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

In the Matter of	)	
	)	
LEVEL 3 COMMUNICATIONS, LLC	)	WC Docket No. 09-153
	)	
Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253	)	

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[1] With the exception of Verizon Wireless, the Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc. ("Verizon").

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I. SUMMARY

This petition presents the Commission with an opportunity to clarify the circumstances under which Congress preempted local right-of-way fees. The Commission should declare that 47 U.S.C. § 253 prohibits right-of-way fees that are unreasonable or discriminatory. Such fees prevent carriers from competing on a level playing field, discourage entry and deployment of broadband facilities, and ultimately harm consumers. Congress has made clear that the Commission should remove competitive barriers to achieve the goal of universal broadband access. Interpreting § 253 to give effect to Congress's intent to limit localities' abuse of their control over public rights-of-way is critical to achieving this goal. As Commission staff recently found, the cost of obtaining access to public rights-of-way—including lengthy administrative delays as well as "highly variable" and excessive fees—"may have a significant impact on fiber deployment."[2]

The demands made by the New York State Thruway Authority ("NYSTA") in this case demonstrate the kind of abuse that Congress prohibited. After Williams Communications, Inc. invested more than $31 million to build a backbone facility along the Thruway, NYSTA demanded that it pay millions of dollars in additional fees in order to make connections necessary to use that backbone. NYSTA improperly exploited its control of the rights-of-way to compel Williams to pay exorbitant fees, given that Williams's only alternative was to abandon its $31 million investment.

Verizon's comments discuss two major points. First, excessive and discriminatory fees imposed by localities for access to public rights-of-way, combined with localities' delay in acting on requests for access, threaten to inhibit the deployment of broadband facilities and to impair

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[2] Commission Meeting Slides from Open Meeting, 50, Sept. 29, 2009, http://www.fcc.gov/openmeetings/092909slides.pdf.

competition. Construing § 253 as prohibiting localities from engaging in such abuse is essential to ensuring that consumers realize the benefits of full and fair competition among carriers. Second, the Commission has authority under 47 U.S.C. § 253 to declare that unreasonable or discriminatory right-of-way fees are preempted. In *California Payphone*, the Commission properly construed § 253 to preempt local action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[3] This petition gives the Commission the opportunity to apply that standard to right-of-way fees. When such fees exceed municipal costs, or are used to favor one carrier over its competitors, they materially inhibit or limit the ability of carriers to compete in a fair and balanced environment. The fees charged by NYSTA violate these standards, and the Commission should exercise its authority to declare them preempted by § 253.

II. THE COMMISSION SHOULD CLARIFY THE SCOPE OF PREEMPTION IN ORDER TO PROMOTE THE DEPLOYMENT OF BROADBAND FACILITIES

A. Encouraging Broadband Deployment Is A Critical National Goal

In 2010, the Commission must submit to Congress a "national broadband plan" for ensuring that broadband services become available to every American.[4] Encouraging further broadband deployment will be critical to improving the country's economic performance, medical care, energy efficiency, and security.[5] While broadband providers have invested to provide service to most Americans, there are still pockets of unserved areas as well as areas

[3] *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,206 ¶ 31 (1997).

[4] *In re Matter of a National Broadband Plan for Our Future*, 24 F.C.C.R. 4342, 4344 ¶ 6 (2009).

[5] *See id.* 4345 ¶ 9 ("[T]he Commission must include a plan for use of broadband infrastructure and services in advancing a broad array of public interest goals, including consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.").

where new facilities are needed to upgrade existing service.[6] The Commission's goal is to make it possible "for every American citizen and every American business to have access to robust broadband services."[7]

The Commission has recognized that "the costs of market entry, network deployment and continuing operations" are among the barriers to universal broadband access.[8] In its report at the September 29, 2009 Open Meeting, Commission staff reviewed government policies impacting broadband deployment. Staff identified the "cost of obtaining . . . rights of way" as a factor that "may have a significant impact on fiber deployment."[9] According to the report, "[r]ights of way fees are highly variable and can exceed hundreds of dollars per year per foot."[10] Staff observed that 18–20 percent of the estimated total cost of an aerial fiber build is attributable to rights of way, pole attachments, and permits, and that "delays of up to 18–24 months can also raise cost of fiber deployment."[11] Local delays also threaten to impede the provision of wireless service. For example, 760 of the 3,300 tower and antenna applications before local zoning authorities in the spring of 2008 had been pending for more than a year.[12] Of those, 180 had been pending for more than three years, including 135 collation applications to use existing towers.

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[6] *See id.* at 4344 ¶ 5.

[7] *Id.*

[8] *Id.* at 4355 ¶ 42.

[9] Commission Meeting Slides from Open Meeting, supra note 2, at 50.

[10] *Id*.

[11] *Id*.

[12] Petition for Declaratory Ruling at 15, *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165, July 11, 2008, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520038471

B. Excessive And Discriminatory Fees, Along With Delay, Inhibit The Deployment Of Broadband And Other Technologies And Impede Competition

Localities' abuse of their authority over public rights-of-way poses a direct threat to the achievement of the national broadband plan. Localities are the gatekeepers to the deployment of broadband facilities. Any carrier that wishes to install broadband facilities in public rights-of-way, or to renew its license to use such facilities, must first get permission from local authorities. As a result, localities can abuse their control by imposing significant costs and delays on carriers in connection with applications for the issuance or renewal of permits to occupy public rights-of-way.[13] For example, localities may require carriers to pay high right-of-way, registration, or other fees. Other local regulations—such as application, inspection, bonding, and indemnity requirements—can be abused and result in unreasonably high compliance costs. When these local actions make it more expensive to deploy broadband facilities, they make it less likely that carriers will build such facilities in the area. In some cases, carriers may have little choice to leave the market and must accede to local demands, diminishing financial resources that could have been used to improve service or deploy new facilities elsewhere. Higher costs also ultimately result in higher prices for consumers.

The most common financial burden imposed by localities is a right-of-way fee. Localities may abuse their control over rights-of-way by imposing excessive fees as a condition

[13] *See Diginet, Inc. v. W. Union ATS, Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992) (Posner, J.) ("[M]unicipalities and other local governments" may use their "locational monopolies to delay, and extort monopolistic fees from, companies that to provide service must frequently run wires and cables across local governmental boundaries."); *see also* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3, 4 (1971) (describing government monopoly power of coercion).

of the issuance or renewal of a license. For example, in 2002, NYSTA required MCI[14] in particular to pay $24,000 to occupy just 19 feet of public rights-of-way along the Thruway. Adjusted for inflation, the annual fee now exceeds $33,000. Verizon's facilities, however, do not disrupt or damage the rights-of-way, and the Thruway's fees therefore far exceed any reasonable measure of cost. As part of the agreement, NYSTA also required MCI to donate two of the eight ducts it constructed in the rights-of-way. NYSTA is not the only locality to impose high fees for use of public rights-of-way. The Kansas Turnpike Authority, for example, requires Verizon Wireless to pay three percent of its annual revenues derived from traffic using the wireless network that operates along 47.5 miles of the Turnpike's rights-of-way. The Kansas Turnpike Authority also required Verizon to make an up-front payment of nearly $1 million in 2002 to sign the contract.

The City of Eugene, Oregon provides yet another example of a locality that has imposed excessive right-of-way fees. MCI Communications installed facilities in private railroad rights-of-way in Eugene. Eugene asserted that, where the railroad tracks cross public streets, any underground facilities are in public rights-of-way. Even if Eugene's position were correct, MCI Communications occupied less than 1,000 linear feet of public rights-of-way in the City and imposed no cognizable burden on the public rights-of-way. In 1991, MCI Communications and Eugene entered into a 15-year agreement that required MCI Communications to pay a total of $2,300—about $250 per year, present value—for the purported use of Eugene's public rights-of-way. Eugene agreed that the fee was "adequate compensation." After the agreement expired, Eugene sought to apply an ordinance requiring any carrier occupying any portion of public

[14] The permittee was MCI Communications Services, Inc. ("MCI Communications"), now d/b/a Verizon Business Services. MCI Communications is the successor to MCI WORLDCOM Network Services, Inc., the original permit holder. MCI Communications is now owned by Verizon.

rights-of-way to pay an annual license fee of seven percent of the revenue derived from the services it provided in Eugene. In addition, the ordinance imposed an annual registration fee equal to two percent of the carriers' revenues. Verizon initially paid the two percent registration fee, which cost more than $81,000 in 2006, related to the operations of MCI Communications. The additional seven percent right-of-way fee would have required Verizon to pay another $286,000 related to the operations of MCI Communications, for a total of more than $360,000 in annual local fees—more than 1,000 times the fee it paid under the previous agreement. Also, Verizon's competitive local exchange carrier[15] decided to suspend its plans to build new facilities to provide local service to a large customer in Eugene because the installation of such facilities would have exposed it to Eugene's seven percent annual right-of-way fee.[16]

These sorts of unreasonable right-of-way fees are analogous to the unreasonable franchise fees imposed by some local franchising authorities ("LFAs") on cable providers. The Commission found that unreasonable financial demands by LFAs, such as large up-front payments and in-kind contributions, threatened competition and technological development in the provision of wireline cable service.[17] The Commission concluded there that unreasonable demands by local authorities "constitute[d] an unreasonable barrier to entry that impedes the achievement of the interrelated Federal goals of enhanced cable competition and accelerated

[15] MCImetro Access Transmission Services LLC ("MCImetro").

[16] MCI Communications and MCImetro challenged the seven percent fee in federal district court. The court determined that the Tax Injunction Act barred a federal district court from hearing the challenge because the fee constituted a tax. *MCI Commc'ns Servs., Inc. v. City of Eugene*, No. 07-6059-AA, 2007 WL 2984118, at *3–*4 (D. Or. Oct. 9, 2007), *aff'd* No. 07-35935, 2009 WL 2952179 (9th Cir. Sept. 15, 2009). Consequently, the court did not reach the merits.

[17] *See In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 F.C.C.R. 5101, 5123 ¶¶ 43–44 (2007).

broadband deployment."[18] In particular, unreasonable demands, coupled with unreasonable delays, "discourage[d] investment in the fiber-based infrastructure necessary for the provision of advanced broadband services . . . ."[19] The same risks exist in this context as well.

Localities may also abuse their control over public rights-of-way by favoring some carriers over their competitors. In Eugene, for example, the incumbent local exchange carrier is subject to substantially lower fees than Verizon, despite its significantly greater use of the City's public rights-of-way. In some cases, localities themselves provide competing services. The City of Portland, for example, operates a fiber-optic network and sells telecommunications services to public schools and other governments.[20] Portland built the network in part by requiring in-kind contributions from private carriers under permits or franchise agreements, which subsidized the municipal network and allowed it to undercut the carriers with which it competes.[21] Discriminatory fees make fair competition impossible and interfere with the Commission's goal of stimulating broadband deployment.

Excessive or discriminatory right-of-way fees can cause carriers to choose not to build facilities in certain areas. As noted above, Verizon decided not to deploy facilities to provide local exchange service in Eugene because occupying public rights-of-way would subject those operations to Eugene's seven percent fee. In other situations, carriers have little choice but to submit to costly local requirements, either when they install new facilities or when they seek to renew expiring licenses. For example, carriers that have already sunk a large investment into a network face a Hobson's choice: either abandon their investment, or pay whatever fees the

[18] *Id*. at 5102 ¶ 1.

[19] *Id.* at 5103 ¶ 3.

[20] *Time Warner Telecomm. of Or., LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1089–90 (D. Or. 2006), *aff'd in part*, 322 Fed. App'x 496 (9th Cir. 2009).

[21] *Id.*

locality demands. In these situations, the carrier must accept nearly any local demand unless the Commission or the courts restrain local authority.

Localities also can coerce carriers into paying outlandish fees by delaying negotiations, leaving sunk investments stranded until carriers accede to their demands.[22] Indeed, that is precisely the tactic that NYSTA has employed in this case. As noted, Commission staff recently found that "delays of up to 18–24 months [in obtaining right-of-way permits] can also raise cost of fiber deployment."[23] The Commission also found that LFAs were using similar delay tactics to coerce cable operators into accepting unreasonable demands in the cable franchising context. Localities often subjected applications to "months of unnecessary delay."[24] The Commission found that these delays, coupled with unreasonable demands, deterred competition in the provision of cable services. Accordingly, it adopted rules that preempted local abuse in the local franchising process.[25]

As in the cable franchising context, the Commission should give effect to Congress's intent to prohibit abusive local practices that impede the deployment of facilities and impair competition. Commission action to enforce the statutory preemption of local authority is especially important at this time, as local abuse can threaten the national goal of promoting the deployment of broadband facilities. Increased deployment of broadband facilities will permit not only enhanced offerings of information services, but also improved offerings of telecommunications services that can be provisioned over broadband.

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[22] *See, e.g.*, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) ("[T]he extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays.").

[23] Commission Meeting Slides from Open Meeting, *supra* note 2, at 50.

[24] *See Implementation of Section 621(a)(1)*, 22 F.C.C.R. at 5101, 5110 ¶ 19.

[25] *Id.* at 5162 ¶ 137.

III. THE COMMISSION SHOULD DECLARE THAT § 253 PREEMPTS UNREASONABLE AND DISCRIMINATORY RIGHT-OF-WAY FEES

The Commission has previously interpreted 47 U.S.C. § 253(a) as preempting local action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[26] This petition presents an appropriate opportunity for the Commission to explain how that standard applies to the most common local action—charging fees for access to public rights-of-way.[27] For the reasons discussed below, the Commission should announce that § 253 preempts local right-of-way fees if they are unreasonable or competitively discriminatory.[28]

A. The Commission Has Already Decided That § 253 Preempts Local Actions That Materially Interfere With Any Carrier's Ability To Enter And Compete Fairly In The Telecommunications Market

Under § 253(a), "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In *California Payphone*, the Commission interpreted this provision to preempt action that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[29]

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[26] *In re Cal. Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,206 ¶ 31 (1997).

[27] Because the petition seeks relief only from right-of-way fees imposed by NYSTA, Verizon's comments focus only on the standard for preempting such fees. States and localities may also impose other costly requirements that are improper and may be preempted as well. These attempts inappropriately impair competition, and the Commission should not suggest otherwise. Verizon reserves the right to challenge those requirements in future proceedings.

[28] The Commission should make clear that discriminatory fees cannot be remedied merely by raising fees. Ultimately, the fee must also be reasonable and based on the cost for administering use of public rights-of-way by service providers.

[29] *Cal. Payphone*, 12 F.C.C.R. at 14,206 ¶ 31.

The Commission acted within its authority in adopting this interpretation of § 253. Because the scope of § 253 is ambiguous, the Commission has discretion to interpret the statute as establishing a material inhibition standard.[30] Section 253(a) blocks local actions that have the effect of "prohibiting" a carrier's ability to provide service, but it does not define the word "prohibit." The Commission reasonably construed "prohibit" in this context as meaning "hinder" or "inhibit." *See, e.g.*, BLACK'S LAW DICTIONARY 1248 (8th ed. 2004) (defining "prohibit" as "to prevent or hinder"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1813 (2002) ("hinder"); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1546 (2d ed. 1998) ("hold back," "hinder," "obstruct"); 12 OXFORD ENGLISH DICTIONARY 2D 596 ("to prevent, preclude, hinder").[31] Indeed, the Supreme Court has used the verb "impedes" as a synonym for "prohibits" when describing the statute.[32]

The Commission's construction of § 253 is entitled to special deference because § 253(d) expressly delegates to the Commission the authority to determine if a state or local requirement is preempted by § 253.[33] The First, Second, and Tenth Circuits have each accepted the

[30] *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 499–500 (1998) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[31] Congress also indicated that the statute is broadly preemptive by precluding "any" state or local action that has the effect of prohibiting the ability of "any" entity to provide service. *See* Brief for the Federal Petitioners at 24, *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (Nos. 02-1238 et al.), 2003 WL 22087499 ("any" indicates breadth outside special "clear statement" context).

[32] *Verizon Commc'ns, Inc*. v. FCC, 535 U.S. 467, 491 (2002).

[33] *See Wyeth v. Levine*, 129 S. Ct. 1187, 1200–01 & n.9 (2009) (citing 47 U.S.C. § 253(d) as example of direct congressional delegation of preemption authority); Brief for the United States as Amicus Curiae at 9, *Level 3 Commc'ns, LLC v. City of St. Louis*, Nos. 08-626 & 08-759 (U.S. May 2009) ("Moreover, the Commission can use its authority under Section 253(d) to help correct and unify the interpretation and application of Section 253 . . . .").

California Payphone standard as a reasonable interpretation of § 253(a).[34] The Eighth Circuit also endorsed the material inhibition test from *California Payphone*, though its application of that standard was ambiguous.[35] The United States has argued that the Eighth Circuit's decision primarily endorsed *California Payphone* and "need not be read as confining the application of Section 253(a) to only those legal requirements that completely bar new entry."[36] The Ninth Circuit held that § 253(a) requires a carrier to demonstrate effective prohibition, but did not elaborate on how that standard could be met.[37] Regardless, the Commission is not bound by judicial constructions of ambiguous language in its governing statute.[38]

Under the *California Payphone* standard, the Commission's task in this case is to determine when a right-of-way fee "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[39] Section 253 does not speak directly to that question, and thus the Commission has discretion to conclude that right-of-way fees have a prohibitory effect when they are unreasonable or

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[34] See *P.R. Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) ("[A] prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a)."); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir. 2004) ("[A] regulation need not erect an absolute barrier to entry in order to be found prohibitive.").

[35] *See Level 3 Commc'ns, LLC v. City of St. Louis*, 477 F.3d 528, 533 (8th Cir. 2007).

[36] Brief for the United States as Amicus Curiae at 13, *Level 3 Commc'ns, LLC v. City of St. Louis*, Nos. 08-626 & 08-759 (U.S. May 2009).

[37] *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc).

[38] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

[39] *Cal. Payphone*, 12 F.C.C.R. at 14,206 ¶ 31.

competitively discriminatory. For the reasons discussed below, the Commission should reach that conclusion.

B. The Commission Should Declare That § 253 Preempts Unreasonable And Competitively Discriminatory Right-of-Way Fees, Including The Fees Identified In The Present Petition

1. Congress Struck An Appropriate Balance Between Local And Federal Interests By Preempting Unreasonable and Discriminatory Right-of-Way Fees

The Telecommunications Act permits localities[40] to regulate rights-of-way, subject to specific limitations. First, localities may "manage" public rights-of-way within their boundaries. 47 U.S.C. § 253(c). For example, localities may legitimately regulate the time of excavation to prevent traffic problems.[41] Other management functions include "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[42] Second, localities may "require fair and reasonable compensation" for the use of public rights-of-way. *Id.* § 253(c). For example, localities can charge carriers for the costs incurred to issue permits or for other direct costs. The scope of this authorization to require fair and reasonable compensation lies at the heart of the present petition.

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[40] We refer to "localities" because local governments typically control public rights-of-way. However, state agencies like NYSTA have no more discretion to impose unreasonable or discriminatory fees when they control public rights-of-way. Section 253(a) applies equally to any "State or local legal requirement." Section 253(c) preserves the authority of any "State or local government" to require reasonable compensation for access to public rights-of-way. Under § 253(b), state agencies have greater latitude when they act as public utility regulators, but NYSTA acted in this case solely as a gatekeeper to public rights-of-way along the Thruway.

[41] *See In re Classic Tel., Inc.*, 11 F.C.C.R. 13,082, 13,103 ¶ 39 (1996) (discussing legislative history on the "permissible management functions" of a locality).

[42] *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,441 ¶ 103 (1997).

The Commission should adopt a standard that reflects the balance struck by § 253(c). Congress preserved local authority to manage rights-of-way and to demand reasonable compensation on a non-discriminatory basis. At the same time, Congress did not intend to allow localities to abuse their control of public rights-of-way by imposing fees that simply capture carrier profits or favor one carrier over another. As the Second Circuit has explained, "[s]ection 253(c) requires compensation to be reasonable essentially to prevent monopoly pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates."[43] Likewise, wireless carriers cannot provide service without obtaining permits from local governments to install necessary facilities.

When they extract unreasonable fees, localities discourage competitors from entering the market, retarding the development and deployment of new broadband and telecommunications technology.[44] To the extent that localities can coerce carriers into paying unreasonable right-of-way fees, either at the time of entry or when permits are renewed, they diminish the resources carriers have to improve service and to invest in further broadband deployment. When they impose discriminatory fees, localities skew competition and discourage new competitors from entering. Both unreasonable and discriminatory fees impair competition, leaving consumers with fewer choices and higher prices.

Congress intended for market competition, rather than municipal officials, to determine the services available to consumers.[45] The Commission should therefore declare that § 253

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[43] *City of White Plains*, 305 F.3d at 79.

[44] *See* 47 U.S.C. § 1302(a) (requiring the Commission to encourage the deployment of advanced telecommunications capabilities).

[45] *See In re Silver Star Tel. Co.*, 12 F.C.C.R. 15,639, 15,656–57 ¶ 38 (1997) ("Congress intended primarily for competitive markets to determine which entrants shall provide the

prohibits local fees that are unreasonably high or exceed the fees charged to any other local competitor. And discrimination in fees cannot be remedied merely by raising fees and applying them to all providers. Instead, the remedy should be to lower all fees, and ultimately to ensure that fees charged to all providers are reasonable.

2. The Structure Of § 253 As A Whole Shows That Congress Intended To Bar Unreasonable And Discriminatory Right-of-Way Fees

Read as a whole, § 253 shows that Congress intended to prohibit unreasonable and discriminatory right-of-way fees. Congress explicitly addressed local authority over right-of-way fees in § 253(c). That section preserves localities' right to charge right-of-way fees so long as they are reasonable and imposed on a competitively neutral and nondiscriminatory basis. The most logical way to harmonize the statute as a whole, and to give effect to Congress's pro-competitive objectives, is to construe § 253(a) as preempting any right-of-way fees that are not saved by § 253(c).

Some courts have found that § 253(c) may reasonably be interpreted to "operate as an independent source of claim," permitting providers to sue directly under § 253(c) when they are charged unreasonable or discriminatory fees.[46] Even if § 253(c) is not preemptive in itself, the scope of the safe harbor informs the scope the prohibition under § 253(a). The clear implication of § 253(c) is that Congress did not want to allow localities to charge right-of-way fees that are

telecommunications services demanded by consumers."); *see also In re Pub. Util. Comm'n of Tex.*, 13 F.C.C.R. 3460, 3463 ¶ 4 (1997) ("Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states . . . .").

[46] *P.R. Tel. Co.*, 450 F.3d at 20; *e.g., TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (section "authorizes a private right of action in federal court for telecommunications providers aggrieved by a municipality's allegedly discriminatory or allegedly unfair and unreasonable rates").

unreasonable or competitively discriminatory—and therefore saved only those fees that are both "fair and reasonable" and "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c).

The Commission has previously looked to § 253(c) to inform the scope of the limitations under § 253(a). In *TCI Cablevision*, for example, the Commission said that "[o]ne clear message from section 253 is that when a local government chooses to exercise its authority to manage public rights-of-way or to require fair and reasonable compensation from telecommunications providers, *it must do so on a competitively neutral and nondiscriminatory basis*."[47] Indeed, Congress expressed its intent to preempt discriminatory right-of-way fees, which Congress thought were impeding fair competition.[48]

Interpreting the statute as prohibiting fees not saved by § 253(c) is also a sensible application of the *California Payphone* standard to right-of-way fees. Localities create an unfair competitive environment when they impose unreasonable right-of-way fees or use those fees to discriminate against one carrier in favor of others. Both unreasonable and discriminatory fees are abuses of local control that discourage potential competitors from entering the locality and deploying broadband facilities. And when a locality does succeed in coercing a carrier to pay excessive fees, it reduces the provider's ability to improve service or deploy new facilities in that

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[47] *TCI Cablevision*, 12 F.C.C.R. at 21,443 ¶ 108 (emphasis added).

[48] *See, e.g.*, S. REP. NO. 103-367, at 56 (1994) ("Currently, one barrier to the deployment of competitive networks has been the unequal treatment by certain local governments of incumbent network providers and new entrants in the assessment and collection of local franchise fees in connection with the use of public rights-of-way."); H.R. REP. NO. 104-204, at 75 (1995) ("The purpose of [a competitive neutrality provision] is to create a level playing field for the development of competitive telecommunications networks. Harmonizing the assessment of fees from all providers is one means of creating this parity."). Other sections of the Telecommunications Act also underscore the importance of competitive neutrality. *E.g.*, 47 U.S.C. §§ 253(b) (preserving state regulatory authority exercised "on a competitively neutral and nondiscriminatory basis"), 254(b)(4) (requiring carriers to make a "nondiscriminatory" contribution to advance universal service), 251(e)(2) (requiring costs of number administration be borne by carriers "on a competitively neutral basis").

locality and elsewhere. These results conflict with Congress's intent to ensure that localities do not frustrate the federal goals of expanded access to broadband technology and greater competition in the telecommunications markets.[49]

3. The Commission Should Articulate Clear Standards For Determining When Fees Are Unreasonable Or Discriminatory

The Commission should declare that right-of-way fees are unreasonable when they exceed the municipal expenses incurred because of a carrier's deployment of facilities in public rights-of-way. In addition, the Commission should declare that discriminatory fees are prohibited to the extent that they exceed the lowest rate charged to any competitor in the locality. In other words, the remedy for discriminatory fees should be to require localities to lower excessive fees, rather than allowing them to raise fees. Together, these tests give effect to Congress's objectives and advance broadband policies while providing administrable standards.

a. Fees Are Unreasonable When They Exceed The Locality's Costs

Right-of-way fees are reasonable only if they are closely related to the locality's costs of managing public rights-of-way incurred as a direct result of a carrier deploying facilities. For two reasons, localities may not simply charge the maximum rate carriers will agree to pay. First, localities manage the rights-of-way in trust for the benefit of the public, not as a private property owner entitled to seek profits.[50] Second, localities' monopoly power would allow them to

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[49] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56, 56 (1996) ("To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."); *see PUC of Texas*, 13 F.C.C.R. at 3463 ¶ 4 ("Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states . . . .").

[50] *See Liberty Cablevision of P.R. v. Municipality of Caguas*, 417 F.3d 216, 221–22 (1st Cir. 2005).

impose inappropriate anticompetitive rates. In discussing the meaning of § 253 in its brief to a federal court of appeals, the Commission suggested that fees exceeding municipal costs or otherwise unrelated to carrier use would constitute unreasonable barriers to entry.[51] The Commission cited a federal district court's conclusion that "a fee that does more than make a municipality whole is not compensatory in the literal sense, and risks becoming an economic barrier to entry . . . ."[52] That court reasoned that the most persuasive reading of "fair and reasonable compensation" is to limit fees to the "recoupment of costs directly incurred through the use of public rights-of-way."[53] In other words, localities should not make a profit from their management of the rights-of-way.

Congress had in mind this simple idea of allowing localities to recoup costs when it passed the Telecommunications Act. For example, Senator Feinstein—a former mayor and strong defender of municipal rights who opposed preemption during the floor debate—expressed concern that local governments would not be able to recover "the costs of reviewing plans and inspecting excavation work," to collect "an appropriate share of increased street repair and paving costs that result from repeated excavation," and more generally to "protect[] the public's

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[51] Brief of the Federal Communications Commission and the United States as Amici Curiae at 15 n.7, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2001) (Nos. 01-7213, 01-7255), 2001 WL 34355501.

[52] *Id.* (quoting *N.J. Payphone Ass'n, Inc. v. Town of W. New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001)).

[53] *N.J. Payphone Ass'n*, 130 F. Supp. 2d at 638. Several courts have left open whether § 253 *requires* right-of-way fees to be limited to municipal costs, but none foreclose that conclusion. *E.g.*, *P.R. Tel. Co.*, 450 F.3d at 22 (1st Cir. 2006) ("We need not decide whether fees imposed on telecommunications providers by state and local governments must be *limited* to cost recovery."); *TCG N.Y.*, 305 F.3d at 79 (2d Cir. 2002) ("However, because the issues of whether 'reasonable compensation' can include gross revenue fees and, if so, what percentage of gross revenue may be exacted are difficult and not necessary to resolve this appeal . . . we decline to reach the issue."); *City of Santa Fe*, 380 F.3d at 1272–73 (10th Cir. 2004) (noting disagreement about whether "fair and reasonable" should be measured by "the City's costs" but finding that fees failed "even the totality of the circumstances test").

investment in infrastructure."[54] States have also recognized the importance of linking right-of-way fees to actual costs. For example, Governor Schwarzenegger of California recently signed an executive order requiring that "any charge to wired broadband providers for State ROW usage shall be based on the actual costs incurred by the State."[55] Fees are unreasonable when they exceed the costs a locality incurs because of a carrier's deployment of facilities in public rights-of-way.

In determining whether a locality's right-of-way fees are cost-based, the Commission should compare those fees to the amounts charged by other localities. The fact that a locality's right-of-way fees substantially exceed those of other localities indicates that the locality's fees may exceed cost and be unreasonable. For example, the fees imposed by NYSTA on Level 3 ranged from $78 to $34,000 per foot—clearly excessive and unreasonable when compared to typical prevailing rates, ranging from $0.50 to $2.00 per foot.[56] But while a fee that substantially exceeds prevailing rates is likely to be unreasonable, the converse is not true: a locality cannot justify its fees simply by pointing to similar fees charged by other localities, as this would simply encourage all localities to set unreasonable fees.

b. The Commission Should Not Adopt A Profit-Based Test

In determining whether a right-of-way fee meets the *California Payphone* standard, the Commission should not attempt to determine whether the fee would preclude the affected carrier

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[54] 141 Cong. Rec. 15,590, 15,591 (1995).

[55] Twenty-First Century Government: Expanding Broadband Access and Usage in California (Revised), Exec. Order S-23-06, *available at* http://gov.ca.gov/index.php?/executive-order/4585/.

[56] Petition at ii, 12–13.

from earning a profit in the locality.[57] First, attempting to estimate the impact of a local fee on the carrier's profitability in a given locality invites abuse. As the First Circuit has observed, the reasonableness of a fee should not turn simply on the amount a carrier can pay.[58] Instead, as noted above, the fee must be based on the locality's costs, not the carrier's profits. Otherwise, even a de minimis use of the public rights-of-way would entitle the locality to extract a substantial portion of the carrier's revenues and profits. As noted, the City of Eugene sought to extract seven percent of MCI's gross revenues for the purported use of less than 1,000 linear feet of public rights-of-way. Further, if one locality can impose a right-of-way fee and escape preemption by asserting that it will have a minimal impact on profits, other localities will impose similar fees and defend them on the same ground. When the localities' actions taken together eventually affect profits seriously enough to justify preemption, the Commission would face the arbitrary task of deciding which localities to hold responsible and which fees to prohibit.

Second, attempting to forecast how particular fees will affect a carrier's profits would be speculative. On the revenue side, the Commission would need to estimate how many customers—and how much associated revenue—the carrier would have with and without the fee. That forecast would require estimating the extent to which the fee would increase price, the extent to which a price increase would reduce demand for services, the extent to which competitors face lower fees and have an ability to charge lower prices, and the impact of a loss of customers in one locality on the carrier's revenues outside the locality, given the existence of network effects. Estimating the impact of a local right-of-way fee on a carrier's revenue is

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[57] In *California Payphone*, the Commission undertook an analysis of carrier profitability. *Cal. Payphone*, 12 F.C.C.R. at 14,209–10 ¶ 40. The Commission did not, however, suggest that a profit-based test was appropriate in all circumstances. For the reasons discussed in the text, a profit-based test is unworkable and unfair in the context of right-of-way fees.

[58] *P.R. Tel. Co.*, 450 F.3d at 23.

impractical.[59] Similar difficulties exist in estimating the carrier's costs. Telecommunications networks are characterized by large joint and common costs that transcend local boundaries. It would be impossible to determine the effect of a right-of-way fee on local profits without allocating these joint and common costs to that locality—an inherently arbitrary exercise.[60] In short, a profit-based test would require just the kind of "forecasting effort . . . [that] can go awry—not only by a few percentage points but by large magnitudes."[61]

C. Section 706 Counsels In Favor Of Interpreting § 253 As Barring Unreasonable And Discriminatory Right-of-Way Fees

Congress emphasized the importance of universal access to advanced telecommunications technologies in § 706 of the Telecommunications Act of 1996.[62] It instructed that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using, among other tools, "measures that promote competition in the local telecommunications market, [and] other regulating methods that remove barriers to infrastructure investment."[63]

Section 706 counsels in favor of interpreting § 253 as barring local actions that have the effect of impeding investment in broadband infrastructure, such as the backbone network in this case. Unreasonable and discriminatory right-of-way fees stand in the way of federal goals

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[59] *See* LESTER D. TAYLOR, TELECOMMUNICATIONS DEMAND IN THEORY AND PRACTICE 253 (1994) ("Another area in which there has been abuse in the use of electronic telecommunications demand models in the regulatory area is in the forecasting of revenues.").

[60] *See also In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,827–30 ¶¶ 643–46 (1996) (finding "considerable disagreement in the record over the appropriate method of allocating joint and common costs").

[61] *See* Detlef Schoder, *Forecasting the Success of Telecommunication Services in the Presence of Network Effects*, 12 INFO. ECON. & POL'Y 181, 181 (2000).

[62] Codified at 47 U.S.C. § 1302.

[63] *Id.* § 1302(a).

articulated in § 706. NYSTA's demands in this case illustrate this problem. By delaying for more than a year, and by demanding millions of dollars in access fees, NYSTA derailed new investment in technological infrastructure and delayed the deployment of new services. Consistent with § 706, the Commission should interpret § 253 as prohibiting such actions.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the petition and adopt standards consistent with these comments.

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