Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment	)	
By Improving Policies Regarding	)	WC Docket No. 11-59
Public Rights of Way and	)	
Wireless Facilities Siting	)	
	)	

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

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I. SUMMARY AND INTRODUCTION

Level 3 Communications, LLC ("Level 3") applauds the Federal Communications Commission ("Commission" or "FCC") for highlighting that broadband deployment is "one of the great infrastructure challenges of our time" and "critical to our country's economic success in the twenty-first century," and for recognizing that improving access to rights-of-way is a fundamental requirement for expanding deployment.[1] As the FCC notes, "obtaining access to rights of way on fair and reasonable terms, and through a predictable process, is critical for all infrastructure providers."[2] Level 3 agrees that FCC action to ensure predictable, fair and reasonable access to rights-of-way is essential to fulfilling the Commission's national broadband agenda.

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[1] Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting ¶ 1, Notice of Inquiry, FCC 11-51 (rel. Apr. 7, 2011) ("NOI").

[2] *Id.* ¶ 4.

The nation's broadband networks require access to rights-of-way. Unpredictable and unreasonable rates for right-of-way access deter new investment in broadband infrastructure. But the most devastating effect falls on owners of existing infrastructure, who find themselves captive to unreasonable and unpredictable, even outrageous, charges. Owners face escalating demands for economically prohibitive payments for continued use of their own network facilities, costs that preclude the possibility of network expansion and additional broadband deployment. As cities and municipalities have demonstrated again and again, once a network is built, the owner has no choice but to agree to almost any right-of-way charge demanded: an owner cannot simply walk away from its facilities and the tens of millions of dollars invested therein. Overpriced rates for right-of-way access thus obstruct the ability of smaller communities to connect to high-speed Internet backbone arteries. The resulting uncertainty around network infrastructure and access costs not only deters new entrants to the market, but also leads to an accelerating incremental decrease in broadband investment nationwide as municipalities and cities impose situational monopoly fees on captive providers.

Level 3 has confronted precisely this scenario along the New York State Thruway ("Thruway"), where the New York State Thruway Authority ("NYSTA") extracts annual rents for access to rights-of-way that are so exorbitant and divorced from prevailing rates as to prevent Level 3 from providing telecommunications service—including middle-mile broadband transport—to communities in New York State.[3] Level 3's predecessor was forced to agree to pay tens of thousands of dollars per year—sometimes for only a few feet of right-of-way that had no scarcity other than being the only way to connect from a point outside the right-of-way to a

[3] Level 3 Commc'ns, LLC Petition for Declaratory Ruling that Certain Rights-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253, Docket No. 09-153, at i (filed July 23, 2009) ("Level 3 Petition").

backbone fiber located within it. Level 3's predecessor had no choice: had it not capitulated, it would never have been able to light its $31 million backbone network running the across the entire state of New York—for which it had already paid. Level 3 accordingly has sought relief under Section 253 from the Commission—which the Level 3 strongly urges the Commission to grant.[4]

As Level 3 has stated in the Level 3 Petition filings, timely consideration of rights-of-way payments—including clarification of a sensible national standard and limits on monopoly pricing—is essential to deployment of both last-mile and middle-mile broadband networks. Carriers cannot build extensive last-mile and middle-mile broadband networks without occupying public rights-of-way. Captive carriers such as Level 3 cannot simply abandon existing and economically significant investments in infrastructure. But the uncertainty regarding costs for right-of-way access deters investment and expansion. Failing to place sensible limits on the rates for public rights-of-way will inevitably also increase the rates for private rights-of-way and the risk of inconsistent judicial rulings in disputed cases. Section 253 authorizes the Commission to ensure that right-of-way access charges are predictable, and fair and reasonable, both for new market entrants and for existing market participants facing incremental effects of unreasonable rates along their networks.

The Commission can achieve its national broadband objectives only by utilizing the tools at its disposal to lower barriers to deployment and enhance private investment: it does not and cannot build and operate broadband networks. Among these tools, it can utilize right-of-way standards, pole attachment rulings, and tower-siting decisions as levers influencing deployment. Under Section 253, the Commission has the ability to affect the cost of broadband supply by

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[4] *See* Level 3 Petition.

articulating a national standard under Section 253 to set upper limits on right-of-way fees. The Commission should act promptly, using its congressionally delegated authority, to clarify § 253's applicable standards and limits. The Level 3 Petition offers a ready vehicle for providing such important guidance to state and local governments and industry—and one that will preclude a "race to the bottom" in which states and local governments vie to see who can extract payments that detract from private broadband investment. Reading § 253 to eliminate FCC authority, as some entities have suggested, would strip the Commission of one of its strongest levers. Accepting a constrained FCC role in § 253 matters would greatly diminish the Commission's authority over broadband policy and delay or ultimately thwart the deployment goals articulated in the National Broadband Plan, which in turn, will harm the public interest. Inaction risks frustrating the Commission's own broadband deployment objectives.

In these comments, Level 3 suggests a clarified standard for determining when rights-of-way charges are presumptively unreasonable under Section 253 and proposes applying a reasonable, fair market value standard for evaluating such charges. Level 3 further discusses its dispute with NYSTA as a case study in the deleterious effects unreasonable charges can have on the public interest and broadband deployment. This case study also illuminates the manner in which state and local right-of-way holders discriminate between right-of-way uses, and provides a sharp example of why a national standard for assessing reasonableness is needed. Finally, Level 3 discusses the Commission's delegated authority to adjudicate rights-of-way disputes arising under Section 253.

II. CHARGES FOR ACCESS TO RIGHTS-OF-WAY ARE PRESUMPTIVELY UNREASONABLE IF THEY VIOLATE THE SECTION 253(a) STANDARD

In this NOI, the Commission seeks comment on how to determine whether charges for rights-of-way access are reasonable, and on whether unreasonable charges are more likely to appear in certain circumstances.[5] As Level 3 explains below, right-of-way charges are presumptively unreasonable if they inhibit or limit service in violation of § 253(a), although charges are not unreasonable if they are necessary to recover the owner's incremental costs or reflect fair market value. As the Commission posits in the NOI, charges are more likely to be unreasonable when the right-of-way user has no alternative routing options, giving the right-of-way owner monopoly power in the negotiation. Level 3's experience with NYSTA provides a textbook example of unreasonable right-of-way charges resulting from chokehold control over the only potential route for fiber-optic cable.

A. Charges for Access to Rights-of-Way Are Presumptively Unreasonable—and Violate § 253(a)—If They Materially Inhibit or Limit the Provision of Service, or If They Result in an Unfair or Unbalanced Legal and Regulatory Environment

The text of § 253 and the FCC's *California Payphone* decision provide the foundation for determining whether rights-of-way charges are reasonable. 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."[6] The provision thus describes two distinct situations requiring action from the FCC. The first—which applies to statutes, regulations and other legal requirements that <u>prohibit</u> the ability of any entity to provide service—is clear on its face but not

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5 *See* NOI ¶¶ 16-20.

6 47 U.S.C. § 253(a).

applicable to right-of-way charges. Since a fee, by itself, is not equivalent to a direct prohibition, this portion of § 253(a) does not aid in assessing the fee's reasonableness. The second component of § 253(a) —which applies to legal requirements like usurious rates that "have the effect of prohibiting" the ability of any entity to provide service—has been applied on several occasions by the FCC and the courts but merits additional clarification.

The foundation for the standard governing the second component of § 253(a) necessarily lies in the FCC's *California Payphone* order,[7] which the FCC and appellate courts uniformly recognize as the bedrock for analyses under § 253.[8] 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."[9]

While the *California Payphone* standard is a valuable foundation for assessing the reasonableness of charges, courts have applied it in divergent ways, demonstrating the need to clarify it further. In this regard, the Solicitor General (representing the FCC and the United States) explained in a Supreme Court amicus brief assessing § 253(a) that the *California Payphone* standard should be applied by assessing the "practical effects" of the challenged legal

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

8 *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.").

9 *California Payphone*, 12 FCC Rcd. at 14,206 ¶ 31; *see also Pub. Util. Comm'n of Tex. et al. Pets. For Decl. Ruling and/or Preemption of the Tex. Pub. Util. Regulatory Act of 1995*, 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").

requirement.[10] Like the FCC itself,[11] the First Circuit employed such a "practical effects" approach in *Puerto Rico Telephone Co., Inc. 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.[12] The *Guayanilla* court analyzed the incremental 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 standard enunciated in *California Payphone*, the court found that the ordinance violated § 253(a) because, if applied to all Puerto Rican municipalities, it would have increased carriers' costs tenfold and dramatically reduced profits.[13] As the *Guayanilla* court recognized, Section 253 is meant to contemplate these incremental effects of unreasonable rights-of-way charges on broadband investment over time, as well as the impact of such charges on new market entrants.

Using *California Payphone* as the foundation and fine-tuning it with the approach employed by the First Circuit in *Guayanilla*, the Commission can clarify the standard for determining when charges for access to rights-of-way are unreasonable and violate the second component of § 253(a), as follows:

> Charges for access to public rights-of-way, or other legal requirements, have the effect of prohibiting the provision of any telecommunications service by any telecommunications provider in violation of § 253(a) if they impose 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.

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10 *FCC Amicus Brief* at 8, 11.

11 *See Public Util. Comm'n of Tex.*, 13 FCC Rcd. at 3470 ¶ 22.

12 450 F.3d 9 (1st Cir. 2006).

13 *Id.* at 18.

There are a number of benefits to this clarified standard. 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 instruction 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.[14]

Moreover, this proposed clarification 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 relying on a subjective assessment of the complaining carrier alone. As a result, this standard will lead to consistent application no matter which entity asserts that charges are unreasonable. In addition, the proposed clarification recognizes that a fee 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 by a thousand cuts." A contrary approach would create a race for states or local governments to apply exorbitant right-of-way fees, so as not to be the entity that "tips" a network or route to non-viability.

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 of investment-deterring incremental effects is evident from the record before the Commission in Level 3's pending petition seeking preemption of NYSTA's rights-of-way access fees. NYSTA itself has acknowledged in that proceeding that

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

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.[15]

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. 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.

B. Charges Are Not Unreasonable If They Reflect the Incremental Cost of Making the Right-of-Way Available or the Fair Market Value of the Right-of-Way, Even If They Materially Inhibit or Limit the Provision of Service

A right-of-way owner's charge for access is not unreasonable—even if it materially inhibits or limits the provision of service under the standard presented above—if it is necessary to recover the owner's incremental costs of making the right-of-way available or if it reflects the fair market value of access to the right-of-way. Numerous courts, when evaluating whether charges for use of public rights-of-way are fair and reasonable under § 253(c), have applied a

[15] *See* Level 3 Commc'ns, LLC 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").

standard that requires the entity with authority over the right-of-way to show that the fees are in some manner related to costs.[16] Such a standard is both defensible in light of the text of § 253 and a workable, easily administered approach that would encourage construction of fiber networks throughout the United States.

A "fair market value" standard for assessing the reasonableness of charges also could 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.[17]

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

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16 *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. 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.").

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

the other), the FCC or a court can assess the results to determine whether occupancy rents are consistent with the appraisal.[18] When there are no appraisals or comparable evidence 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.[19]

The law of eminent domain and governmental seizure of private land provides valuable guidance for appropriate appraisals of the rights-of-way, 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

[18] 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, 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 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 suggested above (as in a competitive market prices will generally equal costs plus some reasonable margin).

[19] 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.

condemnor for some special use but a so-called 'market value.'"[20] 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."

C. Charges Are More Likely To Be Unreasonable When the Right-of-Way Holder Can Exercise Monopoly Control

As the Commission suggests in the NOI,[21] the charges and terms associated with access to rights-of-way are most likely to be unreasonable after a provider has deployed infrastructure and incurred sunk costs, effectively giving the right-of-way holder monopoly control for purposes of contract renewals or requests for additional access to the deployed infrastructure. In such circumstances, the right-of-way holder has nearly unchecked leverage in negotiations with a stranded carrier and therefore has the ability to impose eye-popping demands.

Indeed, this is precisely what Williams, Level 3's predecessor-in-interest, experienced in its dealings with NYSTA. After Williams had invested $31 million in fiber located on NYSTA rights-of-way, NYSTA was able to (and did) exert monopoly power. NYSTA officials knew that Williams had sunk more than $31 million in the network and, based on discussions with Williams personnel, they also knew that Williams would be unable to operate the network as it had planned without additional connections.[22] NYSTA was therefore in a position to impose breathtaking demands—and it did so, demanding that Williams execute riders imposing

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

[21] *See* NOI ¶ 19 ("[O]nce an infrastructure provider has placed facilities in a public right of way, incurring sunk costs, is the public rights of way holder frequently in a position to exercise market power in establishing subsequent charges, such as on renewals of long-term contracts or requests to make changes to a vitally important network facility?").

[22] *See* Level 3 Petition at 10-11.

extraordinary annual rents in exchange for authorization for the additional connections. NYSTA's demands marked a significant modification of its practices with respect to a utility's use of its rights-of-way, as it demanded rent that far exceeded the fees charged to the same utilities for transverse (lateral) crossings of the NYSTA rights-of-way—even though Williams anticipated occupying far less of the right-of-way to make the connections it required.[23]

Section 253 should be understood to address precisely this kind of profiteering, monopoly-driven conduct. The *California Payphone*-based standard presented above 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. Applying the standard in this manner 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."[24] 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."[25]

D. The Fees NYSTA Has Imposed on Level 3 Are a Textbook Example of Unreasonable Charges

The fees that NYSTA has imposed on Level 3 (and on Williams, its predecessor in interest) are punishingly and unreasonably high no matter how they are measured, and they have

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23 *Id.*

24 *Petition of the State of Minn.*, 14 FCC Rcd. 21,697, 21,716 ¶ 35 (1999).

25 *Implementation of Section 621(a)(1)*, 22 FCC Rcd. 5101, 5160 ¶ 134 (2007) (citing *Liberty CableVision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 222 (1st Cir. 2005)).

no connection whatsoever to width, breadth, or physical characteristics of the right-of-way in question.[26] NYSTA imposes annual fees on Level 3 that range from $78 to $34,000 per linear foot, with an average rate of $364.[27] The rates NYSTA charges to Level 3 bear no relationship to prevailing market rates, which typically range from $0.50 to $2.00 per linear foot annually, depending on a variety of factors.[28] NYSTA itself imposes rates in this range for rights-of-way that do not involve the fiber network to which Level 3 requires access; it charged Williams (and now charges Level 3) just $1.45 per foot per year for a lateral communications right-of-way permit that does not connect to the network.[29] The rates NYSTA charges Level 3 for additional connections to its fiber network are thus approximately 180 to 725 times higher than typical market rates, and 250 times higher than the per-foot rate that NYSTA charges Level 3 for the non-connecting right-of-way. NYSTA has not undertaken any form of cost study or market-value appraisal to support the rents it charges Level 3.[30]

NYSTA's fees are, simply put, monopoly rates. Level 3 has no alternative but to cross NYSTA's right-of-way if it wishes to connect off-NYSTA facilities (whether signal regeneration stations necessary for the operation of the longitudinal facilities or off-NYSTA transport facilities) to the fiber network located in the middle of the right-of-way.

III. UNREASONABLE CHARGES OFTEN HAVE NO DIRECT CONNECTION TO PUBLIC INTEREST GOALS, BUT THEY HAVE A DELETERIOUS IMPACT ON PROVIDER DEPLOYMENT DECISIONS AND ON BROADBAND CONSUMERS

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26 *See* Level 3 Petition at 12-17.

27 *See id.* at 12-13.

28 *Id.* at 12.

29 *Id.*

30 *Id.* at 13.

In the NOI, the Commission seeks comment on the extent to which rights-of-way charges are designed to serve or fund public interest goals.[31] All too often, it appears that state and local entities use the right-of-way process simply as a raw revenue generation tool: in many cases, there is simply no connection at all between the fees charged and the impact or burden that the right-of-way usage creates.[32] Indeed, states and localities often appear to give much higher (and shortsighted) priority to revenue generation than to expanding broadband deployment for the long-term benefit of their residents. Far from advancing public interest goals, unreasonable fees tend to undermine them because they have a direct and deleterious impact on infrastructure providers' deployment decisions.[33] In many circumstances, a state or local entity's decision to impose unreasonable charges compels providers not to deploy in that area at all, to the direct detriment of broadband consumers.

Again, Level 3's experience with NYSTA provides a telling example. All else equal, Level 3 would like to introduce services to smaller cities and towns along the Thruway by developing additional access connections to serve as broadband "exit ramps" to connect local communities to the fiber network located in the NYSTA right-of-way. But all else is not equal, because NYSTA's rents prevent Level 3 (like Williams before it) from developing new access

[31] *See* NOI ¶ 22.

[32] NYSTA, for instance, has informed the Commission that it relies on right-of-way rents to pay for maintenance and operation costs, highway repair, bridges, slopes, fencing, safety implementation, and equipment servicing. *See Ex parte* Letter from Charles R. Naftalin, Counsel for the New York State Thruway Authority, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-153, at 11-12 (July 6, 2010). NYSTA has failed to acknowledge, however, that none of these undertakings has any bearing on Level 3's occupancy of discrete areas of the right-of-way, nor has it explained why Level 3 should bear a grossly disproportionate share of NYSTA's aggregate expense.

[33] *See* NOI ¶ 23.

connections that would bring state-of-the-art broadband and other services to dozens of currently un-served or under-served communities.[34] NYSTA itself has acknowledged an even broader impact, observing that not a single provider has requested access to the fiber optic network that runs longitudinally along NYSTA's right-of-way ever since it imposed extraordinary rents on Level 3's predecessor in interest more than 10 years ago.[35] Simply put, NYSTA has escalated its rates to such a level that it has priced every provider out the market for additional access points, effectively preventing consumers in underserved communities along the Thruway from gaining affordable cutting-edge access to services.

The impact on broadband deployment is particularly acute, as rents like NYSTA's destroy the business justification for deploying the so-called "middle-mile" facilities that link backbone networks with the "last-mile" connections to the end user. "Access to adequate and affordable 'middle-mile' broadband facilities," Commissioner Copps explained, "is a necessary precursor to a provider's being able to deploy broadband services to its customers."[36] Without adequate middle-mile capacity, broadband service providers have difficulty providing services to its customers, even if last-mile facilities are in place.[37] This is particularly true in rural communities, where Internet service providers are often located significant distances from

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34 *See* Level 3 Petition at 20-27.

35 See Opp'n of NYSTA, Ex. 2 ¶ 7.

36 Commissioner Michael J. Copps, *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy* at 49 (May 22, 2009), *available at* http://www.tiaonline.org/gov_affairs/stimulus_package/docs/FCC_Rural_Broadband_Strategy.pdf; *see also id.* at 67-69.

37 *See, e.g.*, Comments of Verizon and Verizon Wireless on Report on Rural Broadband Strategy, GN Docket No. 09-29, at 11 (filed Mar. 25, 2009) ("The inadequacy or high cost of the 'middle mile' has been highlighted as one of the significant barriers to greater broadband deployment in rural areas."); Comments of the National Exchange Carrier Association, Inc., GN Docket No. 09-29, at 5-6 (filed Mar. 25, 2009) ("[T]he high cost of middle mile backbone connections is an obstacle to providing broadband services in low-density rural markets.").

network backbone connections.[38] The cost of deploying middle-mile facilities poses a substantial challenge to network operators even absent any right-of-way access fees; including unreasonable charges on top of other deployment costs often makes middle-mile deployments financially unjustifiable. This impacts rural consumers most directly, of course, because rural broadband will continue to lag behind urban offerings until middle-mile infrastructure is in place.[39] In other words, unreasonable rents deter the private sector from entering into the shared resource arrangements necessary to deliver cutting edge high-speed service to consumers.

Unreasonable charges also siphon money away from network expansion projects—including projects unrelated to the right-of-way at issue. This is particularly true for Level 3 and other competitive communications companies looking to expand their networks.[40] One of Level 3's top corporate priorities is increasing the geographic reach of its existing fiber-optic network by expanding where it makes economic and business sense to do so. Like most competitive carriers, Level 3's cash is tightly managed, and the size of its annual capital budget for network expansions is a direct function of the amount of cash the business generates. Every dollar of expense therefore reduces the capital budget available for network expansion. As a result, Level 3 is focused on eliminating or reducing unnecessary or unreasonable expenses, so that the savings can be used to augment existing fiber-optic network facilities and permit delivery of

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38 *See, e.g.,* Comments of Sprint Nextel Corp., GN Docket No. 09-29, at 5 n.7 (filed Mar. 25, 2009) (stating that the typical rural local exchange carrier is located 98 miles from its primary Internet backbone connection).

39 *See, e.g.,* Comments of DigitalBridge Communications Corp., GN Docket No. 09-29, at 8 (filed Mar. 25, 2009) ("The lack of middle-mile infrastructure is one of the greatest obstacles to building sustainable rural broadband networks.").

40 *See* Level 3 Petition at 18-19.

additional telecommunications and enhanced services to additional communities, traffic aggregation points, and end user buildings.[41]

In the NOI, the FCC inquires whether unreasonable rights-of-way charges affect broadband consumers because, for instance, infrastructure owners are forced to pass some of the higher costs on to their customers.[42] While unreasonable rights-of-way charges can indeed have a direct impact on end-user charges, the more troubling consequence arises when unreasonable rights-of-way charges prevent infrastructure providers from deploying facilities at all—in which case consumers are left without access to cutting-edge broadband at any price. As explained above, this has been the result for many consumers who live along the New York State Thruway.

IV. STATE AND LOCAL RIGHT-OF-WAY HOLDERS OFTEN DISCRIMINATE AMONG RIGHT-OF-WAY USES.

In response to the Commission's request for comment on discriminatory treatment of varying right-of-way uses,[43] Level 3 notes that state and local right-of-way holders often discriminate among users apparently in order to maximize their revenues. NYSTA, for example, charges rights-of-way access rates for fiber connections that are hundreds of times higher than the rates that would apply to a gas line occupying the exact same right-of-way.[44] This demonstrates that NYSTA is not attempting to cover costs, or approximate the value of the land, or make sure it can provide adequate signage for highway safety. Rather, it reflects an opportunistic use of monopoly power.

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41 *See id.*

42 *See* NOI ¶ 20.

43 *See* NOI ¶ 26.

44 *See* Level 3 Petition at 14-16; *Ex Parte* Letter from John T. Nakahata, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-153, at 12-13 (filed Mar. 9, 2010).

The NYSTA case is particularly egregious because it had a rate schedule in place at the time that it imposed these rents,[45] but it elected to ignore the schedule completely in its dealings with Level 3's predecessor in interest. The NYSTA rate schedule—designed to provide "a more accurate reflection of market value" and "a more equitable fee determination for any given utility occupancy[46]—applied rates that varied depending on the Thruway milepost where the right-of-way was located. A right-of-way located between mileposts 0.00 and 5.95, for instance, generated an annual fee of $0.3346 per square foot for an underground facility.[47] Thus, a permit covering a 575-foot-long, 2-foot-wide underground right-of-way at that location would have resulted in an annual rent of $384.79. NYSTA disregarded that rate completely when extracting rents from Williams, however, and instead imposed an annual rent of $96,000 (now higher after annual inflation adjustments) for precisely such a right-of-way—a markup of nearly 25,000 percent.[48]

In 2004—long after NYSTA has imposed its unreasonable rents on Williams—NYSTA's board of directors adopted a new policy under which it ostensibly changed its approach to fees for right-of-way permits to connect to networks installed along the Thruway.[49] Even though NYSTA had effectively abandoned the rate sheet four years earlier when negotiating with Williams, the 2004 resolution purported to announce a "new" policy under which "fees for fiber-

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45 *See* Inter Office Mem. from Richard K. Matters, Jr. to Real Property Management Comm. at 5 (Jan. 14, 1997) & Attach. III (Dec. 6, 1996) (adopting rate schedule) (attached as Ex. 35 to Level 3 Petition).

46 *Id.* at 5.

47 *See id.* at Attach. III.

48 *See* Level 3 Petition, Ex. 14, Column H, Row 1.

49 *See* NYSTA Resolution No. 5360 (Feb. 3, 2004) (copy attached as Ex. 36 to Level 3 Petition; pertinent provision appears on the second page of the exhibit).

optic connection permits are to be negotiated amounts" as opposed to amounts set by schedule.[50] Through this post hoc justification, NYSTA effectively acknowledged that it had completely disregarded the then-governing policy when it imposed discriminatory rents on Williams, and that going forward it would continue to use its chokehold over fiber-optic networks to extract exorbitant rents that dwarf the rates applicable to all other uses.

NYSTA's decision to jettison prevailing rates in this context—lateral connections to the fiber network running along the Thruway—was decidedly discriminatory. NYSTA has taken an entirely different tack with other applicants seeking permits for fiber-optic cables or other communications infrastructure. In many cases NYSTA has charged other carriers prevailing rents for rights-of-way permits, and in others it has not charged any rent at all.

V. THE COMMISSION SHOULD DEVELOP A UNIFORM NATIONAL STANDARD FOR ASSESSING REASONABLENESS.

Level 3 applauds the Commission for recognizing that disparate approaches to rights-of-way management and fees in different jurisdictions may hamper the development of communications infrastructure.[51] Differing approaches from one jurisdiction to the next do, of course, impact deployment as providers must devote time and resources to securing access through a variety of processes. Level 3 recognizes, however, that a completely uniform approach to right-of-way management nationwide is simply unrealistic, considering the varying governments that have jurisdiction over rights-of-way, the differing legal requirements that may apply, and the varying terrain those rights-of-way occupy.

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[50] *Id.*; *see also* Level 3 Petition, Ex. 36, at 5-16 (proposing that the NYSTA's board adopt the negotiated fee approach for fiber-optic connection permits).

[51] *See* NOI ¶¶ 27-28.

Nonetheless, providing a clear and uniform reasonableness standard—namely, the clarified *California Payphone*-based standard presented above—would greatly increase predictability in costs for providers and rights-of-way owners, increasing the likelihood of investment from new market entrants, and reducing the risk of incremental effects on existing providers with captive investments. A clear national standard for the application of § 253 would result in investment-encouraging certainty by addressing and resolving the disparate treatment that § 253 has received in the appellate courts. The Solicitor General has acknowledged this divergent treatment in the courts, observing that opinions from the Eighth and Ninth Circuits can be read to "suggest an unduly narrow understanding of Section 253(a)'s preemptive scope."[52] The Solicitor General explained that the FCC is positioned to "restore uniformity by issuing authoritative rulings on the application of Section 253(a)."[53]

Adopting the *California Payphone* and *Guayanilla*-based standard presented above would do just that and, as a result, it would advance the Telecommunications Act's "promise of a national consistency."[54] Without an analytical tool similar to this clarified standard, 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, a clarified national 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.

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[52] *FCC Amicus Brief* at 8.

[53] *Id.* at 18.

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

The Commission's and the White House's emphasis on increased broadband deployment as a route to economic stimulus, recovery and development underscores the need for the FCC to present a clear and uniform national standard, so as to encourage continued infrastructure development and deployment.

Level 3's petition to preempt NYSTA's unreasonable, monopoly rates offers the Commission a ready vehicle to articulate a national standard clarifying predictable, fair and reasonable rights-of-way access charges. Level 3 urges the Commission to act on the Level 3 Petition, increasing certainty over network investment costs for providers and enhancing predictability of revenue streams for state and local governments, all in service of the Commission's national broadband agenda.

VI. THE COMMISSION IS OBLIGATED TO ADJUDICATE RIGHTS-OF-WAY DISPUTES WHEN THE TERMS OR FEES FOR ACCESS VIOLATE SECTION 253.

After seeking input on the challenges that face rights-of-way holders and users alike, the Commission quite appropriately seeks comment on the authority it has to address these issues.[55] The answer is clear. The FCC can—and in fact must—exercise the preemption authority that § 253 entrusts to it. Level 3 supports the adoption of policy guidelines and best practices to provide guidance to stakeholders in rights-of-way disputes, but such non-enforceable measures should not take the place of robust enforcement pursuant to the mandate of § 253. Accordingly, Level 3 encourages FCC-led efforts to implement voluntary rights-of-way management programs, mediate disputes, or issue rules, but—again—such efforts should not come at the cost of delaying preemptive relief under § 253.

A. The Plain Text of the Statute Directs the FCC to Take Adjudicatory Preemptive Action When State or Local Entities Violate § 253

55 *See* NOI ¶¶ 34-49.

As Level 3 has explained at length in the preemption proceeding related to NYSTA's rights-of-way access fees, § 253 unquestionably grants the FCC authority to adjudicate rights-of-way cases. When it passed the 1996 Act, Congress created "a procompetitive, deregulatory national policy framework," with the goal of using competition to "accelerate … deployment of advanced telecommunications services and information technologies and services to all Americans."[56] Recognizing that many state and local governments had adopted laws and other legal requirements limiting competition, Congress enacted § 253 to eliminate all state and local legal requirements that "may prohibit or have the effect of prohibiting" the provision of telecommunications services, including through unfair, unreasonable or discriminatory demands for compensation in exchange for access to rights-of-way.[57]

Section 253 requires the Commission to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," unless the regulation falls within either of two narrowly circumscribed exceptions.[58] Accordingly, if a state requirement violates the standard identified in subsection (a) and does not fall within the safe harbors in subsections (b) or (c), then the Commission has a nondiscretionary obligation to preempt.[59]

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[56] S. Rep. No. 104-230 at 1 (1996) (Conf. Rep.).

[57] *See, e.g., Petition of the State of Minn.*, Order, 14 FCC Rcd. 21,697, 21,703 ¶ 9 (1999) (noting that Congress included Section 253 "to ensure that state and/or local authorities cannot frustrate the 1996 Act's explicit goal of opening all markets to competition")."))."') ("*Minn. Petition*").

[58] 47 U.S.C. § 253.

[59] *See* 47 U.S.C. § 253(d) (providing that the Commission "shall" preempt in this circumstance); *see also Minn. Petition,* 14 FCC Rcd. at 21,704 ¶ 11 (stating that if a regulation

Subsections (b) and (c) establish narrow safe harbors under which a statute, regulation, or legal requirement that violates subsection (a) is saved from preemption.[60] "[T]he burden of proving that a statute, regulation, or legal requirement comes within the exemptions found in sections 253(b) and (c) falls on the party claiming that exception applies."[61] Under subsection (b), states may "impose, on a competitively neutral basis and consistent with section 254 [of this section], requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[62] Under subsection (c), states may "manage the public rights-of-way" and "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."[63]

As the statute's structure makes clear, the Commission must consider not only whether a requirement violates subsection (a), but must also assess whether the disputed requirement falls into either of the safe harbors. If it does, then the Commission must not preempt. Hence, part of the Commission's task is to determine whether either safe harbor applies. There is therefore no

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violates Section 253(a), "the Commission must preempt it unless [it] comes within the terms of the exceptions Congress carved out in sections 253(b) and (c)") (emphasis added).

60 *See Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of Boston*, 184 F.3d 88, 98 (1st Cir. 1999).

61 *Minn. Petition* , 14 FCC Rcd. at 21,704, n.26; *see also Level 3 Commc'ns. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Guayanilla*, 450 F.3d at 21; *N.J. Payphone Ass'n v. Town of West*, 299 F.3d 235, 240 (3d Cir. 2002).

62 47 U.S.C. § 253(b).

63 47 U.S.C. § 253(c).

logical coherence to an argument that the Commission lacks jurisdiction to determine whether the subsection (c) safe harbor applies. Otherwise, a state or local authority could automatically thwart Commission oversight simply by raising a defense under subsection (c), whether or not meritorious. Thus, under the only logical reading of the statute, Section 253 grants the Commission jurisdiction to determine whether a right-of-way requirement falls within the subsection (c) safe harbor.

Courts have considered this issue and concluded that the Commission may consider subsection (c) for the purpose of determining (as it must) whether subsection (a) has been violated. For example, in *TCG N.Y., Inc. v. City of White Plains*, White Plains argued that the court should not accord any deference to the Commission's decisions interpreting § 253(c) because the legislative history of § 253 indicated that Congress intended to deprive the Commission of jurisdiction over § 253(c).[64] The Second Circuit, however, found that it owed deference to the Commission's decisions interpreting the scope of § 253(c):

> [T]he plain language of [§253(d)] which allows the FCC to preempt provisions inconsistent with subsection (a) strongly implies that the FCC has the ability to interpret subsection (c) to determine whether provisions are protected from preemption. Second, the provisions of § 253(d) are mandatory: the FCC 'shall preempt' local statutes to remedy violations of § 253(a) or (b). In light of the FCC's general regulatory authority, the inclusion of a mandatory regulatory role does not logically foreclose FCC action in the areas where it is not mandatory. Third, because § 253(c) provides a defense to alleged violations of § 253(a) or (b), if § 253(d) were read to preclude FCC consideration of disputes involving the interpretation of § 253(c), it would create a procedural oddity where the appropriate forum would be determined by the defendant's answer, not the complaint.[65]

64 305 F.3d 67, 75 (2d Cir. 2002).

65 *Id.* at 75-76.

The Second Circuit thus accorded deference to the Commission's decisions because the statute, read as a whole, requires that the Commission have authority to consider § 253(c). As the Second Circuit recognized, any other result would defy logic.

The Commission itself has explained that it interprets § 253 the same way. In the supplemental amicus brief it submitted in *TCG New York*, the Commission stated, "To the extent that the FCC has jurisdiction under Section 253(d) to adjudicate whether the state or local government action violates Section 253(a), it would appear as a matter of statutory structure and logic that the FCC also has jurisdiction to adjudicate claimed defenses, including the Section 253(c) defense."[66] The Commission also noted that "a limitation on the authority of the FCC under § 253(d) [to adjudicate a defense asserted pursuant to § 253(c)] would create an awkward procedural mechanism for making preemption determinations."[67] In this regard, the Commission stated that it had not yet come across any § 253 case in which a party's assertions regarding § 253(c) prevented the Commission from conducting its statutorily required review.[68]

Moreover, the Commission has issued guidelines for § 253 petitions demonstrating that it assesses whether a state or local provision is saved under subsection (c).[69] In pertinent part, the guidelines direct parties to "describe whether the challenged requirement falls within the proscription of section 253(a); if it does, parties should describe whether the requirement

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66 Supp. Br. of the FCC and the United States as *Amici Curiae* at 4, *TCG N.Y., Inc. v. City of White Plains* (2d Cir. Mar. 11, 2002) (Nos. 01-7213 & 01-7255) (copy attached as Ex. C to Level 3 Reply Comments).

67 *Id.* at 5.

68 *Id.* at 6.

69 *See* Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act, Public Notice, 13 FCC Rcd. 22,970 (1998).

nevertheless is permissible under other sections of the statute, specifically sections 253(b) and (c)."[70] The guidelines note that the Commission requires a "complete factual record" in order to proceed, and that such a record includes specific information relating not only to the purported violation of subsection (a), but also to the possible applicability of subsections (b) and (c).[71] The guidelines thus demonstrate that the Commission considers the possible application of both safe harbors when determining whether it must preempt under Section 253.

Taking the statute as a whole, there is only one interpretation of § 253 that would not render parts of it "inconsistent, meaningless or superfluous":[72] 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 in preempting violations of subsection (a).[73] Reading the statute otherwise, by contrast, would effectively eliminate altogether the Commission's statutory role in cases "implicating" or "involving" state or local rights-of-way. Under such an approach, a locality could evade Commission jurisdiction and preclude the Commission from carrying out its mandate under § 253(d) to preempt all violations of § 253(a) simply by asserting—baselessly or not—that local management of rights-of-way is at issue. This would eviscerate the plain meaning of the statute, which requires the

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[70] *Id*. at 22,971.

[71] *See id*. at 22,971-73.

[72] *E.g.*, *United States v. Harrell*, 637 F.3d 1008, 1010 (9th Cir. 2011); *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. Misc. Firearms*, 376 F.3d 709, 712 (7th Cir. 2004); *Cody v. Hillard*, 304 F.3d 767, 776 (8th Cir. 2002).

[73] *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).

Commission to play the central role in addressing violations of subsection (a) by preempting under subsection (d). Simply put, the Commission cannot do its statutorily mandated job under subsection (d) unless it can consider whether provisions that otherwise violate subsection (a) also fall outside subsections (b) and (c).

B. The Legislative History of Section 253 Reinforces this Reading of the Provision's Plain Language

As a matter of statutory construction and application, the Commission needs to consider only the plain language of the statute, notwithstanding suggestions from some quarters that fragments of the legislative history instead should control. As explained above, only one reading allows each clause of § 253 to have effect. As a matter of black-letter principles of statutory construction, it is not proper to resort to the legislative history in such circumstances.[74] 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."[75]

Nonetheless, the legislative history supports the reading described above. The originally proposed 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

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74 *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").

75 *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).

requirement to the extent necessary to correct such violation or inconsistency."[76] Reacting to that proposed text, Senators Feinstein and Kempthorne introduced an amendment that would have stripped the FCC of all jurisdiction over § 253 matters.[77] Concerned that the Feinstein-Kempthorne amendment went too far, Senator Gorton then introduced a second-degree amendment that had the effect of granting concurrent jurisdiction to federal district courts over § 253(c) issues.[78] 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."[79]

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."[80] 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."[81] Removing the FCC from adjudicatory processes under § 253 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

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76 *BellSouth Telecomms, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190 (11th Cir. 2001).

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

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

79 *Id*.

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

81 *Id.*

judicial district in the United States."[82] 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."[83]

Moreover, reading § 253 in a manner that divests 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' 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."[84] 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

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

[83] *Id.*

[84] *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*, 359 Fed. Appx. 692, 698 (9th Cir. 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 percent 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).

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—the principal drafter of the operative text—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, the statute controls.[85] 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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85 *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.").

VII. CONCLUSION

For the foregoing reasons, Level 3 respectfully urges the Commission to adopt a national standard for assessing reasonableness of rights-of-way charges under its statutorily delegated authority to adjudicate rights-of-way disputes arising under Section 253. Such action will protect the public interest and facilitate the Commission's broadband deployment objectives.

Respectfully submitted,

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