

**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	)	
	)	

**REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC**

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**I. SUMMARY AND INTRODUCTION**

As the comments in this proceeding demonstrate, there is general agreement that localities play a pivotal role in broadband deployment and penetration, and there is widely shared interest in making faster connections available to more people. Indeed, many commenters observe approvingly that increased broadband deployment is a core goal of the FCC’s broadband agenda, as reflected in both the National Broadband Plan and the annual § 706 broadband deployment report.

In their comments, many right-of-way (“ROW”) owners and their representatives focus almost exclusively on the fact (which no one appears to contest) that the ROW practices in many local jurisdictions are reasonable and often very helpful. From this they proceed to argue that there is no reason for FCC intervention or regulation because, they assert, the existing process is working well and only localities have the local expertise needed to manage the ROWs effectively.

But their line of argument ignores that fact that the ROW practices in some jurisdictions stray across the line of “reasonableness” (sometimes far across) and produce outsized harm—most notably to consumers and to the goal of widespread broadband deployment and

subscription. While Level 3 agrees that in many instances there is no need for federal intervention, the FCC should take action (and must do so, under § 253) when a particular practice, like that of the New York State Thruway Authority (“NYSTA”), completely undermines provision of service and broadband deployment. Other providers agree with Level 3 and point to similar, relatively isolated incidents in which localities have abused their control over access points and harmed broadband and telecom deployment as a result.

The FCC should recognize exactly what the ROW owners mean when they contend that localities should be permitted to price and manage ROWs as they see fit without worrying about complying with § 253. They are arguing that the FCC should permit them to do what § 253 prohibits: price ROW access in a discriminatory and monopolistic fashion that deprives consumers of service. While they cloak this outlandish request in arguments related to local expertise and public policy, the fact remains that they are affirmatively seeking license to price exorbitantly—regardless of the cost to consumers, national broadband goals, or the limits that Congress expressly codified in § 253 of the Communications Act.

Level 3 agrees with ROW owners that the FCC should refrain from widespread regulation of most local ROW practices, but it must take action to curb the extreme cases that violate the terms of § 253, the FCC’s precedent, and the *California Payphone*-based standard that Level 3 has proposed.

In Part II of these Reply Comments, Level 3 concurs that many local ROW practices are often unobjectionable and even helpful, but notes that in isolated cases local practices produce counterproductive results that require action from the FCC. In Part III, Level 3 explains that the comments filed by ROW owners essentially ignore the extreme cases and instead urge FCC inaction by focusing only on the unobjectionable practices that prevail in many locations.

Finally, in Part IV, Level 3 explains that § 253 requires the FCC to take preemptive action in response to extreme cases and that Level 3's pending preemption petition provides an opportunity for the FCC to do so immediately.

## **II. PROVIDERS AGREE THAT ISOLATED, EXTREME LOCAL ROW PRACTICES CURB DEPLOYMENT AND EFFECTIVELY DENY SERVICE TO MANY CONSUMERS**

Level 3 concurs with the commenters who state that many local ROW practices are reasonable and do not materially impact the provision of service or broadband deployment. Indeed, as Verizon notes, many states and localities have adopted ROW best practices that help advance broadband deployment and the provision of service.<sup>1</sup> But the fact that many localities engage in reasonable practices only highlights the dysfunctional impact caused by the more isolated instances in which ROW owners completely disregard reasonableness. These are the situations that require FCC action (through preemption, not regulation or direct intervention) pursuant to § 253.

As Level 3 has detailed over the last two years in the context of its pending § 253 petition, NYSTA's actions present a paradigmatic example of counterproductive ROW practices.<sup>2</sup> After holding hostage a \$31 million network investment made by Williams Communications, Inc. (Level 3's predecessor in interest), NYSTA extracted eye-popping rents for 17 additional access points that Williams needed in order to operate the network as planned. The rents that NYSTA imposed average \$364 per foot—which is 180 to 725 times higher than

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<sup>1</sup> Comments of Verizon and Verizon Wireless at 39-41, WC Docket No. 11-59 (filed July 18, 2011) (“Verizon Comments”).

<sup>2</sup> Tellingly, NYSTA did not file comments in response to the NOI. In other words, while more than 100 state and local entities filed comments, NYSTA—which is uniquely attuned to these issues in light of the § 253 proceeding—has not attempted in this proceeding to justify the outrageous fees it has imposed.

typical market ROW rates (\$0.50 to \$2.00), 250 times higher than the per-foot rate (\$1.45) that NYSTA charges Level 3 for a non-connecting right-of-way,<sup>3</sup> and more than 1100 times greater than the rent that should have applied if NYSTA had adhered to its published rate schedule. NYSTA took gross advantage of the fact that Level 3's predecessor had no choice but to accede to NYSTA's demands.<sup>4</sup>

Level 3 has described the consequences of NYSTA's tactics on broadband deployment in great detail.<sup>5</sup> Tellingly, neither Level 3 nor Williams sought authorization to build out any additional access connections since NYSTA imposed these rents more than a decade ago. Level 3 in particular has elected not to build out in areas like Amsterdam, NY—which would present a compelling case for additional deployment were it not for NYSTA's eagerness to extract top dollar regardless of the impact on provision of service and broadband deployment.<sup>6</sup>

Level 3 is not alone. CenturyLink has described comparable isolated cases in which ROW owners have imposed excessive franchise fees, excessive annual linear foot fees, and excessive one-time permit fees—which “have divert[ed] and continue to divert funds from the deployment of broadband infrastructure.”<sup>7</sup> NCTA reports that the cable industry likewise faces excessive and discriminatory ROW access fees,<sup>8</sup> and that the situation is often

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<sup>3</sup> Level 3 Communications, LLC, *Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253* at 13, WC Docket No. 09-153 (filed July 23, 2009) (“Level 3 Petition”).

<sup>4</sup> See, e.g., *id.* at 13-14.

<sup>5</sup> See, e.g., *id.* at 20-24; Reply Comments of Level 3 Communications, LLC at 8-11, WC Docket No. 09-153 (filed Nov. 5, 2009) (“Level 3 Petition Reply Comments”).

<sup>6</sup> See Level 3 Petition at 25-26.

<sup>7</sup> Comments of CenturyLink at 2, WC Docket No. 11-59 (filed July 18, 2011) (“CenturyLink Comments”).

<sup>8</sup> See Comments of the National Cable & Telecommunications Association at 2-3, WC Docket No. 11-59 (filed July 18, 2011) (“NCTA Comments”).

particularly challenging when a cable operator needs additional or separate approvals to use or access facilities that are already located in the ROW.<sup>9</sup>

Verizon presents a long list of cases in which localities, including NYSTA, have imposed excessive fees, treated providers in a discriminatory fashion, and engaged in comparably unreasonable tactics related to ROW management.<sup>10</sup> Among the examples is an instance from 2002, when NYSTA required Verizon to pay \$24,000 to occupy 19 feet of public ROW along the New York State Thruway, and to donate to NYSTA two of the eight ducts Verizon had constructed in the ROW.<sup>11</sup> Verizon notes that other localities have imposed unreasonable percentage-of-revenue payments,<sup>12</sup> even though the localities' costs presumably decrease over time, especially for already-installed existing systems. Verizon explains that this phenomenon has been magnified during the economic crisis of the last several years, in which increasing numbers of localities have *increased* ROW fees (despite their falling costs over time), in some instances by up to 500 percent.<sup>13</sup>

As Verizon details, localities also use a variety of other tactics to increase ROW rents. They may favor some providers, such as the ILEC, over others, or they may impose burdensome application requirements unrelated to ROW occupancy. The lack of a standard application process increases costs for providers, who must reinvent the wheel in each new jurisdiction. Localities also use delay as a negotiation tactic, since preventing the provider from using or

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> *See* Verizon Comments at 17-25.

<sup>11</sup> *See id.* at 18.

<sup>12</sup> *See id.* at 18-19.

<sup>13</sup> *See id.* at 17.

deploying its network assets decreases the provider's revenues.<sup>14</sup> In what can come as no surprise, rent-maximizing practices of this kind have led providers to freeze investment, halt deployment and rollout, and suspend new service plans—directly to the detriment of consumers and broadband deployment.<sup>15</sup>

### **III. ROW OWNERS OPPOSE FEDERAL INTERVENTION BY FOCUSING ONLY ON REASONABLE ROW APPROACHES, BUT THEY IGNORE THE EXTREME CASES THAT REQUIRE FCC ACTION UNDER § 253**

#### **A. ROW Owners Describe Local ROW Principles at a Level of Generality that Obscures the Extreme Cases**

ROW owners espouse unassailable—but also unhelpfully generalized—principles in their comments. The National League of Cities (“NLC”), for instance, states that increasing broadband penetration is a priority for states and localities.<sup>16</sup> Local ROW owners also “have a duty to advance their citizens’ well-being, and to ensure that local property—central to a community’s character, welfare, and daily life—is sensibly protected, shared, and developed.”<sup>17</sup> Similarly, Montgomery County highlights the “important role local governments have and continue to plan [sic] in use, support, and promotion of deployment of broadband” and explains the challenge it faces in “balancing the competing rights and interests of local residents,

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<sup>14</sup> See *id.* at 22.

<sup>15</sup> See *id.* at 25.

<sup>16</sup> See Comments of the National League of Cities *et al.* at iv, WC Docket No. 11-59, (filed July 18, 2011) (“NLC Comments”).

<sup>17</sup> *Id.*

economic development and quality of life related to efficient and appropriate use of public rights-of-way.”<sup>18</sup>

In an attempt to convince the FCC that there is nothing wrong with current ROW management practices, the ROW owners concoct a distorted narrative. Without discussing any of the extreme cases that providers describe in their comments (including the NYSTA example, which Level 3 has detailed over the last two years in its pending § 253 petition), NLC asserts that local officials have no incentive to overprice and simply would not pursue monopolistic practices because they would not advance the public interest.<sup>19</sup> In defense of this position, NLC writes, “[a] local government is not distributing right-of-way fees to shareholders; it is defraying public expenses incurred in providing services to the public.”<sup>20</sup> Unsurprisingly, this theoretical argument—based on NLC’s assessment of localities’ priorities and incentives—completely ignores the cases (described by Level 3 and other providers) in which public ROW owners have used their control over critical access points to demand absurdly high payments.<sup>21</sup>

Not content to stop there, ROW owners further contend that “there is no relationship between local right-of-way charges and broadband deployment or adoption.”<sup>22</sup> NLC argues that higher ROW fees do not translate into higher rates for consumers; instead, NLC contends, data show that adoption rates in states with high ROW fees are similar to those in states with low

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<sup>18</sup> Comments of Montgomery County, Maryland at i, WC Docket No. 11-59 (filed July 18, 2011) (“Montgomery County Comments”).

<sup>19</sup> See NLC Comments at 16.

<sup>20</sup> *Id.* at 14.

<sup>21</sup> See *supra* Part II.

<sup>22</sup> NLC Comments at 10.

fees.<sup>23</sup> But for support, they turn to an ECONorthwest study that assesses penetration and deployment trends only at a 30,000-foot macro level, which buries the deleterious impact caused by isolated ROW mismanagement like NYSTA's.<sup>24</sup> ECONorthwest forthrightly admits that it conducted its analysis only at a high level of generality by "compar[ing] BB deployment in states that allow telecommunications ROW charges that are not tied to a cost calculation ... to deployment in states that limit ROW charges to telecommunications companies to some defined portion of costs."<sup>25</sup> But focusing only on broad national trends skips over the individual cases that cross the line and require FCC action under § 253. Simply put, aggregating data as ECONorthwest has done obscures the offending examples.

Further eroding the utility of the study in the context of the Commission's NOI, ECONorthwest acknowledges that the study does not account for differences in the way states regulate and impose fees, and that the study's authors therefore had an "imperfect ability" to analyze the underlying data.<sup>26</sup> Moreover, they acknowledge that their state-focused approach did not account for the fact that the portion of fees collected by localities (as opposed to states) varies from state to state, and they further admit that "there are some weaknesses in the underlying data on which the analysis relies"<sup>27</sup>—including the fact that they did not determine how frequently providers actually pass ROW costs along to consumers.<sup>28</sup> Having admitted these

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<sup>23</sup> See NLC Comments at 12; see also Comments of Local Government Lawyers Roundtable at 2-4, WC Docket No. 11-59 (filed July 19, 2011) ("LGL Comments").

<sup>24</sup> See Effect on Broadband Development of Local Government Right of Way Fees and Practices at 6, NLC Comments Ex. G ("ECONorthwest Study").

<sup>25</sup> *Id.* at 6.

<sup>26</sup> See *id.* at 5 n. 6.

<sup>27</sup> *Id.* at 8.

<sup>28</sup> See *id.* at 8 & n. 17.

severe shortcomings, the authors punt to the FCC and urge it to “attempt more rigorous study of this issue” before taking action.<sup>29</sup>

In its attempt to gloss over the most problematic ROW practices, NLC further cites to a Columbia Telecommunications Corporation (“CTC”) study stating that “[f]ees charged by local governments in connection with the *deployment* of broadband are a very small portion of the cost of fiber deployment, and certainly nothing close to 20 percent of deployment costs.”<sup>30</sup> But unpacking this statement reveals how misleading it is: the study focuses only on upfront costs while expressly excluding recurring costs—like the annual rental fees that NYSTA has imposed. This artificial distinction between costs that must be paid up front and costs that must be paid over time simply ignores an entire—and significant—category of costs with net present impacts.<sup>31</sup>

Moreover, the CTC study states that labor and material costs range from \$25,000 to \$250,000 per mile, and that they dwarf ROW occupancy fees.<sup>32</sup> Far from supporting NLC’s arguments, however, CTC’s data demonstrate just how extreme NYSTA’s fees are. The labor and material costs CTC cites equate to between \$4.73 and \$47.35 per linear foot—figures that hardly dwarf the ROW fees that NYSTA charges. As Level 3 has explained, NYSTA’s fees alone average \$364 per foot and in some cases run as high as \$34,000 per foot.<sup>33</sup>

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<sup>29</sup> *Id.* at 8.

<sup>30</sup> *An Engineering Analysis of Public Rights-of-Way Processes in the Context of Wireline Network Design and Construction* at 1, NLC Comments Ex. F (“CTC Study”).

<sup>31</sup> NLC defends this omission on the ground that recurring costs “are not deployment costs, but ordinary operating expenses.” NLC Comments at 8. This is comparable to suggesting that private college is eminently affordable because the upfront cost of the plane ticket to get there is only \$400—while completely ignoring the recurring tuition expense.

<sup>32</sup> *See* CTC Study at 2.

<sup>33</sup> *See* Level 3 Petition at 12-13.

In effect, CTC's data prove the point that most ROW practices are reasonable and effective. As CTC states, "[t]he costs and techniques used to perform and charge for rights-of-way permitting vary but the fees *almost always* make up a very small part of the project budget."<sup>34</sup> It is instead the gross outliers like NYSTA—which are divorced from CTC's data—that require FCC preemption under § 253.

In another commonly repeated argument, the Greater Metro Telecommunications Consortium ("GMTC") contends that providers build "wherever the company believes it can generate the best return on its investment" and that "[l]ocal regulatory policies and fees *have no impact* in these decisions."<sup>35</sup> The principle described—that private sector companies make investments and build based on an assessment of likely return on investment—is unassailable. But GMTC's related assertion that local policies and fees "have no impact" is simply untrue. Any additional cost or burden has an impact, and no rational company can afford to ignore them when determining where to invest. Indeed, egregious local ROW costs and burdens have especially acute impacts, and local policies and fees can (and do) tip the balance away from deployment. That has been exactly Level 3's experience with respect to NYSTA.

NLC further defends local ROW practices as technology- and service-agnostic. It avers that "[o]ne of the virtues of local right-of-way practices is that they are rarely technology or service specific. Because of this, each time a new technology arises, these practices need not be developed from whole cloth."<sup>36</sup> While facially appealing, NLC's argument ignores the extreme cases providers have described. NYSTA's practices, most notably, are far from technology

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<sup>34</sup> CTC Study at 12 (emphasis added).

<sup>35</sup> Comments of Greater Metro Telecommunications Consortium, WC Docket No. 11-59, at 42 (filed July 19, 2011) ("GMTC Comments") (emphasis in original).

<sup>36</sup> NLC Comments at 37.

neutral; to the contrary, NYSTA had adopted a ROW fee schedule purportedly applicable to all utilities—but it abandoned that schedule with respect to the broadband operations of Williams and instead imposed rates thousands of times higher.<sup>37</sup>

Having painted the misleading picture that current practices are appropriate and have no impact on broadband deployment in any case, the ROW owners suggest that the FCC’s “time and resources are better spent elsewhere” than on ROW matters.<sup>38</sup> Indeed, Montgomery County “strongly urges the Commission to refrain from further attempts to regulate local zoning, right-of-way management and facility placement processes.”<sup>39</sup> Localities further tell the Commission that it “should not interfere with local policies”<sup>40</sup> or compromise “the authority of local governments”<sup>41</sup> because “local governments have developed their own expertise in applying local policies to protect and further economic development, public safety, and other community interests.”<sup>42</sup>

Over-generalized rhetoric and actual practice often diverge in irreconcilable ways, however. The ROW owners’ arguments ignore the evidence, detailed in Part II above, that certain ROW owners’ practices are unreasonable, discriminatory, and devastating for efforts to

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<sup>37</sup> See Level 3 Petition at 14-16; Level 3 Petition Reply Comments at 20-21.

<sup>38</sup> NLC Comments at 4; *see also, e.g.*, NLC Comments at vi-vii; Montgomery County Comments at 39; LGL Comments at 4.

<sup>39</sup> Montgomery County Comments at 39 (“These are highly fact-specific matters, which turn on local engineering practices, local environmental and historical conditions, local traffic and economic development patterns, and other significant community concerns and circumstances.... Imposing a federal regulatory regime would create unnecessary costs for communities and it undermines important local policies.”).

<sup>40</sup> Comments of the National Association of Towns and Townships at 1, WC Docket No. 11-59 (filed July 18, 2011) (“Towns and Townships Comments”).

<sup>41</sup> Comments of the City of New York Department of Information Technology and Telecommunications at 5, WC Docket No. 11-59 (filed July 18, 2011) (“NYC DITT Comments”).

<sup>42</sup> Towns and Townships Comments at 1.

expand broadband deployment. Moreover, there is no logical coherence to the localities' argument that (a) many local ROW practices are reasonable, and therefore (b) the FCC has no grounds for taking action to address unreasonable practices. That is comparable to arguing that most drivers obey the speed limit, and law enforcement therefore has no authority to take action against those who exceed it.

**B. Even in the Rare Instances Where ROW Owners Acknowledge Extreme ROW Practices, They Distort the Facts**

While the ROW owners are virtually silent with respect to the well-documented cases in which local ROW practices are patently unreasonable, NLC does acknowledge Level 3's dispute with NYSTA in a footnote. In that footnote, however, it claims erroneously that Level 3's predecessor proposed the exorbitant ROW fees itself and that the fees are reasonable in light of the "special rights" afforded.<sup>43</sup>

As the record in Level 3's Petition proceeding reveals, this is a complete distortion. Williams did not propose fees at all when requesting the additional access points. Its opening position in negotiations with NYSTA was that no additional fee was required because the governing contract expressly envisioned building out additional access points.<sup>44</sup> Williams only agreed to the additional exorbitant fees after NYSTA held its network hostage for a year.<sup>45</sup>

Moreover, the ROW riders at issue in the Level 3's Petition do not convey any "special rights"—but the fact that NYSTA (in the preemption proceeding) and now NLC (in this proceeding) would like the FCC to think otherwise is effectively an admission that the fees

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<sup>43</sup> NLC Comments at 16 n. 60.

<sup>44</sup> *See, e.g.*, Level 3 Petition at 8-10 & Ex. 11.

<sup>45</sup> *See id.* at 11.

would be unconscionable if they covered only standard occupancy. Level 3 responded to this argument as follows in an ex parte letter filed in September 2010:

NYSTA contends that the Riders not only afford a right of occupancy, they also allow Level 3 to increase the number of access points and regeneration connections serving its Backbone Network. . . . But this amounts to double and triple counting. Tallying “rights” in this manner is the same as concluding that renting an apartment gives the renter not only the right to occupy the apartment, but also the separate “special” rights to read a book there or keep food in the refrigerator. In other words, NYSTA argues that Level 3’s permits are “special” because they enable Level 3 to use the corresponding right-of-way for a particular purpose (which imposes no additional burden on NYSTA). But, of course, *every* right-of-way permit is just as “special” as Level 3’s since every permittee uses the right-of-way for something (such as conveying electricity, delivering natural gas, etc.).<sup>46</sup>

As Level 3 has asserted from the commencement of the preemption proceeding, the ROW permit riders issued by NYSTA give Level 3 nothing more than an occupancy right for a few feet of land for which there are no conflicting uses or requests for uses.<sup>47</sup> Arguments that attempt to justify NYSTA’s exorbitant rents by dreaming up parallel ephemeral rights should be rejected.

#### **IV. THE FCC MUST TAKE ACTION TO ADDRESS THE EXTREME CASES**

##### **A. The FCC Has the Authority and a Duty to Preempt Under § 253**

The FCC has authority to assess whether § 253(c) insulates a ROW practice that would otherwise require preemption. There is no dispute that § 253(c) is a savings clause: when it applies, it saves a ROW practice that otherwise violates § 253(a).

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<sup>46</sup> Ex Parte Letter from Chad Breckinridge, Wiltshire & Grannis LLP, to Marlene Dortch, FCC, at 13, WC Docket No. 09-153 (filed Sept. 16, 2009) (“Sept. 2009 Ex Parte”) (citations omitted).

<sup>47</sup> *See, e.g.*, Ex Parte Letter from Chad Breckinridge, Wiltshire & Grannis LLP, to Marlene Dortch, FCC, at § III.A., WC Docket No. 09-153 (filed Mar. 9, 2010) (“Mar. 2010 Ex Parte”).

In their comments, ROW owners attempt to limit the FCC's authority to an illogical degree, arguing that the agency is barred from even considering a case in which the ROW owner presents an argument under § 253(c).<sup>48</sup> But pursuing this argument to its conclusion reveals that it makes no sense. Under the only logical reading of the statute, as Level 3 has explained,<sup>49</sup> the FCC must have authority to determine whether § 253(c) applies in order to assess whether an otherwise offending requirement falls within the safe harbor. Any other approach creates an enormous loophole that would eviscerate the FCC's role altogether, effectively taking the agency out of the statutory scheme even though the statute unambiguously gives it a central role.

An analogy helps clarify the illogic of the ROW owners' position. Imagine that U.S. courts had no power to assess any claim against foreign diplomats, and imagine that this limitation extended so far that they were powerless even to assess whether someone who claims to be a diplomat actually is one. The result is easy to predict. Every defendant in every case would claim to be a diplomat regardless of the circumstances, short-circuiting the process and undermining the role of the courts. Localities seek the equivalent here, arguing that the FCC must stop inquiring as soon as a locality claims that § 253(c) applies. The result of this real world argument is as predictable as the hypothetical—localities will learn to claim that § 253(c) applies in every case (regardless of whether it actually does), eviscerating the FCC's ability to take action in any case.

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<sup>48</sup> NLC Comments at 54-55, 57, 60; NYC DITT Comments at 10, 12.

<sup>49</sup> *See, e.g.*, Level 3 Petition Reply Comments at 35-39; Mar. 2010 Ex Parte at 22-27; Sept. 2009 Ex Parte at 23.

**B. The Federal Courts Have Not Held that the FCC Lacks Jurisdiction to Assess § 253(c)**

The federal courts, notwithstanding NLC’s unsupported assertions, have not stripped the FCC of jurisdiction to assess § 253(c).<sup>50</sup> In fact, in each of the three decisions NLC cites the court did *not* hold that the FCC is barred from considering § 253(c), at least to the extent necessary to determine whether the safe harbor applies. In the first of the three cases, the *TCG Detroit v. City of Dearborn* court found that § 253(c)—by itself—creates a private right of action that can be pursued only in Federal court.<sup>51</sup> The *TCG Detroit* court’s analysis is questionable at its core. It conflicts directly with other decisions (including more recent decisions from the Sixth Circuit, discussed below) holding that § 253(c) provides only a safe harbor, not the basis of a standalone cause of action. Even suffering from this apparently mistaken interpretation, however, the decision did not exclude the FCC from § 253(c) matters altogether. It held that the Commission was powerless to hear a hypothetical case brought solely under § 253(c), but recognized that the Commission is “authorize[d] ... to act” in the case of a violation of § 253(a) that implicates § 253(c).<sup>52</sup>

In NLC’s second case, issued a year later, the Sixth Circuit held in *BellSouth v. Town of Palm Beach* that § 253(c) is just a safe harbor, not a separate requirement and cause of action.<sup>53</sup> Unlike the *TCG Detroit* court, the *BellSouth* court recognized that the safe harbor interpretation

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<sup>50</sup> See, e.g., NLC Comments at 61 (claiming, without discussion or analysis, that the Sixth and Tenth Circuits have held that Congress “stripped the FCC of jurisdiction to decide Section 253(c) cases”).

<sup>51</sup> See *TCG Detroit*, 206 F.3d 618, 624 (6th Cir. 2000).

<sup>52</sup> *Id.* at 624.

<sup>53</sup> See *BellSouth*, 252 F.3d 1169, 1187-88 (6th Cir. 2001)

“is the only interpretation supported by the plain language of the statute.”<sup>54</sup> The court was further persuaded of this understanding because the FCC has interpreted the statute the same way.<sup>55</sup> The court cited to the FCC’s § 253 guidelines as authority for this proposition, including the portions of the guidelines in which the FCC directs petitioners to provide detail on whether and how § 253(c) is implicated. “As the federal agency charged with implementing the Act,” the court wrote, “the FCC’s views on the interpretation of § 253 warrant respect.”<sup>56</sup>

The *BellSouth* court then held that a private cause of action exists in federal court *only* when a dispute implicates § 253(c), and stated that all other challenges must be presented to the FCC.<sup>57</sup> In other words, the court’s holding related to the limitations on federal courts’ jurisdiction, and it found that courts can hear § 253 cases only when they implicate subsection (c). The court did not hold, however, that the FCC’s jurisdiction is limited to the inverse. In fact, to the contrary, the court’s positive citation to the FCC’s own approach to § 253 (including the Commission’s guidelines for § 253 preemption petitions) indicates that it would accept the FCC’s view (presented in the guidelines) that the FCC considers § 253(c) when determining whether there has been a violation of § 253(a).

In NLC’s third cited case, *Qwest Corp. v City of Santa Fe*,<sup>58</sup> the Tenth Circuit assessed the limited question of whether a private party can bring suit in court under § 1983 based on a violation of § 253. The *Qwest* court held that there is no such private right of action. In so holding, in dictum it cited to the two cases described above and noted that the “scant” legislative

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<sup>54</sup> *Id.* at 1187.

<sup>55</sup> *See id.* at 1188.

<sup>56</sup> *Id.* at 1188 n.1.

<sup>57</sup> *See id.* at 1191.

<sup>58</sup> 380 F.3d 1258 (10th Cir. 2004).

history relates only to the appropriate forum (not in dispute in *Qwest*), not to the existence of a private of action.<sup>59</sup> In other words, the court did not reach any decision about the proper forum.

### **C. There Is No Constitutional Bar to Preemption Under § 253**

In a remarkable example of not leaving any argument behind, NLC packs three distinct constitutional arguments into the final three pages of its lengthy comments. Specifically, NLC asserts that federal intervention in ROW matters may violate the Takings Clause, the Tenth Amendment, and the Guarantee Clause of the U.S. Constitution.<sup>60</sup> All three arguments are fanciful, particularly as applied to the extreme ROW practices described by providers in this proceeding.

***Takings Clause.*** NLC’s Takings Clause argument is clearly limited to a situation in which the federal government affirmatively required a locality to allow a wire to be placed in a ROW without just compensation. That argument clearly has no bearing on this proceeding. The FCC (as Level 3 understands it) is not proposing to dictate to ROW owners that wires be placed on their property without compensation. Indeed, § 253(c) protects local governments’ rights to “require fair and reasonable compensation from telecommunications providers.”<sup>61</sup> Thus, even if the FCC did use this proceeding to require ROW owners to allow a provider to install fiber at the location of the provider’s choosing, the statute clearly allows localities to recover the fair market value of the ROW. Section 253(c) does not, however, entitle local governments to extract unfair,

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<sup>59</sup> See *id.* at 1265-66, 1273.

<sup>60</sup> NLC Comments at 64-66.

<sup>61</sup> 47 U.S.C. § 253(c).

monopolistic rents. Fatal to NLC’s argument, the Supreme Court has held that fair market value is adequate compensation for a Taking in any event, as NLC itself recognizes.<sup>62</sup>

**Tenth Amendment.** NLC next argues that the Tenth Amendment bars the federal government from regulating states in this context and therefore, it asserts, the FCC is prohibited from “commandeer[ing] the local administration of public property in service of a federal regulatory program.”<sup>63</sup> NLC’s argument again assumes that the FCC is proposing a farfetched course of action. Congress has broad power under the Commerce Clause to “regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce,”<sup>64</sup> and the Supreme Court “long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.”<sup>65</sup>

Notwithstanding the unassailability of these principles, however, there is no need even to push the argument that far. Nothing in the NOI suggests that the FCC proposes to “commandeer” the administration of ROW processes. States and localities will still administer these programs from top to bottom. The FCC is simply ensuring that none of those practices violate the standards of § 253, which presents no issues under the Tenth Amendment.

**Guarantee Clause.** Finally, NLC contends without elaboration that FCC action related to ROWs might violate the Guarantee Clause, which bars the federal government from interfering with the distribution of power among levels of state government. NLC argues that federal

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<sup>62</sup> See NLC Comments at 64.

<sup>63</sup> *Id.* at 65.

<sup>64</sup> *Gonzales v. Raich*, 545 U.S. 1, 2 (2005).

<sup>65</sup> *Hodel v. Va. Surface Mining and Reclamation Ass’n, Inc.*, 452 U.S. 264 (1981).

intervention directing individual levels of state authority to take certain actions related to ROWs “raises concerns.”<sup>66</sup> In effect, NLC’s argument presumes (without any basis) that the FCC is considering rules that would somehow realign the division of authority within the various subdivisions of state government. But there has been no suggestion—and the NLC provides none—that the Commission intends to interfere with the distribution of states’ power or that preemption under § 253 would “leav[e] the local government without a means to recover that compensation.”<sup>67</sup>

**D. As the FCC, the Courts, and Commenters Agree, *California Payphone* Provides the Foundational Standard for Applying § 253**

The standard articulated by the Commission in *California Payphone* is the analytical bedrock for considering § 253 challenges to ROW practices. The FCC, the courts, and commenters concur that violations of the *California Payphone* standard trigger the FCC’s obligation to preempt.<sup>68</sup>

As Level 3 has noted in the context of its § 253 petition, however, the *California Payphone* standard has led to divergent applications in the courts, demonstrating the need to clarify it further. The FCC—the expert agency to which the courts look for guidance when

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<sup>66</sup> NLC Comments at 66.

<sup>67</sup> *Id.*

<sup>68</sup> See *Cal. Payphone Ass’n Petition for Preemption of Ordinance No. 576 NS of Huntington Park*, 12 FCC Rcd. 14,191 (1997) (“*California Payphone*”); see also 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 Petition Reply Comments, WC Docket No. 09-153 (filed Nov. 5, 2009)) (“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.”); *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Pet. of Minn.*, 14 FCC Rcd. 21,697, 21,716 ¶ 35 (1999); see also CenturyLink Comments at 17; Verizon Comments at 30-31.

approaches diverge in this way<sup>69</sup>—must step in and clarify the standard. Level 3 has proposed a clarification that would (a) turn on an objective assessment of a legal requirement’s “practical effects” when adopted broadly, (b) draw a bright line between legal requirements that are prohibited and those that are permissible, and (c) reduce the likelihood that further clarification from the FCC will be required.<sup>70</sup>

**E. Compensation is Reasonable Under § 253 When it Reflects Either the Cost Imposed by the ROW Use or the Fair Market, Non-Monopoly Value of the ROW**

Level 3 has proposed an approach to § 253 under which a ROW fee would not be subject to challenge if it reflects either (1) the cost borne by the ROW owner, **or** (2) the fair market value of the ROW. NLC’s expert economist agrees that fair market value is an appropriate measure. As noted in the ECONorthwest study NLC submitted with its comments, “the closer the fee approximates the relevant market price, the more likely the ROW will be used in an economically efficient manner, a fundamental criterion by which economists evaluate the performance of a market and overall social welfare.”<sup>71</sup>

NLC argues that cost studies are prohibitively expensive for ROW owners to undertake. But this ignores the fact that Level 3’s proposed approach allows for alternative means of justifying rents. Fees are presumptively reasonable, as Level 3 has suggested, as long as they are either cost-based or reflect fair market value—provided that fair market value is understood to

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<sup>69</sup> See, e.g., *BellSouth*, 252 F.3d at 1188 n.1 (“As the federal agency charged with implementing the Act, the FCC’s views on the interpretation of § 253 warrant respect.”).

<sup>70</sup> Comments of Level 3 Communications at 8-9, WC Docket No. 11-59 (filed July 18, 2011).

<sup>71</sup> ECONorthwest Study at 3.

assume non-monopoly conditions.<sup>72</sup> Monopoly conditions, of course, completely distort the prices to which parties agree. Indeed, in the Williams and NYSTA negotiations regarding ROW fees, Williams ultimately accepted only because NYSTA had complete monopoly leverage, not because the price NYSTA demanded was fair.

In an argument relevant to the fair market value analysis, ROW owners contend that scarcity justifies higher rents.<sup>73</sup> But scarcity cannot explain why NYSTA charges one user thousands of times more than another, even though the uses impose the same (negligible) burden on the ROW. Even more fundamentally, the ROWs at issue in the NYSTA context are hardly scarce. Indeed, along the 570-mile length of the Thruway there is enough room for more than 1.5 million right-of-way occupancies (assuming all are two feet wide). Moreover, considering that the permits at issue here are non-exclusive,<sup>74</sup> they are by definition the opposite of scarce since NYSTA can issue permits to others to use the same space simultaneously.

Moreover, with respect to fair market value the ECONorthwest study states that there is “no evidence” that ROW fees reflect market power.<sup>75</sup> After making this broad statement, however, ECONorthwest fails to describe any evidence at all. Rather than attempt to distinguish actual cases like NYSTA—where the evidence runs directly counter to ECONorthwest’s blanket assertion—the study only presents theories as to why it would be bad public policy for localities to engage in price maximizing behavior when they have market power.

Level 3 agrees with ECONorthwest that price-maximizing behavior by monopolists is bad public policy. So does Congress, and it designed § 253 as a result. In the infrequent cases

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<sup>72</sup> Mar. 2010 Ex Parte at 14-16

<sup>73</sup> See NLC Comments at 39-40; ECONorthwest Study at 17.

<sup>74</sup> See, e.g., Level Petition, Ex. 31 (Rider), Art. II.A.1, D.2; Sept. 2010 Ex Parte at 15, 17.

<sup>75</sup> ECONorthwest Study at 22.

where ROW owners do in fact engage in such conduct and materially inhibit service as a result, Congress has expressly directed the Commission to preempt.

**F. Level 3’s Petition Is an Appropriate Vehicle for Addressing Extreme ROW Practices**

In an effort to discourage the FCC from taking action on Level 3’s pending preemption petition, NLC argues that allowing Level 3 to prevail in its petition “will only discourage future innovative arrangements for use of government property.”<sup>76</sup> But, of course, that is precisely the point. ROW owners should be flatly prohibited from “innovative arrangements” under which providers are subjected to rents that are thousands of times higher than market rates and that deny service and advancements to consumers. As Verizon argues, Level 3’s petition provides the Commission with an appropriate and ripe vehicle for taking swift action to address practices that undermine the provision of service and broadband deployment.<sup>77</sup>

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<sup>76</sup> NLC Comments at 16 n.60.

<sup>77</sup> Verizon Comments at 3, 26.

**V. CONCLUSION**

For these reasons, the FCC should assert its clear authority to preempt under § 253, adopt the clarified *California Payphone* standard that Level 3 has proposed, and take action in the pending § 253 proceeding to preempt the indefensible fees that NYSTA has imposed.

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