

**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 )

**REPLY COMMENTS OF VERIZON AND VERIZON WIRELESS**

Michael E. Glover  
*Of Counsel*

Edward Shakin  
Mark J. Montano  
VERIZON  
1320 North Courthouse Road  
9th Floor  
Arlington, VA 22201  
(703) 351-3099  
*edward.h.shakin@verizon.com*  
*mark.j.montano@verizon.com*

John T. Scott, III  
VERIZON WIRELESS  
1300 I Street, N.W.  
Suite 400-West  
Washington, DC 20005  
(202) 589-3760

Henry Weissmann  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue  
35th Floor  
Los Angeles, CA 90071  
(213) 683-9150  
*henry.weissmann@mto.com*

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*Attorneys for Verizon*

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## I. Introduction

As Verizon and Verizon Wireless<sup>1</sup> explained in their opening comments, localities' abuses of their control over rights-of-way and other permit processes distort competition and pose a significant impediment to the deployment of broadband facilities. Localities can harm competition in various ways, including by imposing excessive delays or costly, unreasonable, or discriminatory permitting requirements and fees. Section 253 addresses these impediments to competition by precluding localities from taking actions that have the effect of prohibiting the ability of any carrier to provide service. Under the Commission's interpretation of § 253(a), a local requirement has a prohibitory effect when it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."<sup>2</sup> The Commission should use the opportunity presented by this petition to declare that excessive or discriminatory right-of-way fees and unreasonable delays have precisely this effect.

The Commission unquestionably has authority to declare when local right-of-way fees are preempted by § 253(a). Initially, the Commission's traditional authority to interpret the Communications Act includes the authority to interpret and implement § 253. This authority necessarily includes the power to interpret and reconcile the various provisions of § 253, and specifically to determine that fees not saved by subsection (c) violate subsection (a). The Commission's authority in this respect does not depend on §

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

<sup>2</sup> *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Kuntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, ¶ 31 (1997) ("*California Payphone Order*").

253(d): just as the Commission had the authority to interpret and harmonize the various provisions of § 621 without an express and specific delegation of authority to do so in Title VI,<sup>3</sup> so too does the Commission have authority to determine the kinds of practices that § 253(a) prohibits. Section 253(d) merely fortifies the Commission’s authority. Section 253(d) goes beyond the other provisions of the Act that *authorize* the Commission to interpret the statute; § 253(d) specifically *directs* the Commission to preempt any local actions that it determines violate § 253(a). Section 253(d) applies to all violations of § 253(a), including excessive and unreasonable right-of-way fees. The contrary assertions of certain localities that oppose Level 3’s petition are incorrect.<sup>4</sup>

The Commission should exercise its authority to make clear that § 253(a) applies to legal requirements localities impose through contracts. The New York State Thruway Authority (“NYSTA”) incorrectly argues that localities can circumvent § 253 simply by casting onerous requirements in contractual terms.<sup>5</sup> The Commission addressed and rejected the same argument in the cable franchising context.<sup>6</sup> The problem that § 253 addresses is that localities have the ability to stymie and distort competition by conditioning carriers’ ability to compete (e.g., their ability to access rights-of-way) on acceptance of unreasonable and discriminatory terms. One way in which localities can abuse that power is by forcing carriers to sign contracts. A locality cannot so easily

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<sup>3</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1994*, Memorandum Opinion and Order, 22 FCC Rcd 5101 (2007) (“621 Order”).

<sup>4</sup> *See, e.g.*, NYC Department of Information Technology and Telecommunications, Comments of the City of New York, at 2–8.

<sup>5</sup> *See* Opposition of NYSTA at 12–14.

<sup>6</sup> *See infra* notes 57–62 and accompanying text.

evade § 253, whose very purpose is to prevent localities from imposing terms that materially inhibit carriers' ability to compete and to provide service.

## **II. The Record Supports The Need For Commission Action To Enforce Congress's Prohibition On Local Impediments To Competition**

Verizon's opening comments demonstrated the need for Commission action to enforce § 253's prohibition on local impediments to competition. As Verizon explained, these impediments take many forms, including delay, excessive permit fees, and other burdensome and costly requirements.<sup>7</sup> Excessive and discriminatory right-of-way fees are a particular problem.<sup>8</sup>

Many parties' comments underscore the importance of prohibiting excessive and discriminatory fees. Qwest observes the "dramatic up-tick in excessive right-of-way fee demands by local governments in recent years," and explains that the "deployment of telecommunications and broadband services is being significantly deterred."<sup>9</sup> Time Warner Cable agrees.<sup>10</sup> According to AT&T, permitting localities to abuse their control of public rights-of-way will "substantially compromis[e] providers' ability and appetite to make the enormous investment necessary to expand and upgrade the nation's wireline infrastructure, including the infrastructure necessary to enhance and expand broadband service offerings."<sup>11</sup> American Fiber Systems emphasizes that local abuses ultimately impair the ability to "deploy the middle mile facilities required to bring broadband services to consumers, particularly those in rural areas, which in turn creates a conflict

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<sup>7</sup> Comments of Verizon at 4.

<sup>8</sup> *Id.* at 4–5.

<sup>9</sup> Comments of Qwest at 1–2.

<sup>10</sup> Comments of Time Warner Cable at 1–3.

<sup>11</sup> Comments of AT&T at 2.

with the goal of Section 706 of the Telecommunications Act.”<sup>12</sup> Congress prohibited localities from engaging in such abuses, and the Commission should so declare in this case.

The local abuses discussed in parties’ comments are analogous to the impediments to the development of wireline cable competition that led the Commission to issue its landmark *621 Order*. The Commission found that local franchising authorities imposed lengthy delays and demanded excessive fees in exchange for the right to provide service. According to the Commission, delays “obstructed and, in some cases, completely derailed attempts to deploy competitive . . . services.”<sup>13</sup> Unreasonable demands undermined fair competition and ultimately hurt consumers.<sup>14</sup> The Commission acted in that case to prohibit those local abuses,<sup>15</sup> and it should do so again in the context of excessive and discriminatory right-of-way fees.

### **III. The Commission Has Authority To Declare That § 253(a) Prohibits Excessive And Discriminatory Right-Of-Way And Other Permitting Fees And Delay**

#### **A. The Commission Unquestionably Has Authority to Interpret And Implement § 253**

Just as the Commission has authority to interpret and implement Title VI, so too it has authority to interpret and implement § 253. In its *621 Order*, the Commission considered the interaction between various provisions of Title VI in reaching the conclusion that § 621(a) prohibited local franchising authorities (“LFAs”) from demanding excessive fees, imposing burdensome non-fee requirements, and engaging in

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<sup>12</sup> Comments of American Fiber Systems at 1–2.

<sup>13</sup> *Id.* ¶ 22.

<sup>14</sup> *Id.* ¶¶ 45, 52.

<sup>15</sup> *Id.* ¶ 137.

unreasonable delay.<sup>16</sup> Although § 621(a) is silent with respect to the Commission’s role, the Commission concluded that its traditional authority to interpret and implement the Communications Act encompassed § 621(a).<sup>17</sup> The Sixth Circuit agreed.<sup>18</sup> It concluded that § 201 gives the Commission “clear jurisdictional authority” to interpret every provision of the Communications Act.<sup>19</sup> See 47 U.S.C. § 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”).

Similarly, the Supreme Court held that § 201(b) gives the Commission power to interpret 47 U.S.C. §§ 251 and 252: “Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934...the Commission’s rulemaking authority would seem to extend to implementation of the local-competition provisions.”<sup>20</sup> The Court found no evidence that Congress had limited the Commission’s authority to interpret and implement the Act in the context of the local competition provisions. The Court also found it unnecessary to

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<sup>16</sup> *Id.* ¶ 1.

<sup>17</sup> *Id.* ¶ 56.

<sup>18</sup> See *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 772–73 (6th Cir. 2008).

<sup>19</sup> *Id.* at 774.

<sup>20</sup> *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377–78 (1999); see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing §§ 151, 201(b)) (“Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act . . . . Hence, as we have in the past, we apply the *Chevron* framework to the Commission’s interpretation of the Communications Act.”); accord *United States v. Sw. Cable Co.*, 392 U.S. 157, 173 (1968) (legislation “gave the Commission a comprehensive mandate with not niggardly but expansive powers”) (internal quotations omitted); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 235 (1994) (Stevens, J., dissenting) (“This Court’s consistent interpretation of the Act has afforded the Commission ample leeway to interpret and apply its statutory powers and responsibilities.”).

determine whether § 251(d)<sup>21</sup> granted the Commission additional authority, as § 201(b) gave the Commission all the authority it needed.<sup>22</sup> The Court rejected the contention that the provisions of the 1996 Act that specifically discussed Commission action impliedly limited the Commission’s authority under § 201(b).<sup>23</sup> For example, the Court concluded that the inclusion of a mandatory provision did not diminish the Commission’s discretionary authority. The Court observed that § 251(e) “*requires* the Commission to exercise its rulemaking authority, as opposed to § 201(b), which merely authorizes the Commission to promulgate rules if it so chooses.”<sup>24</sup>

The Commission has precisely the same authority in this case to interpret and harmonize the various provisions of § 253 to prohibit local requirements that materially inhibit or limit competition. As in the Title VI context, the Commission’s authority to interpret § 253 necessarily includes the power to interpret, reconcile, and implement its various subsections. This authority applies to the Commission’s evaluation of all local impediments to competition, including excessive or discriminatory right-of-way fees. As Verizon demonstrated in its opening comments,<sup>25</sup> the most sensible way of harmonizing § 253 as a whole is to interpret subsection (a) as prohibiting right-of-way fees that fall outside the safe harbor of subsection (c).

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<sup>21</sup> “Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.” 47 U.S.C. § 251(d)(1).

<sup>22</sup> *Iowa Utilities Board*, 525 U.S. at 383.

<sup>23</sup> *Id.* at 383 n.9.

<sup>24</sup> *Id.*

<sup>25</sup> Comments of Verizon at 14–16.

Accordingly, the arguments advanced by certain parties that the Commission lacks authority under § 253(d) to prevent the enforcement of right-of-way fees are misplaced. Although, as explained below, those arguments are mistaken, the Commission's authority to declare that § 253(a) prohibits the imposition of unreasonable and competitively discriminatory right-of-way fees does not depend on § 253(d). Just as § 251(e)'s mandate that the Commission establish rules in one discrete context does not diminish the Commission's authority under § 201(b),<sup>26</sup> § 253(d)'s directive that the Commission prevent the enforcement of local requirements that violate § 253(a) does not affect the Commission's traditional authority under §§ 151 and 201 to interpret and implement § 253.

**B. Section 253(d) Provides An Additional Source Of Authority To Prevent The Enforcement Of All Local Requirements, Including Right-Of-Way Fees, That Violate § 253(a)**

In addition to giving the Commission general authority to interpret the Communications Act, Congress specifically directed the Commission to prevent the enforcement of all local requirements that violate § 253(a). Section 253(d) states that “[i]f . . . the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”

The Commission's authority under § 253(d) includes the power to prevent the enforcement of all local impediments to competition, including right-of-way fees. There can be no doubt that right-of-way fees are among the local actions restricted by

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<sup>26</sup> *Iowa Utilities Board*, 525 U.S. at 383 n.9.

subsection (a), as such fees *can* “materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>27</sup> Otherwise, there would have been no need for Congress to save from preemption reasonable and non-discriminatory right-of-way fees in § 253(c). The whole purpose of a savings clause is to “save a specific subset of legal expressions *that would otherwise be preempted*.”<sup>28</sup>

Because the Commission has the authority under § 253(d) to preempt the enforcement of a requirement that violates § 253(a), the absence of any reference in § 253(d) to § 253(c) does not affect the scope of the Commission’s authority to prevent the enforcement of right-of-way fees. Section 253(c) is a savings clause, not a prohibition. As such, a right-of-way fee that falls outside the savings clause does not “violate” § 253(c), but instead violates § 253(a). Accordingly, the fact that § 253(d) does not state that the Commission shall prevent the enforcement of a local requirement that “violates” § 253(c) is unsurprising and has no effect on the Commission’s authority to prevent the enforcement of any local requirement, including a right-of-way fee, that violates § 253(a).<sup>29</sup> The localities’ contrary view would eviscerate § 253(d): it would

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<sup>27</sup> *California Payphone Order* ¶ 31.

<sup>28</sup> *Wood v. Gen’l Motors Corp.*, 865 F.2d 395, 420 (1st Cir. 1988) (emphasis added). See also *Frank v. Delta Airlines, Inc.*, 314 F.3d 195, 199 (5th Cir. 2002) (“the narrow savings language implied a broad scope for federal preemption,” or else the exception “would hardly have seemed necessary”); *Thaw v. Falls*, 136 U.S. 519, 541–42 (1890); 1A NORMAN J. SINGER & J.D. SHAMBLE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 20:22 (7th ed. 2009) (“Where the legislature has made specific exemptions, the courts must presume no others were intended. In interpreting a proviso, if the restrictive scope of the proviso is in doubt, the proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute.” (footnotes omitted)).

<sup>29</sup> Section 253(d) also states that the Commission shall preempt a requirement that violates § 253(b), which also appears to be a safe harbor. Although the reference to

make that section inapplicable in any case that involves the imposition of a right-of-way fee, which is the way localities can most easily inhibit competition.<sup>30</sup>

In *City of White Plains*, the locality argued, as do the localities in this proceeding, that the absence of a reference to § 253(c) in § 253(d) divests the Commission of jurisdiction over all issues concerning the lawfulness of right-of-way fees.<sup>31</sup> In response, the Commission observed in its supplemental amicus brief that to “the extent that [it] has jurisdiction under section 253(d) to adjudicate whether the state or local government action violates section 253(a), it would appear as a matter of statutory structure and logic that the [Commission] also has jurisdiction to adjudicate claimed defenses, including the section 253(c) defense.” Indeed, requiring the Commission to prevent the enforcement of certain requirements without giving it the ability to determine whether those requirements were saved by subsection (c) would “create an awkward procedural mechanism for making preemption determinations.”<sup>32</sup> As the Commission noted, at least one district court has concluded that the Commission “must have the authority to construe section 253(c) in order to determine whether local regulations violate section 253(a).”<sup>33</sup>

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§ 253(b) in this context is ambiguous, it does not divest the Commission of jurisdiction to determine that a local requirement violates § 253(a) simply because the subject matter of the requirement may also implicate § 253(c).

<sup>30</sup> See, e.g., Opposition of NYSTA at 14.

<sup>31</sup> *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 75 (2d Cir. 2002).

<sup>32</sup> Supplemental Brief of the Federal Communications Commission and the United States as Amici Curiae at \*5, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) (Nos. 01-7213, 01-7255), 2002 WL 32308666.

<sup>33</sup> *Id.* at \*5–6 (internal quotation omitted) (quoting *Bell Atlantic-Maryland v. Prince George’s County*, 49 F. Supp. 2d 805, 815 n.24 (D. Md. 1999)).

The Second Circuit agreed with the Commission and rejected the locality's argument for three reasons.<sup>34</sup> First, the court viewed § 253(c) as a savings clause "that creates no independent restrictions but rather permits certain restrictions that would otherwise have been prohibited by subsection (a)."<sup>35</sup> The Commission does not need to find a "violation" of § 253(c) in order to preempt: "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."<sup>36</sup> Second, § 253(d) is not a restriction on the Commission's authority to interpret the statute, but a grant of additional power directly to prevent the enforcement of a local requirement.<sup>37</sup> Third, interpreting § 253(d) as divesting the Commission of jurisdiction whenever § 253(c) might be implicated would create an incongruity that the statute should be construed to avoid. As the court explained, "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. . . . [W]e will not assume that Congress made such a choice here without stronger evidence."<sup>38</sup> The court therefore deferred to the FCC's decisions interpreting the scope of § 253(c).<sup>39</sup>

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<sup>34</sup> *City of White Plains*, 305 F.3d 67 at 75–76.

<sup>35</sup> *Id.* at 75.

<sup>36</sup> *Id.*

<sup>37</sup> *City of White Plains*, 305 F.3d 67 at 75.

<sup>38</sup> *Id.* at 75–76.

<sup>39</sup> *Id.* at 76.

NATOA erroneously suggests that the Eleventh, Sixth, and Tenth Circuits have held that the Commission lacks jurisdiction in cases that involve a defense under § 253(c).<sup>40</sup> On the contrary, the Second Circuit is the only court that has directly addressed the scope of § 253(d) in cases implicating § 253(c); the other circuit court decisions did not reach a contrary holding. The Eleventh Circuit held that subsection (c) creates a private cause of action, enforceable in federal district court, for preemption of a local right-of-way management issue. It did not hold, however, that district court jurisdiction in such cases is exclusive or that the statute divests the Commission of authority to determine when right-of-way fees are preempted.<sup>41</sup> Similarly, the Sixth Circuit held that carriers can bring a private cause of action in district court to preempt actions that violate subsection (c), but did not hold that the Commission lacked jurisdiction to prevent the enforcement of a right-of-way fee that violates § 253(a).<sup>42</sup> On the contrary, the court suggested that “unfair or unreasonable” right-of-way fees may “rise to the level of erecting a barrier to entry,” and that § 253(d) authorizes the Commission to prevent the enforcement of such fees.<sup>43</sup> Finally, the Tenth Circuit found that § 253 does not create a private right enforceable through § 1983.<sup>44</sup> Like the Eleventh

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<sup>40</sup> Comments of the National Association of Telecommunications Officers and Advisors (NATOA) at 15.

<sup>41</sup> *BellSouth Telecomms., Inc. v. City of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001).

<sup>42</sup> *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>43</sup> *Id.* (“[U]nfair or unreasonable fees need not rise to the level of erecting a barrier to entry, while only the latter violation authorizes the Commission to act pursuant to § 253(d).”).

<sup>44</sup> *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266–67 (10th Cir. 2004).

and Sixth Circuits, the Tenth Circuit did not find that the Commission lacks authority to prohibit any local right-of-way fees that violate § 253(a).

The localities' reliance on the legislative history of § 253(d) is also unavailing. Section 253(d) requires the Commission to prevent the enforcement of any local requirement that violates subsection (a). The statute contains no language divesting the Commission of jurisdiction any time a locality asserts that its right-of-way fees are reasonable and nondiscriminatory. At most, the language of § 253(d) is ambiguous as to what role subsection (c) should play when the Commission invokes its § 253(d) authority to make a determination under § 253(a).<sup>45</sup> As a result, the Commission has discretion under *Chevron* to interpret § 253(d) as authorizing it to prevent the enforcement of right-of-way fees that are unreasonable or discriminatory. "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency," and courts "can only enforce the clear limits that the 1996 Act contains."<sup>46</sup>

In this context, a floor statement made by an individual senator regarding his intent in drafting an ambiguous amendment is insufficient to establish that Congress has spoken clearly to the precise issue and foreclosed the view, accepted by the Second Circuit, that the Commission has authority under § 253(d) to prevent the enforcement of right-of-way fees that violate § 253(a). When the text of a statute is ambiguous, courts are "reluctant" to use legislative history to foreclose an agency's discretion at *Chevron*

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<sup>45</sup> *See id.* at 1265–66 & n.3 (noting the ambiguity in the statute).

<sup>46</sup> *Iowa Utilities Bd.*, 525 U.S. at 397.

step one.<sup>47</sup> They do so only when the legislative history compels a particular reading of the statute beyond a reasonable doubt,<sup>48</sup> which is not the case here.

The text of § 253(d) directs the Commission to preempt any local actions that it determines violate subsection (a), including a right-of-way fee. In any case, § 253(d) merely strengthens the Commission’s authority. Even if § 253(d) were deemed inapplicable to right-of-way fees, the Commission would retain its traditional authority to interpret, harmonize, and implement section 253 as a whole. Nothing in §253(d) or its legislative history can be construed as withdrawing this traditional authority.

#### **IV. Localities May Not Circumvent § 253 By Imposing Unreasonable Terms Through Contract**

The Commission should declare that § 253(a) preempts local requirements that materially inhibit or limit competition, including excessive and unreasonable right-of-way fees, regardless of how the locality imposes them. Other parties incorrectly suggest that unreasonable right-of-way fees are exempt from § 253 simply because they are memorialized in a contract.<sup>49</sup> The language of § 253 and Commission precedent foreclose this argument. Localities cannot use contracts to impose on carriers the same onerous terms that would be preempted if imposed by ordinance.

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<sup>47</sup> *Mizrahi v. Gonzales*, 492 F.3d 156, 166 (2d Cir. 2007).

<sup>48</sup> As Justice White explained, “the legislative history must be quite clear if it is to foreclose an agency’s construction.” *Regents. of Univ. of Cal. v. Pub. Employment Rel. Bd.*, 485 U.S. 589, 603 (1988) (White, J., concurring); *see also Perez-Olivo v. Chavez*, 394 F.3d 45, 49–50 & n.2 (1st Cir. 2005); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n.4 (1988) (Kennedy, J., writing for himself and White, J.) (suggesting that legislative history is “irrelevant” when deciding whether a statute is so unambiguous as to foreclose an agency’s discretion to interpret it).

<sup>49</sup> *See* Opposition of NYSTA at 12–14; Comments of NATOA at ii–iii.

Section 253 prohibits local statutes, regulations, and any “other legal requirements” that materially inhibit the ability of carriers to provide service and to compete fairly. The Commission has previously concluded, contrary to the arguments raised by the localities in this proceeding, that the statute’s broad language applies to contracts.<sup>50</sup> The Commission explained that “[t]he 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.”<sup>51</sup> When Congress wanted other provisions to apply only to government “regulation,” it did so explicitly.<sup>52</sup> Consistent with the plain language of the statute, therefore, the Commission has determined that contracts, like regulations, can impose “the type of legal requirement proscribed by section 253.”<sup>53</sup>

Indeed, localities can use a contract just as effectively as an ordinance to regulate the terms on which carriers can provide service to the public. If § 253 applied only to ordinances, localities could simply refuse to allow carriers to access rights-of-way or otherwise do business in a locality unless they signed contracts. Carriers that had already deployed facilities in public rights-of-way would have no choice but to sign the contract,

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<sup>50</sup> *Contra* Comments of NATOA at 9–10.

<sup>51</sup> *Petition of the State of Minnesota for Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, ¶ 18 (1999) (“*Minnesota Preemption Order*”).

<sup>52</sup> *See Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (citing 47 U.S.C. § 332(c)(7)).

<sup>53</sup> *AMIGO.NET For Declaratory Ruling Regarding the Effect of Sections 253 and 257 of the Telecommunications Act of 1996 on an Agreement for Multi-Use Network: Infrastructure Development, Statewide Telecommunications Service Aggregation, and Network Management*, Memorandum Opinion and Order, 17 FCC Rcd 10964, ¶ 7 (2002) (“*AMIGO.NET Order*”).

just as they would have no choice but to comply with an ordinance imposing the same requirements. To allow a locality to extract through contract exactly the same fees it cannot extract by ordinance would frustrate the purpose of the statute. As the Commission has already explained, Congress could not have intended for § 253 to “permit state and local restrictions on competition to escape preemption based solely on the way in which action was structured.”<sup>54</sup>

For these reasons, the Second Circuit squarely held in *TCG v. City of White Plains* that a locality may not, as a condition of granting a franchise, require a carrier to execute a contract that purports to waive the carrier’s right to challenge illegal requirements imposed by the locality. “Requiring telecommunications providers to agree not to challenge the provisions of the franchise in court is a transparent attempt to circumvent § 253. The [Telecommunications Act] does not create a collection of default rules that municipalities and service providers can contract around.”<sup>55</sup> The Second Circuit noted that “[t]he provision would have been completely unenforceable had TCG agreed to it,” and that “it was improper for White Plains to even propose it.”<sup>56</sup> Localities cannot evade preemption by forcing carriers to ratify unreasonable terms in a contract.

In the cable franchising context, the Commission rejected precisely the same contract argument made by the localities in this proceeding. The Commission found that LFAs engaged in excessive delays and demanded unreasonable terms in exchange for the

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<sup>54</sup> *Minnesota Preemption Order* ¶ 18.

<sup>55</sup> *City of White Plains*, 305 F.3d at 82.

<sup>56</sup> *Id.*; see also *Qwest Commc’ns Corp. v. City of New York*, 387 F. Supp. 2d 191, 195 (E.D.N.Y. 2005) (finding that a carrier had not waived its right to challenge a franchise agreement under § 253 despite a provision in the agreement precluding any such challenge for three years).

right to provide cable service.<sup>57</sup> Rather than imposing conditions by ordinance, LFAs often forced carriers to sign franchise agreements memorializing unreasonable terms.<sup>58</sup> LFAs argued that the agreements were simply negotiated contracts that should be immune from federal regulation.<sup>59</sup> The Commission disagreed. It recognized that LFAs were abusing their franchising power in violation of federal policy by imposing onerous terms—even if cable carriers “agreed” to the terms in a contract.<sup>60</sup> As a result, the Commission prohibited “local franchising laws, regulations, *and agreements*” that conflicted with the rules it adopted to prevent abuses.<sup>61</sup> The Sixth Circuit affirmed the Commission’s order, notwithstanding intervenors’ arguments that cable carriers were

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<sup>57</sup> See *621 Order* ¶¶ 1, 22, 45, 52.

<sup>58</sup> See, e.g., *id.* ¶ 24 (“[T]he record shows that numerous entrants have accepted franchise terms they considered unreasonable in order to avoid further delay.”).

<sup>59</sup> E.g., Reply Comments of Anne Arundel County, Carroll County, Charles County, Howard County, Montgomery County, and the City of Baltimore, Maryland, *Implementation of Section 621(a)(1)*, MB Docket No. 05-311, at 2-3 (Mar. 28, 2006) (arguing there should be no “federal interference in negotiations between [the] parties”); see also Comments of the City of Los Angeles, *In re Implementation of Section 621(a)(1)*, MB Docket No. 05-311, at 13 (Jan. 24, 2006) (“Under the law, a cable franchise functions as a contract between a local government (operating as a local franchising authority) and the cable operator. Like other contracts, its terms are negotiated.”).

<sup>60</sup> In a Second Report and Order, the Commission further addressed whether its rules should apply immediately to incumbent carriers who had already accepted franchise agreements that included terms that would be preempted at renewal., *Implementation of Section 621(a)(1)*, Second Report and Order, 22 FCC Rcd 19633, ¶ 19 (2007) (“*Second 621 Order*”). The Commission explained that the agreements could not escape preemption merely because they took the form of a contract. *Id.* Instead, the Commission said those agreements would be evaluated on a case-by-case basis to determine whether franchisees had received benefits beyond those to which they were statutorily entitled in exchange for their agreement to terms that would otherwise be preempted. *Id.*

<sup>61</sup> *Id.* ¶ 129 (emphasis added).

“ultimately *agreeing* to such requirements” on paper.<sup>62</sup> The conclusion about the local franchising process applies with equal force in this case: Local abuses are still abuses even when they take the form of a contract.

Parties opposing Level 3’s petition in this case nevertheless argue that localities have the right to impose whatever contractual terms they wish because they own the public rights-of-way.<sup>63</sup> This argument fails on multiple levels. Initially, it is well-established that localities control rights-of-way as regulators, not as owners. Even when a city “owns” public streets in fee, “the city holds the fee not for itself or its inhabitants alone, but for the general public.”<sup>64</sup> Accordingly, “municipalities do not have a proprietary interest in the public streets.”<sup>65</sup> In 2002, the First Circuit agreed with the long line of precedent supporting this conclusion.<sup>66</sup> In short, “municipalities do not have a

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<sup>62</sup> Brief of Petitioner-Intervenor Nat’l Cable & Telecomms. Ass’n, Inc. at 20, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (Nos. 07-3391 & 07-3673); *see id.* at 19 (“Congress intended case-by-case determinations based on the particular circumstances of particular franchises and did not intend for the Commission to adopt general rules in advance that preempt the give-and-take of the franchising process.”); Brief of Petitioner Fairfax County, Va. at 20–26, *Alliance for Cmty. Media v FCC*, 529 F.3d 763 (6th Cir. 2008) (Nos. 07-3391 & 07-3673) (unsuccessfully arguing at length that the Commission should have given more weight to a record “brimming with evidence” about the voluntary contractual relationship between localities and cable carriers).

<sup>63</sup> *E.g.*, Comments of NATOA at 10.

<sup>64</sup> *City of Clinton v. Cedar Rapids & Mo. R.R. Co.*, 24 Iowa 455, 1868 WL 173, at \*13 (1868).

<sup>65</sup> *Am. Tel. & Tel. Co. v. Village of Arlington Heights*, 620 N.E.2d 1040, 1042 (Ill. 1993); *see id.* at 1044 (“Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public.”).

<sup>66</sup> *Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005); *see* Gardner F. Gillespie, *Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators*, 107 DICK. L. REV. 209, 213 (2002) (“It is a widely accepted principle of long standing that the interest of a city in its street is exclusively publici juris, and is, in any aspect, totally unlike property of a private

proprietary interest in the public streets and may not raise revenue by coercing telephone companies into franchise agreements.”<sup>67</sup> In its *621 Order*, the Commission agreed with the First Circuit’s decision and concluded that “municipalities generally do not have a compensable ‘ownership’ interest in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public.”<sup>68</sup> Clear precedent thus forecloses NATOA’s argument that localities can avoid preemption merely by asserting that their management of public rights-of-way is proprietary.

Nor can NYSTA evade preemption by claiming that it was acting as a “market participant” selling access to public rights-of-way.<sup>69</sup> This is just another way of saying that NYSTA “owns” the right-of-way, which, as noted, is wrong. Localities made the same argument, to no avail, in the cable franchising context.<sup>70</sup> In addition, the government acts as a market participant only to the extent that it either sells goods it produces or procures services for its own use.<sup>71</sup> If a state facility produced fiber-optic cable, it could sell the cable to carriers of its choice.<sup>72</sup> If the state wanted to build a

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corporation, which is held for its own benefit and used for its private gain or advantage.” (quoting *People v. Kerr*, 27 N.Y. 188, 200 (1863) (internal alternations included and quotations omitted))).

<sup>67</sup> *Village of Arlington Heights*, 620 N.E.2d at 1042.

<sup>68</sup> *Second 621 Order* ¶ 134 (footnotes omitted).

<sup>69</sup> See Comments of NATOA at 7–10.

<sup>70</sup> E.g., Reply Comments of Anne Arundel County, Carroll County, Charles County, Howard County, Montgomery County, and the City of Baltimore, Maryland, *Implementation of Section 621(a)(1)*, MB Docket No. 05-311, at 2-3 (Mar. 28, 2006) (“Other aspects are property-based: for example, the right of local communities, like other market participants, to work out agreements to gain the best possible services and infrastructure in the most effective and best adapted ways for their specific situations.”).

<sup>71</sup> See *Reeves, Inc. v. Stake*, 447 U.S. 429, 438–39 & n.12 (1980).

<sup>72</sup> Cf. *id.* at 429 (state can favor state residents when selling cement it produces).

network to provide service to state agencies, it could hire a single carrier to do the job.<sup>73</sup> NYSTA, however, has neither produced nor procured anything. It has merely regulated the terms on which a carrier can access public rights-of-way.

Even if NYSTA were acting as a market participant, that status “is not *carte blanche* to impose any conditions that the State has the economic power to dictate, and does not validate any requirement merely because [it] imposes it upon someone with whom it is in contractual privity.”<sup>74</sup> For example, the Commission will preempt the enforcement of a contract by which a state procures telecommunications services for state agencies from a private carrier if that contract has “an adverse impact on the ability of another entity to provide telecommunications for a fee directly to the public.”<sup>75</sup>

The limits on localities’ power are determined by Congress’s intent to remove barriers to competition, not by whether a locality claims to be acting as an owner or market participant. Allowing localities to evade § 253 by changing the form of their regulations would frustrate its purpose and undermine Congress’s goal of encouraging fair competition and the deployment of new broadband and telecommunications facilities.

## **V. Conclusion**

For these reasons, and the reasons provided in the opening comments of Verizon and Verizon Wireless, the Commission should grant Level 3’s petition and announce a standard barring unreasonable and competitively discriminatory right-of-way fees.

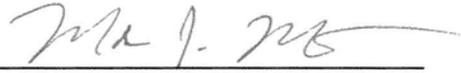
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<sup>73</sup> See *AMIGO.NET Order* ¶ 7.

<sup>74</sup> *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

<sup>75</sup> *AMIGO.NET Order* ¶ 8.

Respectfully submitted,



Edward Shakin  
Mark J. Montano  
VERIZON  
1320 North Courthouse Road  
9th Floor  
Arlington, VA 22201  
(703) 351-3099

John T. Scott, III  
VERIZON WIRELESS  
1300 I Street N.W.  
Suite 400-West  
Washington, DC 20005  
(202) 589-3760

Henry Weissmann  
MUNGER, TOLLES & OLSON LLP  
355 South Grand Avenue  
35th Floor  
Los Angeles, CA 90071  
(213) 683-9150

Michael Glover  
*Of Counsel*

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*Attorneys for Verizon*