

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Joint Michigan CLEC Petition) WC Docket No. 10-45
For Declaratory Ruling and)
Motion for Temporary Relief)

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (Qwest) replies to the comments filed on March 9, 2010 concerning whether the joint petitioners have provided sufficient evidence to satisfy the “effective prohibition” standard under 47 U.S.C. § 253(a) (Section 253(a)).

The Commission held in its *California Payphone Order* that a law has the “effect of prohibiting” an entity’s ability to provide a telecommunications service under Section 253(a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹ Until recently courts nationwide generally followed that standard when considering whether local laws created an effective prohibition under Section 253(a). As Qwest noted in comments it filed recently in two other dockets, however, two recent court decisions have caused confusion regarding the validity of the Commission’s holding in *California Payphone* by applying an “actual prohibition” standard.

The supporting and opposing comments in this docket provide the Commission with an opportunity to confirm its *California Payphone* standard. While the commenters generally agree that *California Payphone* remains the controlling standard, the commenters dispute whether the joint petitioners have presented sufficient evidence to satisfy that standard. However the

¹ *In the Matter of California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Red 14191, 14206 ¶ 31 (“*California Payphone Order*”).

Commission rules on that issue, it should be careful to confirm that the *California Payphone* “materially inhibits or limits” standard is the correct one, rather than the “actual prohibition” standard applied recently. Moreover, given the Commission’s National Broadband Plan issuance and its joint task force recommendation aimed at identifying appropriate guidelines to consider whether local laws are reasonable and nondiscriminatory under Section 253(c), the need for clarity on the appropriate Section 253(a) standard is even more acute. Reaffirming the Commission’s *California Payphone* standard for establishing a Section 253(a) violation could substantially reduce the number of disputes under Section 253 in the future.

I. In Light Of Recent Court Decisions, The Commission Should Reconfirm Its *California Payphone* Holding That A Law Is Effectively Prohibitive Under Section 253(a) If It Materially Inhibits Or Limits The Ability Of Any Competitor or Potential Competitor To Compete In A Fair And Balanced Legal And Regulatory Environment.

In 1997, the Commission announced in *California Payphone* that a law has the “effect of prohibiting” any entity’s ability to provide telecommunications service under Section 253(a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”² The First, Second, and Tenth Circuits each have relied on *California Payphone* in holding that a state or local regulation is preempted by 47 U.S.C. § 253(a) if it impedes an entity from providing telecommunications services. *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2nd Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004).³

² *California Payphone Order*, 12 FCC Rcd at 14206 ¶ 31.

³ See Comments of Qwest Communications International Inc., *In the Matter of a National Broadband Plan for Our Future*, GN Docket No. 09-51, filed June 8, 2009, at pp. 26-33; Comments of Qwest Communications International Inc., *In the Matter of Level 3 Communications LLC Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed*

Unfortunately, two recent federal circuit court decisions blur these bright lines of permissible local regulation, thus resurrecting uncertainty regarding deployment costs and potentially chilling investment. While paying lip service to *California Payphone*, the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *cert. denied*, U.S. 129 S. Ct. 2860 (2009) (*San Diego*) and the Eighth Circuit in *Level 3 Comms., LLC v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007), *cert. denied following remand and affirmance*, U.S., 129 S. Ct. 2859 (2009) (*St. Louis*) narrowly interpreted Section 253(a) in holding that state or local regulations must *actually* prohibit telecommunications services to be deemed illegal. Both cases directly contradict the express purpose of Section 253. Indeed, in the United States’ amicus brief at the U.S. Supreme Court, the government acknowledged that “aspects of the Eighth and Ninth Circuits’ opinions might be read to suggest an unduly narrow understanding of Section 253(a)’s preemptive scope...”⁴ The government specifically noted that the Eighth Circuit in *St. Louis* “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...That specific failure of proof -- which the Court of Appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3’s case -- is not central to a proper Section 253(a) inquiry.”⁵ However, the government advocated that it could address inconsistencies amongst the circuits applying *California Payphone* by authoritative rulings, which would govern the disposition of Section 253(a) claims brought in federal courts

by the New York State Thruway Authority Are Preempted Under Section 253, WC Docket No. 09-153, filed October 15, 2009, at pp. 9-13.

⁴ See *Level 3 Communications, LLC v. City of St. Louis*, and *Sprint Telephony PCS v. San Diego County*, U.S. S. Ct. Docket Nos. 08-626 and 08-759, *Brief for the United States As Amicus Curiae (St. Louis Amicus Brief)* at 8.

⁵ *St. Louis Amicus Brief*, p. 13 (citation omitted).

under *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005), rather than having the Supreme Court review these decisions.⁶

The ramifications of *San Diego* already are being felt. Citing *San Diego*, a Ninth Circuit panel recently held that the mere fact that a provider continues to operate in a locality is *conclusive* evidence that any state or local regulation, however draconian, survives review under § 253(a). *Time Warner Telecom v. City of Portland*, No. 06-36023, slip op. at 4, 2009 WL 965816 ¶ 1 (9th Cir. Apr. 8, 2009). The instant case presents an opportunity for the Commission to address these inconsistent holdings.

II. The Comments Filed In This Docket Provide The Commission With An Opportunity To Reconfirm The *California Payphone* Standard.

None of the commenters here directly advocates the “actual prohibition” standard errantly applied by the Eighth and Ninth Circuits. Commenters opposing the joint petition instead generally argue that a carrier alleging a Section 253(a) violation must come forth with more than allegations that the challenged law would result in increased rates.⁷ Commenters supporting the joint petition generally argue that a law creating subsidy disparity constitutes a Section 253(a) violation *per se*.⁸ Both sides seem to agree that the standard in *California Payphone* should apply, yet they disagree as to the proof required to satisfy their burden.⁹

⁶ *Id.* at 18.

⁷ See Opposition of AT&T, Inc. at 10-11 (“Petitioners’ bald assertion that Act 182 will prevent them from being able to ‘match the rates of the smaller ILECs’ does not provide a sufficient basis for the Commission to conclude that it should preempt a state law”), and Comments of the Michigan Public Service Commission at 10-11 (“the only factual offerings that the Joint CLECs included were five substantively identical affidavits from officers ... attesting that, among other things, the smaller ILECs will have the ability to price its (sic) services at rates lower than [the respective Petitioner] can provide...”).

⁸ See Comments of Paetec Holding Corp., ACN Communications Services, Inc. and Sage Telecom, Inc., at p. 4 (“Act 182 effectively prohibits competition, because for any CLEC that attempts to compete against the smaller ILECs, the CLEC must price its services at levels competitive with the smaller ILECs without receiving the state subsidies the smaller ILECs

While Qwest takes no position on these arguments concerning the requisite proof required to show that a change in subsidies violates Section 253(a), Qwest believes that it is imperative that in ruling on the joint petition the Commission should avoid any appearance of application of the “actual prohibition” standard and re-affirm the “materially limit or inhibit” standard in *California Payphone*. Specifically, if the Commission were to agree with the opponents of the joint petition, it should be careful to tailor its ruling to the facts of this case and, in the process, reconfirm its *California Payphone* standard. Failing to do so will only contribute to future arguments concerning the proper Section 253(a) standard.

III. The Commission’s National Broadband Plan Further Underscores The Need For The Commission To Reconfirm The *California Payphone* Standard.

After the initial comments in this docket were filed, the Commission issued its National Broadband Plan on March 16, 2010 (NBP).¹⁰ Among many other things, the Commission in the NBP proposed mechanisms for bringing uniformity in how Section 253 should be applied to local government right-of-way management. Specifically, the Commission recommended the creation of a joint governmental task force that will identify “competitively neutral,” “nondiscriminatory,” and “fair and reasonable” practices under Section 253(c).¹¹ These practices

receive...), and CompTel Comments in Support of Joint Petition, at p. 3 (“By requiring both ILECs and competitive providers to reduce their intrastate access rates to the interstate level and by reimbursing the ILECs, and only the ILECs, for the revenues lost as a result of the rate reductions, Michigan Act 182 forces competitors who wish to offer consumers an alternative to the ILECs’ services to compete at a state mandated financial disadvantage in violation of Section 253(a).”)

⁹ See Opposition of AT&T, Inc. at 10, n. 21; Comments of Paetec Holding Corp., ACN Communications Services, Inc. and Sage Telecom, Inc., at p. 3, n. 13. See also the Joint Petition for Expedited Ruling that the State of Michigan’s Statute 2009 PA 182 Is Preempted Under Sections 253 and 254 of the Communications Act, p. 9.

¹⁰ GN Docket No. 09-51.

¹¹ NBP, § 6.6, p. 113.

ultimately would be included in “guidelines for public rights-of-way policies that will ensure that best practices from state and local government are applied nationally.”¹²

At the same time the Commission is identifying standards for determining what right-of-way practices satisfy Section 253(c), nothing in the NBP appears to clarify what constitutes an “effective prohibition” under Section 253(a). Yet, showing an effective prohibition under Section 253(a) has commonly been viewed as a necessary predicate to examining whether the practice at issue satisfies Section 253(c) standards.¹³ Without additional clarity from the Commission as to what constitutes an effective prohibition under Section 253(a), the joint task force’s assignment to clarify the Section 253(c) standard may be meaningless. This is particularly so in cases such as this one, where the challenged practice is a regulation that has nothing to do with right-of-way management.¹⁴

IV. Conclusion

For these reasons, Qwest believes that it is vitally important that the Commission confirm the standard necessary to show effective prohibition under Section 253(a) consistent with its *California Payphone Order*. Such confirmation could substantially decrease the number of such disputes in the future and thereby reduce costs and uncertainty in the deployment of broadband

¹² *Id.*

¹³ *See, e.g., In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21,396 ¶ 105 (1997) (once Section 253(a) violation is established, burden shifted to government “to justify [its regulations] under section 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority”).

¹⁴ Qwest appreciates that the Commission in the NBP included a general sentence seemingly concerning Section 253(a), stating that “Section 253 of the Communications Act prohibits state and local policies that *impede* the provision of telecommunications services ...” NBP at § 6.6, p. 113 (emphasis supplied). Qwest submits, however, that such a statement would be more authoritative if issued in connection with rulings in this or related dockets initiated under Section 253(d).

services. Moreover, such a standard likely will assist the joint task force as it moves forward in considering appropriate practices under Section 253(c).

Respectfully submitted,

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March 19, 2010

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**
COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. to be: 1) filed
with the FCC via its Electronic Comment Filing System in WC Docket No. 10-45; 2) served via
email on Ms. Lynn Hewitt Engledow at lynne.engledow@fcc.gov of the Wireline Competition
Bureau, Pricing Policy Division, Federal Communications Commission; and 3) served via email
on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Richard Grozier

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