

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

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

**MCC IOWA LLC PETITION FOR EXPEDITED DECLARATORY RULING
PURSUANT TO SECTION 253 OF THE COMMUNICATIONS ACT**

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EXECUTIVE SUMMARY

Pursuant to Section 253 of the Communications Act of 1934, as amended, MCC Iowa LLC, a subsidiary of Mediacom Communications Corporation (“Mediacom”), an integrated telecommunications and broadband service provider, seeks expedited Commission review of actions by the City of West Des Moines (“City”) which grant exclusive access rights and other benefits regarding City rights-of-way (“ROW”) to a single communications provider, Google Fiber LLC (“Google Fiber”). The City’s actions will discourage new entrants and foreclose incumbent providers from effectively competing in the City, particularly in the significant number of new residential developments and commercial buildings expected to be constructed in the years ahead.

In July 2020, the City announced that it intended to build an underground, citywide “Conduit Network” in its ROW financed entirely with City funds to the tune of \$50 million or more, a substantial sum for a municipality of the City’s size. The City’s public rationale for this expenditure at a time when school budgets are being cut and the economic health of the City and its citizens has been stressed by the Covid-19 pandemic was that the Conduit Network would (i) increase competition among service providers, even though West Des Moines already has eight competing wireline broadband providers and there are no significant barriers to entry of new ones; (ii) assure universal access to high-speed broadband service, even though a panoply of broadband services ranging from 25 megabit up to 1 gigabit are already offered everywhere in the City at prices starting at \$9.95 a month and even faster service is expected to be introduced in the near future; and (iii) relieve congestion in some parts of the ROW, even though, as demonstrated below, the Conduit Network as designed will not add any significant amount of new space for use by incumbent service providers or new entrants, meaning that it will contribute little or nothing to relieving congestion.

In Mediacom’s view, the real reason for the decision to build the Conduit Network can be found in the simultaneous announcement that Google Fiber had signed a contract (the “Google Agreement”) with the City to use the Conduit Network to enter the broadband market in West Des Moines. Although the City has repeatedly represented that the Conduit Network would be open to all Internet service providers (“ISPs”) and that Google Fiber would simply be the inaugural occupant, that claim has proven to be false. In reality, the City Council, one of whose members is Google’s chief lobbyist in Iowa, approved construction of the Conduit Network at taxpayer expense, thereby providing a multimillion dollar subsidy to Google Fiber, who otherwise would not have launched its service in the City.

The Google Agreement grants Google Fiber special rights, benefits and privileges with respect to the City’s ROW which are unprecedented and extraordinary in kind, number and scope. To start with, Google Fiber, which in the past has put its expansion plans on hold because its business model did not justify the costs of constructing its network infrastructure in new cities, is spared the necessity of spending even a dime of the upfront costs required to build the underground conduit and vaults that will house its fiber in West Des Moines—the City is bearing all of those costs using municipal bond proceeds. Once the facility is built, the City, not Google Fiber, will be responsible for maintenance, even though Google Fiber undoubtedly will be the only significant user of the Conduit Network. In addition, the City, not Google Fiber, will be liable for third-party damage claims arising from the construction and maintenance of the Conduit Network.

Additionally, the City allowed Google Fiber to control the design of the Conduit Network, even though it is supposed to be usable by all ISPs. By its public statements, the City would have its citizens believe that it is promoting open, fair and robust competition among multiple providers. In reality, however, the City allowed one competitor to engineer the Conduit Network to its own specifications while denying all other potential users any meaningful input.

It is thus unsurprising that this approach produced designs and plans that ensure the Conduit Network is optimized for Google Fiber's technology and needs and, as a practical matter, is rendered unsuitable for use by any other existing or new ISP for purposes of competing with Google Fiber throughout the City. Just in case the design of the network proves insufficient to protect against the need to share the Conduit Network with competitors, the City also granted Google Fiber contractual approval and veto rights that it could assert to block or stymie any other ISP who might actually try to co-locate in the Google Fiber-designed facility.

Moreover, the City also expressly granted Google Fiber the exclusive right to occupy each segment of the Conduit Network for eighteen months after completion. As a practical matter, this exclusivity period will be even longer because the Conduit Network, as designed, simply will not accommodate hybrid infrastructure like that used by ISPs such as Mediacom and CenturyLink—indeed, the City's terms governing use of the Conduit Network affirmatively prohibit installation of such alternative technologies. But even in the case of the City's preferred technology—fiber-to-the-home—the Conduit Network is inadequate for use by ISPs to operate a network that might be competitive with Google Fiber.

Once the Conduit Network is built, there will be a customized pipeline leading straight to the homes and offices of City residents which Google Fiber can immediately occupy, but which is unusable for competitive purposes by other ISPs for eighteen months or more. This will give Google Fiber a huge competitive advantage. For example, another ISP which wants to compete for customers in a new housing development or office park will have to build its own underground conduit at its own expense. In addition, the Google Agreement requires the City to pre-approve any permits Google Fiber needs to deploy or upgrade its network, while other ISPs will have to go through the City's normal permitting process, which usually is slow, cumbersome and costly. For all these reasons and more, Google Fiber will have lower costs and be able to connect customers faster than competitors. Added to these unfair advantages is the clear bias in

favor of Google Fiber demonstrated by the City, which in press releases, door hangers and other communications with homeowners and businesses refers to Google Fiber as its “partner,” promotes Google Fiber’s services as superior to those of the incumbent ISPs, and offers residents incentives to connect to the Conduit Network.

Anyone expecting that Google Fiber will have to pay license fees to the City reflecting a hefty premium in return for these and other significant business advantages conferred by the City would be surprised to learn that the City, in fact, is charging below-market fees that will cover only a small fraction of its costs to build and maintain the Conduit Network. The City’s remaining expenditures—paid for with tax revenues and totaling tens of millions of dollars—will never be recouped.

The cost and timing advantages conferred solely on Google Fiber are staggering. The City plainly picked a preferred provider—Google Fiber—and a preferred technology—Google Fiber’s—to the detriment of competing ISPs, whether they use the same or different technology. The City agreed to provide these exclusive benefits without securing any meaningful commitments from Google Fiber—there are no buildout requirements, no promise to provide a range of service options to meet the varying needs of City residents like Mediacom offers. And despite the City’s claim that its motivations include the desire to ensure that affordable broadband is available to everyone, the City elicited no pledge to provide affordable Internet packages to lower income residents. The failure to secure service commitments is especially mystifying given that the City, if it conducted even minimal due diligence before turning over the keys to a taxpayer-funded, fifty-million-dollar facility, should also have been aware that Google Fiber’s business model is to sell only a single level of service—one gigabit at \$70 per month¹—a price that the Commission has recognized is not affordable for many households—

¹ Google has launched a 2 Gigabit service plan in limited markets for \$100 per month. *See, e.g., Huntsville*, GOOGLE FIBER, <https://fiber.google.com/cities/huntsville/> (last visited May 10, 2021).

and that Google Fiber has been accused by some critics of not living up to promises made in a number of other cities.²

At the same time as it is extending a host of special privileges and benefits to Google Fiber, the City has been taking actions that will make it harder and more costly for other ISPs to compete. Wireline ISPs historically could inexpensively install or upgrade their networks by overlashing plant onto aerial utilities. The City, however, now requires virtually all upgrades and buildouts to be installed underground, which costs approximately four times more than does overlashing. ISPs must also navigate the City's cumbersome, slow permitting process prior to completing any upgrades or expansions. In addition, the City's undergrounding requirement has created over-congestion in large portions of the City's ROW, and the City has put a moratorium on further builds in certain parts of the ROW. The moratorium precludes ISPs offering telecommunications services that do not currently have conduit in those congested ROWs from making necessary upgrades or buildouts. Although the Conduit Network will be underground, it will not relieve incumbent ISPs or new entrants from these burdens or contribute significantly to relieving congestion because it has been designed so that, as a practical matter, it is usable by only one provider—Google Fiber.

The City's sweetheart deal with Google Fiber will compound the already onerous effects of the City's burdensome undergrounding requirements and will effectively prohibit Mediacom and other ISPs from offering telecommunications services in new and existing areas of the City. Due its exclusive subsidy and highly preferential ROW access rights, Google Fiber will be able to deploy, maintain and upgrade its network throughout the entire City at a fraction of the time and the costs of other ISPs.

² See, e.g., Johnny Kampis, *Op-Ed: Google Fiber, king of broken promises, eyes broadband deal in West Des Moines*, THE CENTER SQUARE (Aug. 21, 2020), https://www.thecentersquare.com/iowa/op-ed-google-fiber-king-of-broken-promises-eyes-broadband-deal-in-west-des-moines/article_d70988e0-e3cc-11ea-bd7f-5fdf3729a9eb.html.

As established by the Brattle Group’s economic analysis, these dynamics will severely inhibit other ISPs from recouping the financial investment needed to upgrade their networks in existing parts of the City or to expand their networks to new parts of the City undergoing development. They will likely be forced to choose between delaying upgrades and network expansions, offering their services at a loss, raising prices and/or slashing low-cost (and less profitable) service options in an effort to preserve profitability. All of these outcomes materially disadvantage other ISPs *vis-à-vis* Google Fiber. The City’s actions have thus unlawfully deprived all other ISPs – and the City’s residents – of the fair and balanced legal and regulatory environment required by Section 253.

There is strong indicia that the City, contrary to its public posture, is fully aware of and actually desires the discriminatory results of its actions. The City negotiated the Google Agreement in secret shortly after Google’s primary lobbyist in Iowa took his seat on the West Des Moines City Council. The City rushed through its approval of the project and the Google Agreement over a period of a few days spanning over the 2020 July 4th holiday weekend and without a public vote. During this process and in the weeks and months following it, the City grossly misrepresented the nature of the project and how it would be financed, misled voters about the supposed deficiencies of the existing broadband market in the City and exaggerated the benefits and underplayed the costs to residents of the Conduit Network/Google Fiber Agreement combination. The City’s lack of candor extended to its dealings with Mediacom. For example, the City told Mediacom that all ISPs could participate in the design process but then ignored Mediacom’s requests to participate, letting Google Fiber design the Conduit Network behind closed doors. The City continues to misrepresent that the Conduit Network is open to all ISPs despite overwhelming evidence demonstrating that only one ISP—Google Fiber—can effectively use it to compete. And it recently came to light that Google Fiber retained the West Des Moines Mayor’s real estate company to secure Google Fiber’s office space in the City. In

addition, Mediacom believes that some City officials may see a political advantage in allying with Google Fiber, for example by claiming in re-election bids to have corrected supposed shortcomings in the City's broadband options by negotiating the entrance into the market of a new competitor using allegedly superior technology.³ The City and some of its leaders have intermingled their financial and personal interests with Google Fiber, and as a result the City has deliberately and unlawfully put a heavy thumb on the scale in favor of Google Fiber.

The City's actions violate Section 253 in at least three ways. *First*, the City gave Google Fiber a large, exclusive subsidy that distorts communications competition in the West Des Moines market. *Second*, the City granted Google Fiber exclusive ROW access rights that enable it to deploy its network far more cheaply and efficiently than its competitors. *Third*, the design of the Conduit Network forecloses its use by any providers that are not Google Fiber, and absolutely prohibits its use by competitors using alternative technologies such as Mediacom and CenturyLink. The City's actions are thus not technology neutral, and they impose discriminatory burdens on all other ISPs that Google Fiber alone is excused from bearing.

The Commission has, on numerous occasions, preempted contracts that violate only one of these principles. The combination of these infractions reflected in the City's arrangement with Google Fiber presents one of the most egregious violations of Section 253 Mediacom has been able to identify. The City cannot justify its actions by claiming that these Google Fiber-only subsidies and access advantages are legitimate ROW management, competitively neutral, or non-discriminatory as to other telecommunications and broadband service providers. The arrangements Mediacom presents to the Commission in this Petition violate Section 253(a) and

³ In January 2015, Google Fiber announced its selection of Atlanta, Georgia as its next "fiber city." An August 2018 article reporting on the fact that Google Fiber had still not begun service more than three years later noted that one reason Atlanta officials "made concessions to pave the way for Google Fiber" was "the unquestioned benefits of being associated with the company's name." Jim Burrell, *The promise and reality of Google Fiber*, MARKETPLACE (Aug. 7, 2018), <https://www.marketplace.org/2018/08/07/promise-and-reality-google-fiber/>.

cannot be not saved by any justification available under Section 253(c). Thus, the Google Agreement – and the City’s resolutions adopting and implementing it – must be preempted under Section 253(d).

Critically, Google Fiber freely acknowledges that its arrangement with West Des Moines reflects its “new business model.” Thus, if unaddressed, Google Fiber’s new model will have competitive implications far beyond West Des Moines. If the Commission does not act to preempt the City’s actions, that inaction will encourage other municipalities to ignore their Section 253 obligations to the detriment of the public and facilities-based competition.

Every day that the City is allowed to continue building its Conduit Network, tens of thousands more taxpayer dollars are being poured into this unlawful project and it will become more difficult to fashion remedies that can correct the competitive imbalance the City has created. The Commission should thus promptly advise the City to halt construction of its ill-conceived project. Mediacom also requests that the Commission direct the City to reform the Google Agreement to remove the preferential design, access, financial and permitting rights the City awarded to Google Fiber, require the City to redesign the Conduit Network to be provider- and technology-neutral, preempt the City from imposing permitting and other restrictions that disadvantage ISPs other than Google Fiber, and direct the City to refrain from marketing technology or services that will be provided through the Conduit Network. Only then will Google Fiber have to operate with the same economic signals and framework as that of other communications providers in West Des Moines.

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**Before the
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In the Matter of)
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Declaratory Ruling Pursuant to Section)
253(d) of the Communications Act)

PETITION FOR EXPEDITED DECLARATORY RULING

MCC Iowa LLC, a subsidiary of Mediacom Communications Corporation (“Mediacom”), files this Petition seeking Federal Communications Commission’s (“Commission” or “FCC”) expedited review and preemption of actions taken by the City of West Des Moines, Iowa (the “City” or “West Des Moines”) under Section 253 of the Communications Act of 1934, as amended.⁴ As detailed in this Petition, the City Council has ratified an agreement with Google Fiber (the “Google Agreement”) that grants the tech giant a range of exclusive and special rights, privileges and benefits with respect to a citywide underground conduit system (the “Conduit Network”) that the City will build for Google Fiber using public rights-of-way (“ROW”) and public financing.

Section 253 requires that municipalities not prohibit or impede the entry or expansion of telecommunications service providers by interposing regulations or other actions that manage the municipal access to ROW in anything other than a competitively neutral, non-discriminatory manner. The City’s determination to fund and build a citywide Conduit Network optimized for a single provider violates this fundamental requirement. Faced with the City’s almost complete subsidization of Google Fiber’s entry, Mediacom and other telecommunications service providers are effectively prohibited from expanding their own networks into new areas of the City and are materially inhibited from initiating upgrades within their existing service areas.

⁴ See 47 U.S.C. § 253 (2018); *generally* Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act, *Public Notice*, 13 FCC Rcd. 22970 (1998).

Despite being on notice that its actions violate its Section 253 obligations, the City is forging ahead with its construction of the Conduit Network. Every day that the City continues to build the Conduit Network, tens of thousands more taxpayer dollars are being poured into this unlawful project and any remedies after the fact – especially those that would require the City to re-design its Conduit Network in a competitively neutral manner – become less feasible and more burdensome for the City to achieve. Mediacom therefore seeks immediate and expedited review of these circumstances. Given the gravity of the infractions here, the Commission should instruct the City to halt construction until it can provide evidence sufficient to convince the Commission that the Conduit Network is in fact “open” as a practical matter to many facilities-based broadband providers on the same economic basis as Google Fiber. Any objective review of the design documents and the terms of the Google Agreement demonstrate just the opposite.

Besides the interim relief of putting the project on hold pending a final decision, Mediacom requests the FCC to direct the City to reform its contract and ancillary arrangements with Google Fiber so that the anti-competitive and unfair subsidies and other preferential treatment that induced Google Fiber to enter the market are reversed. This is necessary so that Google Fiber can make an informed decision about whether to compete on a competitively neutral basis in West Des Moines if it has to bear its own costs of constructing and expanding its network like all the incumbent Internet service providers (“ISPs”) and any new entrant besides Google Fiber. Mediacom also seeks additional relief to mitigate the anti-competitive effects of the City’s actions.

I. The City Is Building a \$50 Million Conduit Network for Google Fiber’s Exclusive Use and Is Managing Its Public ROW in a Discriminatory Manner.

A. Mediacom is an established provider in a competitive broadband market, and its services include a range of options, from low cost monthly services to services with gigabit speeds.

The City is an expanding suburb of Des Moines and it has substantial planned residential and business development anticipated to be built beyond existing populated areas.⁵ The City has approximately 35,000 current servable addresses in existing areas of the City and an additional 7,000 new addresses under permit to be built in newer areas of the City.⁶ The expectation is that the City will enjoy even greater growth in the future. This planned and anticipated growth represents an opportunity for all communications service providers that have the financial wherewithal to expand their networks to serve new customers.

Mediacom has served cable, telecommunications and broadband Internet customers in West Des Moines for over twenty years.⁷ Currently, approximately 14,894 customers in the City subscribe to some combination of Mediacom’s broadband Internet, cable and digital telephone services.⁸ Given the fact that the number of serviceable locations in the City is over 35,000 and soon will grow to over 42,000, it is plain that Mediacom has far from a monopoly in the broadband market in the City. Instead, it faces vigorous and effective competition from the other incumbent ISPs.

Mediacom provides its services through infrastructure it has built primarily by overlashing (attaching) its fiber and co-axial cable plant to existing electric utilities aerial plant.⁹

⁵ See Purcell Decl. Attach. 1, ¶¶ 7, 57.

⁶ See *id.*, ¶¶ 4, 7, 57; see also *City of West Des Moines Fact Book*, CITY OF WEST DES MOINES, 5, <https://www.wdm.iowa.gov/home/showpublisheddocument/34065/637539205116800000> (last visited Apr. 29, 2021) (Figure 1-3).

⁷ See Purcell Decl. Attach. 1, ¶ 5.

⁸ See *id.*

⁹ See *id.*, ¶ 8.

Mediacom financed the construction of its network in the City on its own, without receiving government financing or subsidies. It pays full rates for the City's ROW it occupies and must comply with all of the City's standard requirements when it seeks permission to expand or upgrade its infrastructure. Historically, Mediacom has regularly upgraded its network to improve speed and performance and has consistently expanded its infrastructure so that it can serve newly developed areas in the City. Until the City's recent actions to tilt the competitive playing field in Google Fiber's direction, Mediacom fully expected to continue these practices and expand its service offerings to the new service locations which are already planned and any others that may be developed in the future.¹⁰ Mediacom pays the City approximately \$275,000 per year in cable franchise fees for the general ability to rely on City ROW to operate and pays even more in the form of license fees for use of specific segments.¹¹ Mediacom also maintains a large regional office and has over 400 employees who work or live in the City.¹²

West Des Moines is one of the most competitive broadband markets in which Mediacom operates.¹³ There are presently seven other facilities-based wireline ISPs that offer high speed Internet and other communications services in or throughout the city, including CenturyLink.¹⁴ This range of competitive presence in the City has resulted in better service options for the citizens and businesses of West Des Moines.

Mediacom offers a diverse array of broadband services everywhere its network passes, ranging from low-cost residential service options starting at \$9.95 per month through 1 gigabit services offered at a one year introductory price of \$79.99 per month and a standard price of

¹⁰ See *id.*, ¶¶ 1, 4, 53.

¹¹ See *id.*, ¶¶ 5, 45.

¹² See *id.*, ¶ 5.

¹³ See *id.*, ¶ 4.

¹⁴ See *id.*; Attach. 2, Brattle Group Report: *Exclusive Use of Public Rights of Way, Unfair Competitive Practices, and Fair and Reasonable Compensation* (May 12, 2021), 1.

\$139.99 per month.¹⁵ Mediacom's low-cost service options are enabled largely by the range of demand within its customer base that purchases higher cost options.¹⁶ Mediacom makes these service options available throughout the entire City, except in some enclosed communities where the owner bars ISPs other than a single one which it has chosen as its exclusive broadband provider. Mediacom would be able to quickly connect those communities if allowed to do so and so Mediacom effectively offers its services throughout the whole City.

Mediacom's array of services has proven particularly important during the pandemic. Mediacom has gone to enormous lengths in the City to ensure schools and those working or learning from home have a range of high-quality options for broadband and other services that will meet the needs and financial capabilities of just about everyone.¹⁷ Mediacom was proud to sign onto the FCC's 2020 Keep Americans Connected pledge, and then proceeded to offer even more than the basic pledge required. Mediacom offered new Connect2Compete customers sixty days of free services, raised data speeds for that program from 10 Mbps to 25 Mbps without raising the price, and waived installation fees and suspended data usage limits for these accounts.¹⁸ Day-in and day-out Mediacom's personnel, many of whom live as well as work in the City, have unhesitatingly gone out into the field to connect new customers, enable new services for established customers and troubleshoot service issues, despite the risks of infection by the Covid-19 virus.

¹⁵ See Purcell Decl. Attach. 1, ¶ 53, n.8.

¹⁶ See Attach. 2 at 5, 21.

¹⁷ See Purcell Decl. Attach. 1, ¶ 53.

¹⁸ See *Mediacom Announces Company Initiatives to Combat Spread of Coronavirus*, MEDIACOM (Mar. 16, 2020), <https://mediacomcable.com/about/news/corona-company-initiatives/>; *Chairman Pai Launches the Keep Americans Connected Pledge*, FED. COMM'NS COMM'N (Mar. 13, 2020), <https://docs.fcc.gov/public/attachments/DOC-363033A1.pdf>.

Given its decades of service and commitment to the City, Mediacom has been shocked by the shabby treatment it has received during the City's recruitment of Google Fiber. Of course, Mediacom's frustration with the City's behavior would be of no significance to the FCC if the City had gone about its pursuit of Google Fiber fairly and in compliance with applicable law and rules. That, unfortunately, has not been the case.

Instead, the City has demonstrated blatant favoritism toward Google Fiber in violation of Section 253 of the Communications Act (as well as several State laws). It has done so in two broad ways. First, it has provided a host of subsidies and benefits directly to Google Fiber which it has withheld from other ISPs and, second, it has imposed burdens on other ISPs from which Google Fiber has been spared. We begin with the second category and explain how the City has applied onerous and expensive requirements for access to its ROW on ISPs generally and then turned around and relieved Google Fiber from the need to comply.

B. In recent years, the City has required ISPs to move large portions of their networks underground, which significantly raises costs for network expansions and upgrades.

Over the years, Mediacom has invested tens of millions of dollars to build, maintain and upgrade its broadband network and communications infrastructure in the City.¹⁹ Mediacom expects and plans to make significant additional investments to expand its network to new residential and business development areas and to upgrade and deploy new technology as it becomes available.²⁰ However, unless stopped by the FCC, the City's illegal favoritism towards Google Fiber threatens to make Mediacom's investment plans uneconomical as well as pointless.

One obvious way for the City to encourage economically efficient growth would be to support use of existing aerial utility poles where available for overlashing. Critically, when

¹⁹ See Purcell Decl. Attach. 1, ¶ 5.

²⁰ See *id.*, ¶¶ 7, 57.

aerial plant is available, it is nearly four times less expensive per linear foot to serve new customers than to break ground and build underground plant.²¹ Recently, however, the City has largely rejected overlashing as a permissible means of network construction, upgrading or expansion by applying to ISPs and telecommunications service providers an ordinance that bars “utilities” from overlashing any runs over 300 feet unless the City grants an exception.²² The effect of this interpretation has been to force new runs to be placed underground. This not only increases the cost, time and trouble associated with new builds and expansions, but also impedes Mediacom (and presumably other ISPs) from engaging in routine installation, upgrading and maintenance work along some network segments unless it is willing to move the affected portion of its network underground.²³

Going underground is very expensive as compared to overlashing. Typically, overlashing entails about \$12,187 of labor and other costs per mile. Going underground typically adds to this amount another \$47,000 per mile because of the need to purchase replacement coax cables, trench the ground, build vaults and bury the cables.”²⁴ In addition, Mediacom must apply for and obtain City permits, which often involves a cumbersome, expensive, time-consuming and sometimes unpredictable process—for example, every permit application must be accompanied by an engineering analysis developed and reviewed by both internal and external engineers.²⁵

While the City has not *per se* prohibited overlashing, Mediacom’s experience when it has sought permits to overlash is that there are often delays and permits are often denied, usually

²¹ See *id.*, ¶ 20; Nank Decl. Attach. 3, ¶¶ 28-30.

²² See WES DES MOINES, IOWA, CODE OF ORDINANCE § 7-14-2 (2020), https://codelibrary.amlegal.com/codes/westdesmoinesia/latest/westdesmoines_ia/0-0-0-8450. While it is questionable whether Mediacom is appropriately classified as a “utility” in this way, the City consistently has maintained its position that the utility ordinance should apply.

²³ See Purcell Decl. Attach. 1, ¶¶ 10-13; Nank Decl. Attach. 3, ¶¶ 27-28.

²⁴ Nank Decl. Attach. 3, ¶ 29.

²⁵ See Purcell Decl. Attach. 1, ¶ 41.

with minimal explanation.²⁶ It is very rare that the City allows over 300 feet of overlash.²⁷ Mediacom understands other ISPs' experiences are similar.²⁸ Thus, for all intents and purposes, existing ISPs which want to build, upgrade or maintain their networks must be prepared to go underground. And, when they do, they must bear all of the costs themselves, without any subsidization like Google Fiber is receiving from the City, and must bear all of the delay and uncertainty associated with the permitting process, unlike Google Fiber, which has been granted pre-approval by the City in the Google Agreement.

C. The City proposed open access duct banks to relieve congestion in its ROW but abruptly abandoned that project with no explanation.

Beyond the avoidable expense of burying plant, another byproduct of forcing communications network builds underground is that “certain key commercial corridors” of the City’s ROW have become over-congested, meaning that the available ROW space in key areas is “85% or more consumed.”²⁹ As the City has publicly acknowledged, once the ROW is consumed, the private sector cannot cost-effectively use it, which impedes the availability and quality of services. This leaves incumbent ISPs with two extremely inconvenient and even more expensive options. First, they can seek private easements which, as the City acknowledges, are “very expensive and very time-consuming” to obtain.³⁰ Second, ISPs can use alternative routing, which renders their provision of service “financially and technologically” less efficient.³¹

²⁶ See Attach. 4, November 20, 2020 Correspondence with the City on “Case by Case” Review of Permit Applications Concerning Aerial Overlash; Purcell Decl. Attach. 1, ¶¶ 41-42 (noting rejections and delays in the City’s review of permit applications).

²⁷ See Purcell Decl. Attach. 1, ¶ 36.

²⁸ See *id.*

²⁹ Katie Kienbaum, *Transcript: Community Broadband Bits Episode 426*, Community Networks (Sept. 10, 2020), <https://muninetworks.org/content/transcript-community-broadband-bits-episode-426> (interview with Deputy City Manager Jamie Letzring and Conduit Network consultant Dave Lyon about the City’s Conduit Network project).

³⁰ *Id.*

³¹ *Id.*

Previously, the City represented that it wanted to work with existing ISPs to find a solution to current and anticipated future congestion while preserving non-discriminatory access to the ROW. The solution the City proposed was to build multiple provider “duct banks,” to be constructed only in designated congested parts of the City’s ROW.³² Incumbent ISPs, including Mediacom, participated extensively in ongoing discussions with the City and its consulting engineers about this project from 2018 through the spring of 2020.³³ The discussions focused on accommodating continued or future ISP access in these congested areas through construction by the City of a variety of differently sized stacked conduits through which fiber, coaxial cable or other technology could be pulled.³⁴ Providers seeking access would purchase a conduit space for a one-time-fee, based on the diameter of the conduit selected and the number of linear feet needed.³⁵ The City was clear that it expected to set fees so that the City would fully recover its construction costs.³⁶

At one point during the course of the discussions about this project, a need arose for Mediacom to rapidly remove a specific and small portion of its network off of utility poles and

³² See Purcell Decl. Attach. 1, ¶¶ 14-15.

³³ See *id.*, ¶¶ 14-18.

³⁴ See *id.* This discussion was led by the City’s consultant, David Lyons, with significant involvement from the City’s outside engineering firm HD Green. The City provided a map of these areas, the level of restrictions the City would impose on new cable constructions and other use of the congested portions of public ROW, as well as a depiction of what a multiple provider conduit, also known as a “duct bank,” would look like. See Attach. 5, May 11, 2020 Correspondence with HR Green on “Duct Banks” Project with Three Attachments – the City’s Draft Restricted Right of Way Policy, Restricted ROW Map, and “Duct Banks” Concept Map; Attach. 6, “Duct Banks” Concept Designs.

³⁵ The “duct banks” project was designed to install variable sizes of ducts to accommodate different types of networks (such as cables, fibers, coax, wireless, small cells, and other emerging technologies that are not yet available today). See Purcell Decl. Attach. 1, ¶ 15; Attach. 6.

³⁶ Unlike Mediacom, Google Fiber never participated in these discussions. See *id.*, ¶ 14.

bury it underground due to a City street repair and expansion project at Mills Civic Parkway.³⁷ In order to secure the right to use City-owned conduit for this purpose, on or about June 4, 2020 Mediacom entered into an agreement with the City (the “Mediacom Agreement”) which gave Mediacom only very basic usage rights in exchange for a payment based on the number of linear feet of conduit occupied.³⁸ Mediacom received neither a voice in the design nor any exclusive or other special rights.³⁹ The Mediacom Agreement does not include any right for Mediacom to gain access to any future conduit the City might build. So, unlike Google Fiber which is guaranteed immediate access to the citywide Conduit Network with pre-approved permits, if Mediacom wanted to secure access to additional City-owned conduit, including the Conduit Network assuming that it would accommodate Mediacom’s coax cables, it would be forced, in every individual instance, to seek the City’s permission through the same old cumbersome process involving the usual costs, uncertainties and delays.⁴⁰

Around the time that Mediacom and the City signed the Mediacom Agreement, the City abruptly ceased discussions with incumbent ISPs about the duct banks project.⁴¹ The City provided no explanation for ending those discussions, and it has never formally closed them out.⁴² However, Mediacom later learned that, starting in January 2020, at about the time Google Fiber’s primary lobbyist in Iowa took his seat as a member of the West Des Moines City Council, the City began negotiating an entirely different kind of agreement with Google Fiber to

³⁷ *See id.*, ¶ 18.

³⁸ *See id.*; Attach. 7, Mediacom Agreement.

³⁹ *See Purcell Decl.* Attach. 1, ¶ 18; Attach. 7.

⁴⁰ *See Attach. 7, Background, E, Sec. 2.3.*

⁴¹ *See Purcell Decl.* Attach. 1, ¶¶ 29, 31.

⁴² *See id.*, ¶ 31.

build conduit that was exclusively for the benefit of a single provider, rather than all ISPs.⁴³ The City kept those negotiations a secret not only from its citizens, but also from Mediacom⁴⁴ and the other incumbent ISPs. It was only after the deal had been struck that the City made its plans and arrangements with Google Fiber public as it undertook a rapid fire process to push through formal approval by the City Council.⁴⁵

D. The City misleadingly claimed it was building an “open access” Conduit Network to promote competition and universal access to affordable Internet and communications services.

Over a period of several days spanning over the 2020 July 4th holiday weekend, the City disclosed its plans to build a \$50 million citywide conduit system to be paid for by taxpayers and approved an agreement making Google Fiber the Conduit Network’s so-called “inaugural” tenant.⁴⁶ The City Council approved the Conduit Network project, the Google Agreement and the related financing through issuance of municipal bonds within a week, at its July 6, 2020 meeting.⁴⁷ The City bypassed a public vote on the bonds that ordinarily would be required by Iowa law through the expedience of classifying the Conduit Network as an “urban renewal”

⁴³ See Attach. 8, July 6, 2020 City Council Meeting Minutes, 7 (“Dave Lyons, consultant for the City . . . stated it took six months to reach the proposed model with Google Fiber.”); Attach. 9, Iowa Legislature Lobbyist Disclosure (2020-2021) – Matthew McKinney; Attach. 10, January 6, 2020 City Council Meeting Minutes 1.

⁴⁴ The City’s grave omission of its plans to build a city-wide Conduit Network during the negotiations for the Mediacom Agreement border on bad faith. Mediacom certainly would not have signed the Mediacom Agreement if it had known that the City was preparing to build and if the City were to offer Mediacom access to an “open access” city-wide Conduit Network in exchange of a license fee as low as it is charging Google Fiber for using it. See Purcell Decl. Attach. 1, ¶ 24.

⁴⁵ See *id.*, ¶ 23.

⁴⁶ See Attach. 11, June 19, 2020 Public Notice of Council Meeting on Urban Renewal Bond; Attach 12, June 22, 2020 Proposed Urban Renewal Plan; Attach. 13, June 26, 2020 Public Notice of Council Meeting Agenda on Urban Renewal Plan; Attach. 14, July 1, 2020 Public Notice of Council Meeting Agenda on Google Agreement; Attach. 8 at 7, 9.

⁴⁷ The City’s claim that Google Fiber would pay the City up to \$20 million per year in license fees was also false. See Purcell Decl. Attach. 1, ¶¶ 26-27.

project and designating the entire City as a blighted and/or economic development area to be renewed through the project – a dubious proposition given that West Des Moines is one of the wealthiest cities in Iowa.⁴⁸ In an attempt to justify the Conduit Network’s price tag and the City’s use of the urban renewal law to finance it, the City repeatedly claimed that the Conduit Network would be “open access,” meaning that all ISPs could use it to offer broadband services. The City further claimed that the open access nature of the Conduit Network would “promote competition” and provide universal access to affordable Internet service, which the City suggested was lacking.⁴⁹ The City made these kinds of representations in public notices,⁵⁰ at official City Council meetings, including public hearings on the Conduit Network project,⁵¹ in

⁴⁸ Iowa Code Ann. §§ 403.2, 403.4 and 403.17.

⁴⁹ *See, e.g.*, Attach. 8 at 7 (during the July 6 Council meeting, multiple City representatives and council members assured the public that the Google Agreement would not impede the City’s ability to execute similar agreements with other ISPs, and the Conduit Network would be available for “any company to use”); Purcell Decl. Attach. 1, ¶ 28 (during the City Council’s July 20, 2020 meeting, in response to Mediacom’s pointed question on whether Mediacom would be able to use the Conduit Network, City representatives responded that the “City would be excited to partner with Mediacom Communications to offer their services via the [Conduit Network].”), ¶ 30 (during a November 6, 2020 meeting between Mediacom and representatives of the City, the City again assured Mediacom that the Conduit Network would be open access and that Mediacom could use it when Google Fiber’s Exclusivity Periods ended); Attach. 15, July 20, 2020 City Council Meeting Minutes, 2.

⁵⁰ *See* Attach. 14.

⁵¹ *See* Attach. 8 at 7, 9.

interviews,⁵² and in marketing materials it disseminated to residents.⁵³ As discussed in detail in Section E below, all those representations were and are patently false.

E. The City is building a closed Conduit Network for Google Fiber’s exclusive use and has granted Google Fiber special permitting and other exclusive rights.

In months following the City Council’s approval of the Conduit Network, facts emerged demonstrating the City is not building an open Conduit Network to promote non-discriminatory competition. Rather, it is building a closed network for Google Fiber’s exclusive use and granting Google Fiber a host of special rights and benefits, all of which will severely diminish, not enhance, facilities-based competition in West Des Moines.

i. The Google Agreement grants Google Fiber exclusive rights to design, test and use the Conduit Network as well as enables Google Fiber to rapidly deploy its network without separate permitting requirements.

According to the City’s design documents, the Conduit Network is to be built in six segments that will cover both existing and planned new areas of the City.⁵⁴ The Google Agreement provides the tech giant with exclusive rights to custom-design the Conduit

⁵² See, e.g., *Construction on WDM Google Fiber project set to begin this week*, MSN (Mar. 22, 2021), <https://www.msn.com/en-us/news/us/construction-on-wdm-google-fiber-project-set-to-begin-this-week/ar-BB1eOYbm?ocid=iehrs&srcref=rss> (Councilwoman Renee Hardman statements); *CLIC Zoom-Chat: West Des Moines, Iowa Broadband Project*, COALITION FOR LOCAL INTERNET CHOICE (Oct. 2020), <http://www.localnetchoice.org/wp-content/uploads/2020/10/Transcript-of-CLIC-West-Des-Moines-Broadband-Zoomcast-V2.pdf> (Deputy City Manager Jamie Letzring and Conduit Network consultant Dave Lyon statements); *WDM to bring high-speed internet choices to residents and businesses with Google Fiber*, THE CITY OF WEST DES MOINES (July 2, 2020), <https://www.wdm.iowa.gov/Home/Components/News/News/6579/>; Perry Beeman, *West Des Moines, Google Fiber pursue \$40M broadband project*, IOWA CAPITAL DISPATCH (July 2, 2020), <https://iowacapitaldispatch.com/2020/07/02/west-des-moines-google-fiber-pursue-40m-broadband-project/> (Mayor Steve Gaer, Deputy City Manager Jamie Letzring, and Councilmember Renee Hardman statements).

⁵³ Attach. 16, “Plant the Speed” Website (Nov. 19, 2020) and Sample West Des Moines Open Access Conduit Network Installation Agreement, 15 (“Q: What if I want to change providers in the future? A: That’s the beauty of the system – once you have a conduit to your home, any provider licensing space in the system can bring you service!”).

⁵⁴ See Nank Decl. Attach. 3, ¶ 6; Ludington Decl. Attach. 17, ¶ 11; Attach. 18, WDM Digital Enterprise Sequencing Map (Sept. 18, 2020).

Network.⁵⁵ The range of exclusive and special rights, privileges and benefits given to Google Fiber is stunning and without precedent; Google Fiber is also accorded exclusive construction rights, exclusive delivery and testing rights, exclusive installation rights and approval and veto rights if it is proposed that down the road competitors be given access to the Conduit Network.⁵⁶ Further, the Google Agreement provides that as each segment of the Conduit Network is completed, there will be an eighteen-month “validation period” during which Google Fiber gets exclusive use of that segment (the “Exclusivity Period” for the segment).⁵⁷ These provisions lack any plausible justification from the perspective of consumers⁵⁸ and, because of the realities of the broadband market, they effectively guarantee Google Fiber exclusive use of the Conduit Network for years to come.

The City is also guaranteeing to Google Fiber that its costs of entering and competing in the West Des Moines market will be significantly lower than those of any other ISP. Critically,

⁵⁵ See generally Attach. 19, Google Agreement.

⁵⁶ See *id.*, Secs. 2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.2., 2.3, 2.4, 3.1, 3.2, 3.3, 3.4, 4.1.1., 4.2.1, 4.2.2, 4.2.3, 4.2.4, 4.4, 4.5.2, 4.6, 4.7, 4.7.1, 4.7.2, 4.9.1, 4.9.2, 4.10, 5.1.1, 5.1.2, 5.1.3.3, 5.1.4, 5.1.5, 5.3, 5.4, 5.5, 6.1.1, 6.1.2, 7.4, 9.1, 12.1, Exs. A, B, C, D, F and G.

⁵⁷ See *id.*, Sec. 1.55 (“‘Network Validation Period’ means, with respect to any Network Section, the period of time beginning on the date on which the Network Section Design for such Network Section is deemed validated and ending on the date that is eighteen (18) months following the date on which such Network Section is accepted”); Sec. 4.5.2 (“[T]he City will not require Google Fiber to share space in the Licensed Conduit in a given Network Section . . . with any Third-Party User during Network Validation Period for such Network Section.”).

⁵⁸ During a meeting in November 2020, the City claimed that it needed the Exclusivity Period to “test” the Conduit Network, as new plant, for an adequate time over “harsh Iowa winters” and as such, the City did not think it was “prudent” to allow more than a single operator onto the Conduit Network until the Exclusivity Periods had elapsed. This is pretextual because Iowa winters do not last eighteen months. And there is nothing unique in the City’s design plans nor any deviation from industry practices that would require even weeks of testing, much less years. See Purcell Decl. Attach. 1, ¶ 32, 38, 39; Nank Decl. Attach. 3, ¶ 9, 13. The City’s representative also claimed that the City wanted to avoid being sued by operators if something adverse happened to the Conduit Network during these harsh winters, but the City had no response when Mediacom suggested that that concern could be easily dealt with by appropriate contract terms.

unlike other ISPs in the City that had to finance their network infrastructure independently and ***also pay fees to the City for use of the ROW***, Google Fiber is not paying for any of the construction costs for the Conduit Network, all of which will be borne by the City, and the license fee it is required to pay under the Google Agreement is far below the standard market-rate license fee to lease a similar conduit system.⁵⁹ Specifically, Google Fiber is to pay the City monthly license fees based not on the number of homes passed, but on the number of serviceable addresses (*i.e.* homes connected after customers having agreed to connect to the Conduit Network). That monthly license fee starts at 50 cents per month per serviceable address, rising until it caps out at \$2.25 per month per serviceable address.⁶⁰ Over the term of the Google Agreement, these payments will not reimburse the City for its out-of-pocket expenditures on the Conduit Network, let alone provide the City with any revenues in excess of its costs or send the City recurring franchise or license fee checks for ROW access.

Because the City will construct the Conduit Network, Google Fiber is also relieved of the obligation to secure permits like other ISPs, and as Google Fiber would have to do if it built the facility on its own. Google Fiber, therefore, does not bear any permitting uncertainty, delay, ancillary engineering costs or other burdens associated with gaining access to ROW that other ISPs encounter. Also because the Google Agreement pre-approves authorizations for Google Fiber to install its fiber cables in the Conduit Network, Google Fiber is not required to apply for or await the City's authorizations to deploy its network elements and begin to operate.⁶¹ If the

⁵⁹ See Purcell Decl. Attach. 1, ¶¶ 43-45; Attach. 20, July 6, 2020 Bond Resolution Packet.

⁶⁰ The Google Agreement requires Google Fiber to pay up to \$2.25 per connected household, but that payment is potentially much lower if the City is unable to persuade nearly 100% of property owners to connect to the Conduit Network. Google Fiber's payments will very likely be between \$240,000 and \$1 million per year, meaning it will take the City between thirty-seven and 200 years to pay the initial build costs of the Conduit Network based on the projected income from Google Fiber's exclusive lease arrangement. See Purcell Decl. Attach. 1, ¶ 43; Attach. 19, Secs. 5.1.2, 5.1.5.

⁶¹ Purcell Decl. Attach. 1, ¶ 40.

construction or maintenance of the Conduit Network results in injury or damage to third parties or their property, it will be the City, not Google Fiber, who will be liable.⁶²

On the surface, the Google Agreement seems to allow and contemplate that other ISPs might, after Google Fiber's Exclusivity Periods end, use portions of the Conduit Network to compete (rather than for ancillary network support purposes). However, as discussed below, the actual design of the Conduit Network forecloses that possibility. Even assuming for the sake of argument that another ISP could access and use some portion of the Conduit Network, Google Fiber still gets guaranteed most favored pricing and also receives up to 50% of license payments the City receives from ISPs in the form of a "credit" against Google Fiber's own license payments.⁶³ This framework is in no way evenhanded. As in so many other cases, it is hard to imagine a plausible reason for the City to agree to this term, other than a naked desire to favor its preferred service provider, Google Fiber.

ii. The Conduit Network is being designed for Google Fiber's exclusive use.

In the past several weeks, the City, as required by Iowa law, began to solicit bids for certain work associated with construction of the Conduit Network. In connection with the public bidding process, the City made publicly available some key documents, including design drawings of the Conduit Network. The City has also published the form of easement agreements that are being solicited from City residents so that "drops" connecting the Conduit Network with the premises of individual customers can be installed. After detailed review of those documents by its own engineers and legal counsel, Mediacom has concluded that the Conduit Network will not—indeed, cannot be—an open access conduit system. That conclusion has been confirmed

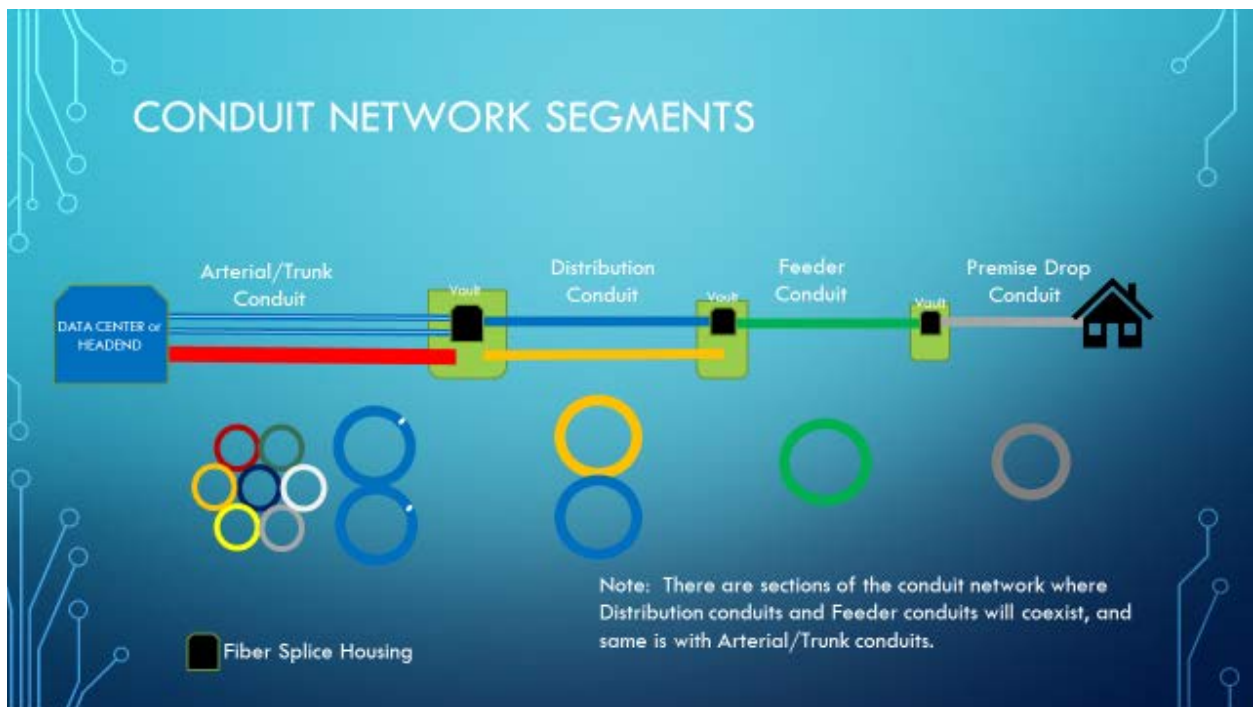
⁶² See Attach. 19, Sec. 12.1.

⁶³ See *id.*, Sec. 5.5.

by an independent expert with years of experience in building and managing infrastructure for broadband networks.

To illustrate why that conclusion has been reached, Figure 1 below diagrams the general design of Segment 2, Phase 1 of the Conduit Network in a residential area.

Figure 1 Illustration of Segment 2, Phase 1 Network Design



As shown in Figure 1, the Conduit Network as designed consists of five key parts necessary to provide Fiber to the Home (“FTTH”) services. The first part is a *headend* – a facility containing video/high speed data/voice service equipment used to supply Internet, video or telephone services to physical premises that subscribe to those services throughout the Conduit Network. In order for a house or apartment to receive any of these services through the Conduit Network, it must be connected to the headend through a continuous network cable connection. The remaining four portions of the segment are necessary to make that connection.⁶⁴

⁶⁴ See Ludington Decl. Attach. 17, ¶ 14.

The *arterial or trunk line* is the main transmission line running from the headend/hub through each segment of the Conduit Network. ISPs that utilize any portion of the Conduit Network will need to install high fiber count cable into the arterial line so that the ISP has enough capacity to provide service to all of the subscribers in each network segment.⁶⁵ The *distribution line* branches off the arterial line into individual neighborhoods (typically following the main roads). The distribution line is connected to the arterial line via a large round or rectangular vault.⁶⁶ When the distribution line reaches each street where serviceable premises are located, it separates further into smaller branches known as the *feeder lines*. Each feeder line is connected to the distribution line via a medium round vault.⁶⁷ The *premises drop*, also known as the subscriber access points, connects a feeder line to individual premises.⁶⁸

As noted, the connections of the different kinds of lines installed in the Conduit Network are connected by vaults of varying size. In these vaults, fibers from two lines connect, using specialized connecting and splitting equipment (“splicing equipment”) so that content or other communications can be transferred from the arterial line to the distribution line then to the feeder lines and finally to the premises drops, and *vice versa*.⁶⁹ The vaults as specified in the design for the Conduit Network contain only a single chamber where these connections can be located.⁷⁰ That creates, in the words of the independent expert consulted by Mediacom, “difficulty of differentiating each ISP’s fiber amid the mud and muck, . . . the possibility of damaging each other’s fiber in the process of maneuvering coils of fiber which provide necessary slack for

⁶⁵ See *id.*, ¶ 15.

⁶⁶ See *id.*, ¶ 16.

⁶⁷ See *id.*, ¶ 17.

⁶⁸ See *id.*, ¶ 18.

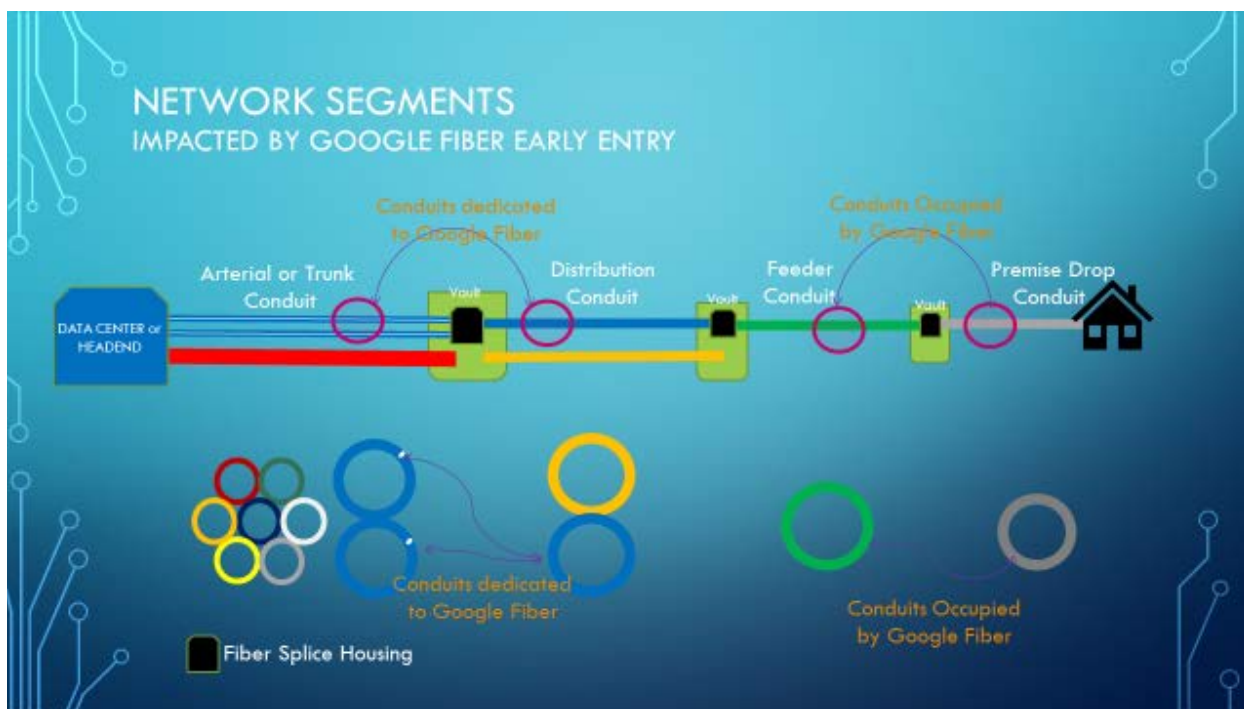
⁶⁹ See *id.*, ¶¶ 29-30, 35.

⁷⁰ See *id.*

splicing and maintenance operations, and the physical logistics of locating multiple splice enclosures in a single vault.”⁷¹ Additionally, “the risk of damage and logistical issues *increase* as the size of the vaults *decrease*.”⁷²

Thus, the Conduit Network as designed contains choke points that, once the Conduit Network is occupied by Google Fiber (which has the right to be the first to pull its fiber through the facility), will directly or effectively preclude any other ISPs from using the Conduit Network. Figure 2 below is a diagram depicting the choke points in Segment 2, Phase 1 of the Conduit Network design documents.

Figure 2 Illustration of Choke Points in Segment 2, Phase 1



In the arterial line, Google Fiber has two dedicated 1-inch ducts. The City is also installing a single two-inch microduct, which contains seven very small ducts that are ½ an inch in diameter each. In order to access and use this part of the Conduit Network, the City, Google

⁷¹ *Id.*

⁷² *Id.*, ¶ 35 (emphasis original).

Fiber, fiber companies, and other ISPs would have to share space in this microduct. Notably, Mediacom cannot fit its network cables into the microduct. While the microduct could be used for non-broadband-network-related purposes or for ancillary support of an ISP's broadband network infrastructure installed outside the Conduit Network, it is not sufficient for any other 100% fiber ISP or any ISP relying on alternative technologies to operate a competing network using the Conduit Network as the main route for its infrastructure. The inadequacy of the microduct for purposes of operating a broadband network is confirmed by the fact that Google Fiber has been given *two significantly larger dedicated ducts* to accommodate the fiber it believes it needs to effectively operate its network.⁷³

In addition, the vaults connecting the arterial line with distribution lines are too small to house the fiber of multiple ISPs. Even assuming they were willing to try to squeeze it in, there would be serious risks of significant damage arising from even routine maintenance and upgrades. Moreover, Google Fiber would have a very good technical case for invoking the “interfering use” provision in the Google Agreement to block any attempt to make a second fiber fit into one of the vaults.⁷⁴

Another serious roadblock in the way of use of the Conduit Network by more than one provider is the fact that the Conduit Network's distribution line contains only two ducts. The City has guaranteed Google Fiber exclusive use of one of these ducts (color-coded in blue on the City's design plans). The City (which has stated it intends to use the Conduit Network for its own purposes), other fiber companies, ISPs, and potentially Google Fiber would be required to share space in the single remaining duct (color-coded in orange)(the “Orange Duct”). It is against industry practice to share space in a single duct because of space constraints, lack of

⁷³ Only specialized cable lines fit in a microduct. But requiring ISPs to use this specialized cable would incur higher installation and maintenance costs. *See id.*, ¶ 25.

⁷⁴ *See id.*, ¶ 26; Attach. 19, Sec. 4.6.

control and the risks that every time one of the occupants does installation, maintenance, repair or upgrade work, it will damage the fiber of one of the other users. At best, only one ISP could occupy the Orange Duct, assuming the City, another fiber company or Google Fiber does not occupy it first (which is likely given City's announcement that it plans to use the Conduit Network itself for purposes such as operating traffic control systems).⁷⁵ Additionally, the vaults connecting distribution and feeder lines, which are even smaller than the vaults connecting the arterial and distribution lines, are too confined for use by more than a single ISP.⁷⁶

The feeder lines, which the design documents indicate will make up approximately 36% of the entire Conduit Network, contains only a single duct. Google Fiber will occupy it first as the "inaugural tenant." For reasons stated above, it would violate standard industry practice for another ISP to attempt to share space in that single duct. Moreover, Google Fiber could, once again, invoke the "interfering use" provision in the Google Agreement to prevent sharing by any other ISP foolish enough to try to force its fiber into the same feeder duct already occupied by Google Fiber.⁷⁷

The premises drop is a single, very small conduit that can only physically accommodate one fiber cable.⁷⁸ This means that a competing ISP who wants to use the Conduit Network to serve a customer and can figure out a way of overcoming all the described obstacles to getting its fiber to the point of connection with the relevant premises drop may find that it is already occupied by fiber installed by the City for Google Fiber and discover that nothing in the Google

⁷⁵ See Ludington Decl. Attach. 17, ¶ 33.

⁷⁶ See *id.*, ¶ 31.

⁷⁷ See *id.*, ¶ 37. Additionally, the vaults connecting the feeder line and the premises drops are even smaller than the vaults specified for connecting the distribution and feeder lines, which are too small for multiple ISP use. See *id.*, ¶ 36.

⁷⁸ See *id.*, ¶ 38.

Agreement would obligate Google Fiber to remove it in order to allow the competing ISP to connect its customer.⁷⁹

In light of all of this, it seems patently apparent that the design of the Conduit Network all but guarantees that whichever ISP gets into a segment first will effectively have exclusive use of the entire segment. Due to contractual Exclusivity Periods and other rights granted to Google Fiber, that first ISP can only be Google Fiber. Clearly, the City and its engineering employees and consultants were well aware that this would be the consequence of the City's decision to hand over exclusive design rights to Google Fiber, to require the City's engineering contractors putting together design plans to report to Google Fiber,⁸⁰ and to reject requests by Mediacom to be meaningfully involved in the design process.⁸¹ In short, the design of the Conduit Network is clear evidence that the City has deliberately set out to assure that the new \$50 million conduit system cannot be used by other ISPs to compete with Google Fiber, despite the City's claims that it would be an open access facility.

iii. The City also promotes Google Fiber's services and disparages other ISPs.

The City has not stopped at building a \$50 million Conduit Network for Google Fiber's exclusive use and providing it with that access at non-compensatory rates. In the fall of 2020, the City also launched an ongoing campaign under the slogan "Plant the Speed" which

⁷⁹ The City's current design will also build the network along the ROW running along the front of service locations. Mediacom and other ISPs have generally built their networks along ROW in the rear because that is where the power lines usually are located. This means that even if a Premises Drop was not cluttered up with Google Fiber's property, in order to use it to connect a customer Mediacom or another ISP would have to acquire additional easements in order to bring its network from the back to the front, resulting in significant expense and delay. In short, the way in which the City has designed the Conduit Network, any ISP other than Google Fiber would incur substantial additional costs in order to access the last mile of the Conduit Network, even if such access were technically possible. *See* Purcell Decl. Attach. 1, ¶ 34; Nank Decl. Attach. 3, ¶ 13.

⁸⁰ *See* Attach. 21, City Resolution Approving HDR Professional Service Agreement, 12-14.

⁸¹ *See* Purcell Decl. Attach. 1, ¶¶ 29, 33-35, 39.

encourages residents to connect to the Conduit Network. The campaign is based on a dual marketing strategy—promoting Google Fiber’s services while disparaging those of incumbent ISPs. Thus, the City is more or less continuously seeking to convince residents that Internet access service delivered through the Conduit Network will be “better, faster” and “more reliable” and, thus, “superior” to the broadband services already available in the City.⁸² Of course, the supposedly “superior” service the City is promoting, can only be Google Fiber’s broadband service because the Conduit Network itself is nothing more than a bunch of empty pipes and vaults which, contractually and as a practical matter, cannot be used to deliver broadband service by anyone other than Google Fiber. The City has disseminated these materials through a website it created for that purpose, in City newsletters and publications, press releases and other methods, and even in door hangers individually placed on residences throughout the City.

The City is also spending millions of dollars seeking permission from property owners to extend the City’s ROW onto their premises and connect to the Conduit Network and, therefore, the Google Fiber network once it is installed. For example, the City is paying \$1.5 million to JCG Land Services to perform services including promoting Google Fiber and the Conduit Network by various means.⁸³ This includes extensive door-to-door solicitation of City residents seeking to have individuals sign “installation agreements.”⁸⁴ These agreements authorize the City to extend its ROW onto private property and install premises drops connecting homes and other service locations to the Conduit Network.⁸⁵ In addition, these agreements, by their express

⁸² See Attach. 16 at 9, 10; Attach. 22, City Resolution Approving Google Agreement; Nank Decl. Attach. 3, ¶ 26 (explaining why the networks using the Conduit Network will not be “more reliable”); Purcell Decl. Attach. 1, ¶ 49.

⁸³ See Purcell Decl. Attach. 1, ¶ 52; Attach. 23, City Resolution Approving JCG Professional Services Agreement, 1, 8, 9, 10.

⁸⁴ See Purcell Decl. Attach. 1, ¶ 51; Attach. 16 at 7-8.

⁸⁵ See Purcell Decl. Attach. 1, ¶ 51; Attach. 16 at 7-8.

terms, allow only FTTH connections to be placed in the City's ROW, thus barring Mediacom and CenturyLink, which will be Google Fiber's two primary competitors in West Des Moines, from using the easements and drops that constitute this portion of the ROW to connect to the home or business.⁸⁶

The City has been pushing hard to convince residents to sign these Agreements. For example, they have used materials that may mislead the reader into thinking that by allowing a connection to the Conduit Network to be installed at this time, the owner will obtain "free" Internet service which will be superior to anything currently available. Scare tactics are also used in the form of a threat that unless residents sign up now for a "free" connection, securing a connection to the supposedly superior service when it is launched in the future will require the payment of a fee.

By getting residents to sign these Agreements, the City is in effect extending its ROW for communications services from the periphery of a property all the way to the premises and, because the premises drop has room for only one fiber strand and that Google Fiber will own and have the sole right to use, the City has once again granted a single preferred provider exclusive access to important parts of the City's ROW. Given the cost and timing advantages the City has given Google Fiber and the marketing campaign the City is conducting on its behalf, a competing ISP's task in convincing a resident to prefer its service to Google Fiber's will be daunting. The challenge will be even greater if the potential customer has been talked into signing an easement agreement because the premises owner will have to be persuaded to allow the ISP to dig up the lawn a second time to install its own drop. Moreover, imagine the situation in one of the planned new housing developments if the City, as it will undoubtedly do, convinces the developer to allow installation of a premises drop for Google Fiber as each house is

⁸⁶ See Purcell Decl. Attach. 1, ¶ 51.

constructed. Besides its cost and other advantages to win new customers in the competition, Google Fiber will be able to promise immediate connection to the Internet, while other ISPs, foreclosed from the Conduit Network and use of the premises drop, will not be able to match that offer because they will have to dig in order to make the connection to the customer.

F. The City's favored treatment of Google Fiber severely distorts the marketplace and leaves other ISPs only cost-prohibitive options to compete.

Rather than being a neutral arbiter of competition, the City has already picked both a winning technology and a winning provider using that technology. The City is building a \$50 million Conduit Network using City bonds and other public funds that will only accommodate a network based on fiber-to-the-home technology. And as a matter of contract rights and design constraints, the only user of that network is Google Fiber. ISPs who do not exclusively use FTTH technology and those who do but are not named "Google Fiber" are required to build and maintain duplicative underground facilities at their own expense, without the benefit of City financing or other subsidies. When it comes to the premises drops, any ISP that does not use exclusively FTTH technology is being denied access to the ROW completely. The City is also charging Google Fiber sweetheart license fees that will never allow the City to recover its upfront or ongoing expenditures, let alone earn a fair return from the lease of scarce ROW to a subsidiary of one of the world's richest corporations.

Google Fiber has also been given, without the need to make any reciprocal commitment regarding the services it will provide, a host of special rights, privileges and benefits that will ensure that it can rapidly deploy its network throughout the entire City at a fraction of the cost and time required of other ISPs. Any one of these actions by the City would be sufficient by itself to heavily skew the competitive balance in Google Fiber's favor, and all of them together will mean that other ISPs, whether incumbents or new market entrants, will be disincentivized and effectively prohibited from launching, expanding, or improving competitive services.

The City's actions will harm consumers in other ways, as well. The City secured no guarantees from Google Fiber about the service packages or pricing it will provide in West Des Moines or the scope or timing of the rollout of its service. Based on publicly available information, Mediacom believes Google Fiber will offer only a one gigabit service at around \$70 per month.⁸⁷ Given the size of the City's investment in Google Fiber's service and the benefits to residents that the City claims will result, it is exceedingly strange that the City neglected to obtain any commitment from Google Fiber to offer different tiers of services so that these supposed benefits could be enjoyed by those who cannot afford easily or at all to pay \$70 per month (or any other commitment, for that matter).⁸⁸

These facts about Google Fiber's likely pricing strategy are problematic for several reasons. First, because of the subsidies and special benefits Google Fiber is receiving from the City, its pricing decisions will not reflect the "true costs" it would have incurred had it not been spared by the City of the necessity of spending its own money on the construction and deployment of the conduit needed to enter the market or on maintaining that conduit.⁸⁹

Mediacom and other ISPs that have to build and maintain their own networks cannot sustain a

⁸⁷ See Adi Robertson, *Google Fiber won't offer its cheaper plan to new customers anymore*, THE VERGE (Dec. 5, 2019), <https://www.theverge.com/2019/12/5/20997732/google-fiber-internet-gigabit-plan-only-100-mbps-new-customers-speed-price> (reporting that "Google Fiber is phasing out its lower-priced 100 Mbps Internet access plan, opting to offer only the core gigabit-speed plan to new users"). According to the article, the 100 mbps service had been priced at \$50 per month, which, while cheaper than \$70, is still a significant amount for many households.

⁸⁸ See *West Des Moines*, GOOGLE FIBER, <https://fiber.google.com/cities/westdesmoines/> (last visited Apr. 27, 2021).

⁸⁹ See Attach. 2 at iv, 5-6, 23-24. Google Fiber's consistent failure to roll out promised high-speed, low-cost services in over two dozens of other so-called "Google Cities" in the last five years also demonstrates that, without substantial subsidy like the one unlawfully given by West Des Moines, Google Fiber is unable to offset the true fixed and incremental buildout costs or sustain a reasonable profit margin by charging customers a \$70/month price.

reasonable operating margin by offering 1 gigabit service on a long term basis at the price Google Fiber is setting.⁹⁰

Second, Google Fiber plainly intends to “cream-skin” or “cherry-pick” customers who can afford higher-priced service offerings and ignore customers who need or want lower cost broadband service options. This is particularly offensive given the City’s characterization of the Conduit Network as an urban renewal project intended to bring development and economic opportunities to exactly those low-income or blighted communities where, based on its history in other cities, Google Fiber has shown no interest in providing a range of lower-cost service tiers.⁹¹ Likewise, this cream-skimming will negatively impact the ability of Mediacom and other ISPs to continue to offer their low-cost packages, which Mediacom can afford to provide, in large part, because other customers purchase higher-priced packages. Google Fiber’s price will drive out competitors who are not cream-skimming and/or may leave them no choice but to raise prices for lower cost packages. Thus, the City’s subsidization of its trillion-dollar-revenue partner will likely result in reduced competition and choices for all residents, but particularly for lower income residents whom the City has claimed will benefit from the Conduit Network and Google’s entry into the market.

II. The City’s Arrangements with Google Fiber Constitute a Legal Requirement That Prohibits Mediacom and Other ISPs from Providing Telecommunications Services in the City in Violation of Section 253.

A. Section 253 preempts local legal requirements that prohibit or have the effect of prohibiting any entity from providing a telecommunications service.

In the Telecommunications Act of 1996, Congress enacted sweeping new provisions intended to facilitate deployment of telecommunications infrastructure. The purpose of these

⁹⁰ See Attach. 2 at 5, 14-15, 24; Purcell Decl. Attach. 1, ¶¶ 44-45, 60.

⁹¹ This is also contrary to the City’s public representation that the Conduit Network – which only Google Fiber will be able to access on an exclusive basis – would benefit low-income areas. See, e.g., Attach. 8 at 9; see also *supra* note 52.

amendments was to “open[] all telecommunications markets to competition,” “remove all barriers to entry,” “secure low prices and higher quality services” for consumers and “encourage the rapid deployment of new telecommunications technologies.”⁹²

Section 253(a) provides that “[n]o . . . local statute or regulation, or other . . . local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Section 253 constitutes “a broad preemption of laws that inhibit competition,” and this bedrock requirement “applies to both wireless and wireline telecommunications services,” including broadband facilities.⁹³

The Commission has identified clear principles for determining whether a state or local legal requirement—such as a local ordinance, a government resolution, a required process or other regulatory action—operates as a prohibition or effective prohibition within the meaning of Section 253. “[A] legal requirement can constitute an effective prohibition of services even if is not an insurmountable barrier.”⁹⁴ A legal requirement prohibits or has the effect of prohibiting telecommunications service when it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁹⁵ This includes local requirements that “render[] a service provider unable to provide an existing service in a new geographic area,” “restrict[] the entry of a new provider in providing service in a

⁹² Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 14 (2018), *aff’d in part and overruled in part by Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

⁹³ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 15; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Report and Order, Declaratory Ruling*, 33 FCC Rcd. 7705, para. 142 (2018).

⁹⁴ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 34.

⁹⁵ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, paras. 10, 16, 35 (quoting 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, *Mem. Opinion and Order*, 12 FCC Rcd. 14191, para. 31 (1997) and citing cases applying this principle).

particular area,” “materially inhibit[] the introduction of new services[, or] the improvement of existing services,” [or] service capabilities.” It also includes requirements that “specif[y] the means or facilities through which a service provider must offer service,”⁹⁶ or “render the provision of telecommunications services financially infeasible.”⁹⁷

Likewise, Section 253 preempts local requirements that impede telecommunications providers from offering services in a multitude of ways with varied capabilities and performance characteristics. The Commission has observed that state and local regulators are “ill-qualified” to pick technological winners and losers and cannot merely cite or assert that their determinations are in the “interests of its constituents” to justify doing so.⁹⁸ This is because “[t]he telecommunications interests of constituents [are] not only local. They are statewide, national and international as well.”⁹⁹

In the same vein, Section 253(a) preempts local requirements that impose excessive or imbalanced “financial burden” on some providers or otherwise “result[] in competitive disparity” among providers that offer similar telecommunications services.¹⁰⁰ Such financial burden could “contraven[e] Congress’ intent to promote the deployment of lower cost, higher quality services to consumers by opening telecommunications markets to competition.”¹⁰¹

In connection with this, the Commission has embraced three principles that are particularly relevant here. **First**, state and local regulators cannot provide implicit or explicit

⁹⁶ See Public Utility Commission of Texas, *Mem. Opinion and Order*, 13 FCC Rcd. 3460, para. 13 (1997).

⁹⁷ Missouri Network Alliance, LLC d/b/a Bluebird Network and Unitit Leasing MW LLC Petition for Preemption and Declaratory Ruling, *Declaratory Ruling*, 35 FCC Rcd. 12811, para. 6 (2020).

⁹⁸ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 40, n.95, para. 42.

⁹⁹ *Id.*

¹⁰⁰ *Id.*, para. 39.

¹⁰¹ See *Declaratory Ruling*, 35 FCC Rcd. 12811, para. 2.

subsidies that “introduce competitive disparities” or create competitive imbalances in the marketplace.¹⁰² The Commission has explained that exclusive subsidies to a favored provider or class of providers “effectively lower[s] the price” of that provider’s service “by an amount equivalent to the amount of the support provided to [the provider] that was not available to their competitors.”¹⁰³ The non-favored providers are thus left with two choices: “match the [supported competitor’s] price charged to the customer, even if it means serving the customer at a loss, or offer the service to the customer at a less attractive price based on the cost of providing such service.”¹⁰⁴ Such non-neutral subsidies “give customers a strong incentive to choose service from [the subsidized provider] rather than competitors.”¹⁰⁵ Further, “it is unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor already provides at a substantially supported price.”¹⁰⁶ Such a carrier “may be unable to secure financing or finalize business plans due to uncertainty surrounding its [government-imposed] competitive disadvantage.”¹⁰⁷ Such exclusive subsidies thus run afoul of Section 253.

Second, where state or local government charges fees for access to ROWs, those fee frameworks must be “competitively neutral and nondiscriminatory.”¹⁰⁸ The Commission has identified three key benchmarks for whether access fees meet this standard and are otherwise fair and reasonable. First, access fees are ordinarily permissible if they are “a reasonable

¹⁰² *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 58.

¹⁰³ Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934, *Mem. Opinion & Order*, 15 FCC Rcd. 16227, para. 8 (2000).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 52.

approximation of the state or local government’s costs in providing the access.”¹⁰⁹ Second, “only objectively reasonable costs are factored into those fees.”¹¹⁰ Third, ROW access fees must be imposed on a “competitively neutral basis,” and “fees charged to one provider cannot be materially higher than those fees charged to a competitor for similar uses.”¹¹¹

Third, contracts granting a carrier exclusive ROW access rights are inherently suspect.¹¹² This is particularly true in situations where the ROW access rights allow the exclusive carrier to provide telecommunications services more cheaply and conveniently than competitors that must use alternative ROW.¹¹³

Under Section 253’s framework, if a local requirement violates section 253(a), it must be preempted unless the local regulator establishes “that the regulation falls under the safe-harbor of § 253(c)” by demonstrating that “its actions were both ‘fair and reasonable’ and imposed on ‘a competitively neutral and nondiscriminatory basis.’”¹¹⁴ Here, the City’s subsidies and grants of exclusive ROW access rights to Google Fiber plainly violate Section 253(a), and the City cannot demonstrate that the safe harbor provision applies to its actions.

¹⁰⁹ *Id.*, paras. 11, 32, 50.

¹¹⁰ *Id.*, para. 50

¹¹¹ *Id.*, paras. 50, 55.

¹¹² *See* 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, *Mem. Opinion & Order*, 14 FCC Rcd. 21697, para. 35 (1999).

¹¹³ *Id.*, para. 26.

¹¹⁴ *Zayo Grp., LLC v. Baltimore*, No. JFM-16-592, 2016 WL 3448261, at *5 (D. Md. June 14, 2016) (surveying decisions from the Eighth Circuit and Tenth Circuit).

B. The City’s subsidization of a \$50-million Conduit Network for Google Fiber’s exclusive use and its discriminatory management of public ROW prohibit Mediacom and other ISPs from providing telecommunications services in new areas of the City and materially impede them from making upgrades in their existing service areas.

i. The Google Agreement and the City’s implementation of it constitutes a “local legal requirement” that must comply with Section 253.

There is no question that the City Council’s ratification of a contract and design plans providing Google Fiber a custom-designed Conduit Network for its exclusive use along with other unique financial and other exclusive rights to the City’s ROW constitute a “legal requirement” for purposes of Section 253(a). Likewise, the City’s ratification and implementation of ordinances and permitting rules imposing less favorable ROW access rights and requirements on Mediacom and other ISPs constitute legal requirements as well.

The Commission reached that exact conclusion under analogous facts in a 1999 ruling addressing a contract executed by the State of Minnesota. In that case, the State of Minnesota had provided a single operator with exclusive rights to access certain public freeway ROW. The freeway ROW were “inherently less costly to use,” provided superior access to “major population centers,” required fewer permits, and involved “fewer obstacles” such as “utilities” and “streets” than alternative ROW available to others.¹¹⁵ In its analysis, the FCC concluded that the State of Minnesota’s contract represented a “legal requirement” for purposes of Section 253(a) because it bound the State of Minnesota to provide ROW access to one developer and effectively denied access to telecommunications providers on competitively neutral terms.¹¹⁶

In reaching this conclusion, the Commission observed that Section 253(a) was meant to capture “a broad range of state and local activities” that impeded facilities-based competition. Congress intended the “legal requirement” language to be “interpreted broadly” to include any

¹¹⁵ *Mem. Opinion & Order*, 14 FCC Rcd. 21697, paras. 22, 26.

¹¹⁶ *See Id.*, paras. 17-19.

“legal requirements permitted or imposed by a state or local government” that contravene Section 253(a).¹¹⁷ If it were otherwise, state and local restrictions on competition “easily” could “escape preemption based solely on the way in which an action is structured.”¹¹⁸ To avoid this irrational outcome, the Commission “look[s] to the effect of the state or local government’s action to determine whether Section 253 is applicable.”¹¹⁹ Because the State of Minnesota was “providing a private party with exclusive physical access” to ROW on non-neutral terms that impeded competition, the State of Minnesota’s contract with the private party constituted a legal requirement subject to preemption.¹²⁰

Here, there is a far stronger case that the City’s contract with Google Fiber and its competitively non-neutral management of its ROW constitute a Section 253(a) legal requirement subject to preemption. The City approved a contract granting Google Fiber exclusive access, design, installation, financial and permitting rights and restricted the use of public ROW to an exclusive technology choice.¹²¹ The City implemented that contract by approving engineering designs which ensure Google Fiber will have exclusive use of the Conduit Network in perpetuity.¹²² The City has also approved contracts with third parties to build the Conduit Network according to Google Fiber’s design plans.¹²³ The City has approved the use of taxpayer funds to finance the Conduit Network, promote Google Fiber’s services and sign residents up to

¹¹⁷ *Id.*, para. 18.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*, para. 19.

¹²¹ By restricting the Conduit Network to a single technology, *i.e.*, fiber-only, the City has excluded all alternative technologies, including twisted copper, coax, small cell, satellite, wireless, and other emerging technologies that are not yet available today, from using public ROW for years to come.

¹²² *See supra* at Sec. I.E.

¹²³ *See supra* at 22.

get access to the Conduit Network.¹²⁴ The City also passed and is enforcing an ordinance generally prohibiting existing ISPs from overlashing for any new buildout or for most installation, maintenance and upgrades of existing aerial infrastructure.¹²⁵ These are plainly legal requirements subject to Section 253(a) under binding FCC precedent.

ii. The City violated Section 253(a) by subsidizing a closed Conduit Network custom-designed for Google Fiber’s exclusive use.

The City’s decision to publicly finance and build a \$50-million Conduit Network custom-designed for Google Fiber’s exclusive use blatantly violates the pro-competitive tenets that 253(a) safeguards. This is so for four reasons.

First, the City is effectively granting a large, exclusive subsidy to Google Fiber, which creates grave risk of distorting the marketplace. Based on conservative cost estimates (which have been prepared with the assistance of and reviewed by independent experts), Mediacom believes a competing fiber ISP would incur at least \$34 million in fixed costs to construct a conduit network similar to that being built by the City for Google Fiber.¹²⁶ The competing ISP would also incur approximately \$20.50 per household per month in incremental costs to provide

¹²⁴ See *supra* at Secs. I.D, I.E.iii.

¹²⁵ The Commission has noted that aesthetic and undergrounding requirements may violate Section 253 in some circumstances. See *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, paras. 81-90. This is particularly true where such requirements are unduly burdensome and are not applied to similar types of infrastructure deployments. Here, the City has represented that its requirement that aerial networks be moved underground is for aesthetic purposes. This rationale is unreasonable, arbitrary and capricious. As explained in Mr. Purcell’s declaration, the City has sometimes required Mediacom to move aerial portions of its network underground without requiring that the aerial utilities on which the plant was located also be moved underground. This undercuts the City’s argument that it disfavors aerial plant for aesthetic reasons. See Purcell Decl. Attach. 1, ¶ 12.

¹²⁶ See Attach. 2 at 30-33; Nank Decl. Attach. 3, ¶ 32. Notably, the ISP’s true costs to build and maintain an equivalent city-wide conduit likely are much higher due to debt service obligations, maintenance expenses and other costs that would be incurred during the twenty-year term similar to that of the Google Agreement.

service, including costs for installing drops as well as customer acquisition costs.¹²⁷ Google Fiber, in contrast, will only incur minimal fixed costs for its use of the Conduit Network. It also will have a fraction of the incremental costs due to its minimal license fees as well as the fact that the City is bearing all of the costs of installing all premise drops and maintaining the Conduit Network as well as the significant costs for marketing for the benefit of Google Fiber.¹²⁸

This situation has enormous potential to “distort the marketplace and create a barrier to entry in violation of Section 253(a).”¹²⁹ As the Brattle Group analysis observes, because Google Fiber “is not paying either its fixed or the true marginal cost of access to customers,” Google Fiber “has every incentive to price below its true costs” and “engage in under-cutting the price of other ISPs indefinitely.”¹³⁰

In contrast, unsubsidized competitors would have to either “serv[e] the customer at a loss” or risk losing market share by “offer[ing] the service at a less attractive price based on the unsubsidized cost of providing such service.”¹³¹ Any prolonged pricing scheme by Google Fiber that is below the “true costs” of network buildout would “effectively foreclos[e] any incentive for an ISP to compete for the market,” and “[o]nce the competitors are shut out of the market, there is no reason Google Fiber would not increase prices to monopoly level.”¹³²

Tellingly, the Brattle Group’s economic modeling and other evidence demonstrates that Google Fiber would not choose to enter the West Des Moines broadband market but for the City’s subsidy. This is principally because there is insufficient demand for Google Fiber’s

¹²⁷ See Attach. 2 at 33-34.

¹²⁸ See *id.*

¹²⁹ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 58.

¹³⁰ Attach. 2 at 23-24.

¹³¹ *Mem. Opinion & Order*, 15 FCC Rcd. 16227, para. 8.

¹³² Attach. 2 at 24.

services to cover its estimated infrastructure build costs. This is consistent with Google Fiber’s admission in a July 7, 2020 press release announcing its intent to enter the West Des Moines market. In that press release, David Finn, Google Fiber’s Director of Corporate Development acknowledged that “West Des Moines marks our first new market in over four years” and that the City attracted Google Fiber by committing to “build[] and maintain[]” infrastructure for Google Fiber.¹³³ Thus, it is extremely unlikely that Google Fiber would have entered the West Des Moines market had it been required to compete on fair and balanced terms with other ISPs.¹³⁴ Indeed, in Google Fiber’s own words, its partnership with the City represents Google Fiber’s “new model” and Google Fiber plans to explore similar “partnerships with other forward-thinking cities.”¹³⁵

Second, the City’s contract with Google Fiber violates the requirement that ROW access charges be competitively neutral and commensurate with the government’s costs in providing the access. Here, the City will spend at least \$50 million constructing a Conduit Network that is custom-designed and largely dedicated to Google Fiber.¹³⁶ The City has committed millions more to soliciting permission from tens of thousands of individual property owners to extend the City’s ROW onto their premises by installing drops connecting those premises to Google Fiber’s

¹³³ David Finn, *Thank you West Des Moines*, GOOGLE FIBER (July 7, 2020), <https://fiber.google.com/blog/2020/thank-you-west-des-moines/>.

¹³⁴ See Attach. 2 at iv, 7, 38-39.

¹³⁵ Jon Brodtkin, *City builds open-access broadband network with Google Fiber as its first ISP*, ARSTECHNICA (July 7, 2020), <https://arstechnica.com/tech-policy/2020/07/google-fiber-expands-again-thanks-to-one-citys-open-access-network/>; see also David Anders, *Whatever happened to Google Fiber?*, CNET (Mar. 5, 2021), <https://www.cnet.com/home/internet/google-fiber-explained/> (noting Google Fiber has publicly “acknowledged choosing West Des Moines because much of the needed fiber is already in place”); *CLIC Zoom-Chat: West Des Moines, Iowa Broadband Project*, *supra* note 52 (statements by Google Fiber’s Director of Corporate that Google Fiber’s new model presents “exciting” opportunities “for all of America”).

¹³⁶ See *supra* at Secs. I.D.-E.

conduit, as well as marketing Google Fiber’s services, and maintaining the Conduit Network.¹³⁷

In exchange, Google Fiber agreed to pay license fees that are tens of millions of dollars below the City’s actual costs. Further, Google Fiber’s pay-as-you-go arrangement allows Google Fiber to space those license fees out over a twenty-year period and avoid virtually any upfront infrastructure costs.¹³⁸

Other ISPs, in contrast, must bear the full costs of constructing and maintaining their network infrastructure in the City’s ROW. They must also incur costs and invest time to comply with the City’s permitting requirements that Google Fiber is not required to bear.¹³⁹ Thus, while the City “is going into the red to support or subsidize the deployment of [Google Fiber’s] infrastructure,”¹⁴⁰ it is requiring other providers to pay the full cost of accessing the ROW. This

¹³⁷ See *supra* at Sec. I.E.iii. As noted above, the City has acknowledged that obtaining private easements is a very expensive, time-consuming process. See *supra* at 9. This is reinforced by the City’s decision to outsource the work needed to obtain the easements needed to connect residences and business to Google Fiber’s conduit—at a cost of millions of dollars.

¹³⁸ See *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, paras. 11, 32, 50, 73.

¹³⁹ Local municipalities’ imposition of non-neutral permit costs has also been noted by the FCC as violating Section 253(a). See, e.g., *TCI Cablevision, Mem. Opinion & Order*, 12 FCC Rcd. 21396, paras. 8-22, 78, 102-05 (1997).

¹⁴⁰ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 73. Here, “the Google Agreement requires Google Fiber to pay the City monthly in an amount ranging from \$0.50 (if less than 31,001 households sign up) to \$2.25 (if more than 37,610 households sign up) for every residence (each building, regardless of how many units it has, counts as one residence for the purpose of calculating Google Fiber’s licensing fees) or business that agrees to connect to the Conduit Network. Significantly, however, the Google Agreement does not require Google Fiber to separately pay for any part of the City’s costs to build the Conduit Network. Those costs are to be paid for by the City’s taxpayers, backed by \$48.2-million urban renewal bonds. In fact, even if 100% of the City’s existing and future residents (the projected total is around 42,000) have signed up to receive service through the Conduit Network, it would take the City over thirty-seven years to recover all the construction costs that it has paid by urban renewal bonds from Google Fiber, based on the highest tier \$2.25 per servable address license fee formula and assuming that Google Fiber’s payment is not offset by other credits that it receives under the Google Agreement.” Purcell Decl. Attach. 1, ¶ 43. In addition to the City entering into the unusual “pay as you go” arrangement with Google Fiber, the City’s agreement to only charge Google Fiber by servable address strongly suggests that the City knew that each address that has signed up to connect to the Conduit Network can only be served by one ISP. This further

disparate treatment violates the requirement that the City's rates for accessing the ROW be fair, reasonable, and competitively neutral.¹⁴¹

Third, the City violated Section 253(a) by granting Google Fiber permanent, exclusive ROW access that provides the tech giant with significant cost and logistical advantages *vis-à-vis* competitors. As a general matter, the Commission has explained that an agreement granting “exclusive physical access to ROW is fundamentally inconsistent with the 1996 Act, which endeavors to replace exclusive monopoly rights with open competition.”¹⁴² But this principle applies with particular force to contracts granting exclusive ROW access rights that grant a single provider less costly, more convenient ROW access than excluded competitors.

That is the exact scenario the FCC addressed in its 1999 State of Minnesota decision. There, the FCC held that a contract allowing a developer exclusive access to the state's highway ROW violated Section 253(a) because it gave that entity material “advantages” over other competitors. The State of Minnesota argued that its exclusive contract did not violate Section 253(a) because alternative ROW were available where competitors had installed or could install their networks. In rejecting this argument, the Commission noted that the freeway ROW access rights Minnesota exclusively granted to one developer/provider had inherent advantages over alternative ROW because: (1) installing fiber in the highway ROW was cheaper (by approximately 11%-30%) and involved fewer obstacles like crossing streets; (2) the freeways at issue connected to major population centers more directly than did alternative ROW; and (3) installing fiber in the freeway ROWs was logistically easier and required fewer permissions and permitting issues.¹⁴³ The Commission concluded that providing the contracting developer the

demonstrates the City knowingly and intentionally conferred Google Fiber exclusive rights and substantial financial incentive to use the Conduit Network.

¹⁴¹ See *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 55.

¹⁴² *Mem. Opinion & Order*, 14 FCC Rcd. 21697, paras. 3, 35.

¹⁴³ See *id.*, paras. 26-33.

“advantages” of having exclusive access to less costly, more convenient ROW than the excluded competitors would violate Section 253(a).¹⁴⁴

The City has given Google Fiber far more advantageous ROW access rights than the entity in the Minnesota case received. There, Minnesota merely gave exclusive temporal rights to a ROW where the developer could choose to *build and maintain its own infrastructure* more cheaply and efficiently than could unrelated carriers that had to use alternative ROW. Here, the City is publicly *financing, building, and maintaining the infrastructure* Google Fiber needs to rapidly install and deploy a city-wide broadband network.¹⁴⁵

In effect, the Conduit Network is a super-highway that runs through all congested areas of the City’s ROW and to all current and planned residential and business areas in the City.¹⁴⁶ The City has also removed virtually all of Google Fiber’s logistical issues by pre-approving Google Fiber’s permit requests.¹⁴⁷ Google Fiber does not have to navigate streets, traffic lights, utility easements, or shared space in the ROW.¹⁴⁸ The City, not Google Fiber, is liable for third-party claims for injury or damage to property arising from the construction and maintenance of the Conduit Network.¹⁴⁹ And due to Google Fiber’s exclusivity rights and the Conduit Network’s design, Google Fiber will have exclusive use of this custom-designed network in perpetuity. This is a far more egregious violation of section 253(a) than the more limited exclusive arrangement the FCC reviewed in the State of Minnesota case.¹⁵⁰

¹⁴⁴ *See id.*

¹⁴⁵ *See supra* at 11-13, 15, 36.

¹⁴⁶ *See supra* at 13.

¹⁴⁷ *See supra* at 15.

¹⁴⁸ *See supra* at Sec. I.E.

¹⁴⁹ *See* Attach. 19, Sec. 12.1; *infra* at 49.

¹⁵⁰ *See generally* *Mem. Opinion & Order*, 14 FCC Rcd. 21697; *see also* Connect America Fund, *Mem. Opinion & Order*, 32 FCC Rcd. 5878, paras. 1, 2, 14-15 (2017); *Zayo Grp.*, 2016 WL

Fourth, the City's subsidization of Google Fiber's entry is particularly harmful to competition given the burdensome underground build-out requirements the City has separately imposed on all other ISPs. The Brattle Group analysis estimates that competing ISPs' fixed costs alone for building parallel conduit infrastructure will be approximately four times higher than if their access to the Conduit Network was equivalent to what Google Fiber has received.¹⁵¹

These economic disparities will distort and suppress competition in the West Des Moines market. Incumbent ISPs will be materially inhibited from making upgrades to their networks in existing parts of the City and will be effectively prohibited from expanding their networks to new areas.¹⁵² New entrants will be effectively precluded from entering the market at all.¹⁵³ The Brattle Group also concluded that the City's arrangement with Google Fiber creates grave risk of a scenario where Google Fiber ultimately monopolizes the West Des Moines broadband market, an outcome that should deeply concern the Commission and the City.¹⁵⁴

In 1997, the FCC preempted a similarly anti-competitive buildout requirement imposed by the State of Texas. There, the State of Texas had required certain competitors to provide telecommunications services using their own facilities or those of new entrants (but not incumbents). The FCC estimated that the buildout requirements would render the affected carriers' costs of providing services several times higher than the incumbent telecommunications provider's costs for providing similar services.¹⁵⁵ The FCC concluded that these disparate cost burdens effectively prohibited certain carriers from providing any telecommunications services

3448261, at *5; *Coastal Commc'ns Serv., Inc. v. New York*, 658 F. Supp. 2d 425, 446 (E.D.N.Y. 2009).

¹⁵¹ See Attach. 2 at 30-33.

¹⁵² See *id.*, Secs. III & IV.

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 3, 24, 34.

¹⁵⁵ *Mem. Opinion & Order*, 13 FCC Rcd. 3460, paras. 78-80.

contrary to Section 253(a) because “the substantial financial investment” required to meet the build-out requirement effectively precluded any entry at all.¹⁵⁶ So too here.¹⁵⁷

iii. The City’s arrangement with Google Fiber violates Section 253(a) regardless of whether other all-fiber ISPs can use the Conduit Network.

Assuming for the sake of argument that the City could demonstrate any real possibility that a 100% fiber ISP other than Google Fiber could ever use any part of the Conduit Network to compete, the City’s arrangement still violates Section 253(a) for numerous reasons.

First, the City’s requirements are not technology-neutral and will discriminate against ISPs that do not use all-fiber networks. The City has been clear that it will only allow all-fiber ISPs into the Conduit Network.¹⁵⁸ Mediacom has demonstrated that it could not fit its coaxial cable into the Conduit Network and the City is well aware of that fact.¹⁵⁹ Mediacom could only use the Conduit Network if Mediacom significantly redesigned all of its network architecture, likely at enormous cost, and even in that circumstance it would still have to build its own feeder lines and drops as Google Fiber exclusively will occupy those Conduit Network segments.¹⁶⁰

The only realistic alternative for Mediacom would be to build a parallel conduit. But this is not a reasonable or competitively neutral requirement for the reasons explained above.¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ See Attach. 2 at iv, 14, 27-37 (noting incumbent ISPs and new entrants are foreclosed from competing, particularly if Google Fiber gets a closed conduit).

¹⁵⁸ See Purcell Decl. Attach. 1, ¶¶ 30, 37, 51, 61; Nank Decl. Attach. 3, ¶¶ 10-13.

¹⁵⁹ See Nank Decl. Attach. 3, ¶¶ 8, 14, 19; Ludington Decl. Attach. 17, ¶ 9. Mediacom typically installs fiber and coaxial cable so that it can efficiently use the same network to connect business customers with fiber cable and residential customers with coaxial cable. See Purcell Decl. Attach. 1, ¶ 8.

¹⁶⁰ See Nank Decl. Attach. 3, ¶ 11; Ludington Decl. Attach. 17, ¶ 5.

¹⁶¹ See *Mem. Opinion & Order*, 13 FCC Rcd. 3460, para. 73 (ruling that Section 253(a)’s “decree[] that no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications” also “bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service.”); *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 37, n.87; cf. Federal-State Joint Board on Universal Service, *Recommended Decision*, 12 FCC Rcd. 87,

The City has also itself claimed that the Conduit Network will provide ISPs that use it with material advantages over competitors. In particular, the City has advertised and represented that broadband networks located in the Conduit Network will be “more reliable” than existing networks in the City.¹⁶² To be clear, Mediacom does not agree with these representations because, to Mediacom’s knowledge, broadband networks installed in the Conduit Network will rely heavily on aerial utilities for power.¹⁶³ Further, due to over-congestion in the City’s ROW, Mediacom anticipates that the Conduit Network will be more susceptible to cuts and long-term outages than aerial infrastructure. However, assuming for the sake of argument that the City is accurately representing that the Conduit Network will be more reliable than existing broadband infrastructure, then the City is plainly denying that competitive advantage to Mediacom and CenturyLink by expressly excluding them from using the Conduit Network.

In addition, as noted above, Google Fiber will be optimally-positioned to “cream-skim” in the West Des Moines market. As the Brattle Group explains, cream-skimming is a phenomenon where a firm is able to target high value customers, and rivals are left with lower valued ones and suffer negative profit consequences.¹⁶⁴ Here, Google Fiber only offers one tier of service at a starting price that may be too high to be affordable for many residents of West Des Moines, many of whom may currently be using lower cost broadband service options.¹⁶⁵ The Brattle Group analysis predicts that the likely outcome of Google Fiber’s pricing approach is

para. 45 (1996) (discussing the Telecommunications Act of 1996’s goal of encouraging competition as technology neutral).

¹⁶² See, e.g., Attach. 16 at 4, 9-10.

¹⁶³ See Nank Decl. Attach. 3, ¶ 26.

¹⁶⁴ See Attach. 2 at 21.

¹⁶⁵ See *West Des Moines*, *supra* note 88; cf. Emergency Broadband Benefit Program, *Report and Order*, WC Docket No. 20-445, FCC 21-29, paras. 4, 71, 76-78 (Feb. 26, 2021) (requiring eligible providers to make available to eligible low-income households a monthly discount of \$50 off the standard rate for an Internet service offering and associated equipment, recognizing that prices like \$70/month are not affordable to those households).

that it will primarily attract greenfield customers as well as customers who already subscribe to higher-end service packages from Mediacom or another ISP.¹⁶⁶

These dynamics will devastate competition in the West Des Moines market and ultimately harm the lower-income neighborhoods and residents whose welfare is one of the concerns cited by the City as a reason for building the Conduit Network. Cream-skimming by Google Fiber will significantly diminish Mediacom's operating margins in the West Des Moines market and potentially affect its ability to provide a broad range of low-cost broadband options at attractive price points.¹⁶⁷

Google Fiber's ability to cream skim will also significantly impede Mediacom's ability to maintain or upgrade its existing infrastructure in the City because it will be harder for Mediacom to recoup its fixed costs of moving its aerial infrastructure underground.¹⁶⁸ Mediacom will effectively be forced to choose between maintaining and upgrading its network to provide services at a loss and indefinitely delaying maintenance and upgrades until the City changes its current restrictions against overloading.¹⁶⁹

This cream skimming potential has significant real world implications for residents in West Des Moines. Mediacom recently piloted a state-of-the-art 10G platform in Iowa that is capable of delivering multi-gigabit download and upload speeds. Mediacom is readying its network upgrades where possible and has embedded a version of this technology (DOCSIS 3.1) in all of its existing networks in West Des Moines and other Iowa cities already.¹⁷⁰ Mediacom

¹⁶⁶ See Attach. 2 at 21-23.

¹⁶⁷ See Purcell Decl. Attach. 1, ¶¶ 53, 60; Ludington Decl. Attach. 17, ¶ 6.

¹⁶⁸ See Purcell Decl. Attach. 1, ¶¶ 20-22; Nank Decl. Attach. 3, ¶¶ 28-29.

¹⁶⁹ See Purcell Decl. Attach. 1, ¶¶ 20.

¹⁷⁰ See *id.*, ¶ 6, n.3.

hopes to make that service available in Iowa, including to residents and businesses in the City.¹⁷¹ But instead of allowing Mediacom to quickly deploy necessary technology upgrades for the 10G platform throughout the City by adding node amplifiers and other electronics where needed, the City's existing ordinances would force Mediacom to move all its aerial infrastructure underground and construct a parallel network in the City, which would likely cause a delay of that rollout by months, if not years.¹⁷² Moreover, if Google Fiber skims the cream represented by the high-end broadband users, then there may not be a sufficient number of potential customers for Mediacom's ultra-fast service to justify the investment needed to launch that service. Google Fiber, by contrast, will be able to use the Conduit Network to quickly and seamlessly offer ultra-fast service to the high-end customers it has skimmed away. In short, the City's decision to arbitrarily exclude Mediacom's technology from the Conduit Network while providing access to a preferred competitor selling its services to top-tier customers at an artificially low price will effectively prohibit Mediacom from introducing this kind of technological upgrade to the West Des Moines market.¹⁷³

Similarly, it is widely believed that CenturyLink needs to extensively upgrade its network in order to more widely offer more robust services than its existing infrastructure currently allows. In this case, what is being talked about is not increases to 10 gigabit service but to the levels of high-speed broadband currently already offered by Mediacom and other ISPs. Obviously, those kinds of upgrades would enhance CenturyLink's ability to compete and would benefit consumers, but they would be costly. Undoubtedly, the same market dynamics that would operate to prevent Mediacom from launching 10 gigabit service will also inhibit CenturyLink from undertaking these kinds of upgrades in West Des Moines.

¹⁷¹ See *id.*, ¶ 6.

¹⁷² See *id.*, ¶ 62.

¹⁷³ See *id.*, ¶ 62.

Further, regardless of whether the City enforces its overlapping restrictions, Mediacom would still be effectively prohibited from expanding its network into new and existing areas of the City where there are no aerial utilities because it would have to build its own conduit in those areas, at its own expense.¹⁷⁴ Given these dynamics, the Brattle Group concluded that the City's decisions to exclude ISPs using alternative technologies from the Conduit Network and to grant Google Fiber subsidized access to that facility will effectively prohibit those ISPs from competing in the market.¹⁷⁵

Second, Google Fiber has been granted critical timing advantages not available to other ISPs. For example, Google Fiber receives exclusive access to each segment of the Conduit Network for a minimum of eighteen months after the segment is completed.¹⁷⁶ As explained above, contracts awarding exclusive ROW access rights inherently violate Section 253. This is particularly true for a ROW construction project like the Conduit Network which offers Google Fiber substantially less expensive, more convenient access to all population and business centers and lets Google Fiber avoid entirely logistical issues like permitting and private easements.¹⁷⁷

In addition, the Brattle Group concluded that the Exclusivity Periods the City has conferred give Google Fiber a significant first-mover advantage. Under a best case scenario, all-fiber ISPs wishing to offer their services through the Conduit Network will have to wait until Google Fiber's Exclusivity Periods end, which will not occur for the full citywide network until several years have elapsed because the Conduit Network is being built in segments.¹⁷⁸ During that time, Google Fiber will likely be able to capture a significant portion of new and switched

¹⁷⁴ See *id.*, ¶¶ 37, 59; Nank Decl. Attach. 3, ¶¶ 31-32.

¹⁷⁵ See Attach. 2 at iv-v, 6, Secs. III & IV.

¹⁷⁶ See Attach. 19, Secs. 1.55, 4.4; Purcell Decl. Attach. 1, ¶ 30; Nank Decl. Attach. 3, ¶ 7.

¹⁷⁷ See generally *Mem. Opinion & Order*, 14 FCC Rcd. 21697.

¹⁷⁸ See Attach. 19, Secs. 1.55, 4.4; Purcell Decl. Attach. 1, ¶ 32; Nank Decl. Attach. 3, ¶ 7.

customers. This is particularly true in greenfield (new development) areas of the City, where Google Fiber will have a strong first-mover advantage over new entrants as well as incumbents who have no financial incentive to expand their networks into new development areas until they are materially completed and there are actual customers that could be served.¹⁷⁹ Because the City is preemptively constructing the Conduit Network in new development areas and granting Google Fiber, at a minimum,¹⁸⁰ years of exclusivity, Google Fiber will invariably be the first provider able to offer services in all new development areas. But it is also true in brownfield areas (existing builds) where Google Fiber can leverage the advantages flowing from its privileged position as the first (or only) provider present in the Conduit Network to capture the bulk of new and switched customers.¹⁸¹

The Brattle Group predicts that this first-mover advantage will be especially pronounced given the nature of broadband as an experience good (*i.e.*, consumers only learn the value after they try it) and Google Fiber's ability to leverage economies of scale from having exclusive access to a city-wide Conduit Network on a heavily subsidized basis.¹⁸² Further, the Brattle Group predicts that Google Fiber's first-mover advantage will be exacerbated if Google Fiber chooses to leverage its subsidized entry (and enormous cost savings) to offer its services at rates that are below the "true costs" of the network buildout for prolonged periods of time.¹⁸³

Third, even if all-fiber ISPs could eventually access and use some parts of the Conduit Network, its design will afford Google Fiber significant advantages over these competitors as

¹⁷⁹ See Purcell Decl. Attach. 1, ¶¶ 58-60 (projecting, based on Mediacom's historical customer acquisition data in the Des Moines metro area, that if Mediacom enters a greenfield area of the City as a second provider, its market share would be approximately 69% lower).

¹⁸⁰ As a practical matter, the period of exclusivity will be perpetual because the design of the Conduit Network means it cannot accommodate two competing networks. See *supra* Sec. I.E.

¹⁸¹ See Attach. 2 at 17-23.

¹⁸² See *id.* at 19-20.

¹⁸³ See *id.* at 23-24.

well. Specifically, the design gives Google Fiber physical “asset specificity” advantages over all-fiber ISPs.¹⁸⁴ As explained above, Google Fiber has received permanent, exclusive use of dedicated ducts in the Conduit Network’s arterial and distribution lines, which are optimally designed to house Google Fiber’s network and allow Google Fiber to control, protect and upgrade its network. Other fiber ISPs, in contrast, will not have enough space in the arterial line to install sufficient fiber to provide competitive services. If they did place fiber in the Conduit Network and attempt to share space in vaults or the single distribution line, that would expose their networks to frequent, potentially extensive damage.

Competing all-fiber ISPs face even greater disadvantages from the design of the feeder and drop lines. Google Fiber will be the first to occupy all of the feeder lines and the tech giant has contractual rights that will allow it to bar other ISPs from accessing those lines. The same is true of the premises drops, which Google Fiber will have the first chance to occupy and which are themselves too small to fit multiple ISPs’ fiber.

Further, the City’s discriminatory decision effectively to give Google Fiber a monopoly over the drop lines will impose significant additional burdens on all-fiber ISPs as well as alternative technology ISPs seeking to build parallel infrastructure. Unlike the arterial, distribution and feeder lines, which are located in the City’s ROW, the drop lines must be installed on private property with the permission of the owner. As the City has acknowledged, obtaining such private easements is time-consuming and costly.¹⁸⁵ Further, residents who granted the City a ROW to install a drop line on their property may be averse to letting another provider dig up their yard a second time so that Google Fiber’s service can be replaced. The

¹⁸⁴ *See id.* at 15-17.

¹⁸⁵ *See supra* at 9.

City's deliberate decision to install a single, small duct in its extended ROW is a telltale sign that the City is trying to drive customers to Google Fiber.

Fourth, the Google Agreement's terms ensure that other all-fiber ISPs will receive inferior financial terms compared to Google Fiber. As noted above, the Google Agreement specifies a pay-as-you-go arrangement that allows Google Fiber to pay its access costs over a twenty-year period.¹⁸⁶ The Google Agreement expressly contemplates, however, that other all-fiber ISPs will fully pay any and all access charges up-front, on a linear foot basis.¹⁸⁷ Further, the Google Agreement precludes the City from offering lower access rates to other users, despite the fact that Google Fiber is allocated dedicated ducts and significantly more space in the Conduit Network than any other ISP can receive.¹⁸⁸ In addition, if another ISP licenses space in the Conduit Network, then Google Fiber is entitled to receive up to 50% of the license payments made by that ISP.¹⁸⁹ Thus, to the extent other all-fiber ISPs are given the opportunity to access parts of the Conduit Network, the Google Agreement effectively requires those ISPs to pay Google Fiber for the privilege of using the Conduit Network, even though it will be the City's property and paid for entirely with City money.

Fifth, the City has granted Google Fiber numerous other ROW access rights that are plainly not available to ISPs using alternative technologies and that are not guaranteed to other all-fiber ISPs that hypothetically could later access or make use of any part of the Conduit Network. For example, Google Fiber receives special permitting rights, including presumptive

¹⁸⁶ See *supra* notes 60, 140.

¹⁸⁷ See Attach. 19, Secs. 5.1.3.1, 5.1.3.3; Purcell Decl. Attach. 1, ¶ 46.

¹⁸⁸ See Attach. 19, Sec. 5.1.3.

¹⁸⁹ See *id.*, Sec. 5.5.

pre-approval for all permitting requests at no delay or cost.¹⁹⁰ All-fiber ISPs that use the Conduit Network have no guarantees that they will receive the same.

Google Fiber is also entitled at least thirty days' notice whenever another ISP receives permission to use a portion of the Conduit Network.¹⁹¹ This advance notice will enable Google Fiber to surgically focus marketing efforts and product promotions on areas of the Conduit Network that another ISP might seek to occupy.

Google Fiber also has contractual indemnification rights which protect it from liability related to the City's development or maintenance of the Conduit Network.¹⁹² Thus, for example, if the City's contractors hit a water main and put critical hospital and infrastructure under a boil order, the City is liable for resulting damages claims, not Google Fiber.¹⁹³ This significantly reduces Google Fiber's liability exposure for the construction and maintenance of the infrastructure it will use to house its network. Other ISPs like Mediacom bear their own liability for damages caused while constructing their infrastructure. These competitive advantages conferred upon Google Fiber far exceed those the Commission has previously found to have violated Section 253 and preempted by Section 253(a) in similar contexts.¹⁹⁴

Finally, as explained above, in addition to providing Google Fiber exclusive ROW access rights, the City is also running a massive marketing campaign for Google Fiber's benefit. The

¹⁹⁰ See *id.*, Secs. 1.8, 4.8, 4.10.

¹⁹¹ See *id.*, Sec. 4.5.2.

¹⁹² See *id.*, Sec. 12.1.

¹⁹³ See *Boil advisory issued in West Des Moines after boring crew strikes water main*, KCCI DES MOINES (Mar. 31, 2021), <https://www.kcci.com/article/boil-advisory-issued-in-west-des-moines-after-boring-crew-strikes-water-main/35996108>.

¹⁹⁴ See *Mem. Opinion & Order*, 32 FCC Rcd. 5878, para. 23; *Mem. Opinion and Order*, 15 FCC Rcd. 16227, paras. 7-8; *Mem. Opinion & Order*, 14 FCC Rcd. 21697, para. 8; *Mem. Opinion & Order*, 14 FCC Rcd. 21697, paras. 26-33; *Zayo Grp.*, 2016 WL 3448261, at *1-3, 5-7; see also *Report and Order, Declaratory Ruling*, 33 FCC Rcd. 7705, paras. 148; *P.R. Tele. Co., Inc. v. Guayanilla*, 450 F.3d 9, 19-24 (5th Cir. 2006).

City has broadly promoted Google Fiber across numerous platforms, including creating a City-run website dedicated to the Conduit Network,¹⁹⁵ City newsletters and publications,¹⁹⁶ social media posts,¹⁹⁷ door-hangers individually placed on thousands of premises,¹⁹⁸ press interviews,¹⁹⁹ and podcasts conducted jointly with Google Fiber executives.²⁰⁰ The City has focused much of its efforts towards branding Google Fiber as a socially just company deeply committed to helping bridge the digital divide. The City has frequently referred to Google Fiber as its “partner” in building the Conduit Network and claimed that, with Google Fiber’s help, the City would “end disparities in Internet access within the city,”²⁰¹ despite the fact that broadband service is already available everywhere in the City and that Mediacom already offers a multitude of service level choices at a range of prices starting as low as \$9.95 while Google Fiber offers a single tier of service at \$70 in all of its markets and recently discontinued offering a 100 megabit service at \$50.²⁰²

City Council Member Renee Hardman frequently has represented that the Conduit Network would address “differences in access to broadband among various segments of the

¹⁹⁵ See *Plant the Speed*, THE CITY OF WEST DES MOINES, <https://wiredwdm.org/> (last visited April 30, 2021).

¹⁹⁶ See, e.g., *WDM to bring high-speed internet choices to residents and businesses with Google Fiber*, *supra* note 52.

¹⁹⁷ See Attach. 24, Examples of City’s Promotion of Conduit Network on Facebook.

¹⁹⁸ See Attach. 25, Examples of Door Hangers of City’s Promotion of Conduit Network.

¹⁹⁹ See, e.g., Kathy Bolten, *West Des Moines, Google Fiber partnering to provide high-speed internet access to residents, businesses*, Innovation Iowa (July 9, 2020), <https://innovationia.com/2020/07/09/west-des-moines-google-fiber-partnering-to-provide-high-speed-internet-access-to-residents-businesses/>; see also *supra* note 52.

²⁰⁰ See *CLIC Zoom-Chat: West Des Moines, Iowa Broadband Project*, *supra* note 52.

²⁰¹ Bolten, *supra* note 199.

²⁰² See Purcell Decl. Attach. 1, ¶¶ 4, 53; *supra* at 26.

population,”²⁰³ particularly for “communities of color.”²⁰⁴ Once again, Mediacom’s service is available in every community in the City, including communities of color, except those where the owner of multiple dwelling units has entered into an exclusive contract with another ISP or the development otherwise excludes Mediacom. It is unlikely that Google Fiber will be able to break through those barriers any more successfully than Mediacom. The City also falsely claimed that incumbent ISPs were unwilling to support the City’s efforts to “bridge the digital divide” and were only interested in using City conduit “in areas of the city where it will be profitable for them.”²⁰⁵ Again, there is no real “digital divide” in West Des Moines—broadband service is available to everybody who wants it and, thanks to Mediacom, at prices that just about anyone can afford. And the implication that Google Fiber is uninterested in profits and will selflessly offer services in areas that incumbents shun is ludicrous, given its one-high-priced-service-level-fits-all business strategy, its focus on cream-skimming those able to pay higher prices, and its unwillingness to enter a market unless profitability is assured because of taxpayer-financed subsidies and benefits and government protection from effective competition. Besides, as noted, Mediacom’s service is available in all areas of the City except where property owners exclude it, which demonstrates Mediacom is not cherry-picking profitable areas of the City in which to offer services. At best, some City Council members and other City officials who were instrumental in enticing Google Fiber into the City because of alleged deficiencies in the broadband market were woefully unaware of the true facts about that market. Regardless of their intentions, it is distressing that those who express concern about closing the alleged digital divide, ensuring that areas supposedly shunned by incumbent ISPs are adequately served

²⁰³ See Beeman, *supra* note 52.

²⁰⁴ See *Construction on WDM Google Fiber project set to begin this week*, *supra* note 52.

²⁰⁵ Bolten, *supra* note 199.

neglected to obtain, before turning over the keys to the Conduit Network, any commitment by Google Fiber to do anything that will help solve those problems.

The City has also repeatedly touted the supposed superiority of Google Fiber's broadband Internet service. At various times, the City has described Google Fiber's Internet as being "world class," the "future" and "better," "faster," and "more reliable" than the options residents currently have.²⁰⁶ In contrast, the City has repeatedly criticized other ISPs' services and has gone so far as to describe Mediacom's technology as "outdated" in public court filings.²⁰⁷ The City has broadly disseminated statements claiming that "high speed Internet" was only "available in some or a few neighborhoods" and that Google Fiber's service through the Conduit Network would be "the best and fastest Internet service in Iowa," despite the fact that Mediacom provides 1 gigabit service throughout most of the City (excluding only those areas where property owners deny access), and other incumbent ISPs offer close or comparable Internet speeds as well.²⁰⁸

The City also solicited residents to give it permission to extend the City's ROW onto their property with vague suggestions that residents would get an Internet connection "at no cost"²⁰⁹ and assured residents that if "we can connect your property to the City's conduit network, then yes, Google Fiber will be able to serve your property."²¹⁰ At other times, the City insinuated that low-income residents who subscribed to Google Fiber's services would receive

²⁰⁶ Attach. 16 at 1-2, 4, 9-10, 14.

²⁰⁷ Attach. 26, Def.'s Reply Br. Supp. Mot. Dismiss Am. Pet. at 29, *MCC Iowa LLC v. West Des Moines*, No. EQCE086347 (Iowa Dist. Ct. Mar. 12, 2021). In fact, Mediacom also provides fiber-to-the-premises connections in the City and chooses to build out most of its network infrastructure using a hybrid fiber coax network in order to maximize its efficiency by using the same network to connect business customers with fiber cable and residential customers with coaxial cable. See Purcell Decl. Attach. 1, ¶¶ 8, 13.

²⁰⁸ Attach. 16 at 4, 10.

²⁰⁹ *Id.* at 1, 4, 7.

²¹⁰ *Id.* at 13.

City subsidies to pay their Internet bill.²¹¹ Finally, the City represented that its agreement with Google Fiber would be a financial boon for the City because Google Fiber supposedly would pay large license fees that would be “capped at \$20 million a year.”²¹² As explained above, the City’s revenue projections from the Google Agreement were gross exaggerations, as Google Fiber will pay only a tiny fraction of this amount under any circumstances.²¹³

The City has never marketed the services of existing ISPs in a remotely similar manner, nor is it likely to do so. The ringing praise of its “partner” Google Fiber’s services and denigration of competitive services is yet another way in which the City has attempted to tip the competitive balance in favor of Google Fiber.

Based on these dynamics, the Brattle Group concluded that it is unlikely that any all-fiber ISPs would enter the Conduit Network after Google Fiber, assuming it is even physically possible for it to do so.²¹⁴ The Brattle Group reached this conclusion based on three key factors. First, due to Google Fiber’s Exclusivity Periods that keep rolling over as each additional network segment is completed, Google Fiber will likely be able to block future entrants from obtaining economies of scale necessary to justify entry.²¹⁵ Second, due to the design specificity issues discussed above, the second ISP’s fixed and incremental costs for entry will likely be significantly higher than Google Fiber’s fixed and incremental costs and as a result, potentially cost-prohibitive.²¹⁶ Third, if Google Fiber leverages its City-provided cost advantages to offer services at prices that are below its “true costs,” this will further impede other all-fiber ISPs from

²¹¹ *Id.* at 12.

²¹² Bolten, *supra* note 199; *see* Attach. 22, at 1.

²¹³ *See supra* notes 60, 140; *see also* Purcell Decl. Attach. 1, ¶¶ 27, 43.

²¹⁴ *See* Attach. 2 at 30-37.

²¹⁵ *See id.* at 19-20, 29, 36-37.

²¹⁶ *See id.* at 30-34.

entering the market.²¹⁷ As the Brattle Group notes, even under a best case scenario (*i.e.*, Google Fiber charges market rate costs, all-fiber ISPs can use large portions of the Conduit Network, and the City signs up a very high percentage of homes), these fiber-ISPs will still be heavily disadvantaged by Google Fiber’s Exclusivity Periods and the Google-Fiber-focused design of the Conduit Network and therefore still may not choose to enter.²¹⁸

In summary, the competitive advantages conferred upon Google Fiber far exceed those the Commission has found to be offensive to federal law and preempted by Section 253(a) in similar contexts. To be clear, Mediacom believes the design of the Conduit Network will foreclose any ISP other than Google Fiber from using it. However, even if the Conduit Network is not completely closed, the rights and privileges the City has granted Google Fiber “materially limit or eliminate the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”²¹⁹ There is no scenario in which the City’s regulation of its ROW will put Google Fiber on fair and balanced footing with *any* competitor, much less all of them.

C. The City’s legal requirements are not shielded by the safe harbor provision of Section 253(c).

Once the FCC concludes that the City’s arrangement with Google Fiber is prohibitive in effect, “the burden shifts to the City to show that the [legal requirement] falls under the safe-harbor of § 253(c)” by demonstrating that “its actions were both ‘fair and reasonable’ and imposed on ‘a competitively neutral and nondiscriminatory basis.’”²²⁰ The City cannot make this

²¹⁷ *See id.* at 37.

²¹⁸ *See id.* at 35-37.

²¹⁹ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, paras. 10, 16, 35.

²²⁰ *Zayo Grp., LLC*, 2016 WL 3448261, at *5; *see P.R. Tele. Co.*, 450 F.3d at 19-24; *Qwest Corp. v. Santa Fe*, 380 F.3d 1258, 1272 (10th Cir. 2004).

showing based on the facts and circumstances here.²²¹ “The FCC has read the ‘competitively neutral’ and ‘nondiscriminatory’ requirements to apply to both compensation regulations and to the management of [ROW]” and each case presents an insurmountable obstacle for the City to either explain or justify.²²²

i. The City’s conferral of exclusive subsidies is unfair and discriminatory.

Under Section 253, local government provisions relating to compensation for use of ROW must be fair and reasonable as well as nondiscriminatory and competitively neutral. The FCC has held that exclusive subsidies that reduce a carrier’s costs of entry or function as price supports are not fair, competitively neutral or non-discriminatory.²²³ One-sided funding mechanisms distort market conditions and deprive non-subsidized providers from competing on a level playing field. This is true when subsidies are provided to a favored provider (*i.e.*, Google Fiber) or a favored technology (*i.e.*, 100% fiber broadband networks). Put another way, any subsidies and price supports must be provider-neutral and technology neutral.²²⁴

Courts have reached similar conclusions. As explained above, courts have generally held that access costs are fair and reasonable if they either accurately reflect a municipality’s costs in providing the ROW access or are higher than the municipality’s costs but are justified under the totality of the circumstances.²²⁵

²²¹ Section 253(b) permits States to impose requirements necessary to preserve and advance universal service, protect public safety and welfare, ensure continued quality of telecommunications services and safeguard rights of consumers. Local governments like the City generally cannot rely on these types of justifications to shield its favorable treatment of Google Fiber here. *See Public Notice*, 13 FCC Rcd. 22970, 3-4.

²²² *Qwest Corp.*, 380 F.3d at 1272.

²²³ *See Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, paras. 58, 73; *Mem. Opinion & Order*, 15 FCC Rcd. 16227, para. 10.

²²⁴ *Mem. Opinion & Order*, 15 FCC Rcd. 16227, paras. 8-10.

²²⁵ *Qwest Corp.*, 380 F.3d at 1272-73. The totality of circumstances test evaluates the extent of use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on profitability of the business.

The City's arrangements with Google Fiber fail under both tests for several reasons. *First*, the City is providing Google Fiber access to the Conduit Network at a rate far below the City's costs in providing that access and far below what it would cost a competing ISP to build equivalent parallel infrastructure. *Second*, Google Fiber has an unusual pay-as-you-go pricing model that allows it to space its infrastructure costs out over a twenty-year period and still not come close to covering the costs of the City's investment, whereas other ISPs must bear all of their infrastructure costs upfront. These financial advantages are bolstered by Google Fiber's best price guarantee and its city-wide credit entitling it to a portion of fees paid by other ISPs. *Third*, in large portions of the Conduit Network, Google Fiber will receive multiple dedicated ducts optimized for its network for a much lower price than competitors will pay for access to smaller and/or shared ducts that are incompatible with their networks. These circumstances demonstrate that the Google Agreement cannot be justified under the cost-based test or the totality of the circumstances test. It is a transparent subsidy to Google Fiber and the City's pretextual justifications—which are contrary to the facts about the West Des Moines market—are nothing more than attempts to disguise the real effects of the City's actions, which is to insulate Google Fiber from having to operate in an environment of balanced competition.²²⁶

In addition, even if the City could somehow demonstrate competitive neutrality as among fiber providers (although it cannot), its Conduit Network is still not *technology neutral*. The City acknowledges the Conduit Network will be open only to 100% fiber networks.²²⁷ As demonstrated, the costs of providers using alternative technologies for building parallel underground networks – assuming that were feasible – would be well in excess of \$30 million. Assuming for the sake of argument that the City intends to give other fiber ISPs similar financial

²²⁶ See *Mem. Opinion and Order*, 15 FCC Rcd. 16227, para. 8; *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 58; *Zayo Grp.*, 2016 WL 3448261, at *5; *supra* note 58.

²²⁷ See, e.g., *supra* at 41.

terms to what it gave Google Fiber, those fiber ISPs will obtain access to the Conduit Network at a fraction of what it would cost ISPs using alternative technologies to build parallel conduit.²²⁸

In existing areas of the City, these barriers will materially impede ISPs that use alternative technologies from upgrading their current networks or implementing new technologies. Mediacom, for example, will face enormous financial challenges in rolling out its 10G platform.²²⁹ Similarly, CenturyLink, which offers lower speed packages in large areas of the City will be severely impeded from making investments necessary to upgrade its network to provide service levels that match the faster speeds that Mediacom currently offers and that will be offered by Google Fiber. The City's unlawful decision to pick technological winners and losers in the broadband market will thus impede innovation and competition by ISPs that use alternative technology and ultimately will deprive them of the value of their prior investments in their networks.

Likewise, ISPs that use alternative technologies will also be effectively prohibited from expanding their networks to serve new areas of the City. Unlike all-fiber ISPs that might receive subsidized use of the Conduit Network (despite the design features which make that impossible as a practical matter), ISPs that use alternative technologies will have to fully bear their own

²²⁸ To the extent the City tries to justify discriminatory subsidies under 253(b), those justifications fail too. Eight wireline ISPs provide high speed Internet in the City, and Mediacom already offers 1 gigabit service. *See Purcell Decl. Attach. 1, ¶¶ 1, 4, 54.* The Google Agreement does not impose any service or pricing requirements on Google Fiber. *See generally Attach. 19.* Google Fiber has represented it plans to offer one service level (1 gigabit) at a price point that is not affordable to many City residents. *See supra* at 26. Thus, while building the Conduit Network for Google Fiber may give high-income residents another option for providers, it will not promote or provide universal access. Nor can the City claim that it is protecting public safety and welfare by subsidizing Google Fiber's entry. Residents already have many options and the City has no basis to claim that subsidizing 1 gigabit service is in the best interests of the public. Further, if the City's intent was to promote availability of 1 gigabit service, it would have made technologically-neutral subsidies available to all providers to offer 1 gigabit services. *See Classic Telephone, Inc., Mem. Opinion & Order, 11 FCC Rcd. 13082, paras. 37-42 (1996).*

²²⁹ *See supra* at 43-44.

infrastructure costs. As the Brattle Group analysis concluded, those ISPs will likely be unable to recoup their investments and are highly vulnerable to being underpriced by those all-fiber ISPs whose prices would be subsidized. This outcome runs directly contrary to Section 253's requirement that the regulatory environment support "a marketplace in which services can be offered in a multitude of ways with varied capabilities and performance characteristics."²³⁰

Each of these disabilities has severe cost implications for Mediacom, including the business cost of losing market share due to Google Fiber's first-mover advantage and ability to keep prices low because of City subsidies, the loss of business opportunities because Google Fiber's cream skimming would prevent Mediacom from carrying out its plans for expansion and technology upgrades, and the fixed and incremental costs it would incur to construct a parallel network.²³¹ The City's actions will have the direct effect of dissuading new entrants and severely diminishing the competitive strength of ISPs who use disfavored technology as well as those who use the favored technology but are not the favored provider.²³²

ii. The City's management of its ROW is unfair and discriminatory.

Aside from the cost and price supports extended to Google Fiber, the City's management of its ROW is also not competitively neutral and discriminates both against incumbent ISPs and new entrants other than Google Fiber.

The FCC has clearly defined permissible ROW management functions.²³³ Examples of "appropriate [ROW] management" include: "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement

²³⁰ *Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 38.

²³¹ *See supra* at 40, 43-44, 45-46; Attach. 2, Secs. III & IV.

²³² *See Declaratory Ruling, Report and Order*, 33 FCC Rcd. 9088, para. 37, n.87; *Mem. Opinion and Order*, 13 FCC Rcd. 3460, para. 73.

²³³ *See Mem. Opinion & Order*, 14 FCC Rcd. 21697, para. 60.

of building codes, and keeping track of various systems using the ROW to prevent interference between them.”²³⁴ Federal courts have also concluded that unfair and discriminatory arrangements that cities or localities have struck with favored providers fall outside the scope of Section 253(c) exemption.

For example, in 2016, a group of communications providers challenged the city of Baltimore’s ordinance requiring all communications providers to place fiber optic and other connections in the city-owned underground conduit and to pay a steeply increased monthly leasing fee while allowing one provider – Verizon – to maintain, exclusively use, and pay a lower fee for continued use of its own conduit system.²³⁵ After ruling that Plaintiffs had adequately pled Baltimore’s application of its ordinance likely had created “a material interference with plaintiffs’ ability to compete in a fair and balanced market,” the District Court of Maryland also held that Baltimore’s ordinance did not fit within the Section 253(c) safe harbor because the City had not acted on a competitively neutral and nondiscriminatory basis when Baltimore treated Verizon differently as compared to other providers in the same telecommunications market.²³⁶

Here, neither the City’s ROW management nor its approach to managing public ROW is remotely “neutral.” First, the City requires placement of communications facilities underground even where utilities are aerial.²³⁷ Second, ISPs that are unable or unwilling to use the Conduit Network must use a far more burdensome permitting process than Google Fiber, which gets to

²³⁴ *Mem. Opinion & Order*, 32 FCC Rcd. 5878, paras. 22-23 (discussing *Telebeam Telecomms. Corp. v. New York*, 194 F. Supp. 3d 178, 188 (E.D.N.Y. 2016) as “expressly distinguish[ing] the exclusive franchisee to operate payphones on city sidewalks . . . with a restriction on the building of networks through the [ROW] to serve the broader community.”).

²³⁵ *See Zayo Grp., LLC*, 2016 WL 3448261, at *1-3.

²³⁶ *See id.* at *6-7.

²³⁷ *See Mem. Opinion & Order*, 11 FCC Rcd. 13082, para. 51 (indicating that permissible ROW management would not include requiring burial underground where utilities are aerial).

skip the line. Third, while the City has prohibited future installation of conduit in areas where ROW is congested, it is building a favored provider (Google Fiber) or class of providers (all-fiber ISPs) a path directly through all the congested ROW. Fourth, the City has admitted that its Conduit Network will exclusively house “fiber only” networks and it is in fact signing installation agreements with property owners that restrict the use of the premises drop portion of the ROW that the City will install on their property to solely conduit that carries fiber optic cable. Fifth, the City’s requirement that ISPs using alternative technologies (and likely all fiber ISPs other than Google Fiber) build their own underground infrastructure, at their own expense, imposes inordinate financial burdens on them that Google Fiber does not have to bear. Sixth, the City has undertaken significant marketing activities for Google Fiber across multiple media platforms and is touting Google Fiber as the City’s “partner” and the superior choice for residents’ broadband needs.

All these actions demonstrate a partnership between the City and Google Fiber which goes far beyond a municipality’s appropriate exercise of its ROW management authority. Rather than serving as a neutral arbiter of competition, the City has declared Google Fiber its chosen winner. This is the opposite of fair, balanced regulation and competitive neutrality.

iii. There are other indicia of discriminatory treatment and intent.

The FCC can and should take note of other direct and indirect ways the City has singled out Google Fiber for favorable treatment.²³⁸ For example, it is notable that the City negotiated its agreement with Google Fiber in secret and rushed through the approval process over a holiday weekend.²³⁹ The City started negotiating the Google Agreement at the same time Google’s

²³⁸ See *Mem. Opinion & Order*, 14 FCC Rcd. 21697, para. 44 (analyzing whether an open procurement process used to award exclusive ROW access mitigated concerns that the State of Minnesota had unfairly favored one party over another).

²³⁹ See *supra* Sec. I.D.

primary lobbyist in Iowa took his seat on the City Council, which the City did not publicly disclose when adopting the Google Agreement. Nor did the City disclose that its Mayor's real estate company was representing Google Fiber in securing property for Google Fiber in the City. The City did not tell Mediacom or other ISPs of its plans to build the Conduit Network, even while they were negotiating access rights to other, far more limited City conduit in congested ROW areas.²⁴⁰

The City has claimed that the Conduit Network would be open to "all Internet service providers," even though the City knew from its prior work on the duct banks project that, as designed, the Conduit Network would not accommodate alternative technologies. The City told residents that the Conduit Network would help bridge a supposed digital divide, ensure equal access for communities of color and correct other alleged deficiencies in the broadband market, but neglected to obtain any commitments from Google Fiber that would accomplish any of these goals. The City also claimed that the Conduit Network would lead to more affordable broadband service and benefit low-income residents even though it knows that Google Fiber's practice is to offer only a single service level at a relatively high price that low-income consumers will not find affordable.²⁴¹ The City misrepresented that Google Fiber would pay tens of millions of dollars a year in license fees when, in fact, the tech giant is paying far less and its fees over the life of the Google Agreement will not come close to covering the costs of constructing and maintaining the Conduit Network. Other key representations made by the City in attempting to justify its actions were also knowingly false.²⁴²

Additional evidence of the lengths to which the City was willing to go to be sure it could deliver millions in benefits to Google Fiber can be found in the form of the scheme it concocted

²⁴⁰ See Purcell Decl. Attach. 1, ¶¶ 23-25.

²⁴¹ See *supra* at 50.

²⁴² See *supra* Section II.E.

to deprive citizens of their statutory right to vote on whether to approve the issuance of municipal bonds to finance the Conduit Network.²⁴³ In Iowa, the issuance of bonds in situations like this would ordinarily require 60% approval in a voter referendum.²⁴⁴ There is an exception to this requirement for a bond issuance for the purpose of urban renewal projects aimed at combatting blight, poverty and unemployment.²⁴⁵ Undoubtedly because it feared that, at a time when school budgets were being cut and the City's finances were being impacted by the Covid-19 pandemic, the requisite vote could not be secured, the City proceeded to try to squeeze the proposed project financing into an exception which does not fit by designating the entire City, including highly-developed, wealthy communities, as one giant urban renewal zone.²⁴⁶ There are other examples of the willingness to skirt or ignore state law to achieve its goal of enticing Google Fiber into the market and making it the predominant broadband service provider. The City's aggressive marketing of Google Fiber's services flouts an Iowa statute that prohibits such conduct.²⁴⁷ The City also ignored Iowa law in granting Google Fiber significant rights over construction of the Conduit Network without public bidding.²⁴⁸

Another key indicator of the City's discriminatory intent is its decision to cut existing ISPs out of the design process entirely and allow a City owned and paid for resource which it claims will be "open access" to be designed exclusively by Google Fiber.²⁴⁹ The City and its

²⁴³ See *supra* Sec. I.D.

²⁴⁴ See IOWA CODE ANN. § 384.26.

²⁴⁵ See IOWA CODE ANN. §§ 403.2 (Declaration of Policy); 403.4 (limiting municipality's authority to lawfully authorize urban renewal areas); 403.17(5), (10), (12) and (22) (limiting definitions of "urban renewal areas to slums, blighted areas, areas slated for commercial industrial development, or areas where there is planned construction of affordable or low and moderate income housing for specific purposes).

²⁴⁶ See Attach. 12; Attach. 20.

²⁴⁷ See Iowa Code Ann. § 23A.2.

²⁴⁸ See Iowa Code Ann. §§ 26.2 & 26.3.

²⁴⁹ See *supra* at 22.

consultants must have been fully aware that the result would be a facility optimally designed for Google Fiber's network, one that lacks standard features essential to ensuring that the Conduit Network could effectively be used by other ISPs.

These points each illustrate that the City's entire course of conduct is deliberate and the resulting distortion of the broadband services market and tilting of the competitive landscape West Des Moines was intentional and designed to benefit the City's chosen partner, Google Fiber, and its preferred technology. The City cannot legally accomplish this goal consistent with its Section 253 obligations.

III. The Commission Must Preempt the City's Actions and Require the City to Re-Form the Google Agreement and Take Additional Steps to Mitigate the Anti-Competitive Effects of Its Actions.

Mediacom seeks immediate and expedited review of these circumstances. The City began construction of the Conduit Network in late March 2021. Although Mediacom filed a lawsuit asserting independent state law causes of action, the City has represented that it will proceed with an aggressive construction schedule. Under the current construction schedule, there is a real danger that the City may complete a large part of the Conduit Network before the Commission creates a record and rules on this Petition. Obviously, if the Commission finds that Section 253 has been violated, this would make it much more challenging to fashion an effective remedy. If the project is temporarily delayed while the Commission considers the matter, it can easily be resumed if the Commission rules in favor of the City and the only consequence is some delay. On the other hand, if a substantial part of the Conduit Network is constructed while the Commission deliberates and there is ultimately a finding that Section 253 has been violated, then the negative impact on the City's residents and taxpayers would be much worse. In short, it is much easier and less painful to delay construction than to undo it. Given the very serious competitive issues presented in this Petition, Mediacom respectfully requests that the

Commission put the City on notice of potential violations of Section 253 and advise the City to halt construction until the Commission determines whether the City’s actions are lawful.

If the City does move forward with constructing broadband infrastructure, then Mediacom seeks four types of relief necessary to ensure the City is providing the fair, competitively neutral regulatory environment required by Section 253.

A. Reformation of the Google Agreement

The Commission should preempt the Google Agreement and require the City to reform it.²⁵⁰ Mediacom specifically requests that the City be required to reform the following portions of the Google Agreement, along with any other provisions the Commission determines may function to give Google Fiber material advantages over competitors:

Category of Preferential Rights	At-Issue Provisions	Requested Reformation
Exclusive Design, Construction, and Testing Rights	2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.2, 2.3, 2.4, 3.1, 3.2, 3.3, 3.4, 4.2.1, 4.2.2, 4.2.3, 4.2.4, 7.4, Ex. A, Ex. B, Ex. C, Ex. D, Ex. F	If the City permits Google Fiber involvement in the design, testing or construction of the Conduit Network, then all other ISPs must be offered equivalent opportunity for involvement
Exclusive Access Rights	4.1.1, 4.1.2, 4.4, 4.5.1, 4.5.2, 4.6, 4.9.1, 4.9.2, 9.3.1	Eliminate Google Fiber Exclusivity Periods and exclusive access rights and require that all other ISPs be offered access at the same time and on equivalent terms
Preferential Financial Terms	3.6, 4.7, 4.7.1, 4.7.2, 5.1.1, 5.1.2, 5.1.3.1, 5.1.3.2, 5.1.3.1, 5.1.4, 5.1.5, 5.3, 5.4, 5.5, 7.2, 9.3.2, 9.5, 12.1	Eliminate current license fee terms and credits, require the City to develop and recalculate Google Fiber license fees based on competitively neutral rate chart applicable to all ISPs that reflects the City’s true costs in providing access to the Conduit Network
Preferential Permitting Rights	4.10	Require Google Fiber to comply with permitting requirements applicable to all ISPs.

²⁵⁰ See *Mem. Opinion & Order*, 32 FCC Rcd. 5878, para. 25.

B. Redesign of the Conduit Network

The City should be required to demonstrate to the Commission's satisfaction that the design of the Conduit Network, including its extension to the premises via drop facilities, is provider-neutral and technology-neutral. If the City is unable to make that showing, then the Commission should require the City to reform the design plans it has previously ratified and preempt the City from ratifying additional design plans that are not competitively neutral as to providers and technology. The Commission should then direct the City to retain an independent expert chosen by a majority of facilities-based ISPs in the West Des Moines market to review the design plans and certify that they are competitively neutral as to providers and technology.

In addition, if the City decides to move forward with its Conduit Network project, the Commission should require the City to include in its design plans the construction of duct banks in areas of its ROW that are congested or are projected to be congested within the next five years. The duct banks' design should align with the plans the City previously provided to ISPs which included sufficient duct and vault space to accommodate fiber ISPs and ISPs that use alternative technology. Otherwise the City may bar the future expansion of ISPs in the City that are not able or willing to access and use the Conduit Network.

C. Burial of Wires, Joint Trenching and Equity in Permitting

In addition or as a partial alternative to requiring the City to redesign the Conduit Network, the Commission should preempt the City from applying its ordinance restricting overloading on aerial plant already in place to telecommunications providers and order the City to allow ISPs to overlash onto overhead wires if they obtain necessary consents from owners of the poles/wires. The City should also be restricted from requiring burial of telecommunications fiber or cable if utilities are not also required to bury their plant, unless there is a reason for the discriminatory treatment which has been validated by an independent expert. Similarly, with respect to future installations of City conduit, the Commission should direct the City to provide

incumbent ISPs and known potential new entrants proper notice and an opportunity to install their own conduit at the same time. In addition, the Commission should order the City to amend its permitting processes to ensure that the process, timing of issuance, terms and conditions upon which permits needed by ISPs to use City ROW to overlash, bury or otherwise install network elements or use Conduit Network are equivalent among all ISPs.

D. Competitively Neutral Communications

The Commission should direct the City to cease any and all promotional activities related to the Conduit Network or Google Fiber, including press releases, mailings, emails, door hangers, websites or webpages, social media or other forms of advertising. At a minimum, the Commission should direct the City to cease making statements about the Conduit Network that refer or relate to specific providers and the quality or attributes of any provider that will use the Conduit Network or their technology. The Commission should also direct the City to stop saying or suggesting that service delivered through the Conduit Network is more reliable or otherwise superior to other service options unless the City can substantiate those claims, to the Commission's satisfaction, through producing reliable objective evidence.

E. Level Playing Field

While the remedial measures outlined above would go a long way to ensuring that the purposes of Section 253 are served, the City's behavior described in the Petition makes it crystal clear that there is pervasive and deeply embedded bias within City government in favor of Google Fiber and its chosen technology. If Google Fiber launches its service in West Des Moines, there will be many opportunities as its competition with incumbent ISPs unfold for the City to favor Google Fiber in subtle or not-so-subtle ways. Accordingly, any remedial order issued by the Commission should make it clear that the City should adopt and apply requirements and exercise discretionary authority in a manner that will not give Google Fiber

any discriminatory advantages that translate into an edge in terms of cost of service, timing to installation, promotional opportunities or other material competitive factors.

IV. CONCLUSION

The FCC has a responsibility under Section 253 to review the circumstances presented here by the City's exclusive agreement with and exclusive license to Google Fiber for access and use of a \$50 million Conduit Network financed by taxpayer funded bonds. The City has deliberately and intentionally set out to deny any providers that are not Google Fiber the ability to provide telecommunications or other services using the City owned and financed Conduit Network constructed in public ROW. Ignoring its Section 253 obligations, the City has set out to pick winners and create losers in the competition between providers and technologies by heavily subsidizing and supporting the entry of a single competitor. The ultimate result of the City's discriminatory and unreasonable actions will be to render it cost-prohibitive for Mediacom and other telecommunications and broadband service providers to provide service in the City's areas of new development and to upgrade existing services elsewhere.

The City cannot justify these actions by claiming that these Google Fiber-only subsidies, access advantages and other benefits are legitimate ROW management, competitively neutral, or non-discriminatory as to incumbent telecommunications and ISPs. There is no question that the arrangements violate Section 253(a) and are not saved by any justification available under Section 253(c). Thus, the Google Agreement (and the City's resolution adopting it) must be preempted under Section 253(d) and the City must be required to either redesign the Conduit Network so that it is available for use by all providers and technologies on non-discriminatory terms or extend rights and protections to providers who are blocked from using the Conduit Network that will restore competitive neutrality.

Mediacom seeks expedited review of its Petition, because despite being aware of Mediacom's position that the City's behavior is not neutral, fair or legal, the City is forging

ahead with building the Conduit Network and with promoting connections to the Conduit Network and every day that passes increases the difficulty of fashioning an effective remedy for the City's violations of Section 253 that does not unduly burden City taxpayers.

Respectfully submitted,



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May 12, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2021, a true copy of the foregoing Petition for Expedited Declaratory Ruling Pursuant to Section 253 of the Communications Act was served electronically and by first-class mail upon:

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