sup>9</sup> *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000) (*RT Communications*), affirming *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639 (1997) (*Silver Star*).

telecommunications services, and safeguard the rights of consumers.”<sup>10</sup>

5. Section 253(c) creates exceptions to preserve state and local authority by stating that nothing in section 253 “affects the authority of a State or local government to manage their public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”<sup>11</sup>

6. Section 253(d) requires the Commission, after notice and comment, to preempt the enforcement of a specific state or local requirement that is contrary to sections 253(a) or (b) “to the extent necessary to correct such violation or inconsistency.”<sup>12</sup> Pursuant to section 253(d), the Commission has preempted state and local actions, regulations, and legal requirements that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services, such as a locality’s denial of franchise applications from a new competitor,<sup>13</sup> provisions in state codes that protect incumbents,<sup>14</sup> the imposition of legal requirements that render the provision of telecommunications services financially infeasible,<sup>15</sup> and a state grant of an exclusive license to provide telecommunications services.<sup>16</sup>

7. *Bluebird’s Services and Access to the Cities’ Rights-of-Way.* Bluebird is a competitive local exchange carrier providing telecommunications services in Missouri, including tandem switching and transport services for interexchange carriers, pursuant to a domestic 214 authorization granted by the

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<sup>10</sup> 47 U.S.C. § 253(b).

<sup>11</sup> 47 U.S.C. § 253(c).

<sup>12</sup> 47 U.S.C. § 253(d).

<sup>13</sup> See *Classic Telephone, Inc.; Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCB Pol 96-10, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13101, para. 36 (1996) (*Classic Telephone*).

<sup>14</sup> See *Public Utility Commission of Texas et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCB Pol 96-14 et al., Memorandum Opinion and Order, 13 FCC Rcd 3460, 3466, para. 13 (1997) (*Public Utility Comm’n of Texas*); *Silver Star*, 12 FCC Rcd at 15658, para. 42, *aff’d sub nom. RT Communications*.

<sup>15</sup> See *Public Utility Comm’n of Texas*, 13 FCC Rcd at 3498, para. 78 (finding that the enforcement of the build-out requirements at issue would have the effect of prohibiting certain carriers from providing any telecommunications service, contrary to section 253(a), because “the substantial financial investment” required to meet the build-out requirement effectively precluded any entry at all); see also *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21709, para. 22 (1999) (expressing concern that the agreement at issue “may have the effect of prohibiting facilities-based entry” because of “evidence in the record that utilizing rights-of-way other than the freeway rights-of-way to install telecommunications infrastructure is substantially more expensive than using the freeway rights-of-way”) (*Minnesota Order*).

<sup>16</sup> See *Sandwich Isles*, 32 FCC Rcd at 5888, para. 26.

Wireline Competition Bureau (Bureau).<sup>17</sup> The company operates a fiber network that spans 9,300 fiber-route miles and provides connectivity to over 50,000 on-net and near-net buildings.<sup>18</sup>

8. Bluebird is currently in the process of deploying new fiber facilities to serve customers in several communities in Missouri, and recently completed a 17.89 fiber mile build within the city of Joplin (Joplin),<sup>19</sup> approximately 40% of which is located in the city's rights-of-way, including a portion that supports a nearby Bluebird Point of Presence (POP), which is used to interconnect with other carriers and support services to customers throughout the area.<sup>20</sup> Bluebird also serves customers with existing fiber facilities in the cities of Cameron, Maryville, and St. Joseph.<sup>21</sup> Approximately 38% of the fiber Bluebird uses in the city of Cameron is located in the city's rights-of-way, with the same being true for approximately 53% of the fiber it uses in the city of Maryville and approximately 47% of the fiber it uses in the city of St. Joseph.<sup>22</sup> Bluebird also has three points-of-presence in St. Joseph, one of which is served by fiber that must traverse the city's rights-of-way.<sup>23</sup>

9. Bluebird operates the facilities in the Cities' public rights-of-way pursuant to rights-of-way use agreements entered with each city,<sup>24</sup> which incorporate requirements from each city's rights-of-way code.<sup>25</sup> Each rights-of-way agreement grants Bluebird, in pertinent part, the nonexclusive right and privilege to "construct, operate, and maintain Facilities in, through and along the City's Rights-of-Way and utility easements" to provide its telecommunications services.<sup>26</sup> 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

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<sup>17</sup> See *Domestic Section 214 Application for the Transfer of Control of Missouri Network Alliance, LLC d/b/a Bluebird Network to MIP IV MidWest Fiber, LLC*, Public Notice, DA 19-530 (WCB June 6, 2019); see also *Missouri Network Alliance, LLC*, Order, File No. EB-IHD-19-00029224, DA 20-234 at paras. 4-9 (March 30, 2020); Letter from Joshua S. Turner, Counsel, Missouri Network Alliance, LLC d/b/a Bluebird Network, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Oct. 19, 2020) (Petition Supplement). Bluebird explains that it is also a "carrier's carrier" for wholesale customers that provide telecommunications services to their end users. *Id.*

<sup>18</sup> See *Petition of Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934*, WC Docket No. 20-46 at 4 (filed Feb. 13, 2020) (Petition); Petition Supplement at 2.

<sup>19</sup> As noted below, Petitioners reached a settlement with Joplin after the Petition was filed and withdrew their request for relief against that city. See *Petition of Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934*, Notice of Settlement As To City of Joplin, WC Docket No. 20-46, at 1-2 (filed Mar. 19, 2020) (Notice of Settlement). Facts from the record concerning Joplin are included in this Declaratory Ruling where necessary to describe the facilities and services at issue in this matter, as well as the events that led to the filing of the Petition.

<sup>20</sup> See *Petition of Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC for Preemption and Declaratory Ruling Pursuant to Section 253(d) of the Communications Act of 1934*, WC Docket No. 20-46, Declaration of Michael C. Morey at 2, para. 5 (filed Feb. 13, 2020) (Morey Declaration).

<sup>21</sup> See Morey Declaration at 2, para. 6. Bluebird notes that it provides services in other Missouri cities, including the City of Columbia, Petition Supplement at 3, but those other cities are not the subjects of the Petition.

<sup>22</sup> Morey Declaration at 2-3, paras. 6-7.

<sup>23</sup> *Id.* at 3, para. 7.

<sup>24</sup> See Comments of the Cities of Cameron, Maryville, and St. Joseph, Missouri, WC Docket No. 20-46, Exh. 4-6 (filed Mar. 23, 2020) (Cities Comments).

<sup>25</sup> See Cities Comments, Exh. 4 at 2, para. 1.3; Cities Comments, Exh. 5 at 2, para. 1.3; Cities Comments, Exh. 6 at 2, paras. 1.3.

<sup>26</sup> See Cities Comments, Exh. 4 at 2, para. 2.3; see also Cities Comments, Exh. 5 at 2, para. 2.3; Cities Comments, Exh. 6 at 2, para. 2.3.

payment from Bluebird of approximately \$2,500, or approximately \$30,000 annually.<sup>27</sup> Bluebird states that it generates less than \$50,000 in annual revenue from the services it provides in Cameron.<sup>28</sup>

10. Petitioners state that Bluebird’s rights-of-way use agreements with Maryville and St. Joseph require the payment of rights-of-way fees based on gross receipts for what Petitioners refer to as “telephone services,”<sup>29</sup> and that, because Bluebird does not provide “telephone service,” it does not currently pay rights-of-way fees to either Maryville or St. Joseph under either agreement.<sup>30</sup> The agreements also provide, however, that both Maryville and St. Joseph may hold Bluebird responsible “for all reasonable, actual and documented costs incurred by the City that are directly associated with [Bluebird’s] installation, maintenance, repair, operation, use, and replacement of its Facilities within the Rights-of-Way that are not otherwise accounted for as part of the permit fee established by” their Rights-of-Way Codes or contrary to applicable requirements of sections 67.1830 and 67.1846 of Missouri state law.<sup>31</sup> In 2019, both Maryville and St. Joseph adopted code provisions that allow each city to require payment of “reasonable” compensation for use of the rights-of-way subject to applicable law.<sup>32</sup>

11. *Bluebird-LMW 2019 Transaction and the Cities’ Response.* Bluebird is a wholly owned subsidiary of Bluebird Network LLC (Bluebird Network).<sup>33</sup> Between January 2019 and August 30, 2019, MIP IV MidWest Fiber, LLC (MIP), LMW, and Bluebird Network entered into a series of agreements that resulted in: (1) the transfer of indirect ownership of Bluebird to MIP; (2) the sale, from MIP to LMW, of the fiber optic network (though not any electronics to “light” the fiber) and the real property interests previously owned by Bluebird Network; and (3) LMW then leasing the Network back to MIP so that Bluebird could continue to operate and provide telecommunications services to customers (2019 Transaction).<sup>34</sup>

12. Following the 2019 Transaction, Bluebird continued to provide services to customers using the Network it leased from LMW.<sup>35</sup> Bluebird and its parent MIP retained full operational control over the Network in the Cities and elsewhere.<sup>36</sup> Bluebird continued to have the sole right to offer services using the Network, for which it requires access to the public rights-of-way.<sup>37</sup> Under this arrangement, LMW did not access, operate, or maintain the Network; nor did it provide any telecommunications

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<sup>27</sup> See Morey Declaration at 4, para. 11.

<sup>28</sup> Petition Supplement at 2.

<sup>29</sup> See Morey Declaration at 4, para. 12.

<sup>30</sup> *Id.*

<sup>31</sup> See Cities Comments, Exh. 5 at 3, para. 2.7; Cities Comments, Exh. 6 at 3, para. 2.7; see also Cities Comments at Exh. 4 at 3, para. 2.7. Bluebird is also obligated to pay all applicable taxes “in addition to compensation, if any, required by the City by ordinance subject to any limitations of applicable state or federal law.” Cities Comments, Exh. 4 at 4, para. 4.1; Exh. 5 at 4, para. 4.1, Exh. 6 at 4, para. 4.1.

<sup>32</sup> Maryville Rights-of-Way Code § 550.120.B (2019) (stating that the city may “require compensation for use of the [rights-of-way] or other public property as may be reasonably required by the City Council, subject to applicable law”); St. Joseph Rights-of-Way Code § 29-352(c) (2019) (“Nothing herein shall be construed to prohibit the city from also charging reasonable compensation for use of the right[s]-of-way where such a fee is not contrary to applicable law.”).

<sup>33</sup> See Morey Declaration at 4, para. 13.

<sup>34</sup> See *id.* at 4-5, paras. 13-14.

<sup>35</sup> See *id.* at 5, para. 14.

<sup>36</sup> See *id.* at 4-5, paras. 13-14.

<sup>37</sup> See *id.* at 5, para. 14.

services.<sup>38</sup> Further, under the terms of the master lease agreement between LMW and MIP, MIP was generally responsible for costs associated with the construction, maintenance, and operation of the assets covered by the agreement, including rights-of-way fees.<sup>39</sup> Accordingly, additional rights-of-way fees assessed against LMW by the Cities would have been passed on to MIP and ultimately borne by Bluebird.<sup>40</sup>

13. In June 2019, prior to the completion of the 2019 Transaction, LMW wrote to several of the Cities, informing them of the nature of the 2019 Transaction and requesting that they approve the assignment of Bluebird's rights-of-way agreements to LMW and the leaseback of the facilities to Bluebird.<sup>41</sup> The City Managers of St. Joseph and Maryville granted their approval of the 2019 Transaction on June 28, 2019 and July 16, 2019, respectively.<sup>42</sup> LMW also contacted Joplin, informing it of the 2019 Transaction and proposing that the rights-of-way use agreement be updated to reflect LMW's role as owner of the Network.<sup>43</sup> In October 2019, Joplin rejected this proposal, arguing that the 2019 Transaction violated several provisions of the Joplin Rights-of-Way Code and Bluebird's rights-of-way use agreement with the city.<sup>44</sup>

14. On December 3, 2019, St. Joseph and Maryville retracted their earlier approval of the 2019 Transaction and, together with Joplin and Cameron, informed Petitioners via email that the Cities' Rights-of-Way Codes require a separate fee to be assessed for each entity that elects to own or operate facilities within the Cities' rights-of-way, meaning that LMW would be required to enter into a separate rights-of-way use agreements with, and pay rights-of-way fees to, each of the Cities for the Network already covered by Bluebird's rights-of-way agreements with the Cities.<sup>45</sup> On December 5, 2019, the Cities provided Petitioners with formal "notices of breach," alleging that Petitioners were in violation of the Cities' Rights-of-Way Codes because LMW had not yet entered into separate rights-of-way agreements and paid additional rights-of-way fees to the Cities.<sup>46</sup>

15. *Bluebird and LMW's Petition for Preemption.* On February 13, 2020, Petitioners filed a petition for preemption and declaratory ruling.<sup>47</sup> The Petition argues that the Cities' attempt to require both Bluebird (as the operator of the Network and provider of telecommunications services) and LMW (as the passive owner of the Network) to enter into rights-of-way use agreements with the Cities and pay

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<sup>38</sup> See *id.* at 5, para. 14.

<sup>39</sup> See *id.* at 4, para. 13.

<sup>40</sup> Petition at 3.

<sup>41</sup> See Morey Declaration at 6, para. 17; see also Petitioners Reply, Exh. 1 at Exh. A.

<sup>42</sup> See Morey Declaration at 6, para. 17; see also Petitioners Reply, Exh. 1 at Exh. A.

<sup>43</sup> See Morey Declaration at 5, para. 15.

<sup>44</sup> *Id.*; see also Petition, Exh. 3, E-mail from Joseph E. Bond, Attorney, Cunningham, Vogel & Rost, P.C., to Keith Harvey, Senior Vice President – Deputy General Counsel, Uniti Group, and Jack Coles, Director, OSP Engineering, Bluebird Network, LLC (Oct. 24, 2019, 4:41 pm) (Bond Oct. 24, 2019 E-mail).

<sup>45</sup> See Petition, Exh. 4, E-mail from Joseph E. Bond, Attorney, Cunningham, Vogel & Rost, P.C., to Jim Falvey, Counsel, LMW, at 1-3 (Dec. 3, 2019, 5:21 pm) (contending that "the Cities' Codes . . . assess a fee for each entity which elects to own or operate facilities within the Cities' Rights-of-Ways," and requiring of LMW "an agreement, compensation, and compliance consistent with other like users," noting further that "[w]here Bluebird already has an agreement with the City calling for compensation, such agreement would be generally that required of [LMW], unless otherwise established by the Governing Body pursuant to Code and based on review of any differing application information received") (Bond Dec. 3, 2019 E-mail); Morey Declaration at 6, para. 17.

<sup>46</sup> See Petition, Exh. 5, Letters from Joseph E. Bond, Attorney, Cunningham, Vogel & Rost, P.C., to Missouri Network Alliance, L.L.C. et al. (Dec. 5, 2019).

<sup>47</sup> See generally Petition.

the associated rights-of-way fees conflicts with section 253(a) of the Act.<sup>48</sup> Consequently, Petitioners request that the Commission preempt, pursuant to section 253(d) of the Act, the Cities' requirements that LMW enter into separate rights-of-way use agreements with the Cities and pay the associated rights-of-way user fees.<sup>49</sup> On February 20, 2020, the Bureau released a Public Notice seeking comment on the Petition.<sup>50</sup> In response, the Commission received six comments<sup>51</sup> and six reply comments.<sup>52</sup>

16. On March 16, 2020, Bluebird, LMW, and Joplin reached a settlement of their dispute and executed a formal settlement agreement and an amendment to Bluebird's existing rights-of-way use agreement, designating LMW as a third party beneficiary of Bluebird's existing rights-of-way use agreement and providing that Joplin would not seek to impose duplicative charges on LMW for use of the public rights-of-way.<sup>53</sup> As a result, on March 19, 2020, Petitioners requested that the Petition be withdrawn as it pertains to Joplin.<sup>54</sup> The Petition remains pending as it pertains to St. Joseph, Maryville, and Cameron.<sup>55</sup>

17. *Bluebird-LMW 2020 Transaction.* On August 18, 2020, Petitioners notified the Commission of a transaction in which the indirect parent of Bluebird acquired a majority interest in LMW (2020 Transaction).<sup>56</sup> As a result, the majority ownership of the Network and Bluebird are now both held by the same corporate entities.<sup>57</sup> LMW still leases the Network to Bluebird for the provision of its telecommunications services and still "has no operational control over those assets, nor does it use those

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<sup>48</sup> Petition at 1, 8-9; 47 U.S.C. § 253(a).

<sup>49</sup> See 47 U.S.C. § 253(d) (providing that the Commission shall, after notice and an opportunity for public comment, preempt the enforcement of a State or local government statute, regulation, or legal requirement that it determines violates sections 253(a) or (b) of the Communications Act "to the extent necessary to correct such violation or inconsistency"). See Petition at 1, 4.

<sup>50</sup> See *Wireline Competition Bureau Seeks Comment on a Petition For Preemption and Declaratory Ruling Filed by Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC*, WC Docket No. 20-46, Public Notice, 35 FCC Rcd 1480 (2020) (*Bluebird Public Notice*).

<sup>51</sup> See Cities Comments; Comments of Extenet Systems, Inc., WC Docket No. 20-46 (filed Mar. 23, 2020) (Extenet Comments); Comments of Crown Castle Fiber LLC, WC Docket No. 20-46 (filed Mar. 23, 2020) (Crown Castle Comments); Comments of INCOMPAS, WC Docket No. 20-46 (filed Mar. 23, 2020) (INCOMPAS Comments); Comments of CenturyLink, WC Docket No. 20-46 (filed Mar. 23, 2020) (CenturyLink Comments); Comments of The Wireless Infrastructure Association, WC Docket No. 20-46 (filed Mar. 23, 2020) (WIA Comments).

<sup>52</sup> See Reply Comments of NTCA – The Rural Broadband Association, WC Docket No. 20-46 (filed Apr. 7, 2020) (NTCA Reply); Reply Comments of USTelecom – The Broadband Association, WC Docket No. 20-46 (filed Apr. 7, 2020) (USTelecom Reply); Reply Comments of T-Mobile USA, Inc., WC Docket No. 20-46 (filed Apr. 7, 2020) (T-Mobile Reply); Reply Comments of Petitioners Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC, WC Docket No. 20-46 (filed Apr. 7, 2020) (Petitioners Reply); Reply Comments of The National Association of Telecommunications Officers and Advisors, WC Docket No. 20-46 (filed Apr. 7, 2020) (NATOA Reply); Reply Comments of Crown Castle Fiber LLC, WC Docket No. 20-46 (filed Apr. 7, 2020) (Crown Castle Reply).

<sup>53</sup> Notice of Settlement at 1-2.

<sup>54</sup> See *id.* at 2. We grant Petitioners' request to withdraw the Petition as it pertains to Joplin.

<sup>55</sup> See generally Petition.

<sup>56</sup> Bluebird August 2020 *Ex Parte* Letter at 2 (stating that MIP's parent entity acquired a majority interest in LMW); Morey Declaration at 4, para. 13 (explaining that Bluebird is a wholly owned subsidiary of Bluebird Network, and that, as a result of the 2019 Transaction between Bluebird Network and MIP, indirect ownership of Bluebird was transferred to MIP).

<sup>57</sup> *Id.* (stating that, as a result of the 2020 Transaction, "[t]he majority controlling interest in LMW is now held by Bluebird's indirect parent company, thereby putting both majority ownership of LMW (and the Bluebird Network assets it owns) into the hands of Bluebird and its owners").

assets to provide any services on its own.”<sup>58</sup> Uniti Group, Inc. and its subsidiaries, which formerly owned LMW,<sup>59</sup> now hold only a minority, non-controlling interest in LMW and the Network.<sup>60</sup> Following the closing of the 2020 Transaction, counsel from Bluebird sought confirmation from counsel to the Cities that a separate rights-of-way agreement requiring duplicate fees would no longer be required, but counsel to the Cities responded “by asserting that they have been instructed by the [Cities] not to incur further expenses in this matter, and that they could not give a definitive response.”<sup>61</sup>

### III. DISCUSSION

18. After reviewing the record in this proceeding, we find that the Cities’ requirements, to the extent that they mandate LMW pay rights-of-way user fees that are duplicative of those Bluebird pays under its existing rights-of-way agreements covering the Network, impose a financial burden on Bluebird that effectively prohibits the provision of telecommunications services in violation of section 253(a).<sup>62</sup> We find further that these violations are not saved by any of the exceptions pursuant to sections 253(b) or (c).<sup>63</sup> Accordingly, we grant Petitioners’ request and preempt the Cities’ legal requirements to the extent they demand rights-of-way fees from LMW that are duplicative of those paid by Bluebird.<sup>64</sup>

#### A. The Cities’ Demands Are Legal Requirements Subject to Section 253 of the Act

19. The Commission has previously held that the term “other legal requirements” in section 253(a) should be interpreted broadly.<sup>65</sup> In so holding, the Commission has recognized that municipal practices, such as impermissible constructions of otherwise benign ordinances, may be legal requirements subject to preemption under section 253 of the Act even if they are not explicitly codified or incorporated into a rights-of-way use agreement.<sup>66</sup> That is the case here.

20. The Cities’ demands that LMW pay additional rights-of-way fees for the Network hinge on language in each of their Rights-of-Way Codes stating that no rights-of-way user may construct, maintain, own, control, use, or lease facilities located in the rights-of-way without a franchise or rights-of-

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<sup>58</sup> *Id.*

<sup>59</sup> Petition at 6 n.16.

<sup>60</sup> Bluebird August 2020 *Ex Parte* Letter at 2.

<sup>61</sup> *Id.* at 2-3.

<sup>62</sup> *See* 47 U.S.C. § 253(a).

<sup>63</sup> *See* 47 U.S.C. §§ 253(b)-(c).

<sup>64</sup> *See* 47 U.S.C. § 253(d). In this Declaratory Ruling, we address only the narrow factual question raised in the Petition of whether the Cities’ requirements that both Bluebird and LMW pay rights-of-way fees for the Network accessed and used exclusively by Bluebird to provide telecommunications services are preempted under section 253. *See* Petition at 1-4. We agree with NATOA that this Declaratory Ruling should be confined to the unique factual circumstances, parties, and allegations at issue in the Petition. *See* NATOA Reply at 3. Accordingly, we decline to issue the broader declarations requested by some commenters based on the record currently before us. *See* CenturyLink Comments at 4, 9, 11-13; INCOMPAS Comments at 3-4, 13-14; WIA Comments at 4-5; NTCA Reply at 2-3; USTelecom Reply at 2; Crown Castle Reply at 6-9, 11.

<sup>65</sup> *See Sandwich Isles*, 32 FCC Rcd at 5882-83, paras. 13-14; *Minnesota Order*, 14 FCC Rcd at 21707, paras. 17-18.

<sup>66</sup> *See Sandwich Isles*, 32 FCC Rcd at 5882-83, paras. 13-14.

way use agreement, except when otherwise authorized by applicable law.<sup>67</sup> Although neither the Cities' Rights-of-Way Codes nor their rights-of-way user agreements with Bluebird explicitly charge duplicative user fees for a particular use of a single network,<sup>68</sup> the Cities have construed the list of potential rights-of-way uses in their respective Rights-of-Way Codes as authorizing the collection of the maximum rights-of-way user fee permitted under law from each and every entity that engages in one of the listed uses, even if the entities do not actually access or use their public rights-of-way.<sup>69</sup> For instance, under the Cities' interpretation of their Rights-of-Way Codes, they are authorized to collect the maximum rights-of-way user fee permitted under law from an entity that operates a network using their public rights-of-way as well as a second entity that owns the network *and* a third entity that maintains the network—even though the service at issue (and use of the rights-of-way) remains unchanged. The Cities have relied on these interpretations of their Codes to argue that LMW has a legal obligation to enter into its own use agreements with the Cities for the Network that Bluebird's existing agreements cover and pay a second set of rights-of-way user fees for the Network.<sup>70</sup> We conclude, therefore, that the Cities' respective demands that both Bluebird and LMW pay rights-of-way fees for the Network accessed and used exclusively by Bluebird are “legal requirements” subject to section 253.

**B. The Cities' Requirements That Duplicative Rights-of-Way Fees Be Paid for Bluebird's Use of the Network to Provide Telecommunications Services Violate Section 253(a)**

21. Section 253(a) proscribes any state or local statute, regulation, or legal requirement that prohibits or has the effect of prohibiting the ability of any entity to provide telecommunications services.<sup>71</sup> Both the Commission and the courts have established that imposing a financial burden that precludes a telecommunications provider from being able to compete in a fair and balanced legal and regulatory environment as a result of a legal requirement that demands or significantly increases fees charged for use

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<sup>67</sup> See St. Joseph Rights-of-Way Code § 29-352(a) (2019) (“Except when otherwise authorized by applicable law, no right[s]-of-way user may construct, maintain, own, control, or lease facilities located in the right[s]-of-way without a franchise or right[s]-of-way use agreement with the city as provided herein.”); Cameron Rights-of-Way Code § 10.5-151.1 (“Except where otherwise authorized or required by applicable law, no ROW-user may construct, maintain, own, control, or use facilities in the public rights-of-way without a public ways use permit agreement issued by the city as provided herein.”); Maryville Rights-of-Way Code § 550.120(A) (2019) (“Except when otherwise authorized by applicable law, no ROW user may construct, maintain, own, control, or use facilities in the rights-of-way without a franchise or ROW agreement with the City as provided herein.”).

<sup>68</sup> See *generally* Cities Comments, Exh. 4-6; St. Joseph Rights-of-Way Code § 29; Cameron Rights-of-Way Code § 10.5; Maryville Rights-of-Way Code § 550.

<sup>69</sup> See Bond Oct. 24, 2019 E-mail (citing the Rights-of-Way Codes of each City and construing them to require a rights-of-way use agreement with LMW and corresponding compensation); Bond Dec. 3, 2019 E-mail (“Each City has a [Rights-of-Way] Code requiring an agreement and payment of compensation and compliance with other applicable conditions (insurance, indemnification, applications, etc.), where applicable, for each entity that ‘owns’ or ‘leases’ (among other interests stated) facilities in the right[s]-of-way.”).

<sup>70</sup> Bond Oct. 24, 2019 E-mail; *see also* Bond Dec. 3, 2019 E-mail.

<sup>71</sup> See 47 U.S.C. § 253(a).

of public rights-of-way constitutes an effective prohibition.<sup>72</sup> We agree with Petitioners and the majority of commenters that the Cities' requirements that LMW pay rights-of-way user fees based on its passive ownership of the Network used by Bluebird constitute a financial burden that materially inhibits Bluebird's ability to provide telecommunications services and compete in a fair and balanced legal and regulatory environment.<sup>73</sup>

22. Neither the Cities nor any commenter has entered evidence into the record to rebut Petitioners' sworn statements that LMW does not access, operate, maintain, or otherwise use the Network.<sup>74</sup> The record shows that Bluebird and its parent MIP retain full operational control of the Network that Bluebird uses to provide its telecommunications services<sup>75</sup>—a fact that has become even more evident now that, as a result of the 2020 Transaction, the “majority ownership of LMW (and thus the Bluebird Network assets that it owns), as well as full control and use of the Bluebird Network assets, are consolidated within Bluebird and its parent entities.”<sup>76</sup>

23. The record demonstrates that Bluebird would be responsible for any additional rights-of-way fees assessed against LMW. After the 2019 Transaction, Bluebird's parent, MIP, was contractually responsible for all costs associated with operating the network, including rights-of-way fees.<sup>77</sup> Any additional rights-of-way fees assessed against LMW by the Cities based on its passive ownership of the Network would flow down to Bluebird, increasing its rights-of-way fee burden in the Cities by 100%.<sup>78</sup> Following the 2020 Transaction, LMW is now owned and controlled by Bluebird and its parent entities, making any claim that LMW would somehow be independently accountable for rights-of-way fees imposed on it by the Cities even more attenuated.

24. The Cities' fee requirements would, therefore, increase Bluebird's rights-of-way user fees of approximately \$30,000 annually in Cameron<sup>79</sup> to approximately \$60,000 annually—an amount that is

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<sup>72</sup> See *Public Utility Comm'n of Texas*, 13 FCC Rcd at 3498, para. 78; *Minnesota Order*, 14 FCC Rcd at 21700-701, paras. 6-7; *Puerto Rico Telephone Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 17-19 (1st Cir. 2006) (*Municipality of Guayanilla*) (finding an ordinance to be effectively prohibitive because it imposes a 5% gross revenue fee across all municipalities that would result in surging costs and reduce the Puerto Rico Telephone Company's annual Commonwealth-wide profits by 86%); *Qwest Corp. v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1270-71 (10th Cir. 2004) (*City of Santa Fe*) (finding the “substantial increase in costs imposed” by ordinance provisions that allowed the city a large amount of discretion to set a “fair and reasonable rental” price for leasing the rights-of-way based on an appraisal and finding that the excess conduit requirements could increase Qwest's installation costs by 30 to 59% to be prohibitive under section 253(a)); see also *Peco Energy Co. v. Township of Haverford*, 1999 WL 1240941, \*8 (E.D. Pa. 1999) (determining that “the Ordinance imposes fees of uncertain amounts, a fact which, by itself, may serve as a significant barrier to entry”).

<sup>73</sup> See Petition at 1, 3-4; CenturyLink Comments at 3-4; Crown Castle Comments at 7; INCOMPAS at 7-9; WIA Comments at 2-3; T-Mobile Reply at 4.

<sup>74</sup> See Petition at 6; Morey Declaration at 5, para. 14; Bluebird August 2020 *Ex Parte* Letter at 2 (stating that, following the 2020 Transaction, LMW “has no operating control over [the Network] assets, nor does it use those assets to provide any services of its own”).

<sup>75</sup> See Morey Declaration at 4-5, paras. 13-14.

<sup>76</sup> Bluebird August 2020 *Ex Parte* Letter at 2.

<sup>77</sup> See Morey Declaration at 4, paras. 13.

<sup>78</sup> See *id.* at 7, para 22 (“If the Cities proceed with their plans to require [LMW] to pay additional [rights-of-way] fees on the same fiber network for which Bluebird is already paying [rights-of-way] fees . . . [i]t would increase Bluebird's costs by 100 percent annually without any change in the size of the Network for which fees are charged, nor any change to the access, use, or operation of those facilities by Bluebird – a cost increase Bluebird cannot afford.”).

<sup>79</sup> See Morey Declaration at 4, para. 11.

\$10,000 more than the annual revenue that Bluebird generates in that city.<sup>80</sup> In Maryville and St. Joseph, Petitioners are subject to open-ended Rights-of-Way Code provisions that permit user fees to be charged in an amount “reasonably determined by the City Council,”<sup>81</sup> with correspondence between counsel for the Cities and Petitioners making clear that those cities intend to charge fees.<sup>82</sup> That correspondence demonstrates that, under the Cities’ reading of the Maryville and St. Joseph codes, LMW would be responsible for rights-of-way fees in the same amount Bluebird is already paying, thereby doubling the rights-of-way fees borne by Bluebird.<sup>83</sup>

25. In their comments, the Cities make no attempt to rebut Petitioners’ section 253 claims on the merits. Instead, the Cities claim that they would refrain from charging LMW duplicative fees if it signs a rights-of-way use agreement stipulating that it does not have operational control of the Network.<sup>84</sup> We agree with Petitioners that the Cities’ offer on this point is not supported by the record.<sup>85</sup> The record shows that the Cities were notified, on several occasions, that LMW does not have operational control of the Network and continued to press their demand for additional rights-of-way fees, regardless.<sup>86</sup> Petitioners have entered evidence into the record showing that they have contacted the Cities on multiple occasions in an effort to settle this matter—most recently, to ascertain whether the acquisition of LMW by Bluebird’s indirect parent altered the Cities’ position on the need for a separate rights-of-way agreement and additional fees.<sup>87</sup> The Cities have not responded to these overtures by pursuing a settlement or withdrawing their demands that LMW pay rights-of-way fees for the Network. Instead, counsel for the Cities has maintained the status quo by responding to Petitioners’ inquiries that he has been instructed not to incur further expenses on this matter.<sup>88</sup> We must conclude, therefore, that the Cities’ will continue to demand that LMW pay rights-of-way fees that are duplicative of those already paid by Bluebird under its rights-of-way agreements covering the same Network.

26. We therefore conclude that the Cities’ requirements materially inhibit the provision of Bluebird’s telecommunications services and those of its wholesale customers. Petitioners have entered uncontested evidence into the record showing that the financial burden the Cities’ fee schemes impose (and that could increase further based on the Cities’ intention to begin charging fees in Maryville and St.

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<sup>80</sup> Petition Supplement at 3.

<sup>81</sup> See Maryville Rights-of-Way Code § 550.120(B) (2019); St. Joseph Rights-of-Way Code § 29-352(c) (2019); see also CenturyLink Comments at 4 (“The respective codes of both St. Joseph and Maryville state that the city can collect an undefined amount of compensation for the use of the [rights-of-way] as they may ‘reasonably’ require.”).

<sup>82</sup> See Bond Dec. 3, 2019 E-mail; Petition Supplement at 4.

<sup>83</sup> See Bond Dec. 3, 2019 E-mail (stating that each city has “a [rights-of-way] Code requiring an agreement and payment of compensation . . . for each entity that ‘owns’ or ‘leases’ . . . facilities in the right[s]-of-way” and that each City “would require an agreement, compensation, and compliance [from LMW] consistent with other like users. Where Bluebird already has an agreement with the City calling for compensation, such agreement would be generally that required of [LMW], unless otherwise established by the Governing Body pursuant to Code and based on review of any differing application information received.”).

<sup>84</sup> See Cities Comments at 3; see also Cities Comments, Exh. 8, E-mail from Joseph E. Bond, Attorney, Cunningham, Vogel & Rost, P.C., to Keith Harvey, Senior Vice President – Deputy General Counsel, Uniti Group, Jim Falvey, Counsel, LMW, and Thomas Greaves (Feb. 13, 2020, 4:01 pm).

<sup>85</sup> Petition Supplement at 5.

<sup>86</sup> See Petitioners Reply at 5 (“Petitioners have repeatedly stipulated to the fact that [LMW] would not operate—or even access—the network”); see also Morey Declaration at 5, paras. 14-15; Petition at 6.

<sup>87</sup> Bluebird August 2020 *Ex Parte* Letter at 2-3; Petition Supplement at 5-6.

<sup>88</sup> Bluebird August 2020 *Ex Parte* Letter at 2-3; Petition Supplement at 6.

Joseph)<sup>89</sup> has rendered Bluebird unable to sell or market its services to potential customers, stranding capital across the Cities.<sup>90</sup> Sworn statements from the Petitioners show that the increased financial burden has prevented Bluebird from expanding its services.<sup>91</sup> The Cities have offered no evidence to refute these sworn statements. We find, therefore, that the Cities' requirements imposing rights-of-way user fees on LMW that are duplicative of those Bluebird pays under its rights-of-way agreements covering the same Network effectively prohibit the provision of telecommunications services in violation of section 253(a).<sup>92</sup>

### C. The Cities' Fee Schemes Are Not Saved by Section 253(b)

27. Section 253(b) of the Act preserves from preemption certain state requirements that are "competitively neutral" and "necessary" to achieve the enumerated public interest objectives.<sup>93</sup>

28. The Cities' legal requirements are not saved by that statutory exemption, however, for four reasons. *First*, the burden of proving that a legal requirement is saved by section 253(b) falls on the party invoking the exemption,<sup>94</sup> and Cities do not even attempt to make such a showing.<sup>95</sup> Indeed, the Cities do not actually engage with Petitioners' section 253 arguments at all, relying instead on state law contract claims that are not relevant to the section 253 inquiry at issue in this proceeding.<sup>96</sup> *Second*, no local or municipal legal requirement can fall within section 253(b) of the Act absent a specific delegation of authority by the state,<sup>97</sup> and there is no indication here that the Cities are acting pursuant to a specific delegation of authority from the state. *Third*, the Cities' legal requirements are not competitively neutral for the reasons we discuss in the following section.<sup>98</sup> *Fourth*, nothing in the record indicates that the requirements are necessary to advance universal service or the other public interest objectives listed in the

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<sup>89</sup> *City of Santa Fe*, 380 F.3d at 1270-71 (invalidating an ordinance provision that allowed the city a large amount of discretion to set a "fair and reasonable rental" price for leasing the rights-of-way based on an appraisal).

<sup>90</sup> See Petition at 10-16.

<sup>91</sup> See Morey Declaration at 7-8, paras. 22-26.

<sup>92</sup> Because we find that a 100% increase in fees is an effective prohibition under 253(a), we need not address commenters' and Petitioners' claim that the fees are also barred under section 253(a) because they are not a reasonable approximation of the Cities' costs to manage the rights-of-way. See Petition at 10, 15-16; Petitioners Reply at 11-12; Petition Supplement at 2-3, 4; see also CenturyLink at 5; Crown Castle Comments at 7-8; ExteNet Comments at 3-4; INCOMPAS Comments at 8-9; WIA Comments at 3; USTelecom Reply at 3.

<sup>93</sup> See 47 U.S.C. § 253(b).

<sup>94</sup> *Sandwich Isles*, 32 FCC Rcd at 5885-86, para. 21 ("The burden of proving that the State or local requirement comes within the exceptions of Section 253 falls on the party claiming that the exemption applies."); *Minnesota Order*, 14 FCC Rcd at 21724, para. 50 n.108 ("Since Minnesota asserts that the Agreement falls within the exception to preemption created by section 253(b), it bears the burden of demonstrating that the Agreement falls within the parameters of section 253(b).").

<sup>95</sup> We also note that no commenter raises a section 253(b) argument on the Cities' behalf.

<sup>96</sup> We decline to address both the contract claims raised by the Cities in their comments, and the question of whether LMW has obtained the required authorization to conduct business in Missouri as we do not have jurisdiction to adjudicate such contractual or state law claims. See Cities Comments at 3-8. Regardless, such claims are unrelated to whether the request for LMW to pay user fees in addition to Bluebird for the same facilities violates section 253 and are thus beyond the scope of this proceeding.

<sup>97</sup> 47 U.S.C. § 253(b) ("Nothing in this section shall affect the ability of a State to impose . . .") (emphasis added); see also *Moratoria Order*, 33 FCC Rcd at 7783, para. 154 ("[W]e find that no local or municipal moratoria can fall within the section 253(b) exception absent a specific delegation of regulatory authority by a state to the locality or municipality in question.").

<sup>98</sup> See *infra* paras. 34-35.

statute.<sup>99</sup> Accordingly, we conclude that the Cities have failed to demonstrate that section 253(b) applies.

**D. The Cities' Fee Schemes Are Not Saved by Section 253(c)**

29. Since we have determined that the Cities' legal requirements violate section 253(a) and are not saved by section 253(b), we must preempt them unless they fall within the safe harbor established by section 253(c) of the Act, which states:

Nothing in this section affects the authority of the State or local government to manage the public rights-of-way or to require 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, if the compensation required is publicly disclosed by such government.<sup>100</sup>

30. As an initial matter, we reject NATOA's argument that the Commission lacks authority to determine whether a legal requirement falls within the powers reserved to states and municipalities under section 253(c) and preempt it if it does not.<sup>101</sup> Both the courts and the Commission have recognized that section 253(c) is a safe harbor that may save a legal requirement that violates section 253(a) from preemption, and it is well within the authority of both the courts and the Commission to adjudicate that question.<sup>102</sup> If it were otherwise, any party could avoid preemption or the Commission's jurisdiction simply by invoking section 253(c) as a defense, "creat[ing] a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint."<sup>103</sup>

31. The Cities have not attempted to demonstrate that their fee requirements fall within the safe harbor established by section 253(c), as is their burden.<sup>104</sup> Nevertheless, we agree with Petitioners and commenters that the Cities' imposition of rights-of-way fees on LMW that are duplicative of the fees Bluebird pays under its rights-of-way use agreements fails to satisfy the requirements of section 253(c) because it is not related to the management of the rights-of-way and because the fees do not constitute fair and reasonable compensation from a telecommunications provider for use of the rights-of-way.

**1. The Duplicative Fee Requirements Are Not for the Management of the Public Rights-of-Way**

32. The Commission has described the "types of activities that fall within the sphere of

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<sup>99</sup> 47 U.S.C. § 253(b).

<sup>100</sup> 47 U.S.C. § 253(c).

<sup>101</sup> See NATOA Reply at 4.

<sup>102</sup> See, e.g., *Sandwich Isles*, 32 FCC Rcd at 5886-87, paras. 22-25 (determining whether a legal requirement violating section 253(a) falls within the powers reserved to state and local governments under section 253(c) and, finding that it did not, preempting the legal requirement); *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441, para. 103 (1997) (*TCI Cablevision*) (describing the types of activities that fall within the sphere of appropriate rights-of-way management for purposes of qualifying for the safe harbor under section 253(c)); *City of Santa Fe*, 380 F.3d at 1272-73 (relying on the Commission's interpretation of section 253(c) to conclude that ordinance provisions violating section 253(a) were not "saved" from preemption by section 253(c)); *XO Missouri, Inc. v. City of Maryland Heights*, 256 F.Supp.2d 987, 995-96 (E.D. Mo. 2003) (*XO Missouri*) (considering the Commission's interpretation of section 253(c) to its preemption analysis).

<sup>103</sup> *City of White Plains*, 305 F.3d at 75-76; see also *Moratoria Order*, 33 FCC Rcd at 7788, para. 163 (stating that nothing in section 253 limits the Commission's authority "to define and provide an authoritative interpretation as to what constitutes a violation of section 253(a) and what qualifies for the section 253(b) or (c) exceptions").

<sup>104</sup> See *Sandwich Isles*, 32 FCC Rcd at 5887, para. 24; *Minnesota Order*, 14 FCC Rcd at 21715, para. 35 n.77; *City of Santa Fe*, 380 F.3d at 1273 n.10; *N.J. Payphone Ass'n v. Town of W. N.Y.*, 299 F.3d 235, 240 (3d Cir. 2002); *TC Sys. Inc. v. Town of Colonie*, 263 F.Supp.2d 471, 484 (N.D.N.Y. 2003).

appropriate rights-of-way management” as including “coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.”<sup>105</sup> In other words, rights-of-way management is limited to the actual use of the public rights-of-way.<sup>106</sup>

33. LMW does not access, maintain, operate, or otherwise use the Network or provide telecommunications services.<sup>107</sup> Bluebird is the only entity that uses the Network.<sup>108</sup> Accordingly, to the extent the Cities are imposing duplicative fees on LMW based merely on its ownership of the facilities, and irrespective of the fact that it does not actually use or access facilities in the Cities’ public rights-of-way, the fees are not related to the Cities’ management of the rights-of-way and thus cannot be saved by section 253(c) on that basis.<sup>109</sup>

## **2. The Duplicative Fee Requirements Are Not Fair and Reasonable Compensation for A Telecommunications Provider’s Use of the Rights-of-Way**

34. A fee charged by a state or local government only constitutes “fair and reasonable compensation” under section 253(c) of the Act if it is sought: (1) from telecommunications providers; (2) on a competitively neutral and nondiscriminatory basis; (3) for use of the public rights-of-way on a nondiscriminatory basis; and (4) is publicly disclosed.<sup>110</sup> The fees that the Cities seek to levy on LMW, which are duplicative of those already paid by Bluebird under its agreements with the Cities, do not meet the third criterion because they are based merely on LMW’s passive ownership of the Network and not an actual use of the Cities’ public rights-of-way.<sup>111</sup> We also conclude that the Cities’ fee schemes fail the second criterion that compensation for use of the public rights-of-way be levied in a way that is “competitively neutral.”<sup>112</sup>

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<sup>105</sup> *TCI Cablevision*, 12 FCC Rcd at 21441, para. 103; *see also Sandwich Isles*, 32 FCC Rcd at 5886, para. 23.

<sup>106</sup> *See Moratoria Order*, 33 FCC Rcd at 7786-87, para. 160; *Municipality of Guayanilla*, 450 F.3d at 22 (stating that, to constitute fair and reasonable compensation under section 253(c), “fees should be, at the very least, *related* to the actual use of rights of way” (emphasis in original)); *Classic Telephone*, 11 FCC Rcd at 13103, para. 39; *AT&T Comm. of Southwest v. City of Dallas, Tex.*, 52 F. Supp.2d 756, 761 (N.D. Tex. 1998) (*City of Dallas*) (“All of the legislative history surrounding the adoption of § 253(c), and the cases that have since been decided on the issue, have interpreted the provision to apply to *physical* occupation of a city’s rights-of-way.” (emphasis in original)); *City of Santa Fe*, 380 F.3d at 1272 (“[P]rovisions granting the City broad discretion to deny a lease application cannot be saved from preemption by § 253(c). These provisions do not relate to activities ordinarily associated with the management of rights-of-way, such as control of excavation or the management of construction.”).

<sup>107</sup> *See* Morey Declaration at 5, para. 14; Bluebird August 2020 *Ex Parte* Letter at 2.

<sup>108</sup> Morey Declaration at 4-5, paras. 13-15.

<sup>109</sup> *See supra* note 106.

<sup>110</sup> 47 U.S.C. § 253(c).

<sup>111</sup> *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1177-78 (9th Cir. 2001) (*City of Auburn*), *overruled on other grounds*, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008); *XO Missouri*, 256 F.Supp.2d at 994-995 (stating that for a fee to constitute “fair and reasonable compensation” saved by section 253(c), it “must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way,” and that “plainly a fee that does more than make a municipality whole is not compensatory in the literal sense and instead risks becoming an economic barrier to entry”).

<sup>112</sup> *See Sandwich Isles*, 32 FCC Rcd at 5887, para. 24 (“[E]ven assuming [a legal requirement] constitute[s] right-of-way management, such management must be ‘competitively neutral’ and ‘nondiscriminatory’ to receive protection under Section 253(a).”). Because Petitioners have shown that the additional fees will be borne by Bluebird, a provider of telecommunications services, we find that the first criterion that the fee be imposed on a provider of telecommunications services has been met in this case.

35. Although Bluebird leases the Network from LMW,<sup>113</sup> Bluebird and its parent companies have operational control of the Network,<sup>114</sup> a fact that is even more clear now that LMW and Bluebird have common ownership.<sup>115</sup> As INCOMPAS observes, “[c]arriers have always exhibited complex ownership structures.”<sup>116</sup> Many provide telecommunications services through different subsidiaries and affiliates, using assets held by different subsidiaries and affiliates.<sup>117</sup> The record indicates, however, that the Cities have demanded duplicative rights-of-way fees from LMW based only on the passive ownership of the facilities that Bluebird actually uses to provide services.<sup>118</sup> The Cities have not contested statements made by Petitioners and commenters that such requirements have not been imposed on other telecommunications providers.<sup>119</sup> Indeed, CenturyLink, a competitor of Bluebird’s in the Cities, volunteers that, while it has been required to pay the fees charged by the Cities, it has not been required “to pay *multiples* of the fees in the fashion alleged in the Petition.”<sup>120</sup> As the U.S. Court of Appeals for the Second Circuit has found, “[m]unicipalities can take into account different costs incurred by different uses of the rights-of-way” and “consider the scale of the use of rights-of-way,” but municipalities “may not . . . impose a host of compensatory provisions on one service provider without placing any on another.”<sup>121</sup> Given that there is no evidence in the record that refutes Petitioners’ assertion that no other providers have been subjected to such double charging,<sup>122</sup> the Cities’ attempts to extract duplicative fees from LMW are discriminatory and violate the requirement under section 253(c) that compensation related to the management of the rights-of-way be administered in a way that is competitively neutral.

**E. The Commission Is Required to Preempt the Cities’ Legal Requirements under Section 253(d)**

36. Because we determine that the Cities’ legal requirements violate section 253(a) and are not saved by sections 253(b) or (c), we are required to preempt enforcement of the requirements under section 253(d). Section 253(d) says that the Commission “shall preempt the enforcement” of a state or local legal requirement that violates section 253(a) “to the extent necessary to correct such violation or inconsistency.”<sup>123</sup> We thus preempt the Cities’ legal requirements to the extent that they have been or

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<sup>113</sup> Bluebird August 2020 *Ex Parte* Letter at 2.

<sup>114</sup> *See* Petition at 3, 6 n.17.

<sup>115</sup> Bluebird August 2020 *Ex Parte* Letter at 2 (stating that “majority ownership of LMW (and thus the Bluebird Network assets that it owns), as well as full control and use of the Bluebird Network assets are consolidated within Bluebird and its parent entities”).

<sup>116</sup> INCOMPAS Comments at 10.

<sup>117</sup> *Id.* (noting that “[d]etermining which AT&T, Verizon, CenturyLink, or Frontier entity actually owns a network would require a comprehensive inquiry up the corporate organization chart”).

<sup>118</sup> *See* Morey Declaration at 9, para. 27; Petitioners Reply at 8.

<sup>119</sup> *See, e.g.*, Morey Declaration at 9, para. 27; Petitioners Reply at 8; Crown Castle Comments at 9-10; INCOMPAS Comments at 9-10 (“The Cities have singled out one network owner, [LMW], without inquiring into the ownership structure of any other carrier operating in the Cities.”); WIA Comments at 4.

<sup>120</sup> *See* CenturyLink Comments at 4-5.

<sup>121</sup> *City of White Plains*, 305 F.3d at 79-80; *see also City of Dallas*, 52 F.Supp.2d at 762 n.22 (finding that imposing franchise obligations on Teligent, a fixed wireless provider installing base stations on private property with no facilities in the rights-of-way, “would amount to discriminating against the Company. Teligent would be forced to pay franchise fees twice: once to the City directly and once to the other service provider from which it leases facilities. The other provider with facilities in the rights-of-way would be required to have a franchise and to pay franchise fees, which it would pass on to Teligent whenever Teligent leases those facilities.”).

<sup>122</sup> *See* Morey Declaration at 9, para. 27.

<sup>123</sup> *See* 47 U.S.C. § 253(d).

may be used to mandate that LMW pay rights-of-way user fees that are duplicative of those paid by Bluebird under its rights-of-way use agreements with the Cities covering the Network.

#### IV. ORDERING CLAUSES

37. Accordingly, **IT IS ORDERED** that, pursuant to section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253, sections 0.91(b), 0.291, and 1.2 of the Commission's rules, 47 CFR §§ 0.91(b), 0.291, 1.2, and section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), this Declaratory Ruling **IS ADOPTED**.

38. **IT IS FURTHER ORDERED** that the Petition is **GRANTED** to the extent described herein and the Cities' legal requirements **ARE PREEMPTED** to the extent described herein.

39. **IT IS FURTHER ORDERED** that Petitioners' request to withdraw the above-captioned Petition as to the City of Joplin is **GRANTED** and the above-captioned Petition is **DISMISSED WITHOUT PREJUDICE** as to the City of Joplin.

40. **IT IS FURTHER ORDERED** that this Declaratory Ruling and the obligations set forth herein **ARE EFFECTIVE** upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief  
Wireline Competition Bureau