

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

In the Matter of)	
)	
City Signal Communications, Inc.)	
19668 Progress Drive)	
Strongsville, OH 44136)	
)	
Petitioner)	
)	
v.)	
)	
Defendants:)	
)	
City of Cleveland Heights)	CS Docket No. 00-253
40 Severance Circle)	
Cleveland Heights, OH 44118)	
)	
City of Wickliffe)	CS Docket No. 00-254
28730 Ridge Rd.)	
Wickliffe, OH 44092)	
)	
City of Pepper Pike)	CS Docket No. 00-255
28000 Shaker Blvd.)	
Pepper Pike, OH 44092)	

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

William P. Hunt, III
Vice President for Public Policy
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-2516 (Tel)
(720) 888-5134 (Fax)

Jeffrey M. Karp
Tamar E. Finn
Heather A. Thomas
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
(202) 424-7500 (Tel)
(202) 424-7643 (Fax)

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EXECUTIVE SUMMARY

Level 3 Communications, LLC (“Level 3”) urges the Federal Communications Commission (“FCC” or “Commission”) to grant City Signal Communications, Inc.’s (“City Signal”) Petitions for Declaratory Rulings concerning unlawful delays by Cleveland Heights, Wickliffe and Pepper Pike, Ohio (collectively, “Cities”) in granting permits for use of public right-of-way to install fiber optic cable. Level 3 agrees with City Signal that the Cities actions violate Section 253 of the Telecommunications Act of 1996. The Cities’ delay in granting permits to City Signal to construct its facilities constitutes a significant barrier to entry in violation of Section 253(a), and the Cities are not managing their rights-of-way on a competitively neutral and nondiscriminatory basis as required by Sections 253(b) and 253(c). Accordingly, the FCC should preempt the Cities’ actions pursuant to Section 253(d).

The Cities’ actions violate 253(a) because they have greatly delayed City Signal’s facilities’ construction, thus unlawfully impairing City Signal’s ability to provide telecommunications service. The FCC has determined that administrative delays may constitute unlawful barriers to entry if such delays have the effect of prohibiting the ability of a carrier to provide telecommunications services. Delay in obtaining approvals from a single municipality along a route can jeopardize the operability of an entire regional network, and necessarily impairs the competitive provider’s ability to generate the revenues needed to sustain its business. The Cities’ failure over an eight-month period to issue permits to City Signal to construct its facilities constitutes substantial and unreasonable delay and creates a significant barrier to entry in violation of Section 253(a).

Furthermore, the Cities are not managing their rights-of-way on a competitively neutral and nondiscriminatory basis since they are subjecting only new market entrants, and not

incumbents, to delays in granting access to local rights-of-way. Thus, the Cities' actions are not protected by either Section 253(b) or 253(c). The FCC has recognized that treating new market entrants in a disparate manner than incumbents is discriminatory and not competitively neutral in violation of these provisions.

Section 253(d) directs the Commission to preempt the enforcement of a state or local requirement that is contrary to Sections 253(a) and 253(b). Level 3 believes that the Cities' actions are contrary to both of these provisions. Subjecting only new market entrants like City Signal to delays in granting access to facilities, while incumbents retain and operate existing facilities, prohibits City Signal's ability to provide telecommunications services. Accordingly, Level 3 urges the Commission to preempt the Cities' actions against City Signal pursuant to its power under Section 253(d).

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COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC (“Level 3”) by undersigned counsel and pursuant to the Commission’s *Public Notice DA 00-2872* (dated Dec. 22, 2000), submits these Comments in support of City Signal Communications, Inc.’s (“City Signal”) Petitions for Declaratory Ruling concerning unlawful delays by Cleveland Heights, Wickliffe and Pepper Pike, Ohio (collectively the “Cities”) in granting permits for use of public rights-of-way to install fiber optic cable. For the reasons stated below, the Federal Communications Commission (“FCC” or “Commission”) should grant City Signal’s Petitions.

I. INTRODUCTION AND SUMMARY

Congress enacted Section 253 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”), “to remove all barriers to entry in the provision of telecommunications services,”¹ and empowered the Commission, in Section 253(d), to preempt state and local legal requirements that run counter to that goal. The municipal requirements complained of in City Signal’s Petitions exemplify the barriers to market entry that Congress sought to eliminate. Level 3 therefore urges the Commission to exercise its preemption authority under Section 253(d) and grant City Signal’s Petitions.

Petitioner City Signal seeks Commission preemption with respect to two local barriers to entry that substantially threaten competitive telecommunications providers: (1) excessive delay by municipalities in granting competitive providers access to local rights-of-way; and (2) discriminatory treatment of new market entrants versus incumbent carriers. City Signal states that it applied to the Cities for permits to attach fiber optic cable on existing utility poles in May, 2000 and June, 2000.² To date, the Petitions allege, the Cities have ignored City Signal’s applications.³ City Signal contends that the delaying tactics of the Cities are tantamount to a denial of its applications, and impose a *de facto* undergrounding requirement on City Signal that has not been imposed upon the incumbent telecommunications company, thus requiring City Signal to expend greater sums to construct its facilities than did the incumbent. This, in turn,

¹ H.R. Conf. Rep. No. 104-458 at 126 (1996).

² See *City Signal v. Cleveland Heights*, Petition for Declaratory Ruling, at 2 (Oct. 18, 2000); *City Signal v. Wickliffe*, Petition for Declaratory Ruling, at 2 (Nov. 27, 2000), and; *City Signal v. Pepper Pike*, Petition for Declaratory Ruling at 2 (Nov. 29, 2000) (hereinafter collectively, “City Signal Petitions” or “Petitions”).

³ *Id.*

argues City Signal, has the effect of prohibiting the company from providing interstate and intrastate telecommunications services, in violation of Section 253 of the Act.⁴

Level 3 is a communications and information services company building an advanced Internet Protocol (“IP”) technology-based network. This network, consisting of both local and long distance networks, will be the first international communications network to use IP technology end-to-end. Level 3 owes its existence, in large part, to Congress’s enactment in 1996 of the Telecommunications Act amendments to the Communications Act of 1934. In particular, Level 3 relies on Section 253’s protections to install its fiber optic infrastructure in a manner that enables it to compete with the incumbent local exchange carriers (“ILECs”).⁵ Level 3, however, has experienced delay and discriminatory treatment, and can attest to the very real anti-competitive effects of the Cities’ legal requirements complained of in the Petitions.

Therefore, Level 3 supports City Signal’s request for Commission preemption of statutes, regulations, or other requirements of the Cities that prohibit or have the effect of prohibiting the use by City Signal or other new entrants of public rights-of-way to install their facilities in a timely manner and on a competitively neutral and nondiscriminatory basis.

Level 3 agrees that the Cities’ actions violate Section 253 of the Act because (1) the Cities’ delay in granting permits to City Signal constitutes a significant barrier to entry in violation of Section 253(a); and (2) the Cities are not managing their rights-of-way on a competitively neutral and nondiscriminatory basis as required by Sections 253(b) and 253(c). Therefore, the Commission should preempt the Cities’ actions pursuant to 253(d).

⁴ *Id.*

⁵ 47 U.S.C. § 253.

II. THE CITIES' ACTIONS VIOLATE SECTION 253 OF THE ACT

A. Section 253

Section 253 broadly preempts state and local regulations that are direct and indirect barriers to competitive entry in the local telecommunications marketplace. Section 253(a) states that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁶ Statutes or ordinances, as well as any other state or local legal requirements, that run counter to this procompetitive goal by erecting barriers to market entry for new competitors are barred.⁷

Sections 253(b) and (c) outline areas in which state or local governments may exercise their police powers. Section 253(b) provides that states may impose “requirements *necessary* to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,” but such requirements may only be exercised “*on a competitively neutral basis*.”⁸ Section 253(c)

⁶ 47 U.S.C. § 253(a).

⁷ See Memorandum Opinion and Order, *In the Matter of The 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*, 14 FCC Rcd. 21,697 at ¶ 18 (1999) (stating that 253(a) was intended to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services) (hereinafter “*State of Minnesota*”).

⁸ 47 U.S.C. §253(b) (emphasis added). On its face, Section 253(b) refers only to state, not local, regulatory authority, but the FCC has concluded that Section 253(b) applies to municipalities to the extent they have been delegated appropriate regulatory authority by the state government. See *BellSouth Telecommunications, Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304 (1999) (hereinafter “*Coral Springs*”); see also *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCB Pol 96-10, *Memorandum Opinion and Order*, 11 FCC Rcd. 13,082 at ¶ 34 (1996) (hereinafter “*Classic Telephone I*”).

preserves state and local governments' authority to manage public rights-of-way, but imposes important limitations on the exercise of such powers in order to eliminate discrimination and promote competition: "Nothing in this section affects the authority of state or local governments to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a *competitively neutral and nondiscriminatory basis*."⁹

Section 253(d) gives the FCC broad power to preempt state and local statutes, regulations or legal requirements that serve as barriers to entry or that are not competitively neutral or not necessary:

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.¹⁰

The FCC has stated that, in accordance with Congress' intent, the "national competition policy for the telecommunications industry . . . [can]not be frustrated by the isolated actions of individual municipal authorities."¹¹ Moreover, the FCC has stated that "one clear message from [S]ection 253 is that when a local government chooses to exercise its authority to manage the public rights-of-way . . . it must do so on a competitively neutral and nondiscriminatory basis."¹² Thus, the FCC has crafted the following legal standard in determining whether to preempt a

⁹ 47 U.S.C. §253(c) (emphasis added).

¹⁰ 47 U.S.C. §253(d).

¹¹ See *In the Matter of the Public Utility of Texas*, CCB Pol 96-13, *Memorandum Opinion and Order*, FCC 97-346, 13 FCC Rcd. 3460 at ¶ 3 (rel. Oct. 1, 1997) (hereinafter "*Texas PUC*").

¹² See *In the Matter of TCI Cablevision of Oakland County, Inc.*, CSR-4790, *Memorandum Opinion and Order*, FCC 97-331, 12 FCC Rcd. 21,396 at ¶ 108 (rel. Sept. 19, 1997) (hereinafter "*City of Troy*").

requirement pursuant to 253(d): “whether [the requirement] may prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service.”¹³

B. Cities’ Delay In Granting Permits Constitute A Significant Barrier to Entry In Violation of Section 253(a)

The ability of new facilities-based market entrants to compete with entrenched incumbent telecommunications providers depends, in large part, on speed to market and the ability to construct facilities cost-effectively. The Cities’ actions complained of in City Signal’s Petitions violate Section 253(a) because they have greatly delayed City Signal’s facilities’ construction, thus unlawfully impairing City Signal’s ability to provide telecommunications service.

City Signal has been waiting approximately eight months for the Cities to grant its applications for permits to construct its facilities, notwithstanding that Ohio State law requires that the Cities act within thirty (30) days.¹⁴ Level 3 also has experienced excessive delays by municipalities in granting permits or rights-of-way franchise agreements needed to construct and operate its network over the public rights-of-way. For example, one municipality has refused to process Level 3’s application for a construction permit for sixteen months, claiming that it is in the process of passing an ordinance governing rights-of-way access. *See* Affidavit of Bonni Carr on behalf of Level 3 Communications, LLC, at ¶ 5 (hereinafter referred to as “Carr Affidavit”). In another municipality, after eight months of delay, Level 3 decided to re-route around the city. *See* Carr Affidavit at ¶¶ 6-8.

The FCC has stated that administrative delay in granting rights-of-way access may constitute an unlawful barrier to entry in violation of Section 253:

¹³ *See State of Minnesota* at ¶ 11. *See also City of Troy* at ¶ 98.

¹⁴ *See City Signal Petitions* at 2.

We make clear . . . the Commission's serious concerns about the potential adverse effect on the development of local exchange competition caused by unreasonable delay by local governments in processing franchise applications and other permits. . . . [W]e also note that regulatory delays may threaten the viability of financing arrangements for new entry or transactions for the purchase of existing facilities. Such results would seriously undermine the development of local competition, and run counter to Congress' procompetitive goals in the 1996 Act. More specifically, in certain circumstances a failure by a local government to process a franchise application in due course may "have the effect of prohibiting" the ability of the applicant to provide telecommunications service, in contravention of [S]ection 253.¹⁵

Clearly, the Cities' failure over an eight-month period to issue permits to City Signal to construct its facilities constitutes substantial and unreasonable delay and creates a significant barrier to entry in violation of Section 253(a).

Facilities-based competitive telecommunications providers incur huge initial costs to establish their business and construct the infrastructure necessary to provide services. A provider cannot begin to generate revenue and recoup those costs until it is allowed to construct its facilities and initiate service. Delay in obtaining approvals from a single municipality along a route can jeopardize the operability of an entire regional network, and necessarily impairs the competitive provider's ability to generate the revenues needed to sustain its business. Competition throughout a market is delayed and, ultimately, threatened, when any one municipality delays the construction of a competitor's facilities. This is precisely the kind of impediment to competition that Congress intended Section 253(a) to overcome.

¹⁵ See *In the Matter of Classic Telephone, Inc.*, 12 FCC Rcd. 15,619 at ¶ 28 (1997). See *City of Troy* at ¶ 76 ("An unexplained failure [by the City] to respond to a permit application . . . within a reasonable time would lead to the assumption that local franchising authority under Title VI is being used for some other purpose, thereby violating section 621 [of the Act].").

C. The Cities Are Not Managing Their Rights-of-Way On A Competitively Neutral And Nondiscriminatory Basis As Required by Sections 253(b) and 253(c)

As outlined above, under Section 253(b) municipalities may manage their rights-of-way on a “competitively neutral” basis in order to achieve public interest objectives, such as protection of the public safety and welfare.¹⁶ Also, under Section 253(c) municipalities may manage their rights-of-way pursuant to their police powers “on a competitively neutral and nondiscriminatory basis.”¹⁷ The Cities are not managing their rights-of-way on a competitively neutral or nondiscriminatory basis since they are subjecting only new market entrants like City Signal, and not incumbents, to delays in granting access to local rights-of-way. Therefore, the Cities actions are not protected by either Section 253(b) or 253(c).

The FCC has taken a very strict view of what constitutes competitive neutrality under Section 253(b):

Section 253(b) acknowledges the authority of states to prescribe competitively neutral regulations of statewide applicability necessary to preserve and to advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Competition is best served where states wield their powers carefully, avoiding, to the greatest extent possible, an intricate intrastate patchwork of telecommunications regulation at the local level that will frustrate the prospects for full and effective competition. . . . [G]overnments. . . should not view new entrants as being more susceptible to regulation than the incumbents. These efforts would go a long way in hastening the arrival of local telephone competition in many varieties, and in particular, of facilities-based local competition.¹⁸

¹⁶ 47 U.S.C. §253(b). The Cities’ purported aesthetic reasons for delaying approval of the permits do not involve the protection of the public safety and welfare which is required under Section 253(b). For an analysis of the FCC’s determination of whether a requirement is necessary to protect public safety and welfare *see State of Minnesota* at ¶¶ 54-58.

¹⁷ 47 U.S.C. §253(c).

¹⁸ *City of Troy* at ¶ 109 (emphasis added). *See also New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCB Pol 96-11, *Memorandum*

Also, the FCC has stated that the proper inquiry regarding whether certain actions are protected by Section 253(b) is whether the *effect* of such actions is competitively neutral.¹⁹ Thus, although the Cities argue that their management of public rights-of-way is competitively neutral because “all telecommunications providers requesting authorization to use the City’s rights-of-way are treated in a similar manner with the same requirements,”²⁰ the Cities acknowledge that they are not treating incumbents and other carriers already in the market in a similar manner as new market entrants.²¹ Accordingly, the *effect* of the Cities’ delay in granting City Signal permits to access rights-of-way is not competitively neutral because it disadvantages new market entrants who must wait an indefinite period of time prior to receiving authority to build their facilities while the incumbent already has its facilities in place.

The FCC has recognized that states may not have to treat all entities in the same way for such treatment to be deemed competitively neutral, so long as the regulatory authority

Opinion and Order, FCC 96-470 11 FCC Rcd. 19713 at ¶ 25 (rel. Dec. 10, 1996) (hereinafter “*New England Public Communications*”) (stating that FCC’s goal in interpreting the term necessary “is to foster the overall pro-competitive, deregulatory framework that Congress sought to establish through the 1996 Act and the directive in [S]ection 253 to remove barriers to entry”); *Texas PUC* at ¶¶ 83-87 (subjecting discriminatory build out requirements to strict interpretation of the term necessary).

¹⁹ *State of Minnesota* at ¶51 (emphasis added) (rejecting state’s argument that inquiry relates only to how requirement is *imposed*). See also *Texas PUC* at ¶ 22 (stating that “[w]e believe that [Section 253] commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service”).

²⁰ *City Signal v. Cleveland Heights*, Opposition to Petition for Declaratory Ruling, at 2 (Oct. 26, 2000) (hereinafter “*Cleveland Heights Opposition*”).

²¹ *Id.*

demonstrates that there are differences in circumstances that warrant disparate treatment.²² In this case, however, the Cities have made no such demonstration.²³ Regarding the differences in circumstances between new entrants and incumbents, the Cities set forth that the latter have had their facilities “in place in excess of twenty years.”²⁴ Level 3 does not believe, however, that this rationale warrants disparate treatment among carriers. In short, the Cities have submitted no evidence that their delay in granting City Signal its permits to access the rights-of-way is competitively neutral treatment of carriers under Section 253(b), especially where such delay violates Ohio law which requires the Cities to act on applications within thirty days.

Similarly, the Cities are not managing their rights-of-way pursuant to their police powers “on a competitively neutral and nondiscriminatory basis” under Section 253(c).²⁵ The FCC has

²² *State of Minnesota* at ¶ 52. *See also Cablevision of Boston, Inc. v. Public Improvement Commission of the City of Boston*, 184 F.3d 88 (1st Cir. 1999) (stating that requirement of competitive neutrality means municipalities must be even-handed, but does not require them to level the playing field).

²³ *See Texas PUC* at ¶ 83 (rejecting argument that state had demonstrated build-out requirements were “necessary” to advance public interest goals, concluding that “Congress reached a different conclusion in establishing a national framework for competitive entry into the local exchange marketplace since it did not impose any build-out obligations on carriers”). Similarly, Congress did not impose any special construction requirements on carriers in establishing the framework for competitive entry.

²⁴ Cleveland Heights Opposition at 4.

²⁵ Activities within the scope of permissible rights-of-way management pursuant to police powers include traditional regulation of rights-of-way, such as coordination of construction schedules, determination of insurance, bonding, and indemnity requirements, and the establishment and enforcement of building codes. *See City of Troy* at ¶ 76. It is worth noting that refusing to grant City Signal a permit to construct its facilities aboveground, which effectively forces it to build underground, is not a function of traditional regulation of rights-of-way management. Although the FCC has stated that a permissible activity under Section 253(c) may include the imposition of an undergrounding requirement, it also stated that such a requirement must be “consistent with the requirements imposed on other utility companies.” *See Classic Telephone I* at ¶ 39 (citing 141 Cong. Rec. 58172 (daily ed. June 12, 1995)). As discussed in detail throughout this Section II. C., the Cities actions toward City Signal are not

stated that “[l]ocal requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.”²⁶ Furthermore, according to the legislative history, the purpose of Section 253's non-discrimination requirement is to “create a level playing field for the development of competitive telecommunications networks.”²⁷ The Cities’ delaying tactics with City Signal are preventing it from deploying its network and providing services, but such tactics do not similarly affect incumbents who already have their facilities in place.

Like City Signal, Level 3 has encountered discriminatory treatment in its attempts to obtain access to public rights-of-way. For example, one City will not process Level 3's construction permit application until it passes a telecommunications ordinance. *See Carr Affidavit* at ¶ 5. Meanwhile, incumbent carriers in that City are allowed to continue operating

competitively neutral and are discriminatory. Level 3 believes that such non-competitively neutral and discriminatory treatment supercedes the argument that requiring new entrants to construct underground is a permissible activity within the scope of permissible rights-of-way management activities under Section 253(c), and, therefore, does not address such an argument in its Comments.

²⁶ *City of Troy* at ¶ 108. Moreover, courts have not hesitated to reject requirements that exceed the parameters of permitted rights-of-way management authority under Section 253(c) of the Act. *See e.g., See Bell Atlantic-Maryland, Inc. v. Prince George’s County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated and remanded on other grounds* (4th Cir. 2000) (finding that an ordinance which imposed burdensome requirements on new entrants exceeded the scope of local rights-of-way management permissible under Section 253(c)); *PECO Energy Co. v. Township of Haverford*, No. 99-4766, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999) (finding that an ordinance which did not specify terms or procedures for obtaining a franchise agreement exceeded the scope of local rights-of-way management permissible under Section 253(c)); *Coral Springs* at 1309 (1999) (finding that provisions in an ordinance that do not deal directly with managing the rights-of-way must be struck down). *See also New Jersey Payphone Association, Inc. v. City of East Orange*, No. 99-2227 (JWB) (D.N.J., Dec. 13, 1999) (finding that Section 253(c) merely preserves municipal authority under state law, rather than adding an independent basis of authority for local management of public rights-of-way).

²⁷ House Report No. 104-204 at 75 (July 24, 1995).

their telecommunications facilities even though an ordinance is not yet passed. *See Carr Affidavit at ¶ 4.* Similarly, another City refused to approve Level 3's permit application because it was in the process of passing a telecommunications ordinance. *See Carr Affidavit at ¶ 6.* Yet during this time, the same City approved a competing carrier's permit application, not requiring this carrier to wait for the passage of the ordinance. *See Carr Affidavit at ¶ 8.* Such discriminatory behavior cannot be countenanced under Section 253(c), which mandates that local rights-of-way be managed on a competitively neutral and nondiscriminatory basis.²⁸

D. The Commission Should Preempt The Cities' Actions Pursuant to 253(d)

Section 253(d) directs the Commission to preempt the enforcement of a state or local requirement that is contrary to Sections 253(a) and 253(b).²⁹ As set forth above, Level 3 believes that the Cities' actions against City Signal are contrary to both of these provisions. Specifically, the Cities' delay in granting permits to City Signal to construct its facilities constitutes a significant barrier to entry in violation of Section 253(a). Regarding Section 253(b), the Cities' actions are not "competitively neutral" and necessary to achieve public interest objectives. In addition, the Cities are not managing their rights-of-way on a competitively neutral and nondiscriminatory basis as required by Section 253(c) since they are subjecting only new market entrants like City Signal, and not incumbents, to delays in granting access to local rights-of-way.

The FCC has not hesitated to use its power of preemption under Section 253(d) in cases involving treatment that could be viewed as creating barriers to new entrants. For instance, the

²⁸ *See New England Public Communications at ¶ 18* (striking down a state regulation that allowed only ILECs and certified LECs to provide payphone services); *see also City of Troy at ¶ 107* (noting that a municipality's discrimination in favor of ILECs with respect to right-of-way access is "especially troubling" and rejecting arguments that incumbents somehow occupy a favored position).

²⁹ 47 U.S.C. §253(d).

FCC preempted a Texas statute that imposed build-out requirements on certain classes of carriers, finding that the requirements restricted the means of facilities through which a party could provide service.³⁰ The FCC stated:

We find that Congress enacted Section 253 to ensure that no state or local authority could erect legal barriers to entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition. We further conclude that this mandate requires us to preempt not only express restrictions on entry, but also restrictions that indirectly produce that result.³¹

In addition, the FCC preempted two cities' denials of franchises to prospective providers of local exchange telecommunications services. The cities did not "want to see two telephone companies . . . competing side by side, in a situation that [would] be financially uneconomic for either company," but the FCC held that the market must be open to all competitors.³² The FCC also preempted a state regulation which permitted only ILECs and certified LECs to provide payphone services in the State of Connecticut, because the regulation was not competitively neutral and imposed greater costs on competitive providers, thus deterring new market entrants:

We conclude that the DPUC's prohibition is not competitively neutral. . . . The prohibition significantly affects, if not completely eliminates, the ability of independent payphone providers to compete for customers in the Connecticut payphone market. We find that requiring payphone providers to provide local exchange services in order to be eligible to offer payphone services significantly hinders such providers relative to incumbent LECs and certified LECs. *Such a requirement substantially raises the costs and other burdens of providing payphone services, thus deterring the entry of potential competitors.*³³

³⁰ See *Texas PUC* at ¶ 3.

³¹ *Id.* at ¶ 41.

³² See *Classic Telephone I* at ¶ 6.

³³ *New England Public Communications* at ¶ 20 (emphasis added). See also *State of Minnesota* at ¶ 18 (declining to endorse an agreement between the State of Minnesota and a private party which grants to the private party exclusive rights to install fiber optic cable along Minnesota's interstate highways"); *In the Matter of Silver Star Telephone Company, Inc., Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, *Memorandum Opinion and*

Based on this precedent and Section 253(d)'s preemption standard, the FCC should preempt the Cities' actions in failing to grant City Signal permits.

Level 3 urges the Commission to preempt the Cities' actions against City Signal pursuant to its power under Section 253(d). As noted above, in determining whether to implement this power, the FCC determines whether the requirement at issue "may prohibit or have the effect of prohibiting the ability of any entity to provide any telecommunications service."³⁴ By refusing to grant City Signal permits to construct its facilities for an eight month period, the Cities prohibit City Signal's ability to provide telecommunications services. Thus, the FCC should not hesitate to preempt the Cities' actions.

III. CONCLUSION

Level 3 urges the Commission to grant City Signal's Petitions and preempt any statutes, regulations, or other requirements of the Cities that prohibit or have the effect of prohibiting City Signal's or other new entrants' provision of telecommunications service by imposing excessive delay on the construction of facilities. The Telecommunications Act of 1996 was enacted "to provide for a pro-competitive, deregulatory national policy framework designed *to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.* . . ."³⁵ Achievement of this important goal requires, of course, that telecommunications providers

Order, FCC 97-336, 12 FCC Rcd. 15,639, at ¶ 40 (rel. Sept. 24, 1997) (preempting Wyoming statute that enabled a rural ILEC to veto the certification of a new entrant).

³⁴ See *supra* p. 6 and note 13.

³⁵ H.R. Conf. Rep. No. 104-458 at 113, reprinted in 1996 U.S.C.C.A.N. 124 (emphasis added).

receive timely access to public rights-of-way to install their necessary facilities on a competitively neutral and nondiscriminatory basis. Without Commission action in this matter, true, open competition will continually be threatened as new market entrants encounter delays in the attempt to deploy their telecommunications systems in the Cities and throughout the country.

Respectfully submitted,

William P. Hunt, III
Vice President for Public Policy
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80021
(720) 888-2516 (Tel)
(720) 888-5134 (Fax)

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Counsel for Level 3 Communications, LLC

Dated: January 30, 2001

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**AFFIDAVIT OF BONNI CARR ON BEHALF OF
LEVEL 3 COMMUNICATIONS, LLC**

1. My name is Bonni Carr. I am Senior Program Manager, Infrastructure Deployment, for Level 3 Communications, LLC (“Level 3”). I was hired by Level 3 on January 5, 1998. From that date until August 2000, I was employed as a Network Developer in Level 3’s Los Angeles office. During that time, I was responsible for obtaining permits and general oversight of the construction of Level 3’s fiber optic telecommunications network throughout Los Angeles and Orange counties. In August 2000, I transferred to Level 3’s Infrastructure Deployment group. Although the Infrastructure Deployment Group is not directly responsible for construction, I continue to work closely with the Network Development team due to my

previous involvement with Level 3's projects throughout Southern California.

2. The purpose of this affidavit is to provide the Commission with information regarding the excessive delay Level 3 has encountered when attempting to obtain any necessary franchises and/or permits from local municipalities to construct and operate its systems over the public rights-of-way.

Culver City, California

3. In Culver City, California, our agents first approached the City to apply for permits to install Level 3's telecommunications facilities in August 1999. Construction applications were submitted on August 30, 1999. After several exchanges of comments and drawings, permits were still not forthcoming. Level 3 followed up by meeting with the City's Public Works Department and the City Attorney's office on May 17, 2000. At that meeting, the City informed us that it was contemplating a comprehensive telecommunications ordinance.

4. Subsequent to the May 17, 2000 meeting, I was informed by City staff that it would not process Level 3's application, or the application of any other telecommunications company seeking a permit for new construction in the city, until it passed an ordinance governing access to the City's rights-of-way. During that time, incumbent carriers such as Pacific Bell and AT&T were allowed to continue operations of their telecommunications facilities within city limits.

5. As of the date of this affidavit, the City still has not passed the above-mentioned ordinance and continues to refuse to process Level 3's application for construction. As a result, Level 3 has waited approximately sixteen months to install its telecommunications facilities in the City's public rights-of-way and will continue to wait for an unknown period of time.

Vernon, California

6. In the City of Vernon, California, our agents approached the City in September 1999 to apply for permits to construct Level 3's telecommunications facilities. On December 9, 1999, our agents were told that our permits were ready to be picked up, but would not be released until Level 3 reached an agreement with the City Attorney. We were also informed that the City had not begun work on any type of ordinance and/or agreement process. On January 20, 2000, we sent the City a draft copy of an interim agreement which would govern access to the

City's public rights-of-way until an ordinance was passed.

7. On February 24, 2000, the City Attorney contacted me and stated that he would consider the interim agreement. On March 1, 2000, the attorney contacted me to let me know that the City refused the interim agreement, stating that an official version would soon be available.

8. On April 6, 2000, I contacted the attorney again to check the status of the ordinance. During this same time frame, the City granted Nextlink, a competing carrier, permits to install its telecommunications system without an agreement in place. The City Attorney informed me that the ordinance had not been passed, but he outlined some basic provisions that would be required by the City. The provisions were extremely onerous and far exceeded anything required by the City of other carriers, including Nextlink. As a result of the proposed requirements and the ongoing delay in obtaining permits while other carriers were allowed entry into the marketplace, Level 3 decided to re-route around the city.

Burbank, California

9. In Burbank, California, we first met with City staff in February, 1999. We were told that if the department required any additional conduit or fiber, that they would process the permitting and no agreement would be required. I met with the Public Works Department on March 29, 1999, and after waiting three months without a firm answer, again approached the City for an agreement. We were asked to fill out an in-depth questionnaire regarding our business so that the City could determine if we were truly a telecommunications company wanting to deploy our services city-wide in which case we would not require an agreement. After three weeks, we were notified that an agreement would be required. Our attorney contacted the City's Attorney, but we were told that after submitting all engineered drawings that they would contact us.

10. Our agents began submitting engineered drawings in May 1999, however, the City requested us to consider adding an additional joint-build partner to our plans. Fourteen months later, after many sets of comments and discussions regarding what the City really wanted, an agreement was finally signed by the City.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Bonni Carr
Senior Program Manager, Infrastructure Deployment
Level 3 Communications, LLC

Dated: _____

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