D. NYSTA's Unreasonable Rents Impede Level 3's Ability to Provide Telecommunications Service

Level 3, which acquired the Williams Backbone Network in November 2005,[15] is now the most significant communications facilities owner along the NYSTA right-of-way, owning or leasing at this point more than 200 fibers and one vacant conduit along the Thruway. Gordon Decl. ¶ 6. Level 3 currently delivers its full suite of services over the Backbone Network, including a variety of telecommunications services such as private line service, voice service, and others. *Id.* Of particular note, Level 3 has the capability to use the Backbone Network to connect retail Internet Service Providers to the worldwide Internet backbone via high-speed dedicated private-line services or long-term capacity-lease arrangements. Ary Decl. ¶ 2 (attached as Exhibit 3).

NYSTA's exorbitant rents severely hamper Level 3's ability to provide service to many customers along the Backbone Network. All else equal, Level 3 would like to introduce its services to smaller cities and towns along the Thruway by developing additional access connections to serve as broadband "exit ramps" to connect local communities to the Backbone Network. Elliott Decl. ¶ 3 (attached as Exhibit 4). But all else is *not* equal, because NYSTA's unreasonable and extortionate rents destroy the business justifications for such service offerings.

NYSTA's rents prevent Level 3 (like Williams before it) from developing new access connections that would bring state-of-the-art broadband and other services to the

[15] In November 2005, Level 3 acquired the WilTel Communications Group, Inc. which was the name Williams took after emerging from Chapter 11 financial restructuring in October 2002. As a result, Level 3 now owns the Backbone Network and holds the corresponding IRU. It is also the successor to the exorbitant rents that NYSTA originally imposed on Williams.

dozens of currently un-served or under-served small communities located along the Backbone Network's route. Allen Decl. ¶ 4 (attached as Exhibit 5); Elliott Decl. ¶ 4, 6. In the eight years since Williams signed the Riders authorizing the additional access connections, neither Williams nor Level 3 has requested authorization for another. Ary Decl. ¶ 4. The reason for the lack of expansion is clear: Level 3 (and Williams before it) recognizes that NYSTA's approach to rents is unreasonable and extortionate. Simply put, adding an additional annual cost of $48,794.51 (the average rent for the additional POP connections, *see* Exhibit 14, Rows 6-8) completely undermines the financial justification for any additional access points, particularly for the un-served and under-served smaller communities that would not come close to generating revenues adequate to offset the rent. Ary Decl. ¶ 5; Elliott Decl. ¶ 6.

Level 3's "Extended On-Net" ("EON") project illustrates this impact. Level 3 recently launched the EON project to construct additional connection points to its long-haul networks throughout the United States. Ary Decl. ¶ 6. In connection with this initiative, Level 3 evaluated the feasibility of implementing EON capabilities along approximately 43,000 miles of backbone networks across the country, classifying facilities as "green" (desirable for EON deployment), "yellow" (more difficult for EON deployment), or "red" (off the list of possible sites for EON deployment due to a variety of factors). All possible EON locations situated within the NYSTA's rights-of-way have been classified as "red" due to a variety of factors, prominently including NYSTA's rent demands and the difficulty of dealing with NYSTA. Ary Decl. ¶ 6. Level 3 has also classified even its off-NYSTA facilities as "red" due to their close proximity to the NYSTA rights-of-way and the strong likelihood that Level 3 would have to negotiate with NYSTA to acquire property rights for the network crossings necessary to use these facilities to deliver traffic to customers. *Id.* As a result, Level 3 currently does not plan to deploy EON capabilities anywhere along the Backbone Network, resulting in lost business opportunities for Level 3, lost cost savings opportunities for the rural carriers that Level 3 would otherwise serve along the route, and fewer advanced broadband service offerings for consumers in those communities.

As Level 3's EON deployment decisions demonstrate, the ramifications of NYSTA's onerous rents are particularly ominous for broadband deployment in smaller communities in New York State. This impact is obviously counterproductive and anathema to the Commission's efforts to spur broadband deployment beyond urban centers. The Commission has made clear that broadband access is critical to American prosperity and development. Chairman Genachowski has made widespread high-speed access to the Internet a top priority at the Commission, explaining that the Internet has been perhaps "the most successful driver of economic growth" in the country.[16] Similarly, Commissioner Michael Copps has explained that "America's economy depends on ensuring that all Americans, including those in rural areas, have access to broadband and are able to compete in this connected, global economy."[17]

Crucial to that access are so-called "middle-mile" facilities providing relatively fast, high-capacity access between backbone networks and the "last mile" connection to

[16] Amy Schatz, *New FCC Chairman's Agenda Includes Broader Internet Access, More Transparency*, WALL ST. J., July 20, 2009, at B3.

[17] Commissioner Michael J. Copps, *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy* at 11 (May 22, 2009), *available at* http://www.tiaonline.org/gov_affairs/stimulus_package/docs/FCC_Rural_Broadband_Strategy.pdf ("*Rural Broadband Strategy Report*").

the end user.[18] The POP access connections at issue in this petition are examples of such middle-mile infrastructure. "Access to adequate and affordable 'middle-mile' broadband facilities," Commissioner Copps explained, "is a necessary precursor to a provider's being able to deploy broadband services to its customers."[19] Without adequate middle-mile capacity, broadband service providers have difficulty providing services to its customers, even if last-mile facilities are in place.[20] This is particularly true in rural communities, where Internet service providers are often located significant distances from network backbone connections.[21]

NYSTA's rent requirements thoroughly undermine Level 3's ability to deploy the middle-mile facilities necessary to bring the Backbone Network's capacity and capabilities to the smaller communities along the Thruway's route. The cost of deploying

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18 FiberTower Corporation, the Rural Telecommunications Group, Inc., COMPTEL, and Sprint Nextel Corporation, Letter and Petition for Reconsideration, FCC GN Docket No. 09-29, at 2 (filed Mar. 25, 2009) (noting that middle mile "infrastructure is necessary for broadband mobile wireless networks, first responder networks, and broadband connectivity to municipal buildings, including medical facilities, schools, and libraries. Absent this infrastructure, broadband networks . . . *cannot* operate") (italics in original).

19 *Rural Broadband Strategy Report* at 49; *see also id.* at 67-69.

20 *See, e.g.*, Comments of Verizon and Verizon Wireless on Report on Rural Broadband Strategy, FCC GN Docket No. 09-29, at 11 (filed Mar. 25, 2009) ("The inadequacy or high cost of the 'middle mile' has been highlighted as one of the significant barriers to greater broadband deployment in rural areas."); Comments of the National Exchange Carrier Association, Inc., FCC GN Docket No. 09-29, at 5-6 (filed Mar. 25, 2009) ("[T]he high cost of middle mile backbone connections is an obstacle to providing broadband services in low-density rural markets.").

21 *See, e.g.*, Comments of Sprint Nextel Corp., FCC GN Docket No. 09-29, at 5 n.7 (filed Mar. 25, 2009) (stating that the typical rural local exchange carrier is located 98 miles from its primary Internet backbone connection).

middle-mile facilities already poses a substantial challenge to network operators,[22] and NYSTA's exorbitant rental costs makes deployments along the Backbone Network financially unjustifiable. Allen Decl. ¶ 4. This impacts rural consumers most directly, of course, because rural broadband will continue to lag behind urban offerings until middle-mile infrastructure is in place.[23]

In many instances, because of the small size of unserved or underserved communities (like Amsterdam and other communities in the same area), it is difficult to sustain the economic case for completing the network connections and extensions necessary for Level 3 to serve broadband providers serving these areas. *See* Elliott Decl. ¶ 4. Federal broadband stimulus funding under the American Recovery and Reinvestment Act ("ARRA") can tip the balance toward additional deployments, *see id.*, reflecting Congress's goal of bringing broadband services to the smaller communities across the country.[24] ARRA funding is available only for capital expenses, however, *see NOFA*, 74 Fed. Reg. at 33112 (§ V.D.2.b.i.) (operating expenses ineligible); *see also id.*

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22 *See, e.g.*, New America Foundation, Comments, FCC GN Docket No. 09-29, at 5 ("[A]ccess to the high-speed middle-mile links that carry Internet traffic to the backbone, and the escalating costs associated with transporting traffic among networks, have become fundamental barriers to spreading connectivity, promoting broadband competition, improving speeds and lowering prices.").

23 *See, e.g.*, Comments of DigitalBridge Communications Corp., FCC GN Docket No. 09-29, at 8 (filed Mar. 25, 2009) ("The lack of middle-mile infrastructure is one of the greatest obstacles to building sustainable rural broadband networks.").

24 Congress crafted the ARRA's broadband stimulus provisions to "(1) provide access to broadband service to consumers residing in unserved areas of the United States; (2) provide improved access to broadband service to consumers residing in underserved areas of the United States; [and] (3) provide broadband education, awareness, training, access, equipment, and support to [schools, libraries, job-training centers, and other community-focused organizations]; (4) improve access to, and use of, broadband service by public safety agencies; and (5) stimulate the demand for broadband, economic growth, and job creation." *See* 47 U.S.C. § 1305(b).

at 33113 (§ V.E.) (projects must be sustainable post-funding), meaning that these additional deployments are economically justifiable only if recurring and operational costs are not exorbitant. NYSTA's rents are a textbook example of an exorbitant recurring cost, and they prevent Level 3 from pursuing additional deployments that would otherwise be financially justified with ARRA funding. Elliott Decl. ¶¶ 5-6. In other words, NYSTA's rents undermine Congress's intent to promote broadband deployment.

Level 3's decision not to seek stimulus funding for additional connections in and around Amsterdam, New York, illustrates this impact. (A map identifying a possible deployment in and around Amsterdam is included as Attachment C to the Elliott Declaration.) The capital costs of constructing the Amsterdam-area network extension would be approximately $7.2 million. Elliott Decl. ¶ 6. In addition, assuming prevailing rates applied with respect to access to public rights-of-way for the extension, the incremental operating expenses associated with the extension would be approximately $205,000 per year. *Id.* Under this scenario, ARRA funding that offsets eighty percent of the capital costs would make it financially feasible to proceed with the deployment. *Id.*

If, on the other hand, NYSTA imposed an annual rent charge of $48,000 for each of the two Backbone Network connections envisioned in this deployment (resulting in a total annual rent of $96,000 per year with future annual adjustments for inflation), there would be no financial justification for Level 3 to proceed with the project. *Id.* Imposing such rents for access to relatively small sections of NYSTA's right-of-way increases annual operating expenses for the Amsterdam project by nearly fifty percent. *Id.* The same reasoning applies to other small community connection opportunities along the

NYSTA rights-of-way. In most (if not all) instances, the additional $48,000 rent charge per year per connection would make the construction of extensions off of the Backbone Network uneconomic. *Id.*

The potential impact of NYSTA's rent payments can also be demonstrated by assuming that such rents were applied to the rest of network owned by Level 3 in the United States.[25] NYSTA's 2008 rent bill for the seventeen additional rights-of-way totaled $706,468, which amounts to approximately $364 per linear foot. *See* Exhibit 14, Row 18. Applying this rate hypothetically to the portions of Level 3's North American network located in public rights-of-way (*i.e.*, 35,000 miles, or 184,800,000 linear feet, *see* Gordon Decl. ¶ 4) reveals how a ubiquitous application of NYSTA's exorbitant fees would crush service providers nationwide. If public right-of-way owners across the country applied the average NYSTA rate of $364 per foot, Level 3's annual rent for those portions alone would total $67,267,200,000. That fee would dwarf Level 3's revenues from network operations and force it to stop operating its networks altogether. Gordon Decl. ¶ 4. In fact, imposing $67 billion in rent costs on a company with annual revenues from North American network operations of approximately $4 billion would force Level 3 to close its doors immediately. *See id.*

Indeed, NYSTA's per-foot fee completely swamps Level 3's per-foot revenues. In aggregate, Level 3 earned revenues of approximately $4.59 per foot from its North

[25] Unfortunately, this is not an entirely hypothetical exercise. If the Commission determines that NYSTA's rent regime survives challenge under Section 253, Level 3 expects that other state and local governments and agencies facing similar budget challenges will follow suit and significantly *increase* their existing rent or franchise payments to match NYSTA's outrageous charges. Previous case law construing Section 253 expressly recognizes this concern. *See Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 17-18 (1st Cir. 2006).

American network in 2008. *See id.* ¶¶ 7-8. NYSTA's average rent for use of the rights-of-way is nearly 8,000 percent higher.

II. ARGUMENT

The Commission Must Preempt the Rental Provisions

Section 253 requires the Commission to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," unless the regulation falls within either of two narrowly circumscribed exceptions. 47 U.S.C. § 253. Accordingly, if a state requirement violates the standard identified in subsection (a) and does not fall within the safe harbors in subsections (b) or (c), then the Commission has a nondiscretionary obligation to preempt. *See* 47 U.S.C. § 253(d) (providing that the Commission "shall" preempt in this circumstance); *see also Petition of the State of Minnesota*, 14 FCC Rcd at 21,704 ¶ 11 (stating that if a regulation violates Section 253(a), "the Commission *must* preempt it unless [it] comes within the terms of the exceptions Congress carved out in sections 253(b) and (c)") (emphasis added).

As detailed below, NYSTA's rents manifestly violate Section 253(a) because they have the effect of barring Level 3 from providing telecommunications services to communities along the Thruway. Neither of the safe harbors applies. Accordingly, the Commission must preempt the rent requirements pursuant to Section 253(d). Moreover, preempting these rent provisions under Section 253 would advance the goals of Section 706, which directs the Commission to further the deployment of advanced communications services.

A. The Commission Has Jurisdiction to Preempt

Pursuant to Section 253, the Commission has jurisdiction to issue a declaratory ruling preempting NYSTA's rents. In relevant part, Section 253(d) provides that "the Commission *shall* preempt the enforcement" of a state requirement upon determining that the challenged requirement violates the standard identified in Section 253(a). 47 U.S.C. § 253(d) (emphasis added). Section 253(a) provides that "No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). NYSTA's rents plainly violate the subsection (a) standard. *See infra* part II.B.

Subsections (b) and (c) establish narrow safe harbors under which a statute, regulation, or legal requirement that violates subsection (a) is saved from preemption. *See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999). "[T]he burden of proving that a statute, regulation, or legal requirement comes within the exemptions found in sections 253(b) and (c) falls on the party claiming that exception applies." *Petition of the State of Minnesota*, 14 FCC Rcd at 21,704, n.26 *see also Level 3 Commc'ns. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Guayanilla*, 450 F.3d at 21; *N.J. Payphone Ass'n v. Town of West*, 299 F.3d 235, 240 (3d Cir. 2002). Under subsection (b), states may "impose, on a competitively neutral basis and consistent with section 254 [of this section], 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." 47 U.S.C. § 253(b). Under subsection (c), states may "manage the public rights-of-way" and "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. § 253(c). Neither of these provisions saves NYSTA's exorbitant rents. *See infra* parts II.C and II.D.

As the statute makes clear, the Commission must consider not only whether a requirement violates subsection (a), but must also assess whether the disputed requirement falls into either of the safe harbors. If it does, then the Commission must not preempt. Thus, part of the Commission's task is to determine whether either safe harbor applies. There is therefore no logical coherence to an argument that the Commission lacks jurisdiction to determine whether the subsection (c) safe harbor applies. Otherwise, a state or local authority could automatically thwart Commission oversight simply by raising a defense under subsection (c), whether or not meritorious. Thus, under the only logical reading of the statute, Section 253 grants the Commission jurisdiction to determine whether a state requirement falls within the subsection (c) safe harbor.

The Second Circuit has reached precisely this conclusion:

> [T]he plain language of the text which allows the FCC to preempt provisions inconsistent with subsection (a) strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption. . . . [B]ecause § 253(c) provides a defense to alleged violations of § 253(a) or (b), if § 253(d) were read to preclude FCC consideration of disputes involving the interpretation of § 253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint.

TCG New York, Inc. v. City of White Plains, 305 F.3d 67, 75-76 (2d Cir. 2002).

Moreover, the Commission itself has issued guidelines for Section 253 petitions demonstrating that it assesses whether a state or local provision is saved under subsection (c). *See Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd. 22,970 (1998). In pertinent part, the guidelines direct parties to "describe whether the challenged requirement falls within the proscription of section 253(a); if it does, parties should describe whether the requirement nevertheless is permissible under other sections of the statute, specifically sections 253(b) and (c)." *Id.* at 22,971. The guidelines note that the Commission requires a "complete factual record" in order to proceed, and that such a record includes specific information relating not only to the purported violation of subsection (a), but also to the possible applicability of subsections (b) and (c). *See id.* at 22,971-73. The guidelines thus demonstrate that the Commission considers the possible application of both safe harbors when determining whether it must preempt under Section 253.

B. <u>NYSTA's Rents Violate Section 253(a)</u>

Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). In this case, NYSTA does not categorically ban the provision of telecommunications services, but its stifling rents achieve the same result by increasing the costs of providing telecommunications services to many communities throughout New York State to the point that Level 3 will not enter those markets. Further, NYSTA's rents—which are nearly 8,000 percent higher than Level 3's average revenues per foot, *see* Gordon Decl. ¶¶ 4, 7-8—sap funds away from Level 3's capital budget, effectively eliminating Level 3's ability to extend its network to serve new communities or buildings.

"[I]n determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, [the Commission] 'considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *TCG*, 305 F.3d at 76 (citing *Cal. Payphone Ass'n Petition*, Mem. Op. & Order, 12 FCC Rcd 14,191, 14,206 ¶ 31 (1997)); *see also Pub. Util. Comm'n of Tex.*, Mem. Op. & Order,13 FCC Rcd 3460, 3463 ¶ 3. "[A] prohibition does not need to be complete or insurmountable to run afoul of § 253(a)." *TCG*, 305 F.3d at 76 (internal quotation marks omitted). Rather, a requirement that "material[ly] interfere[s]" with a carrier's ability to compete violates subsection (a). *Level 3 Commc'ns.*, 477 F.3d at 533; *see also Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004) ("[A]n absolute bar on the provision of services is not required. It is enough that the [regulation] would 'materially inhibit' the provision of services.") (internal citation omitted).

Two decisions under Section 253(a) are particularly instructive. In *Qwest Corp. v. City of Santa Fe*, Santa Fe passed an ordinance that required telecommunications providers to obtain a lease agreement for the use of a city right-of-way. 380 F.3d at 1262. The ordinance also required providers to obtain an appraisal of the rental value of the right-of-way from a city-approved appraiser, which would form the basis of the rental price. *Id.* In addition, the ordinance required carriers to install excess capacity equal to 100 percent of the capacity the carrier intended to use. *Id.* Qwest sought to install a utility cabinet on a city-owned right-of-way, and the appraisal process resulted in a proposed annual rent of $6,000. *Id.* Qwest estimated that the excess conduit capacity required under the ordinance would increase its costs by 59 percent, and it therefore withdrew its lease application and sought preemption of the ordinance. *Id.* at 1263.

The Tenth Circuit found that the rental price and the excess-capacity requirements violated Section 253(a). *Id.* at 1271. With respect to the rental price, the court noted that Qwest had many more roadside utility cabinets that would require approximately the same amount of space, and that the $6,000 rent for each would undermine the business justifications for deploying them. *Id.* In concluding that the rent violated Section 253(a), the court held that "it is sufficient to show that the rental provisions are prohibitive because they create a massive increase in cost." *Id.* In addition, the Tenth Circuit held that the excess capacity requirement also violated Section 253(a) by injecting an effectively prohibitive cost. *Id.* Reiterating that the ordinance need only "'materially inhibit' the provision of services," the court concluded that, "[g]iven the substantial costs generated by this Ordinance, it meets that test and is prohibitive under 47 U.S.C. § 253." *Id.*

Puerto Rico Telephone Co. v. Municipality of Guayanilla is similarly instructive. 450 F.3d 9 (1st Cir. 2006). In that case, Guayanilla passed an ordinance requiring telecommunications providers to pay a monthly fee of five percent of their gross revenues earned from calls originating within the municipality. *See id.* The Puerto Rico Telephone Company ("PRTC") estimated that the five percent fee, if adopted by all Puerto Rican municipalities, would result in a tenfold increase in PRTC's costs and a massive reduction in Commonwealth-wide profits. *Id.* at 18. The court concluded that the gross revenue fee (together with other certification requirements in the ordinance) violated Section 253(a) because it "'materially inhibits or limits the ability' of PRTC 'to compete in a fair and balanced legal and regulatory environment.'" *Id.* at 19 (quoting *TCG*, 305 F.3d at 76).

The onerous rents NYSTA has imposed in the Riders meet this standard, as they profoundly inhibit Level 3's ability to compete in a fair and balanced legal and regulatory environment. As detailed above, NYSTA's rents are wildly variable, completely divorced from prevailing market rates for such rights-of-way, and designed to extract exorbitant sums by holding a $31 million asset hostage. *See supra* part I.C. Not surprisingly, the rents effectively prohibit Level 3 (and its affiliates) from providing telecommunications services (including private line service, voice service, and others) to other carriers and serving thousands of potential end users. *See supra* part I.D.

While Level 3 currently offers these telecommunications services to many customers along the Backbone Network, NYSTA's rents have precluded Level 3 from pursuing additional access connections that would allow it to deliver service to other communities along the Thruway. *See id.* Level 3 has decided not to install EON capability anywhere along the Thruway because of NYSTA's rents and the difficulty of working and negotiating with NYSTA. *See supra* Part I.D. Likewise, Level 3 has determined that federal stimulus funding would, but for NYSTA's rents, justify building out in communities like Amsterdam, New York. *See supra* Part I.D. NYSTA's rents result in nearly a fifty percent increase in operating costs for a potential Amsterdam build-out, however, thus destroying the financial justification for such deployments and undermining the purpose of the federal broadband stimulus program. *See id.*

The stifling impact is particularly acute with respect to broadband services and the deployment of middle-mile infrastructure. The Commission has made broadband deployment a top national priority, and there is universal agreement that deploying middle-mile broadband infrastructure is critical to delivering broadband to currently un-served communities outside of urban centers. *See supra* Part I.D. By installing additional access connections to the Backbone Network, Level 3 could deploy exactly the kind of middle-mile exit ramps necessary to bring broadband services to smaller communities along the length of the Thruway. NYSTA's rents foreclose that possibility, however, by utterly destroying the business justification for building out any additional access connections. *See id.*

The *Guayanilla* decision is particularly instructive here. If, as in the First Circuit's analysis, *see Guayanilla*, 450 F.3d at 18, NYSTA's fees were assumed to apply to other segments of Level 3's network lying on public rights-of-way, Level 3's annual rents alone would completely undermine the viability of its operations and force it to cease network operations altogether. *See supra* Part I.D. This results in a clear violation of Section 253(a). *See Guayanilla*, 450 F.3d at 18.

Moreover, the rents NYSTA imposes on Level 3 completely eviscerates the possibility of competition "in a fair and balanced legal and regulatory environment." *Cal. Payphone Ass'n Petition*, 12 FCC Rcd at 14,206. As explained above, *see supra* part I.C.2., NYSTA's rents are manifestly discriminatory. At the same time that it charges Level 3 mind-boggling rents for access to the right-of-way, it has subjected other permittees to manifestly reasonable rents—or to no rent at all. This results in a grossly tilted playing field on which Level 3 operates at a competitive disadvantage.

The Commission should remedy this violation of Section 253 by holding that the rent provisions of the Riders are and have been preempted, and are and were invalid.

This would correct the violation in the least intrusive manner possible, as it would not result in invalidating any other provisions in the Riders, the Occupancy Permits, or the On-NYSTA User Agreement. Preempting the rent provisions would be consistent with Section 706, which directs the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 Note (Pub. L. 104-104, tit. VII, § 706 (Feb. 8, 1996)). As explained above, *see supra* part I.D., NYSTA's rents make it prohibitively expensive for Level 3 to deploy the network infrastructure necessary to deliver telecommunications service, including broadband, to customers in smaller cities and towns along the Backbone Network. Therefore, consistent with its obligation under section 706, the Commission should preempt NYSTA's rents.

C. NYSTA's Rents Do Not Fall Within the Section 253(b) Safe Harbor

Section 253(b) preserves the ability of states and local governments "to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to [i] preserve and advance universal service, [ii] protect the public safety and welfare, [iii] ensure the continued quality of telecommunications services, and [iv] safeguard the rights of consumers." 47 U.S.C. § 253(b) (alterations added). The burden of showing that Section 253(b) applies falls on the party claiming the safe harbor. *See, e.g., Petition of the State of Minnesota*, 14 FCC Rcd at 21,704, n.26; *see also Level 3 Commc'ns.*, 477 F.3d at 532; *Guayanilla*, 450 F.3d at 21; *N.J. Payphone Ass'n*, 299 F.3d at 240.

To qualify for the Section 253(b) safe harbor, a state or local requirement must be (1) necessary to achieve one of the four enumerated purposes, (2) competitively neutral, and (3) consistent with section 254 (which provides for the preservation and advancement of universal service). *See W. Wireless Corp. Petition for Preemption of an Order of the S.D. Pub. Utils. Comm'n*, Decl. Ruling, 15 FCC Rcd. 15,168, 15,171 ¶ 7 (2000). A state or local requirement that fails to satisfy each of these criteria does not fit within the safe harbor. *See e.g., Silver Star Tel. Co. Inc., Petition for Preemption and Declaratory Ruling*, Mem. Op. & Order, 12 FCC Rcd 15639, 15659-60 ¶¶ 42, 45 (1997) (preempting a Wyoming statute for failure to meet the "competitive neutrality" criterion) (*recons. denied*, 13 FCC Rcd 16356 (1998), *aff'd RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000)).

Far from being necessary to achieve any of the four purposes enumerated in subsection (b), NYSTA's rent requirements effectively undermine each of those goals. First, the rents are not in any respect necessary to preserve and advance universal service. To the contrary, they effectively retard universal service by creating a pronounced disincentive to extend service to additional consumers. *See supra* part I.C.7. Moreover, there is nothing in the NYSTA budget that suggests it uses the rent revenues to preserve or advance universal service in any manner.[26] Second, the rents are not necessary to protect the public safety and welfare. Rather, the fees are wholly unrelated to that purpose; if anything, the rents disserve those interests by preventing end users along much of the Backbone Network's route from benefiting from the state-of-the-art services

26 *See* 2008 Budget, New York State Thruway Authority & New York State Canal Corporation, at 1 (2007), *available at* http://www.nysthruway.gov/about/financial/2008proposedbudget.pdf.

that, but for the rents, could be provided to smaller communities at cost-effective rates. *See supra* part I.D. Third, the rents directly undermine the goal of preserving the quality of communications services. As noted above, the rents prevent Level 3 in many cases from providing the most advanced services offerings that the Backbone Network supports, and they require Level 3 instead to serve many smaller communities over more dated, incumbent-owned facilities. *See id.* And, fourth, the rents are not necessary to safeguard consumers' rights. They in fact achieve the opposite result. By stifling Level 3's ability to provide its full array of services to customers along the Backbone Network, the rents deprive consumers of the variety of service offerings that Congress intended to encourage through the pro-competitive principles at the foundation of the 1996 Act.

Moreover, the rents are not competitively neutral, regardless of the purpose they may arguably serve. By applying disparate rates for fiber-optic connection permits and non-connecting permits, *see supra* part I.C.3. (noting 25,000 percent markup for fiber-optic connections); by employing different rent formulas to different carriers, *see supra* part I.C.4. (describing rents applicable to Adesta for use of NYSTA rights-of-way); and by compelling Level 3 to provide service over the incumbent's facilities rather than its own fiber-optic network, *see supra* part I.B. (describing the manner in which NYSTA rents create a financial incentive to utilize incumbent facilities), NYSTA has established a rent requirement that is anything but competitively neutral. Indeed, the rents favor some carriers over others, and they encourage the disadvantaged carriers to lease circuits on incumbent networks rather than use their own more efficient facilities, thereby completely frustrating the "overall pro-competitive, de-regulatory framework that Congress sought to establish through the [Act]." *Cheyenne River Sioux Tribe Tel. Auth'y* *and US WEST Commc'ns, Inc.; Joint Petition for Expedited Ruling Preempting South Dakota Law*, Mem. Op. & Order, 17 FCC Rcd 16916, 16,929-30 ¶ 29 (2002) (internal quotation marks omitted). For all of these reasons, the subsection (b) safe harbor does not apply.

D. NYSTA's Rents Do Not Fall Within the Section 253(c) Safe Harbor

In order to be saved by Section 253(c), a state requirement requiring compensation must be "fair and reasonable" and "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c). A state requirement that fails to satisfy either of these criteria does not qualify for the safe harbor. *See id.* As with Section 253(b), the burden under Section 253(c) falls on the party asserting that the safe harbor applies. *See, e.g., Petition of the State of Minnesota*, 14 FCC Rcd at 21,704, n.26; *see also Level 3 Commc'ns.*, 477 F.3d at 532; *Guayanilla*, 450 F.3d at 21; *N.J. Payphone Ass'n*, 299 F.3d at 240.

Factors used to determine whether compensation is "fair and reasonable" include "the extent of the use contemplated, the amount other telecommunications providers would be willing to pay, and the impact on the profitability of the business." *Qwest Corp.*, 380 F.3d at 1272 (adopting factors considered in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000)). In addition, "fees should be, at the very least, *related* to the actual use of rights of way," and "the costs [of maintaining those rights of way] are an essential part of the equation." *Guayanilla*, 450 F.3d at 22 (internal quotation marks omitted) (alteration in original).

In *Qwest Corp. v. City of Santa Fe*, the Tenth Circuit applied a "totality of the circumstances" test to determine whether the compensation provisions imposed by Santa

Fe's ordinance were "fair and reasonable." 380 F.3d at 1272. The court held that they were not, even though they were derived from mandated appraisals designed to assess the rental value of the right-of-way. The court reached this conclusion after noting that the appraisal required by the challenged ordinance did not take into account how Qwest intended to use the right-of-way, and it did not consider the non-exclusive nature of the permit rights. *Id.* at 1272-73. Accordingly, the court found that the ordinance failed to satisfy the "fair and reasonable" compensation requirement, and therefore did not fall within the safe harbor. *Id.*

Likewise, in *Guayanilla*, the First Circuit found that a proposed five-percent gross-revenue fee did not "directly relate to the extent of actual use of public rights of way" because it applied "regardless of whether the call traverses over one inch or 100 feet of the public rights of way." 450 F.3d at 22. Accordingly, the court held that the challenged ordinance failed to fit within the narrow subsection (c) safe harbor.

NYSTA's rents fail to satisfy either of subsection (c)'s criteria, and they are therefore not protected by the safe harbor. First, the rents are plainly not "fair and reasonable." To the contrary, they bear no relationship to the use of the rights-of-way, the costs imposed on NYSTA, the value they provide to Level 3, prevailing market rates, or any other plausible measure of a fair and reasonable fee. *See supra* part I.C.5. Indeed, NYSTA has not undertaken any form of cost study or market-value appraisal to support the rates it has imposed. *See supra* part I.C.2. In this regard, NYSTA's rents fall far short of the fees at issue in *Qwest*, where the city imposed payment requirements based on an appraisal designed to capture a fair rental value. *See* 380 F.3d at 1272. Notably, Santa Fe's appraisal-backed fees were found to be unfair and unreasonable because the appraisal did not assess critical characteristics of the right-of-way at issue. *See id.* NYSTA's failure to justify its rents with *any* cost study or appraisal leads even more conclusively to the same result. Moreover, NYSTA's rents impose blanket fees calculated via a formula that lacks any reference to the distance covered by the rights-of-way, and instead result in wildly erratic fees when measured on a per-linear-foot basis. Because the rents apply without any connection to whether Level 3 uses "one inch or 100 feet of the public rights of way," they do not qualify for protection under subsection (c). *Guayanilla*, 450 F.3d at 22.

In addition, NYSTA's rents are discriminatory and not competitively neutral. It is almost impossible to avoid this conclusion after comparing the extraordinary rents NYSTA imposes on Level 3 with the rents it imposes on other communications permittees, some of whom are not obliged to pay any annual rent at all for certain installations. *See supra* part I.C.2. Indeed, applying Level 3's average rent-per-foot to other carriers would result in ludicrously large fees that dwarf the rent and permit fees it actually collects. If NYSTA were to impose comparable rents on Adesta, for instance, for its operation of communications networks along the full length of the Thruway, Adesta would be obliged to pay NYSTA annual rents of more than $1 billion—a sum that equals the entire operating budget for 2008 for NYSTA and the New York State Canal Corporation combined.[27] *See supra* part I.C.4. By employing a rent scheme that favors some carriers and disadvantages others, NYSTA has created a grossly unbalanced competitive landscape. Section 253(c) therefore does not apply.

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[27] *See* 2008 Budget, New York State Thruway Authority & New York State Canal Corporation, at I (2007), *available at* http://www.nysthruway.gov/about/financial/2008proposedbudget.pdf.

Policy considerations support the same conclusion. Ruling that subsection (c) somehow protects these rents would create a dangerous incentive for other state and local authorities to extract similar ransoms from other entities that have invested millions of dollars in immovable assets beholden to regulatory authorization. Many CLECs are starting to renegotiate franchise agreements with local authorities that are nearing expiration. If these local authorities can act with impunity under subsection (c), then they will have the ability and financial incentive to hold the CLECs' existing networks hostage (just as NYSTA did with the Backbone Network), forcing the CLECs to pay exorbitant sums for the right to continue providing service to the public.

Furthermore, even if the rent provisions of the Riders were found—notwithstanding the evidence—to be fair, reasonable, and non-discriminatory, Section 253(c) would still not provide NYSTA with protection. For a rent obligation to be protected under Section 253(c), the compensation required must be "publicly disclosed" by the governmental agency. 47 U.S.C. § 253(c). NYSTA has complied with this requirement with respect to transverse crossings of its rights-of-way by publishing a fee schedule that utilities can use to accurately predict, in advance, what costs would be imposed by their use of NYSTA rights-of-way. With respect to connections to the Backbone Network, however, NYSTA's *post hoc* 2004 board resolution states simply that fees will be "negotiated" by NYSTA's Finance Committee. *See* NYSTA Resolution 5360 at 8 (attached as Exhibit 36; the relevant provision is on the second page of the exhibit). This provision—which says nothing about compensation actually required—does not satisfy the "public disclosure" requirement of Section 253(c). *See Peco Energy Co. v. Township of Haverford*, No. 99-4766, 1999 U.S. Dist. LEXIS 19409, at *20 (E.D.

Pa. Dec. 20, 1999) (finding that a local ordinance did not fall under the safe harbor provision of section 253(c) because the ordinance "fail[ed] to disclose the required compensation and fees, or even the basis for calculating and imposing those fees").

E. Williams Did Not Waive Section 253 Claims

In each of the Riders at issue, NYSTA demanded the inclusion of a clause purporting to release claims related to disputes stemming from the Riders themselves or from other agreements related to the Backbone Network. *See supra* part I.C. These releases, however, are void because NYSTA effectively forced Williams to accept them under duress, and they are unenforceable with respect to Section 253 in any event.

First, the Riders are contracts of adhesion because they were "entered into between parties with vastly unequal bargaining positions." *Smith, Bucklin & Assocs. v. Sonntag*, 83 F.3d 476, 478 (D.C. Cir. 1996). Particular terms in contracts of adhesion are unenforceable when "one of the parties lacked a meaningful choice [and] the terms of the contract are unreasonably favorable to the other party." *Id.* at 480 (quoting *Riggs Nat'l Bank v. Dist. of Columbia*, 581 A.2d 1229, 1251 (D.C. App. 1990)); *see also Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824, 829 (N.Y. 1988) (holding that contract terms are unenforceable when one party lacks a meaningful choice with respect to contract terms that are unreasonably favorable to the other party). That standard applies perfectly to the purported releases at issue here. The mothballed $31 million Backbone Network put virtually all bargaining power in the hands of NYSTA, requiring Williams to agree to the completely one-sided release clauses in order to secure the additional access connections necessary to bring the network to technical and financial operability. The release is therefore void.

Second, and more fundamentally, courts have held releases of this kind unenforceable with respect to Section 253. As the Second Circuit has ruled, "[r]equiring telecommunications providers to agree to not challenge the provisions . . . in court is a transparent attempt to circumvent § 253." *TCG*, 305 F.3d at 82. Such waivers are not enforceable because the Telecommunications Act is not simply "a collection of default rules that municipalities and service providers can contract around." *Id.* The purported release at issue here is thus "completely unenforceable" as applied to Section 253, and it was "improper" for NYSTA "to even propose it." *Id.*

III. CONCLUSION

For the foregoing reasons, Level 3 respectfully petitions the Commission to issue a declaratory ruling preempting the rent provisions that NYSTA imposes and has imposed on Level 3 (and its predecessors) for access to rights-of-way necessary to provide telecommunications services over its fiber-optic backbone network.

Respectfully submitted,

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Counsel to Level 3 Communications, LLC

July 23, 2009

Petitioner: Level 3 Communications, LLC
State Entity: New York State Thruway Authority
Date: July 23, 2009

List of Exhibits

1. **Declaration of Steve Gordon**
2. **Declaration of Tim Elbert**
3. **Declaration of Jeff Ary**
4. **Declaration of Ike Elliott**
5. **Declaration of Jeffrey Allen**
6. **Agreement between NYSTA and MFS Network Technologies (September 27, 1995)**
7. **On-NYSTA User Agreement (April 12, 1999)**
8. **Off-NYSTA User Agreement (April 12, 1999)**
9. **Letter from Michael J. Keogh (NYSTA) to Misty Stine (MFS Network Technologies) (Dec. 11, 1998)**
10. **Letter from John R. Platt (NYSTA) to William Parker (Williams) (April 12, 1999)**
11. **Letter from Charles Plake (Williams) to Sharon O'Conor (NYSTA) (May 9, 2000)**
12. **Letter from James Highsmith (MFS Network Technologies) to Michael Keogh (NYSTA) (Sept. 8, 1999)**
13. **Letter from Henry C. Collins (N.Y. Office of the Attorney General) to John M. Ryan (Level 3) (July 7, 2009)**
14. **Table of Riders' Terms**

15. – 31. **NYSTA Riders**

32. **Occupancy Permit for Lateral Right-of-Way**
33. **Sample NYSTA occupancy permits with prevailing market rents**
34. **Sample NYSTA occupancy permits with no annual rent**
35. **Inter Office Memorandum from Richard K. Matters, Jr. to Real Property Management Committee (Jan. 14, 1997)**
36. **NYSTA Resolution 5360 (Feb. 3, 2004)**