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Ex Parte Submission – Filed Electronically Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Level 3 Communications, LLC, Petition for Declaratory Ruling that Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253, WC Docket No. 09-153

Dear Ms. Dortch:

In response to questions posed by Federal Communications Commission ("FCC" or "Commission") staff during an *ex parte* meeting on December 16, 2009, Level 3 Communications, LLC ("Level 3") submits this letter to provide the Commission with additional information related to the above-captioned petition ("Petition").

Level 3 proposes in Part I of this letter that the Commission clarify that § 253(a) requires preemption when a locality's legal requirement imposes a franchise fee or rent (or other material obligation) for use of public rights-of-way that, if applied more broadly by state and local governments, would materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment. In Part II, Level 3 explains that its use of rights-of-way maintained by the New York State Thruway Authority ("NYSTA") has no appreciable impact on public safety and that the Commission's resolution of this proceeding will have no impact whatsoever on public safety issues. In Part III, Level 3 explains that the permits at issue in its Petition grant it authority only to occupy certain portions of NYSTA's rights-of-way; the rental fees associated with the permits therefore do not cover any maintenance work or any other costs beyond rent for use of land. Finally, in Part IV Level 3 analyzes Senator Gorton's floor statements and explains that there is no need to resort to the legislative history to resolve this case, but that, even if it is consulted, the legislative history supports Level 3's interpretation of § 253.

I. THE COMMISSION SHOULD CLARIFY THAT § 253(a) REQUIRES PREEMPTION WHEN A LOCALITY IMPOSES PAYMENT OR OTHER MATERIAL OBLIGATIONS WHICH, IF APPLIED MORE BROADLY, WOULD INHIBIT DELIVERY OF TELECOMMUNICATIONS SERVICES.

A. Precedent from the Commission and the Courts Demonstrates that § 253(a) Prohibits Legal Requirements that Would Inhibit Delivery of Telecommunications Services.

Section 253(a) provides in its entirety that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[1] The provision thus describes two distinct situations requiring preemption. The first – which applies to statutes, regulations and other legal requirements that prohibit the ability of any entity to provide service – is clear on its face; under this portion of § 253(a), a statute, regulation or legal requirement that bars the provision of any telecommunications service by any carrier violates § 253(a). The second component of § 253(a) – which bars statutes, regulations and legal requirements that "have the effect of prohibiting" the ability of any entity to provide service – has proved harder to define and therefore more challenging in practice to apply in a consistent manner.

The foundation for the standard governing the second component of § 253(a) necessarily lies in the FCC's *California Payphone* order,[2] which the FCC and appellate courts uniformly accept as the bedrock for analyses under § 253.[3] In that case, when considering whether a particular legal requirement violated § 253(a), the FCC assessed whether the legal requirement in question "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[4]

While the *California Payphone* standard is a valuable foundation, it has led to divergent applications in the courts, demonstrating the need to clarify it further. In this regard, the Solicitor General (representing the FCC and the United States) explained in a recent Supreme

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[1] 47 U.S.C. § 253(a).

[2] *Cal. Payphone Ass'n Pet. for Preemption of Ordinance No. 576 NS of the City of Huntington Park*, 12 FCC Rcd 14,191 (1997) ("*California Payphone*").

[3] *See* Brief for the United States as *Amicus Curiae* at 9, *Level 3 Commc'ns, LLC v. City of St. Louis*, Nos. 08-626 and 08-759 (S. Ct. May 2009) (copy attached as Ex. B to Level 3's Reply Comments, WC Docket No. 09-153 (filed Nov. 5, 2009)) ("*FCC Amicus Brief*") ("The courts of appeals uniformly recognize that the FCC's *California Payphone Order* . . . prescribes the applicable standard for determining whether a legal requirement has the effect of prohibiting the ability to provide a telecommunications service.").

[4] *California Payphone*, 12 FCC Rcd at 14,206 ¶ 31; *see also Pub. Util. Comm'n of Tex.*, 13 FCC Rcd. 3460, 3470 ¶ 22 (1997) (assessing "the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment").

Court *amicus* brief assessing § 253(a) that the *California Payphone* standard should be applied by assessing the "practical effects" of the challenged legal requirement.[5] The First Circuit employed such a "practical effects" approach in *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, in which it assessed a municipal ordinance requiring carriers to pay monthly fees equal to five percent of their gross revenues earned from calls originating within the municipality.[6] In *Guayanilla*, the court analyzed the impact of the fee by considering the consequences that would result if it were adopted throughout the Commonwealth, not just in the municipality in question. Reciting the "fair and balanced legal and regulatory environment" standard enunciated in *California Payphone*, the court found that the ordinance violated § 253(a) because, if it applied to all Puerto Rican municipalities, it would have increased carriers' costs tenfold and dramatically reduced profits.[7]

Using *California Payphone* as the foundation and fine-tuning it with the approach employed by the First Circuit in *Guayanilla*, Level 3 suggests that the Commission refine its *California Payphone* standard to clarify which legal requirements in the area of public rights-of-way compensation violate the second component of § 253(a):

> A legal requirement has the effect of prohibiting the provision of any telecommunications service by any telecommunications provider in violation of § 253(a) if it imposes a franchise fee or rent (or other material obligation) that, if applied more broadly by a significant percentage of state and local governments, would materially inhibit or limit the ability of any competitor or potential competitor to offer telecommunications services or compete in a fair and balanced legal and regulatory environment.[8]

There are a number of benefits to the clarified standard advanced by Level 3. Most notably, it turns on an objective assessment of a legal requirement's "practical effects" when adopted broadly. It therefore draws a bright line between legal requirements that are prohibited and those that are permissible, thus clarifying the obligation on states and localities and drastically reducing the likelihood that further clarification from the FCC will be required. It is particularly appropriate for the Commission (rather than the courts) to articulate this standard, since the statutory role assigned to the FCC constitutes a "comprehensive enforcement scheme" for § 253 disputes.[9]

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[5] *FCC Amicus Brief* at 8, 11.

[6] 450 F.3d 9 (1st Cir. 2006).

[7] *Id.* at 18.

[8] Clarifying the standard as Level 3 suggests would not require the Commission to initiate a rulemaking proceeding, as "[t]he Commission has substantial discretion as to whether to proceed by rulemaking or adjudication." *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 808 n.29 (1978) (citing *SEC v. Chenery Corp*., 332 U.S. 194, 201-202 (1947)).

[9] *Sw. Bell Tel., LP v. Houston*, 529 F.3d 257, 262 (5th Cir. 2008).

Moreover, Level 3's proposed clarification of the standard adheres to the statutory language by focusing objectively on a legal requirement's impact on the ability of *any* telecommunications provider to offer services, rather than a subjective assessment of the complaining carrier alone. As a result, the proposed clarification avoids the possibility of different results depending on which carrier brings the claim. In addition, the proposed clarification recognizes that a legal requirement that would inhibit delivery of telecommunications services if applied network-wide must be invalidated even when applied by a single state or locality. The clarified standard therefore prevents franchising authorities from inflicting a "death of a thousand cuts." A contrary approach would create a race for states or local governments to apply exorbitant rights-of-way fees, so as not to be the entity that "tips" a network or route to non-viability. In this case, for instance, if NYSTA's fees were assumed to apply to all other segments of Level 3's network lying on public rights-of-way, Level 3's annual rents alone would completely undermine the viability of its operations and force it to cease network operations altogether.[10]

Level 3's proposed clarification of the standard also accounts for the risk that a rent regime adopted by one governmental agency can and does influence the charges imposed by other governmental agencies. That risk is evident from the record before the Commission. NYSTA itself acknowledges that the law firm it retained to negotiate permit riders with carriers was simultaneously negotiating similarly exorbitant access rent requirements on behalf of its Massachusetts-based government clients.[11] This phenomenon exists elsewhere as well. Level 3 has encountered many situations in which the compensation methodology or fee imposed by one government entity is strikingly similar to the methodology or fee imposed by another in the same geographic region. This suggests either that the governmental entities are coordinating their compensation practices or that there is a "domino effect" where governmental entities within a state or region learn of each others' right-of-way compensation practices and develop their own practices accordingly.[12] Level 3 is not aware of any state or local government agency that has implemented a change to its compensation regime that had the effect of *lowering* the compensation due from telecommunications providers for access to rights-of-way. As a result, "group pricing" practices tend to move overall telecommunications franchise fees and rents upward to the highest price charged by a state or local government within the region.[13]

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[10] *See* Level 3 Commc'ns, LLC Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253, Part I.D, WC Docket 09-153 (filed July 23, 2009) ("Level 3 Petition").

[11] *See* Level 3 Reply Comments in Support of Petition at 17-18, WC Docket No. 09-153 (filed Nov. 5, 2009); Opposition of New York State Thruway Authority at 9-10, Ex. 1 ¶ 5, Ex. 2 ¶ 4, WC Docket No. 09-153 (filed Oct. 15, 2009) ("Opp'n of NYSTA"); Second Supplemental Declaration of Steve Gordon ¶ 3 (attached as Ex. 1).

[12] *See* Second Supplemental Declaration of Steve Gordon ¶ 2.

[13] *See id*.

Level 3's Petition and the proposed clarification of the standard also afford the Commission an opportunity to address the disparate appellate applications of § 253(a) that the Solicitor General described in the *FCC Amicus Brief*. In particular, the Solicitor General observed that recent opinions in the Eighth and Ninth Circuits can be read to "suggest an unduly narrow understanding of Section 253(a)'s preemptive scope."[14] The Solicitor General explained that the FCC can "restore uniformity by issuing authoritative rulings on the application of Section 253(a)."[15] Adopting the *California Payphone* and *Guayanilla*-based standard articulated by Level 3 would do just that and, as a result, it would advance the Telecommunications Act's "promise of a national consistency."[16] Without an analytical tool similar to the clarified standard Level 3 suggests, local governments would retain the ability to impose an array of inconsistent fees and restrictions as a condition of access to rights-of-way, so long as any particular policy did not push a carrier to the tipping point beyond which it is unable to provide some particular and identified service. By analyzing the impact that such fees would have when applied broadly, the clarified standard would ensure a critical degree of uniformity in local regulation, thereby providing a measure of regulatory certainty that encourages new entrants and promotes further deployments.

Beyond adopting the standard described above, the Commission should further explain that an assessment of a challenged legal requirement's validity under the clarified standard necessarily requires an assessment of the legal requirement's reasonableness and competitive neutrality. This analytical requirement flows directly from *California Payphone*, as a legal requirement that is either manifestly unreasonable or competitively biased will by definition impair "the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[17]

With respect to reasonableness, § 253 should be understood to address the concern that in many instances carriers had no alternative (due to sunk investments and existing network deployments) but to deal with local governments to reach particular locations, and that the local governments would use that monopoly dynamic to extract unreasonable rents.[18] This is the case

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[14] *FCC Amicus Brief* at 8.

[15] *Id.* at 18.

[16] *Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004).

[17] *California Payphone*, 12 FCC Rcd at 14,206 ¶ 31.

[18] The standard Level 3 proposes would comport with longstanding precedent from the FCC and the courts barring localities from using their control over public rights-of-way to extract monopoly rents from occupants. This approach would reflect the purposes of the 1996 Act, which "endeavors to replace exclusive monopoly rights with open competition." *Pet. of the State of Minn.*, 14 FCC Rcd 21,697, 21,716 ¶ 35 (1999). Localities are not entitled to monopoly profits for occupancy of the rights-of-way they administer. As the Commission has explained, "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." *Implementation of Section 621(a)(1)*, 22 FCC Rcd 5101, 5160 ¶ 134 (2007) (citing *Liberty CableVision of Puerto*

here, where Level 3 has no choice but to interact with NYSTA to complete connections to its Backbone Network. Moreover, a compensation requirement permits competition in a "fair and balanced legal and regulatory environment" as required by *California Payphone* only if the franchise fee or rent in question is reasonably related to the length, breadth and scope of the rights-of-way actually occupied by the carrier; fees like those that NYSTA has imposed – which bear no relationship to the length of rights-of-way Level 3 occupies – therefore run afoul of § 253(a).[19] The *California Payphone*-based standard that Level 3 proposes should be applied to prevent localities from using their stewardship over public rights-of-way to profiteer or to charge compensation that is not rationally related to the scope of the use of the rights-of-way, as NYSTA has done, once they have bottleneck control over facilities that have been deployed.

With respect to competitive neutrality, the standard Level 3 proposes should be understood to invalidate legal requirements that disadvantage some carriers or classes of carriers by charging them higher rates for access to rights-of-way in comparison to other users that impose the same burdens on the right-of-way. Legal requirements of this kind extract higher rents only from certain classes of carriers for use of rights-of-way and thus amount to restrictions that impermissibly inhibit the ability of those entities to provide service.[20] Competitively biased pricing of this kind signals that the entities subject to the higher rate are unable to compete "in a fair and balanced legal and regulatory environment" in violation of § 253(a).[21] Indeed, the FCC has recognized that imposing regulations that effectively require some carriers to pay significantly more than others to provide service violates § 253(a). In *Petition of the State of Minnesota*, for instance, the FCC concluded that the availability of another more expensive right-of-way route does not save a state legal requirement from preemption under § 253(a) if the requirement bars some carriers from taking advantage of the less expensive alternative.[22]

Rico, Inc. v. Municipality of Caguas, 417 F.3d 216, 222 (1st Cir. 2005)). The *California Payphone*-based standard that Level 3 proposes would prevent localities from using their stewardship over public rights-of-way to profiteer once they have bottleneck control over facilities that have been deployed. In particular, the proposed prohibition on unreasonable fees would bar localities from extracting any rents that are not logically related to the fair market value of the right-of-way occupied or the costs imposed by the occupancy.

[19] *California Payphone*, 12 FCC Rcd at 14,206 ¶ 31.

[20] *See Pet. of the State of Minn.*, 14 FCC Rcd at 21,708 ¶ 21 ("[S]ection 253(a) bars state or local requirements that restrict the means or facilities through which a party is able to provide service.").

[21] *California Payphone*, 12 FCC Rcd at 14,206 ¶ 31.

[22] *See Pet. of the State of Minn.*, 14 FCC Rcd at 21,709-14 ¶¶ 23-29 (rejecting Minnesota's argument in defense of exclusivity to one developer that other rights of way were available, stating that "[e]vidence on the record indicates that the cost of using the alternative rights-of-way is not competitive with using of the freeway rights-of-way, to serve communities along the freeway's route").

From an economic perspective, focusing on competitive neutrality makes sense in the context of § 253(a). Particularly in highly competitive markets, biased pricing for government-provided rights-of-way can have a significant market impact. A hypothetical scenario involving four or five firms competing against each other in a highly competitive market illustrates the impact of competitively biased pricing. Each firm faces a high elasticity of demand for its services, because if it attempts to increase its prices, consumers will simply choose another capable vendor. In this competitive environment, a variable rights-of-way fee will raise one competitor's costs above the others'. Over the long run (*i.e.*, when capital investment itself is variable), all other things being equal, a carrier with higher unit costs for rights-of-way will be disadvantaged, and eventually foreclosed from either competing for certain opportunities requiring extension of its network, or from competing at all within that market.[23]

B. The Clarified Standard Would Bar Legal Requirements that Inhibit Expansion of Existing Networks, Not Just Those that Prevent Initial Network Deployments.

The clarification proposed by Level 3 directly serves the Commission's headline policy goals by prohibiting legal requirements that inhibit expansion of existing networks and facilities (most notably middle-mile broadband expansion), rather than simply barring only legal requirements that prevent entities from providing any telecommunications services at all. As the Commission has explained, § 253 "is designed to ensure that state and/or local authorities cannot frustrate the 1996 Act's explicit goal of opening *all* markets to competition."[24] Under the standard Level 3 proposes, occupancy rents for access connections on public rights-of-way would be preempted if their ubiquitous application would materially inhibit delivery of services, even if a longitudinal network were already in place. This would protect carriers' ability to make the capital investments necessary to bring middle-mile connectivity to communities along the routes of existing fiber networks, and thus directly advance the Commission's top priority of spurring broadband deployment.

A standard based on the complaining carrier's ability to provide some identified and specific service would derail the policy purposes underlying the 1996 Act and stifle middle-mile broadband deployment. Such a standard would permit states and localities to extract crippling

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[23] The Commission has, in other contexts, considered the long-run in which capital is variable. *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15,499, 15,845-46 ¶¶ 677-78 (1996) (in defining total element long run incremental costs ("TELRIC"), explaining that the "'long run,' in the context of 'long run incremental cost,' refers to a period long enough so that all of a firm's costs become variable or avoidable") (citation omitted).

[24] *Pet. of the State of Minn.*, 14 FCC Rcd at 21,703 ¶ 9 (1999) (emphasis added); *see also Pub. Util. Comm'n of Tex.*, 13 FCC Rcd at 3463 ¶ 4 ("Through [§ 253], 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.").

monopoly fees (like NYSTA's) where, as here, the carrier's investment is sunk and the state or locality has a chokehold over the rights-of-way necessary for access.[25] This would completely freeze expansion of existing networks, allowing them to continue providing a measure of service via existing connections, but making any expansion uneconomic. Carriers like Level 3 can provide the middle mile facilities necessary to bring the FCC's broadband initiatives to fruition, but they will be unable to do so if § 253(a) is applied in a manner that permits states and localities to use their monopoly pricing power with respect to existing facilities to undermine the economic justification for middle-mile deployments.

C. The Standard Apparently Proffered by NYSTA Would be Unworkable, Would Not Advance the Purpose of the Telecommunications Act, and Would Produce Wildly Inconsistent Results.

In contrast to the standard advocated by Level 3, NSYTA appears to advance a standard for § 253 cases that focuses solely and exclusively on the conduct of the complaining carrier, rather than the impact that the local regulation has on all existing and potential market participants. In NYSTA's view, Level 3's § 253 claim is defeated because (a) Williams signed the documents incorporating the unreasonable rent requirements, and (b) Level 3 continues to operate the Backbone Network. Thus, NYSTA seeks to advance an entirely *subjective* standard to all § 253 claims – namely, a standard that focuses only on whether the complaining carrier uses the right-of-way in question to provide any telecommunications service at all – which every court has acknowledged is not the applicable standard.[26]

Level 3 asserts that the evidence in this case satisfies even the subjective standard advocated by NYSTA. Setting that aside, however, Level 3 strongly believes that the approach advanced by NYSTA is inconsistent with both the purpose and the text of § 253.

In the Telecommunications Act of 1996, Congress sought to spur competition by new entrants. These would-be competitors come in all sizes: some are major corporations, while others are start-ups with limited resources. Some have the financial wherewithal to pay almost any fee that a state or local government could plausibly impose and would agree to pay that fee if the provider had no practical choice but to traverse a particular right-of-way – *even if* the fee would make the provision of local competitive telecommunications services uneconomical on a standalone basis. Yet, under NYSTA's view, a local government's assessment of any outrageous and competition-inhibiting charge does not amount to a preempted "prohibition" under § 253(a)

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[25] As other carriers have noted, this standard would also enable states and localities to increase the costs of a franchise agreement dramatically after the initial term of the franchise has expired. See Comments of Qwest Commc'ns Int'l Inc. at 3-9, WC Docket No. 09-153 (filed Oct. 15, 2009).

[26] *See* Opp'n of NYSTA at 19 ("If the Commission determines it does have jurisdiction under Section 253 to resolve the Level 3 *Petition*, the Commission must then conclude that the negotiated payments between Level 3 and the NYSTA do not actually or effectively prohibit *the ability of Level 3* to provide service.") (emphasis added).

as long as it is paid by the complaining carrier, regardless of the disincentives and financial dislocations it creates.

NYSTA's focus on the effect of a local regulatory scheme on the services offered by the particular provider that happened to bring a challenge cannot be reconciled with either the text of § 253(a) or the purpose animating its enactment. The statute provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service."[27] Thus, the language of § 253(a) itself, which mandates a focus on all telecommunications providers, is inconsistent with NYSTA's proposed standard.

In order to establish a violation of § 253(a), NYSTA's position implausibly requires that a provider such as Level 3 (a) succumb to an onerous regime like NYSTA's by abandoning its plans to offer any services at all, (b) suffer significant customer losses as a consequence of ceasing to provide service in areas otherwise served by the Backbone Network, and then (c) initiate costly and lengthy litigation against NYSTA in the hope of prevailing on a claim under the Telecommunications Act.

NYSTA's subjective standard is simultaneously too broad and too narrow, and would lead to unsustainably inconsistent results. If a financially strong carrier with a compelling business need to provide service in a particular area was faced with unreasonable and discriminatory rent requirements imposed by state or local government, that carrier might elect to accede to the demands of the government (and thus, under NYSTA's reading, have no right to challenge the rent under § 253). Alternatively, if a cash-strapped carrier with a less compelling need to service a particular vicinity were faced with the exact same requirements, that carrier might reasonably refuse to accept the government's rent requirements, and as a result, establish a violation of § 253(a) under NYSTA's reasoning. As these examples illustrate, resolution of § 253 petitions should not hinge on the peculiar facts facing the complaining carrier. A more objective standard, such as the clarified standard advanced by Level 3, will lead to more rational, uniform and consistent results.[28]

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[27] 47 U.S.C. § 253(a) (emphasis added).

[28] The Commission should use this case to clarify that § 253 is governed by the bright-line objective standard Level 3 has described, not the unduly subjective and stringent standard suggested by two courts of appeals. *See FCC Amicus Brief* at 13 (explaining that the Eight Circuit "appears to have accorded inordinate significance to Level 3's inability to 'state with specificity what additional services it might have provided' if it were not required to pay St. Louis's license fee") (citation omitted); *id.* at 14 ("Portions of the Ninth Circuit's decision . . .could be read to suggest that a Section 253 plaintiff must show effective preclusion—rather than simply material interference—in order to prevail.").

D. A Legal Requirement that Violates § 253(a) Merits Preemption If It Does Not Satisfy the Statute's Safe Harbors.

Under the statutory structure of § 253, once a violation of § 253(a) is demonstrated, the "safe harbor" provisions of § 253(b) and (c) must be evaluated. If neither safe harbor applies, the FCC is required to preempt the challenged legal requirement pursuant to § 253(d). Level 3's complaint and NYSTA's response do not implicate the safe harbor in § 253(b). Much of NYSTA's response, however, focuses on issues that arise in an analysis under § 253(c). Accordingly, it is important to assess the contours of that safe harbor and to determine whether NYSTA's rents fall within it.

Section 253(c) protects legal requirements that otherwise violate § 253(a) in only two circumstances:

- When preemption would affect the locality's "authority . . . to manage the public rights-of-way;" and

- When preemption would affect the locality's "authority . . . to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[29]

As Level 3's Petition and the comments filed in response pertain only to NYSTA's rent charges, not its management authority,[30] this letter assess only the second component of the § 253(c) safe harbor. That component, which pertains to compensation, is expressly subject to a number of material conditions. Specifically, a legal requirement falls within the "compensation" safe harbor of § 253(c) only if (1) the required compensation is imposed on a "nondiscriminatory" *and* "competitively neutral" basis; (2) the required compensation is "fair and reasonable;" and (3) the required compensation is publicly disclosed. Each of these conditions is discussed in turn.

1. "Nondiscriminatory" and "Competitively Neutral" Rents

Section 253(c) requires that a franchise fee regime be *both* "competitively neutral *and* nondiscriminatory" in order for the safe harbor to shield it from preemption. The concepts of "nondiscrimination" and "competitive neutrality" are not necessarily synonymous, however, and

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[29] 47 U.S.C. § 253(c).

[30] While the text is not clear on its face, the language of § 253(c) suggests that the safe harbor related to a locality's "management" authority is broad and arguably unqualified, though it is possible to construe the provision to require that the management of public rights-of-way be competitively neutral and nondiscriminatory. As the "management" component of § 253(c) is not at issue, there is no need for the Commission to address this question here.

the fact that Congress included both in § 253(c) requires that they be afforded distinct meaning.[31] While the concept of "competitive neutrality" logically relates to the impact of a fee on various competing providers (*i.e.*, telecommunications carriers), the concept of "nondiscrimination" is much broader – logically requiring an inquiry into whether the fee discriminates against a class of entities (*e.g.*, telecommunications carriers) as opposed to others that may provide some other utility function. A rental scheme that charges higher rates to telecommunications companies for a comparable use of the rights-of-way in comparison to other utilities (*e.g.*, gas, electricity, etc.) – all of which are potential entrants into the telecommunications market[32] – should be condemned as "discriminatory" under § 253(c).[33]

Separate from the "nondiscrimination" inquiry, § 253(c) applies only if the locality's rights-of-way regime is also competitively neutral – a requirement that focuses on the impact among competing entities. As a result, legal requirements that impose rents based on an occupant's actual or anticipated profits or revenue (or the "value" they may ostensibly add to a network) are thus almost certain to result in competitively biased pricing in violation of § 253(c), as multiple carriers occupying the same rights-of-way could (notwithstanding their equivalent use of the rights-of-way) be subject to wildly varying payment obligations.

Applied to this case, there can be no doubt that the rents NYSTA imposes on Level 3 are both discriminatory and competitively biased, and therefore not saved by § 253(c). Level 3's occupancy of lateral rights-of-way along the Thruway for connections to the longitudinal backbone is no more burdensome to NYSTA's rights-of-way as lateral fiber crossings (or, for that matter, any other utility crossings) that do not connect with the longitudinal backbone. (In fact, Level 3's lateral connections impose less of a burden in most cases because the connections reach only part of the way across the right-of-way, from one edge of the right-of-way to the Backbone Network.) While the use of and alleged burden on the rights-of-way for the lateral connections are the same as (or smaller than) those imposed by transverse fiber or other utility crossings, NYSTA imposes rents on the former that are hundreds of times higher than those it

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[31] *See, e.g.*, *Qi-Zhou* v. *Meissner*, 70 F.3d 136, 139 (D.C. Cir. 1995) ("An endlessly reiterated principle of statutory construction is that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage.").

[32] *See* Telecommunications Act of 1996 § 103, Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending the Public Utilities Holding Company Act (15 U.S.C. § 79) to allow registered holding companies to diversify into telecommunications services, information services, and related services and products).

[33] Applying a more robust "nondiscrimination" requirement dovetails into the discussion, *infra*, that "fair and reasonable compensation" does not require or allow an inquiry into the particular use or amount of money that the buyer might make by using the rights-of-way. If a telecommunications carrier, for example, purchased an abandoned gas pipeline and populated it with fiber (instead of natural gas), the "value" of the right of way has not changed, regardless of whether the carrier makes more or less money than the previous occupant.

imposes on the latter.[34] This type of discriminatory pricing does not satisfy the requirements of § 253(c).

NYSTA appears to argue that its rent charges for the lateral connections are designed to extract additional rents for the use of *longitudinal* rights-of-way, because the "value" of the longitudinal rights-of-way is somehow enhanced as a result of the connection to other network assets operated by Level 3.[35] This claim fails for two reasons. First, the argument necessarily means that Level 3 is now paying more than other users of the longitudinal rights-of-way that have not had to, for example, install regeneration stations. Second, even communications companies that use NYSTA's rights-of-way for full transverse crossings invariably connect those networks to other networks, including backbone networks and local distribution networks. Their use of the rights-of-way is thus *indistinguishable*, both in terms of alleged "value" as well as in terms of the burden on the rights-of-way, from Level 3's use of the rights-of-way for lateral connections to the Backbone Network. But their rent is a fraction of Level 3's. Level 3 is thus competitively disadvantaged as compared to *both* (a) other occupants of the NYSTA longitudinal backbone rights-of-way not requiring additional connections, and (b) carriers fortunate enough to own and operate off-NYSTA backbone networks.

2. Fair and Reasonable Compensation

While "fair and reasonable compensation" can be difficult to define, there are at least two potential standards for assessing whether a franchise fee or rent provision constitutes fair and reasonable compensation under § 253(c): (a) localities are permitted only to recover incremental costs associated with a permittee's use of the rights-of-way, or (b) localities may recover based on the fair market value of the rights-of-way (assuming fully competitive conditions, as explained in greater detail below). While the first of these standards is arguably easier to articulate and easier to apply in practice, either standard in this case leads to the same result – NYSTA extracts rents that far exceed "fair and reasonable compensation."[36]

a. A Cost-Based Standard.

Numerous courts, when evaluating whether charges for use of public rights-of-way are fair and reasonable, have applied a standard that requires the government agency to show that the fees are in some manner related to costs.[37] Such a standard is both defensible in light of the text

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[34] *See* Level 3 Petition, Part I.C.3.

[35] *See* Level 3 Reply Comments in Support of Petition at 12-14; Opp'n of NYSTA at iii, 26, 28.

[36] Under either the "cost-based" or "fair market value" standards discussed in the text, rents for rights-of-way occupancy are fair and reasonable only if they logically reflect the width and length of the rights-of-way actually occupied by the carrier.

[37] *See, e.g.*, *Guayanilla*, 450 F.3d at 22 ("[F]ees should be, at the very least, *related* to the actual use of rights of way," and "the costs [of maintaining those rights of way] are an essential part of the equation.") (internal quotation marks and citation omitted) (alteration in original); *N.J.*

of § 253 and a workable, easily administered approach that would encourage construction of fiber networks throughout the United States.

b. A Fair Market Value Standard.

A "fair market value" standard for determining fair and reasonable compensation could also be employed, provided that the term "fair market value" is appropriately defined. Under such a standard, in order to be reasonable, rents or franchise fees must not exceed the fair market value of the right-of-way *assuming competitive, non-monopoly conditions and willing, knowledgeable and unpressured market participants*. This standard would not prohibit states and localities from recouping overhead costs, administrative expenses and other costs.[38]

While it can be exceedingly difficult to determine the "fair market value" of a right-of-way (because it requires employing a fiction, namely competitive, non-monopoly conditions and willing, knowledgeable and unpressured market participants), there are several methods that can allow the Commission or a court to analyze the issue. Perhaps most obviously, when a locality has performed an appraisal of the right-of-way to determine fair market value (in a competitive marketplace, where neither the buyer nor seller is compelled to consummate a transaction with the other), the FCC or a court can assess the results to determine whether occupancy rents are consistent with the appraisal.[39] When there are no appraisals or other evidence of reasonableness

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Payphone Ass'n Inc. v. Town of West N.Y., 130 F. Supp. 2d 631, 638 (D.N.J. 2001) ("[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."); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 817 (D. Md. 1999) (vacated on other grounds) ("[L]ocal governments may not set their franchise fees above a level that is reasonably calculated to compensate them for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way. Franchise fees thus may not serve as general revenue-raising measures.").

[38] In most instances, including here, the actual expenses incurred by the government in permitting the use of its rights-of-way are recovered through one-time cost reimbursement requirements imposed in addition to the annual rent.

[39] If an appraisal is used to support the reasonableness of rent for use of the right-of-way, consideration must be given to whether the appraisal is focused on the "value" of right-of-way sold by a *monopoly* provider, or whether the appraisal presupposes that carriers have multiple right-of-way providers that can be used to reach a given location. It is important to focus on value in a competitive marketplace (*i.e.*, one characterized by willing, knowledgeable and unpressured market participants). The value in a marketplace characterized by unequal bargaining power may reflect the value inherent to one user with comparatively little market power (*i.e.*, a carrier with substantial sunk costs and a dependency on particular rights of way) rather than an objective quantification of value. Since § 253 requires an assessment of a regulation's impact on *all* carriers, not just any individual carrier, *see infra* Part I.B., an assessment of fair market value is useful only if it determines an objective measure of value under competitive conditions, not the inherent value that any particular carrier places on the right

presented, information regarding the rents that other right-of-way providers charge for comparable uses (*i.e.*, uses that impose comparable costs and burdens) constitutes probative evidence of the cost (plus reasonable administrative compensation) that the locality in question can recover.[40]

The law of eminent domain and governmental seizure of private land provides valuable guidance for appropriate appraisals of the rights-of-way at issue here, particularly in its treatment of the "just compensation" owed to private owners' of condemned land. As the Supreme Court repeatedly has held, "just compensation … is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value."[41] The same principle applies here: the fee that a locality imposes for access to rights-of-way must reflect "market value" in a competitive market, not the value that the locality can extract when it has the power to impose monopoly rents based on a utility's "particular purpose."

In this case, policy documents maintained by NYSTA reveal that it accepts this "reasonable rent" standard in principal, even though the rents it actually imposes on Level 3 demonstrate that NYSTA ignores the standard in practice. NYSTA's Standard Operating Procedures for Real Property Management state unequivocally that "[a]nnual fees for occupancy permits shall be based on the estimated *fair market value* of the property."[42] The Standard Operating Procedures continue, explaining that "[w]here a rate schedule has not been established for an occupancy permit, annual fees shall be based upon, at a minimum, the property's fair market value as estimated by an appraisal, except in limited circumstances where the fair market value may be estimated by other means as determined by the Office of Real Property Management."[43] Moreover, NYSTA's Occupancy/Work Permit Information Packet recognizes

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to occupy. Because an appropriately defined "fair market value" test assumes a competitive marketplace and knowledgeable, willing and unpressured participants, it may in fact yield results that over time are not materially different than the cost-based test proposed by Level 3 above (as in a competitive market prices will generally equal costs plus some reasonable margin).

[40] The inquiry as to reasonableness should be informed by what state and local governments charge to non-telecommunications utilities for comparable uses of the rights-of-way. Broadening the inquiry to include these additional entities provides greater assurance that the resulting prices will be consistent with "fair market value" (the price a knowledgeable, willing, and unpressured buyer would pay to a knowledgeable, willing, and unpressured seller in a competitive market), rather than a theoretical value determined by the particular needs or anticipated uses of the purchaser.

[41] *United States v. Petty Motor Co.*, 327 U.S. 372, 377 (1946); *see also Brown v. Legal Found.*, 538 U.S. 216, 243-44 (2003) (quoting *Petty Motor*, 327 U.S. at 377).

[42] NYSTA Real Property Management Manual, § 2.5 (Occupancy Permits) at 1 (Nov. 2006), available at http://www.nysthruway.gov/realproperty/sop/500-2-02.5.pdf (emphasis added) (copy attached as Ex. 2).

[43] *Id.*

the need to calculate rents by reference to the length of an occupant's use of the right of way.[44] NYSTA's policies and fee schedule do not distinguish among the types of utilities that occupy its rights-of-way, but instead ostensibly impose the same rents on all users, varying only to reflect the length of the occupancy.[45]

These procedures and policies, if actually followed in practice, would satisfy a "fair market value" standard for determining the reasonableness of compensation under § 253(c). In actuality, however, NYSTA has ignored its standard operating procedures. There is no indication that the monumental rents it has imposed on Level 3 bear any relationship to the rights-of-way's fair market value;[46] the rents imposed are completely divorced from the length and width of Level 3's occupancy;[47] and NYSTA has failed to rebut Level 3's demonstration that NYSTA did not undertake any kind of cost study.[48] Accordingly, NYSTA's rents fail to qualify for safe harbor protection under § 253(c).

3. Public Disclosure

The third requirement for safe harbor protection under § 253(c) provides that the compensation localities charge for use of rights-of-way must be "publicly disclosed by such government."[49] The facts show that NYSTA has not satisfied this requirement.

The rent requirements imposed on Williams in this case were not "publicly disclosed" in any meaningful manner. Instead, NYSTA disregarded its standard disclosed rate schedule for utility occupancies, electing instead to negotiate rates with requesting carriers.[50] At the time Williams completed its negotiations, the only "publicly disclosed" compensation scheme for rights-of-way was the rate sheet that NYSTA elected to disregard. It took NYSTA four years to formally recognize its new "policy" respecting connections to the Backbone Network – but even then it did so in a manner that does not satisfy § 253(c)'s public disclosure requirement. Instead, NYSTA adopted a *post-hoc* policy that stated that "fees for fiberoptic [sic] connection permits

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44 *See id.* at 12 (NYSTA's August 2006 Occupancy and Work Permit Information Packet (TAP-424)) ("In order to determine an annual fee, the length of Authority right-of-way being used by the utility must be accurately determined.").

45 *See* Level 3 Petition, Ex. 35 at 5, Att. III (Memorandum from NYSTA's Real Property Management Committee) (explaining that NYSTA's fee schedule sets rates for "utility occupancy permits" in general (not just for telecommunications) and that the rates were calculated by reference to "'all types' of utility facilities").

46 *See* Level 3 Petition at Parts I.C.2, I.C.5.

47 *See id.* at 16-17.

48 *See id.* at 13, 39-40.

49 47 C.F.R. § 253(c).

50 *See* Level 3 Petition at 41-42.

are to be negotiated amounts determined by the Authority's Finance Committee."[51] The "public disclosure" requirement of § 253(c) is not satisfied by such a statement, as it does not in any manner disclose the compensation required.

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In order to gain the protection of the safe harbor contained in § 253(c), a compensation requirement must meet *all of the conditions* set forth in the text of the statute. NYSTA's rent regime meets *none of them*. Thus, the safe harbor provisions set forth in § 253(c) do not save NYSTA's rent requirements from mandatory preemption.

II. LEVEL 3'S PETITION RAISES NO PUBLIC SAFETY CONCERNS.

Level 3's use of lateral connections to the Backbone Network and the Backbone Network itself raises no public safety concerns, nor would it if the Commission were to grant Level 3's Petition. Several related facts pertaining to Level 3's occupancy of the rights-of-way associated with the network and the lateral connections illustrate that the public safety impact (if any) of Level 3's operations along the Thruway is extremely limited, and is not at all related to the rights-of-way fees at issue in this petition. First, all of the right-of-way occupancy permits at issue in the Petition require Level 3 (and, previously, required Williams) to adhere to NYSTA's Occupancy and Work Permit Accommodation Policy (known as "TAP-401"), which has been in place since 1995.[52] TAP-401 imposes on Level 3 numerous requirements with respect to ensuring safety and minimizing traffic disruption as a result of its use of the NYSTA rights-of-way; Level 3 complies with all of them, and none of them are at issue in this proceeding. Second, Level 3 has complied with NYSTA's directive to use Adesta to perform or monitor all work relating to the Backbone Network and lateral connections located on NYSTA rights-of-way. Third, the conduits and fiber network were installed underground with access points located far from the roadway, meaning that installation and maintenance associated with the lateral connections have interrupted Thruway traffic flows only minimally. Finally, Level 3 requires physical access to the laterally connected fibers within NYSTA rights-of-way only in very limited circumstances; in those rare cases, the hand hole through which Level 3 can access the fibers is on average 60 to 80 feet from the actual roadway (with a range from 30 feet to 585 feet), which means that Level 3 (through Adesta and as directed by NYSTA) can complete its work with little or no interruption to traffic flow or NYSTA operations. In any event, when additional measures might be needed to address traffic flow or other safety-related issues, those are subject to separate fees that are not part of the right-of-way rental fees at issue in the Petition. (In practice, the need for such additional measures is exceedingly rare since ongoing maintenance and repair work has virtually no impact on Thruway operations.)

In all network operations involving lateral crossings of roadways (including controlled access freeways like the New York State Thruway), Level 3 complies with all safety, lane

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51 *See id.*, Ex. 36.

52 A copy of the applicable version of TAP-401 is attached as Exhibit 3.

closure and traffic control rules imposed by the government agency operating and maintaining the roadway. Level 3 has adhered to that approach here, and it complies fully with NYSTA's requirements governing use of its rights-of-way.[53] For instance, NYSTA's TAP-401 requires entities undertaking work requiring traffic management or protection, or emergency stoppage of traffic, to comply with the requirements of NYSTA's traffic safety manual.[54] Under the requirements of TAP-401, Level 3 is not empowered to stop or divert traffic on its own; rather, it must make arrangements with NYSTA at least 48 hours prior to undertaking any work requiring traffic stoppage, and all costs incurred by NYSTA in stopping traffic must be reimbursed by Level 3.[55] In addition, all traffic protection devices (*e.g.*, signs, cones, flashing lights, etc.) indicating changes to traffic patterns or a lane closure must be furnished by Level 3 unless NYSTA has sufficient traffic protection devices available, in which case the devices will be made available to Level 3 for a rental fee.[56] Level 3 complies with all of these requirements (none of which are at issue in any respect in this proceeding),[57] and it has never been advised that it is in material violation of any of them.[58]

NYSTA has retained Adesta as its exclusive contractor for all work relating to the Backbone Network controlled by NYSTA and Adesta. In cases involving splicing or maintenance of the Backbone Network or lateral connections located within the NYSTA rights-of-way, Level 3 has complied with NYSTA's directive and in each instance has used Adesta to perform or monitor the work.

The entire Backbone Network was deliberately designed by MFS Network Technologies, Inc. (now Adesta) so as to be located in areas where routine maintenance of the conduits and the fibers installed within them could be completed without interference with highway operations and without sacrificing the safety of people traveling on the roadway.[59] For the vast majority of the Thruway's length (except where physical barriers prevent it), the Backbone Network is located to the side of the roadway, between the edge of the shoulder and the fence line marking the edge of NYSTA's rights-of-way.[60] In only limited circumstances (such as where interchanges, rock outcroppings or other physical barriers affect the route), the Backbone Network occupies the Thruway's median.[61] None of the 17 interconnection points at issue in

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53 *See* Declaration of Mike Carollo ¶ 3 ("Carollo Decl.") (attached as Ex. 4).

54 *See* TAP-401 § VI.A.

55 *See id.* § VI.A.2.

56 *See id.* § VI.A.3.

57 *See* Carollo Decl. ¶ 3.

58 *See* Declaration of Mike Wiemer Decl. ¶ 4 ("Wiemer Decl.") (attached as Ex. 5).

59 *See id.* ¶ 2.

60 *See id.*

61 *See id.*

Level 3's Petition is located within the median; instead, each interconnection point is located between the shoulder and the fence line.[62]

Because the conduits and fiber network were installed underground, construction of the lateral connections to the network resulted in only minimal interruption to NYSTA traffic flows, requiring traffic control measures or lane restrictions (if at all) for a maximum of 1-5 days for each lateral network interconnection point.[63] When this did occur, the costs of the traffic control measures were borne by Williams. Generally, these lateral network interconnection points were constructed by accessing NYSTA rights-of-way through adjacent property owned or leased by Williams or through public rights-of-way adjacent to the NYSTA rights-of-way, so that any materials and equipment required for the installation could be stored off of the NYSTA rights-of-way or sufficiently distant from traffic to avoid impacting use of the Thruway.[64] Indeed, the installation of the lateral interconnections resulted in far fewer traffic interruptions, lane restrictions and safety concerns than did the construction of the Backbone Network along the entire NYSTA rights-of-way.[65] Furthermore, because the distance from the edge of the NYSTA right-of-way to the point of interconnection was in most cases very short, installing the lateral interconnection caused minimal interruption in NYSTA's operations relative to lateral crossings that transverse the entire width of the right-of-way.[66]

In the years since construction of the lateral connections was completed, there have been very few instances in which Williams or Level 3 has required physical access to the fibers within each lateral network interconnection point located on NYSTA rights-of-way. With respect to each lateral connection, Williams installed an "egress hand hole" located at or near the edge of the NYSTA rights-of-way; Level 3 has in limited circumstances accessed its fibers through these egress hand holes to complete, for example, splicing of fiber or other routine maintenance activities (in each instance using Adesta to complete or monitor the work). Generally, because the work is performed at the edge of NYSTA rights-of-way, such work can be completed with little to no interruption to traffic flow or NYSTA operations. Level 3 owns or leases land adjacent to the NYSTA rights-of-way in each of these instances, and it can therefore access the egress hand holes from these locations without causing disruption to NYSTA's operations or traffic flow on the Thruway. The engineering drawings related to the lateral connections at issue here demonstrate that the egress hand holes are, on average, 60 to 80 feet away from the edge of the NYSTA roadway (ranging from 30 feet to 585 feet).[67]

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62 *See id.* ¶ 3.

63 *See* Carollo Decl. ¶ 3.

64 *See* Wiemer Decl. ¶ 4.

65 *See id.*

66 *See id.* ¶ 4.

67 Engineering maps depicting the interconnections points at issue in the Petition illustrate that the hand holes are located in positions that ensure virtually no impact to Thruway operations in the event maintenance is required. Copies of the engineering maps are attached as Ex. 6 (use of right-of-way highlighted in yellow).

In addition to the egress hand holes located an average of 60 to 80 feet from the roadway, each lateral connection is also served by an egress hand hole located at the point where the lateral connection connects to the Backbone Network. These egress hand holes are only rarely accessed for maintenance or splicing, however, because most maintenance work can be accomplished through the more distant (and less disruptive) hand holes. In the rare instances when work does need to take place at an egress hand hole located at the interconnection point, traffic lanes almost never need to be closed. Instead, the maintenance team typically can conduct their work from the shoulder or breakdown lane after deploying safety protective cones and lights.

Indeed, the New York State Department of Transportation has recognized that communications infrastructure of the kind at issue here impacts roadway use and maintenance to a smaller degree than other utilities:

> [T]he physical nature of communication lines is relatively unimposing as compared to other types of utilities. For instance, these types of facilities do not pose the threat of electrocution or explosion in the event they are struck by maintenance or construction forces. Also, communication lines are generally easier to relocate in the even NYSDOT needs to expand or realign the highway.[68]

In sum, Level 3's occupancy of NYSTA's rights-of-way for use of the Backbone Network and lateral connections has almost no material impact on public safety, and granting Level 3's Petition will not alter the minimal public safety impact at all. Level 3 currently adheres to all requirements related to public safety that apply to its use of the rights-of-way, and it will continue to do so regardless of the outcome of this proceeding.

III. THE RENTS REQUIRED BY THE RIDERS GIVE LEVEL 3 ONLY THE RIGHT TO OCCUPY THE LATERAL LAND, AND INTERPRETING THEM DOES NOT REQUIRE ANALYSIS OF THE ON-NYSTA AND OFF-NYSTA AGREEMENTS BETWEEN WILLIAMS AND ADESTA.

A. The Riders Cover Only the Right to Occupy.

As Level 3 explained in its Petition, Williams executed occupancy permits authorizing the use of rights-of-way for seventeen additional connections to the Backbone Network.[69] Each occupancy permit is accompanied by a Rider that identifies the rent due with respect to the

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[68] *New York Regional Interconnect, Inc.*, Testimony of Michael A. Mariotti, Statewide Utilities Engineer, New York State Department of Transportation at 5, lines 14-19, New York State Pub. Utils. Comm'n Case 06-T-0650 (filed Jan. 9, 2009), *available at* http://documents.dps.state.ny.us/public/Common/ViewDoc.aspx?DocRef Id={B8518012-BEAE-460C-A26B-845A29B8D674}.

[69] Level 3 Petition at 11-12.

additional access points.[70] Contrary to what NYSTA may imply, the annual rent provisions in the Riders cover only the right to occupy the rights-of-way in the designated location. The rent does *not* cover, however, installation, materials, maintenance, road closure fees, payments for crews, etc.[71] All such costs are separate from the rent required under the Riders.

The fact that the Riders cover only the right to occupy is illustrated not only in the language in the Riders themselves, but also within TAP-401, which, in turn, is incorporated into each of the occupancy permits.[72] As the Accommodation Policy affirms: "The permittee is responsible for the installation, maintenance, repair and restoration of [NYSTA] property during original construction and the term of the occupancy."[73] Moreover, a permittee must "agree[] to pay all expenses incurred by [NYSTA] in the inspection of work described in the permit."[74]

It is important to note that in addition to the requirements described above, TAP-401 provides detailed safety requirements – which Level 3 has not challenged. Indeed, Level 3 believes that local agencies should retain these types of "rights-of-way management" functions. Instead, Level 3's sole challenge is to the exorbitant rents in the Riders – Riders which provide only the right to occupy the small areas of NYSTA rights-of-way required for lateral connection to the Backbone Network.

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70 *Id.* at 11, Exs. 15-31.

71 *See, e.g.*, *id.*, Exs. 16-31, Art. II.A.1 & B.3 ("[NYSTA] shall permit Williams to connect one . . . fiber cable in each of 2 innerducts from the Facility to the ROW line. . . . In addition to this permit, a work permit, which work permit shall contain any and all conditions required by [NYSTA], shall be required for any specific construction or maintenance work activity on [NYSTA] property. . . . [Williams] shall pay the [rent], . . . *plus all one-time non-recurring fees required by the Authority for such Occupancy Permits*, prior to issuance of the Work Permit.") (emphasis added); *see also id.* Art. II.A.2 ("*[Williams] shall require Adesta, at no cost or expense to the Authority, to be responsible for the construction and maintenance* of the additional access connection. Adesta may perform such work through contractual arrangements with others, including Williams or Williams's contractors.") (emphasis added).

72 *See, e.g.*, *id.*, Ex. 16 at 3 ("The following additional terms and conditions are incorporated into . . . the New York State Thruway Occupancy and Work Permit Accommodation Policy. . . . This Rider and . . . all documents incorporated therein, are hereinafter referred to as the 'Permit Agreement.'").

73 TAP-401 § II.A.1. In addition, "[t]he permittee . . . shall pay . . . any and all assessments and governmental charges that shall or may be levied, assessed or imposed during the term of the permit by any governmental or other lawful authority upon or against such facilities." *Id.* § IV.B.2.a.

74 *Id.* § IV.B.2.b.

B. The Riders Are Separate and Distinct from the On-NYSTA and Off-NYSTA Agreements.

In opposing Level 3's petition to invalidate the rent provisions in the Riders, the National Association of Telecommunications Officers and Advisors ("NATOA") insists that Level 3 is "selectively challeng[ing] parts of its complex contractual relationship with [NYSTA]."[75] NATOA argues that the Commission must view the Riders together with the On-NYSTA and Off-NYSTA Agreements (collectively, "Agreements"), and that if the Commission were to bind NYSTA to the Agreements while preempting the provisions in the Riders, it would "essentially creat[e] a contract without consideration."[76]

NATOA is conflating distinct agreements. As Level 3 explained in its Petition, the Agreements were formed between Adesta and Williams.[77] The Riders, meanwhile, are direct agreements between Williams and NYSTA.[78] Furthermore, the Agreements granted Williams the rights to use and occupy a completed conduit system that had been already installed by Adesta. The Riders, on the other hand, deal only with a "ground lease" of real property owned by NYSTA. As such, the Commission need not consider the Agreements for purposes of preempting the rents in the Riders under § 253.

Furthermore, even considering the Riders in conjunction with the backbone Agreements does not impact the analysis. It is clear that NYSTA has used its monopoly power to gouge Williams/Level 3, regardless of the context in which the FCC assesses the Riders.

IV. THERE IS NO NEED TO RESORT TO THE LEGISLATIVE HISTORY IN THIS CASE, BUT THE LEGISLATIVE HISTORY SUPPORTS LEVEL 3'S INTERPRETATION OF § 253 IN ANY EVENT.

The Commission needs to consider only the plain language of the statute to analyze and take action on Level 3's Petition, notwithstanding some commenters' suggestions that fragments of the legislative history instead should control. Only one reading allows each clause of § 253 to have effect, and that reading reflects the position taken by Level 3 in this proceeding. As a matter of black-letter principles of statutory construction, it is not proper to resort to the legislative history in such circumstances.[79] To the extent the Commission considers the legislative history, the plain language of the statute controls when the statute and the legislative

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[75] Comments of the National Association of Telecommunications Officers and Advisors at ii, WC Docket No. 09-153 (filed Oct. 15, 2009).

[76] *Id*. at 6.

[77] Level 3 Petition at 6.

[78] *Id.* at 10-11.

[79] *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (noting that courts "do not resort to legislative history to cloud a text that is clear").

history diverge. The Supreme Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[80]

Section 253 is titled "removal of barriers to entry." Both the statutory language and the legislative history evince Congress's concern that a patchwork of varying State and local regulations had limited competition in the nation's telecommunications market. Assessing the statutory language as a whole, there is only one interpretation of § 253 that would not render parts of it "inconsistent, meaningless or superfluous":[81] when a party raises a defense under subsection (c) to an alleged violation of subsection (a), the Commission must consider whether the legal requirement falls outside subsection (c) in order to fulfill its role, under subsection (d), of preempting violations of subsection (a).[82] Any other reading of the statute renders § 253(d) illogical and strips the Commission of the role that Congress has directed it to fill. The legislative history supports this interpretation.

As Qwest Communications explained in its reply comments, the original version of § 253(d) vested exclusive jurisdiction in the Commission, directing 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."[83] Senators Feinstein and Kempthorne subsequently introduced an amendment that would have stripped the FCC of all jurisdiction over § 253 matters.[84] Concerned that the Feinstein-Kempthorne amendment went too far, Senator Gorton then introduced a second-degree amendment that had the effect of

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[80] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted); *see also Zedner v. United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in part and concurring in the judgment) ("It may seem that there is no harm in using committee reports and other such sources when they are merely in accord with the plain meaning of the Act. But this sort of intellectual piling-on has addictive consequences. To begin with, it accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole--so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has expressed' thus-and-so. There is no basis either in law or in reality for this naive belief.") (internal citation omitted).

[81] *E.g., Milner v. Navy*, 575 F.3d 959. 966 (9th Cir. 2009); *United States v. Goins*, 516 F.3d 416, 421 (6th Cir. 2008); *United States v. Amaya-Portillo*, 423 F.3d 427, 434 (4th Cir. 2005); *United States v. Miscellaneous Firearms*, 376 F.3d 709, 712 (7th Cir. 2004); *Cody v. Hillard*, 304 F.3d 767, 776 (8th Cir. 2002).

[82] *See, e.g., Cafarelli v. Yancy*, 226 F.3d 492, 499 (6th Cir. 2000) (stating that a court must interpret a statute "as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous") (citation omitted).

[83] Reply Comments of Qwest Communications International, Inc.., WC Docket No. 09-153, at 8 (filed Nov. 5, 2009) (citing *BellSouth Telecommc'ns, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190 (2001)) (emphasis added).

[84] *See* 141 Cong. Rec. S 8305 (daily ed. June 14, 1995).

granting concurrent jurisdiction to federal district courts over § 253(c) issues.[85] As Senator Gorton explained, this "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."[86]

But that was not all Senator Gorton said on the subject. He noted as well that he intended for his amendment to protect and promote "a nationwide telecommunications system."[87] Accordingly, he observed that "[t]here ought to be one center place where these questions are appropriately decided by one Federal entity which recognizes the impact of these rules from one part of the country to another and one Federal court of appeals."[88] Notwithstanding Senator Gorton's recognition of the need for national uniformity in this area, some opposing commenters urge an interpretation of § 253, purportedly based on Senator Gorton's views, under which states and municipalities could frustrate the Commission's position as that "center place," undermining national telecommunications policy and the pro-competition purpose of the 1996 Act.

Reading the statute as opponents suggest would render subsections (a) and (b) unenforceable at the FCC in cases involving rights-of-way. Whenever a state or local government entity wished to insulate its actions from FCC review, it could simply classify a legal requirement as a component of managing the public right-of-way. This, of course, would utterly frustrate Congress's goal of maintaining central policy-making authority for the nation's telecommunications policy. A completely localized approach of this kind would, in Senator Gorton's words "destroy[] the ability of the very commission which has been in existence for decades to seek uniformity, to promote competition, effectively to do so; and [will create] a balkanized situation in every Federal judicial district in the United States."[89] As Senator Gorton urged, "if this amendment – the Feinstein amendment [to which Senator Gorton offered a second-degree amendment] – in its original form is adopted, that will be some 150 or 160 different district courts with different attitudes. We will have no national uniformity with respect to the very goals of this bill, what constitutes a serious barrier to entry."[90]

Moreover, divesting the FCC of jurisdiction over rights-of-way compensation claims would lead to a "heads-I-win, tails-you-lose" result under which *neither the FCC nor the federal courts* could consider challenges to some types of franchise fees charged by state and local governments. In § 253 challenges commenced in federal court, municipalities have repeatedly argued that the Tax Injunction Act divests the courts of jurisdiction to assess whether localities' fees for rights-of-way occupancy run afoul of § 253. And, giving credit to the localities'

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85 *See id.* at 8308 (statement of Sen. Gorton).

86 *Id*.

87 *See* 141 Cong. Rec. S 8206, 8213 (daily ed. June 15, 1995) (statement of Sen. Gorton).

88 *Id.*

89 *See* 141 Cong. Rec. S 8305, 8306 (daily ed. June 14, 1995) (statement of Sen. Gorton).

90 *Id.*

arguments, "[n]umerous . . . courts have concluded that charges imposed upon users of a city's rights-of-way are taxes for purposes of the Tax Injunction Act."[91] Coupled with that track record in federal court, a determination that the FCC lacks jurisdiction to assess such violations as well would insulate localities' rents and fee ordinances from any review outside of state courts. That was clearly *not* Congress's intent (nor Senator Gorton's) in passing § 253, and the Commission should avoid any determination that reaches that result.

As a general matter, therefore, the legislative history reveals that Senator Gorton did not intend effectively to eliminate the FCC's central role under § 253. In any event, however, to the extent any of his statements in the legislative history cannot be reconciled with the text of the statute,[92] the statute controls. And if the statute is ambiguous, courts defer to the implementing agency's reasonable interpretation. Section 253(d), however, has only one logical interpretation: it commands the Commission to preempt State or local requirements impeding competition, including rights-of-way fees. Had Congress intended to circumscribe the FCC's authority to preempt state or local rights-of-way requirements, Congress could have written: "*Except with respect to cases involving rights-of-way management or compensation subject to subsection (c)*, if, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." But that is not what § 253(d) provides, as passed by Congress and signed by the President. Instead, it *requires* the Commission to preempt any violation of § 253(a), necessarily including any violation of § 253(a) that does not fall within the § 253(c) savings clause.

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[91] *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183 (9th Cir. 2006) (listing cases); *see also id.* at 1178 (affirming dismissal of Qwest's § 253 challenge to charges imposed under municipalities' licensing and franchise ordinances because, as the municipalities had argued, "the charges that the Cities impose upon Qwest are taxes, not fees, so the Tax Injunction Act deprived the district court of jurisdiction to consider their validity"); *MCI Commc'ns. Servs., Inc. v. City of Eugene*, 2009 U.S. App. LEXIS 20646 at *13-14 (9th Cir. Sept. 15, 2009) (unpublished opinion) (upholding the lower court's conclusion that a carrier's § 253 challenge to a local ordinance's fee provisions "runs afoul of the jurisdictional constraints imposed upon federal courts by the TIA," and affirming dismissal as a result); *City of Chattanooga v. BellSouth Telecomms., Inc.*, 1 F. Supp. 2d 809, 814 (E.D. Tenn. 1998) (ordinance imposing 5% charge on gross revenue of telecommunications providers that install cable on rights-of-way is a tax subject to the TIA despite being labeled "rent" in the ordinance).

[92] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 665-66 (2006) (Scalia, J., dissenting) ("Of course this observation [that legislative history may contain statements inserted into the Congressional Record after the fact] makes no difference unless one indulges the fantasy that Senate floor speeches are attended (like the Philippics of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes' practice sessions on the beach) alone into a vast emptiness. Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator.").

Opposing commenters argue that Congress intended subsection (c) to strip the Commission of jurisdiction over any State and local requirement relating to rights-of-way. But contrary to opponents' claims, the FCC has previously recognized that subsection (c) grants federal district courts *concurrent* jurisdiction with the Commission, and does not act as a bar to Commission preemption of legal requirements that violate § 253(a). As the Commission previously has concluded, its jurisdiction extends to an assessment of regulations and requirements implicating § 253(c). In guidelines covering the submission of petitions under § 253, the Commission directed that:

> 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).*[93]

The Commission's subsequent decisions reflect this understanding: its preemption analysis under § 253(a) requires consideration of whether the challenged requirement falls within the safe harbors of either § 253(b) or § 253(c). The Commission has told the Supreme Court just this, stating that "[t]o the extent that the [Commission] 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 [it] also has jurisdiction to adjudicate claimed defenses, including the section 253(c) defense."[94]

Any other interpretation risks creating an exception to § 253(d) that could swallow § 253 entirely. "[B]ecause § 253(c) provides a defense to alleged violations of § 253(a) or (b), if § 253(d) were read to preclude FCC consideration of disputes involving the interpretation of § 253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint."[95] Examination of the statute yields a straightforward answer to the question of how best to apply § 253 in this case. The 1996 Act directs the Commission to preempt any "State or local statute or regulation, or other State or local legal requirement, [that] may prohibit or have the effect of prohibiting the ability of any entity to

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[93] *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd. 22,970, 22,971 (1998) (emphasis added).

[94] *Supplemental Brief of the Federal Communications Comm'n 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.

[89] *TCG N.Y., Inc. v. City of White Plains*, Supplemental Brief of the Federal Communications Comm'n and the United States as Amici Curiae at 4, Docket Nos. 01-7213, 01-7255 (filed March 11, 2002) (copy attached as Ex. C to Level 3 Reply Comments (filed Nov. 5, 2009)).

[95] *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 75-76 (2d Cir. 2002).

provide any interstate or intrastate telecommunications service,"[96] unless the State can demonstrate that its requirement fits within the safe harbors of subsections (b) or (c). The evidence in the record demonstrates that NYSTA's fees violate § 253(a) and cannot be saved by (b) or (c). Accordingly, the Commission is required, under subsection (d), to preempt the anticompetitive and discriminatory NYSTA rents at issue in this petition.

V. FACTUAL TIMELINE.

Level 3's Petition presented much of the factual background necessary to address the Petition. Recognizing that additional detail could assist the Commission, Level 3 has attached as Exhibit 7 a timeline of events relevant to its use of NYSTA's rights-of-way.

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Should you have any questions about any of the foregoing discussions or any other matters related to the Petition, we would welcome the opportunity to meet with you.

Respectfully submitted,

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Austin Schlick
Christopher Killion
Blair Levin

[96] 47 U.S.C. § 253(a).

LIST OF EXHIBITS

1. Second Supplemental Declaration of Steve Gordon
2. NYSTA Real Property Management Manual, Section 2.5 (Occupancy Permits) (2006)
3. NYSTA's Occupancy and Work Permit Accommodation Policy ("TAP-401") (1995)
4. Declaration of Mike Carollo
5. Declaration of Mike Wiemer
6. Engineering Maps
7. Factual Timeline