

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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	)	

**REPLY COMMENTS OF  
QWEST COMMUNICATIONS INTERNATIONAL INC.**

**I. INTRODUCTION AND SUMMARY<sup>1</sup>**

The following Reply addresses three issues raised by the Comments submitted in this docket. First, the City of Philadelphia urges the Federal Communications Commission (FCC or Commission) to adopt a literal prohibition standard under Section 253(a) that permits local governments to enact any laws, regulations, or legal requirements whatsoever, as long as telecommunications carriers are not literally prohibited from providing services. This standard is contrary to the purposes of the 1996 Act, the FCC's own decision in *In re California Payphone Assoc.*, 12 FCC Rcd 14191, 14206 ¶ 31 (1997), and decisions of the First, Second, Eighth, and Tenth Circuits. Second, the National Association of Telecommunications Officers and Advisors (NATOA) argues that the New York State Thruway Authority (NYSTA) can adopt any fees whatsoever, because Section 253 does not apply to contracts for the use of facilities or property such as the Occupancy Permits and Riders that NYSTA is imposing on Level 3. The FCC already ruled on this issue in *In re Petition of Minnesota*, 14 FCC Rcd 21697 (1999), and

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<sup>1</sup> In its September 18, 2009 Order, the Commission extended the time to Comment on the Level 3 petition to October 15, 2009, and set the deadline for Reply Comments on November 5, 2009. *See* Order, DA 09-2081.

determined that government contracts for right-of-way use can be unlawful under Section 253 when they contain prohibitory requirements such as the excessive and discriminatory fees at issue here. Lastly, NYSTA argues that the FCC simply does not have jurisdiction to hear any cases involving Section 253(c). Like the other issues above, this issue has also been previously decided by the FCC which has concurrent jurisdiction with federal district courts to rule on issues implicating Section 253(c).

## II. DISCUSSION

### A. **The FCC's *California Payphone* Standard Prohibits Legal Requirements that Impede the Provision of Telecommunications Services.**

In its opening Comments, Qwest stated that the FCC should adopt the *California Payphone* standard and, in so doing, re-emphasize that the preemptive scope of Section 253(a) is very broad and a carrier's burden of proof under this Section is light, while the savings clause in Section 253(c) is narrow and the local government's burden is heavy. This emphasis is important because local governments are now arguing that, unless a carrier can prove that local fees are prohibitory under Section 253(a), evidence that a fee is unfair, unreasonable, anti-competitive, or discriminatory under Section 253(c) is irrelevant. This argument, Qwest also pointed out, is often coupled with the position that a carrier must show a literal prohibition or nearly absolute prohibition to establish a violation of Section 253(a). In other words, a court does not get to the evidence of a violation of Section 253(c), cities are now arguing, unless a carrier meets its extremely difficult task of proving that it is literally prohibited from providing services under Section 253(a).

Ironically, this is exactly the argument that the City of Philadelphia makes in its opening Comments. The City argues that "a showing under Section 253(a) is necessary before a challenger can even reach the issue of whether right-of-way fees and management practices are

reasonable, competitively neutral, and non-discriminatory.” Comments of the City of Philadelphia, *In the Matter of Level 3 Comm., LLC*, WC Docket No. 09-153, at 2. Philadelphia likewise raises the burden under Section 253(a), requiring a provider to be virtually unable to provide any services before the standard is met: “Petitioner fails to satisfy the threshold required by Section 253(a) by showing the rents charged by NYSTA constitute either an actual or effective prohibition to its provision of service . . . [because] Petitioner is currently providing services using these facilities.” *Id.* at 3 (emphasis added). In other words, like many other cities, Philadelphia is arguing that it can enact any fees whatsoever, even if they are unreasonable, not competitively neutral, and openly discriminatory, as long as the fees do not literally prohibit the provision of services under Section 253(a).

The standard that Philadelphia is promoting is contrary to the purposes of the 1996 Act, the FCC’s own decision in *California Payphone*, and to the Circuits’ interpretation of the *California Payphone* decision. It is well recognized, as indicated by the title, that the 1996 Act was designed to “reduce regulation and . . . promote competition in the local telephone service market.” *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 857 (1997). The Congressional Record states that the Act was designed to create a “pro-competitive, de-regulatory national policy framework,” *see* H.R. Rep. No. 104-458, at 113 (1996) (Conf. Rep.), and is thus a “very, very broad prohibition against State and local” regulation of telecommunications companies. *See* 141 Cong. Rec. S8212 (daily ed. June 13, 1995) (comments of Sen. Gorton).

In accordance with this purpose, the FCC ruled that Section 253 preempts any legal requirements, including right-of-way fees, that “materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment. *California Payphone*, 12 FCC Rcd at 14206 ¶ 31. Relying on this decision, the

First, Second, Eighth, and Tenth Circuits have all held, albeit in slightly different formulations, that a state or local regulation is preempted by 47 U.S.C. § 253(a) if it impedes an entity from providing telecommunications services. In *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, for example, the First Circuit held that “a prohibition does not need to be complete or ‘insurmountable’ to run afoul of § 253(a).” 450 F.3d 9, 18 (1st Cir. 2006) (citing, *inter alia*, *California Payphone*, 12 FCC Rcd at 14206 ¶ 31). Applying that standard, the Court invalidated a 5% gross revenue fee on the bases that it would “negatively affect [the challenging provider’s] profitability;” give rise to “a substantial increase in [the provider’s] cost;” and “place a significant burden on the provider.” *Id.* at 18-19. The Second Circuit likewise noted that “a prohibition does not need to be complete or ‘insurmountable’ to run afoul of § 253(a).” *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2<sup>nd</sup> Cir. 2002) (quoting *California Payphone Assoc.*, 12 FCC Rcd at 14206 ¶ 31). The Court concluded that the ordinance was preempted because it would pose “obstacles . . . to [the challenging provider’s] ability to compete in [the locality] on a fair basis.” *Id.* at 76-77. The Eighth Circuit concluded that the provider “must show an existing material interference with the ability to compete in a fair and balanced market.” *Level 3 Commc’ns, LLC v. City of St. Louis*, 477 F.3d 528, 531-33 (8th Cir. 2007) (citing *California Payphone*, 12 FCC Rcd at 14206 ¶ 31), *cert. denied*, 129 S. Ct. 2859 (2009). Importantly, the Eighth Circuit also recognized that a challenging provider “need not show a complete or insurmountable prohibition.” *Id.* In *Qwest Corp. v. City of Santa Fe*, the Tenth Circuit held that “an absolute bar on the provision of services is not required.” 380 F.3d 1258, 1271 (10<sup>th</sup> Cir. 2004) (quoting *California Payphone Assoc.*, 12 FCC Rcd at 14206 ¶ 31). Applying this standard, the Court invalidated local regulations that would “den[y] telecommunications providers the ‘fair and balanced legal and regulatory environment’ the

[Telecom Act] was designed to create” and other provisions that “create[d] a significant burden” and imposed “substantial cost[s]” on the challenging provider. *Id.* at 1270-71.

**B. The Occupancy Permits and Riders at Issue Here Are Unlawful Under Section 253 Because NYSTA Is Imposing Unlawful Legal Requirements Through these Contracts.**

NATOA argues that Section 253 does not apply to NYSTA’s patently discriminatory and excessive fees, because Section 253 “has no application in the context of contracts for [] facilities or property” and the Occupancy Permits and Riders are merely part of NYSTA’s actions as a “market participant.” Comments of the National Association of Telecommunications Officers and Advisors, *In the Matter of Level 3 Comm., LLC*, WC Docket No. 09-153, at ii-iii, 2, 7-10. But, there is no doubt that the fees NYSTA is seeking to impose here, through its Occupancy Permits and Riders, fall within the ambit of Section 253.

The plain language of Section 253(a) broadly precludes local governments from passing “statute[s] . . . regulation[s] . . . or other . . . legal requirement[s]” that prohibit or have the effect of prohibiting the ability of any entity from providing telecommunications services:

(a) In general

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). In accord with the purposes of the 1996 Act, the FCC broadly interpreted the phrase “other . . . legal requirements” to include any municipal actions that “may prohibit or have the effect of prohibiting” telecommunications services:

We conclude that Congress intended that the phrase, “State or local statute or regulation, or other State or local legal requirement” in section 253(a) ***be interpreted broadly***. The fact that Congress included the term “other legal requirements” within the scope of section 253(a) ***recognizes that State and local barriers to entry could come from sources other than statutes and regulations***.

The use of this language also indicates that section 253(a) was ***meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting*** entities from providing telecommunications services. We believe that interpreting the term “legal requirement” broadly, best fulfills Congress’ desire to ensure that states and localities do not thwart the development of competition. . . . ***A more restrictive interpretation of the term “other legal requirements” easily could permit state and local restrictions on competition to escape preemption based solely on the way in which action was structured.***

*In re Petition of Minnesota*, 14 FCC Rcd 21697, 21707 ¶ 18 (1999) (emphasis added). What is at issue here is not simply the Occupancy Permits and Riders, as NYSTA implies, but the actions of NYSTA which seek to impose excessive and discriminatory fees on Level 3 in order for Level 3 to obtain an Occupancy Permit. These actions plainly fall within the ambit of “other legal requirements.” *See, e.g., In re Classic Tel., Inc.*, 11 FCC Rcd 13082, 13096 ¶ 26 (1996) (ruling that “the ***manner in which the Cities implemented*** their franchise requirements, ***as reflected in their decisions*** denying [the] franchise requests, prohibits Classic from providing” telecommunications services (emphasis added)); *id.* at 13097 ¶ 28 (concluding that “the Cities’ exercise of their franchising authority to prevent Classic from providing service appears, without further examination, to be prohibited by section 253(a.)”); *White Plains*, 305 F.3d at 80-81 (finding provision in city’s proposed franchise agreement requiring carrier to pay five percent of its annual gross revenues from city business to city did not impose fee on nondiscriminatory basis, and thus was not saved from invalidation under Telecom Act). In other words, Occupancy Permits and Riders are prohibitory precisely because NYSTA is using these contracts to enforce excessive and discriminatory fees.

**C. The FCC Has Jurisdiction to Rule When an Issue Implicates Section 253(c).**

The NYSTA, along with other entities submitting comments, argues that the language of Section 253(d) and its legislative history preclude the FCC from ruling on any laws, regulations, or legal requirements that violate Section 253(c). *See, e.g., Opposition of New York State Thruway Authority, In the Matter of Level 3 Comm., LLC*, WC Docket No. 09-153, at 14-19. To

be sure, there is no dispute that, as a result of the Gorton amendment to Section 253, federal district courts now have jurisdiction to hear cases involving Section 253. *See* 141 Cong. Rec. S8306, S8308 (daily ed. June 14, 1995), cited in *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190-91 (2001). But, contrary to the Comments, federal court jurisdiction is concurrent with the jurisdiction of the FCC.

The FCC has already determined that it has jurisdiction to preempt laws, regulations and legal requirements even if Section 253(c) is implicated:

In preparing their submissions, parties should address as appropriate all parts of section 253. In particular, parties should first 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)***.

*See Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd 22970, 22971 (1998) (emphasis added). The Guidelines are consistent with several decisions by the FCC where the Commission “found that the governmental actions [at issue] in those cases did not fall within the powers reserved to states and localities under sections 253(b) and/or 253(c).” *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21438-39 ¶ 97 (1997) (discussing previous decisions by the FCC where it ruled against state and local legal requirements under Sections 253(b) and 253(c)); *see also Classic Telephone, Inc.*, 11 FCC Rcd at 13097-13104 ¶¶ 27-40 (discussing and applying Section 253(c) to local legal requirements). The FCC could not be clearer when it stated that “Section 253(d) gives the Commission an important and powerful tool to promote competition in telecommunications markets -- it permits us to preempt the enforcement of legal requirements to the extent necessary to correct violations or inconsistencies with section 253.” *TCI Cablevision of Oakland County*, 12 FCC Rcd at 21440 ¶ 101. The Commission, in other words, did not limit

its jurisdiction when Section 253(c) is implicated; rather, it acknowledged that its preemption analysis under Section 253(a) requires that it determine whether the legal requirements at issue fall within the savings clause of Section 253(c). *Id.* at 21440-41 ¶¶ 101-02.

This is consistent with the ruling of the Second Circuit, which stated that “the 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.” *White Plains*, 305 F.3d at 75. It is because Section 253(c) is a savings clause which must be pled as an affirmative defense, and does not give rise to a direct cause of action, that the FCC need not have specific authority stated in Section 253(d) to rule on matters impinging upon Section 253(c). In other words, “because § 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.” *Id.* at 75-76.

This is also consistent with the legislative history and the Eleventh Circuit, contrary to the comments of the NYSTA. The original version of subsection (d) to Section 253 states that the FCC “shall immediately preempt the enforcement of [any] statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency” with Section 253. *See BellSouth Telecommunications*, 252 F.3d at 1190 (discussing Senate Bill 652, emphasis added). Under this version of Section 253, the FCC had exclusive jurisdiction. Senators Feinstein and Kempthorne then introduced a bill that sought to eliminate all FCC jurisdiction over Section 253 matters. *See* 141 Cong. Rec. S8305 (daily ed. June 14, 1995), cited in *BellSouth Telecommunications*, 252 F.3d at 1190. As a compromise, Senator Gorton introduced

a bill that granted federal court jurisdiction over Section 253(c) issues, to permit local governments to deal with right-of-way issues in local courts. *See* 141 Cong. Rec. S8306, S8308 (daily ed. June 14, 1995), cited in *BellSouth Telecommunications*, 252 F.3d at 1190-91. The Gorton amendment, however, did not displace the concurrent jurisdiction of the FCC. Senator Gorton explained that “my modification of the Feinstein amendment says that in the case of these purely local matters dealing with rights of way, there will not be a jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances.” *Id.* (emphasis added). In other words, as the Eleventh Circuit recognized, the Gorton amendment created “a private cause of action in federal district court . . . under § 253 to seek preemption of a state or local statute, ordinance, or other regulation[, but] only when that statute, ordinance, or regulation purports to address the management of the public rights-of-way, thereby potentially implicating subsection (c).” *Id.* at 1191. Nowhere does the legislative history or the Eleventh Circuit (or any other circuit, for that matter) state that this jurisdiction is exclusive.

### **III. CONCLUSION**

The FCC has jurisdiction to rule on the Level 3 matter. It should apply the *California Payphone* standard, as interpreted by the Circuits discussed above, and rule that NYSTA actions in exacting excessive and discriminatory fees are prohibitory under Section 253(a) and are not saved under Section 253(c).

Respectfully submitted,

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November 5, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**  
**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed  
with the FCC via its Electronic Comment Filing System in WC Docket No. 09-153; 2) served via  
email on the Competition Policy Division, Wireline Competition Bureau, Federal  
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Class United States Mail, postage prepaid, on the parties listed on the attached service list.

/s/ Richard Grozier

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