

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re the Matter of)	
)	
Acceleration of Broadband Deployment:)	WC Docket No. 11-59
Expanding the Reach and Reducing the Cost of)	
Broadband Deployment by Improving Policies)	
Regarding Public Rights of Way and Wireless)	
Facilities Siting)	

REPLY COMMENTS OF NEW YORK STATE THRUWAY AUTHORITY

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EXECUTIVE SUMMARY

Even prior to enactment of the Telecommunications Act of 1996, the New York State Thruway Authority (“NYSTA”) was at the vanguard of efforts to encourage broadband deployment. Specifically, in 1995, NYSTA, a user-supported public corporation, began planning the construction of a fiber optic network in the New York State Thruway’s 550-mile longitudinal right-of-way in order to provide a system for its own needs and one that could be used by others in exchange for revenues. The basic network infrastructure, which was designed in consultation with interested system users and was subject to federal approval, included various access points and regeneration facilities conveniently located for connection to off-system points of presence.

NYSTA also has a unique interest in this proceeding because of an ongoing dispute with Level 3 Communications, LLC (“Level 3”). In 1999, Level 3’s predecessor in interest, Williams Communications Inc. (“Williams”), entered into a user agreement with the contractor who had won the competitive process to construct, maintain, and manage NYSTA’s fiber network. Five months later, Williams sought to substantially expand the network, and thus its use of NYSTA’s rights-of-way and the benefit it received from that use. Because the contractor’s authority was restricted to a federally-approved plan contained in its contract with NYSTA, Williams entered into negotiations with NYSTA to effectuate its newly-expressed plan. Through arms-length negotiations, the parties contractually-agreed to annual rates for additional access points and regeneration facilities that were substantially similar to the rates initially proposed by Williams.

Williams fully performed under these contracts for six years, making timely payments. At no time did Williams allege that the negotiated rates in any way prohibited or effectively prohibited it from providing service or seek any kind of relief. As a result of a bankruptcy proceeding and subsequent acquisition of the company that emerged from that proceeding, Level 3 voluntarily assumed assets from Williams, including its rights and obligations under the

agreements with NYSTA. Within a year of that acquisition, Level 3 discontinued all payments with respect to its use of NYSTA's rights-of-way and the fiber network while at the same time continuing to use the network. Although NYSTA attempted to settle the matter, Level 3 continued to withhold payment. After Level 3's failure to pay continued for three years, NYSTA's counsel sent a demand letter to Level 3. Almost immediately, Level 3 filed a Petition for Declaratory Ruling with the Commission alleging violations of §253 and seeking preemption of the agreements.¹ Despite years of non-payment, Level 3 made no effort to present its contractual or §253 claims to any forum prior to receiving NYSTA's demand letter. Level 3 now attempts to use its Comments in this proceeding to strengthen its position in that contractual dispute and to continue seeking preemption of those agreements. But this matter is not properly before the Commission, and the contracts cannot be preempted, for a number of reasons.

First, the dispute between NYSTA and Level 3 is a highly fact-specific contractual matter already properly before a federal district court rather than the Commission. As that court found in denying Level 3's motion to stay the judicial proceeding pending an FCC determination, a breach of contract claim and the contractual defenses asserted by Level 3 rest exclusively within the ambit and expertise of the courts. In addition, the court noted that even if the Commission could assert jurisdiction over certain aspects of the dispute, only a court can provide a complete resolution of the various issues involved.

Second, the Commission lacks jurisdiction to adjudicate disputes related to, and cannot otherwise regulate, right-of-way management. The plain language of §253, its legislative history, numerous federal court decisions, and even FCC precedent demonstrate this lack of authority over public rights-of-way.

¹ See *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*, WC Docket No. 09-153, Petition (Jul. 23, 2009) ("*Level 3 Petition*"); see also *Opposition of New York State Thruway Authority* (Oct. 15, 2009) ("*NYSTA Opposition*").

Third, the negotiated rates do not actually or effectively prohibit Level 3 from providing service, and Level 3 has not provided any credible factual evidence to the contrary, so Level 3 has failed to meet its burden of proof. Significantly, rather than prohibit service, Level 3 has in recent years expanded service in New York State. Because of its utter failure to prove effective prohibition, Level 3 again proposes an inappropriate, unnecessary, and self-serving standard in an attempt to shift or reduce the proper burden of proof imposed upon §253 petitioners. Level 3's quest for an expansive new interpretation of §253(a) emphasizes that the facts underlying this dispute, like those underlying its previous unsuccessful attempt to challenge rates imposed by the City of St. Louis, cannot satisfy the well-established *California Payphone* standard.

Fourth, the negotiated fees are fair and reasonable, as well as competitively neutral and nondiscriminatory, and thus fall within §253(c)'s safe harbor provision. The parties engaged in arms-length negotiations to determine the proper rates for the significantly-expanded use of NYSTA's fiber optic network and its highly, perhaps uniquely, valuable rights-of-way. These negotiated rates are the fair market value of the additional rights conveyed, and are substantially similar to those initially proposed by Williams. In addition, all users of NYSTA's fiber network that have sought the same expanded use pay identical rates.

Finally, NYSTA is a public corporation wholly supported by user fees. NYSTA is required by New York State law, as are hundreds of other New York State public authorities, to obtain at least fair market value for its assets, and it is empowered to fix fees to produce sufficient revenue to meet the expense of its maintenance and operations. However laudable the goal of broadband, it cannot be viewed in a vacuum. When NYSTA made its rights-of-way available for broadband, it did not intend to cede control of its assets and its contracts. To the contrary, one of the goals of the Request for Proposals in 1995 was to *realize* revenues for its operations. NYSTA, whose core mission is to operate a safe and effective limited access

highway for the traveling public, should not be asked to forego the needs of its own operations and patrons to subsidize the operations of a multi-billion dollar private corporation.

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The New York State Thruway Authority (“NYSTA”), by its attorneys, hereby submits these Reply Comments in response to the Notice of Inquiry (“NOI”) released April 7, 2011 in the above-captioned proceeding, as well as the Comments already filed in this proceeding. As the custodian of some of the most valuable rights-of-way in the nation, and as a user fee-supported highway authority, NYSTA has a substantial interest in the issues raised in the NOI. In addition, NYSTA feels compelled to address the various unjustified attacks leveled upon it by Level 3 Communications, LLC (“Level 3”), which essentially used its Comments to rehash arguments previously made in an ongoing dispute with NYSTA, and to once again urge the Commission to enter into a fact-specific contractual dispute in contravention of the jurisdictional constraints imposed by §253 and in conflict with a decision of the federal court in front of which the parties’ dispute remains pending.

In effect, Level 3 is seeking preemption in order to make modifications and alterations to a facility constructed and managed for common use, and used by competing providers, to enhance the value of NYSTA’s fiber optic system for its sole and unique benefit, and for free. Level 3 seeks to arrogate contractual rights not provided to other users of the common system, to customize the facility in a substantial way for its own competitive advantage at inconvenience to Thruway operations and other users, and then not pay for these additional benefits.

I. FACTUAL BACKGROUND OF DISPUTE BETWEEN NYSTA AND LEVEL 3.

NYSTA is a user fee-supported independent public benefit corporation created to construct and manage the New York State Thruway system (the “Thruway”), which includes a limited access highway connecting New York State to Connecticut, Massachusetts, New Jersey, Pennsylvania, and the Canadian province of Ontario. In 1995, NYSTA decided to construct a fiber optic network in the Thruway’s 550-mile longitudinal right-of-way to provide a system for its own needs and to realize revenues necessary for its operation. By constructing a system that could be used by itself and others, NYSTA sought to meet its own needs and maximize use of its valuable right-of-way assets. In so doing, it was at the vanguard of facilitating broadband access.

NYSTA had to ensure the network would comply with many statutory and regulatory requirements unique to limited access highways. For instance, the Federal Highway Administration (“FHWA”) imposes significant restrictions on utility (including fiber optic system) use of rights-of-way associated with a limited access highway.² The FHWA also must approve, in accordance with guidelines of the American Association of Highway Transportation Officials (“AASHTO”), an accommodation plan prior to any utility installations in the longitudinal right-of-way.³ First and foremost, an accommodation plan must assure that installations will preserve highway safety. Utility usage also must not affect the safety, design, construction, traffic operations, maintenance or stability of the freeway, and must not interfere with or impair present use or future expansion of the freeway.⁴ In 1997, the FHWA approved, subject to conditions regarding preservation of traffic safety, an accommodation plan

² See 23 U.S.C. §109(1)(1), 23 C.F.R. §§645.209, 645.211, 645.213 and 645.215.

³ 23 C.F.R. §645.209(c).

⁴ See *NYSTA Opposition* at 3-4.

(“Accommodation Plan”) drafted by the New York Department of Transportation (“NYDOT”) with respect to NYSTA’s proposed fiber optic system.⁵

Consistent with state law, NYSTA sought competitive proposals for the construction, maintenance, and management of the fiber network. Ultimately, MFS Network Technologies (now G4S Technology LLC, formerly Adesta LLC and, hereinafter, “Adesta”) was awarded the contract, the terms of which were subject to the Accommodation Plan. The basic network design consisted of six conduit ducts, fifteen access points, and fourteen regeneration facilities, which the parties believed was sufficient to both meet NYSTA’s communications needs and provide a viable network for telecommunications providers interested in leasing capacity. Common access points and regeneration facilities were conveniently located for connection to off-system points of presence.⁶ In accordance with the Accommodation Plan, these access points and regeneration facilities were limited in number to ensure that the network did not interfere with traffic, otherwise impair highway use, or conflict with maintenance requirements.

Adesta’s user agreements with telecommunications providers lease duct space and fibers together with use of the system’s fifteen access points and fourteen regeneration facilities. Consistent with AASHTO pricing recommendations, Adesta pays NYSTA for use of the longitudinal right-of-way through a mixture of reserved capacity and revenue-sharing. In accordance with New York law, NYSTA uses this revenue to defray its costs of maintaining the right-of-way, as well as for the maintenance and operation of the Thruway itself.⁷

Level 3’s predecessor in interest, Williams Communications Inc. (“Williams”), was one of the last carriers to lease fiber, entering into an agreement with Adesta in April 1999. As a

⁵ *See id.* at 4.

⁶ The number and location of the regeneration facilities and access points was based on input from interested system users to develop a network that would work for all companies rather than any one particular company, and the basic contract fees were based on this planned network.

⁷ *See* PAL Title 9 §354(8).

result, Williams was well aware of the services and facilities provided by Adesta pursuant to its user agreements. Nevertheless, at no time while negotiating with Adesta did Williams indicate a desire for a unique use of the fiber optic system, and its alleged need for additional access points and regeneration facilities beyond those provided on a common basis to all other users.⁸ Not until five months after it executed the user agreement did Williams advise Adesta that it wished to substantially expand the system by adding ten new regeneration facilities, three combined regeneration/access point facilities, and four new access points. At Williams' request, NYSTA entered into negotiations in order to effectuate Williams' newly-expressed plan.⁹

Because no other user had requested the type of expanded access sought by Williams, NYSTA lacked a fee schedule or identical contractual rates to determine the exact compensation necessary for Williams' expanded use. However, Frontier Communications had negotiated for a new access point connecting to a regeneration facility at a rate of \$2,000 per fiber. Six other users subsequently negotiated for and received the same type of access to regeneration facilities at the same rates. Because of similarities to the unique arrangements proposed by Williams with respect to adding new regeneration facilities for its own use, and because NYSTA sought to remain competitively neutral in its dealings with all telecommunications providers, NYSTA proposed \$2,000/fiber as a starting point with respect to the new regeneration facilities.

Williams, however, proposed a flat rate per regeneration facility rather than a per-fiber charge. Although such an approach lacked precedent, NYSTA agreed to Williams' proposed pricing methodology. To inform its decision as to what constituted a reasonable fee for

⁸ Level 3 has failed to provide any evidence as to why Williams allegedly could not conduct its operations using the same infrastructure provided for by the basic agreement and used by all other network users, particularly when the additional access points and regeneration facilities Williams subsequently requested are proximate to those shared by the other system users.

⁹ Adesta could not enter into an amended agreement with Williams because it was limited to negotiating for use of the network covered by its agreement with NYSTA, which was approved by the FHWA as consistent with the Accommodation Plan.

Williams' unique proposal, NYSTA relied upon AASHTO's recommended practices, which identify six potential pricing methodologies: (1) competitive auction; (2) valuation of adjacent land; (3) cost of next best alternative; (4) needs-based compensation; (5) historical experience; and (6) market research. AASHTO recommends combining more than one approach.¹⁰

NYSTA chose to combine historical experience and market research in approaching the negotiations with Williams. More specifically, it used existing commercial lease agreements adjusted to take into account differing property characteristics, and retained outside counsel with substantial experience negotiating agreements for fiber use. NYSTA and Williams, through arms-length negotiations, ultimately agreed to an annual fee of \$18,000 per regeneration facility with cost of living adjustments.

Adesta already had negotiated with Williams for a new access point at an annual rate of \$500 per lit fiber for the first and second innerducts and \$333 per lit fiber for the third and fourth innerducts. Williams and NYSTA used this comparable agreement to inform their discussions regarding pricing for the new access points. Williams initially proposed to pay an annual fee of \$300 per fiber. Because Williams would perform most of the required construction, NYSTA recognized that a reduced rate was reasonable, and the parties ultimately met halfway, agreeing to a charge of \$400 per fiber with cost of living adjustments. NYSTA subsequently received nine additional requests from other entities to negotiate additional access points. In each case, the user also agreed to an annual fee of \$400 per fiber with cost of living adjustments.

Williams made all payments under the occupancy and use agreements over a period of six years. However, in 2006, shortly after it acquired Williams, Level 3 stopped all payments.¹¹

¹⁰ See *NYSTA Opposition* at 9.

¹¹ Level 3 voluntarily acquired Williams' assets and presumably performed due diligence with respect to the existing contractual obligations it would assume. If Level 3 believed the Thruway pricing was unfavorable to its interests, it could have simply lowered its bid for Williams' assets, refused to acquire the NYSTA agreements, or otherwise restructured the deal.

NYSTA engaged Level 3 in lengthy discussions to no avail. As a result, on July 7, 2009, the New York State Attorney General, representing NYSTA, sent Level 3 a demand letter due to breach of contract. Rather than respond to the demand letter, on July 23, 2009, Level 3 filed its Petition, hoping to have the FCC protect it from outstanding and future contractual payments.

Level 3 argues several contract defenses before the Commission, including that Williams had been under duress during its negotiations with NYSTA,¹² that the agreements constitute “contracts of adhesion,” that the negotiated fees are so excessive they violate §253, and that NYSTA wielded monopolistic power to force Williams to agree to these fees. Those arguments are unjustified and unsupported. On October 14, 2009, NYSTA brought suit in New York State court seeking collection of payments owed. Level 3 subsequently removed the litigation to the U.S. District Court for the Northern District of New York (the “District Court”). On August 11, 2010, the District Court denied Level 3’s motion to stay the litigation pending FCC action.¹³ That litigation remains pending while the court considers NYSTA’s currently pending motion for summary judgment and the parties prepare for discovery.

As previously detailed to the Commission, and again discussed below, the Commission should dismiss the *Level 3 Petition* because the dispute primarily involves a contractual matter, the Commission lacks jurisdiction to adjudicate disputes involving right-of-way management, and the negotiated fees have not prohibited or effectively prohibited either Williams or Level 3 from providing service,¹⁴ so do not violate §253 in the first place.¹⁵

¹² Both parties were represented by knowledgeable, experienced outside counsel.

¹³ See *New York State Thruway Authority v. Level 3 Comm’ns, LLC*, 734 F.Supp.2d 257 (N.D.N.Y. 2010) (“*Stay Order*”).

¹⁴ In fact, Level 3 has expanded its services in New York State in recent years.

¹⁵ If Williams was displeased with its negotiations, it certainly could have challenged the fees at that time pursuant to §253, which had been enacted several years earlier.

In addition, NYSTA does not possess monopoly power over New York State's rights-of-way. Not only is there an extensive railway system,¹⁶ but also more than 1,500 miles of freeways, as well as thousands of miles of parkways and other state highways, managed by NYDOT. Significantly, in 1996, NYDOT released a Request for Proposals ("RFP") "to invite submissions for the longitudinal installation, operation, maintenance and joint use of fiber optic facilities on over 1,500 miles of available Department freeway."¹⁷ Although NYDOT repeatedly released this RFP, no entity ever submitted a proposal. Therefore, at the time Williams entered into the agreements, these freeways remained available for the installation and operation of fiber optic facilities. Apparently, Williams concluded that NYSTA's rights-of-way would provide greater value. In addition, Level 3 itself has noted that it could have foregone the additional access points and regeneration facilities and instead have purchased capacity from incumbent carriers.¹⁸ Although Level 3 implies this would have been economically unreasonable, it has failed to provide a thorough explanation or any documentary proof for its contention.

Level 3's Comments in this proceeding are misleading and disingenuous. It fails to deal with decisive facts or even mention the lawsuit well-underway between NYSTA and Level 3. Level 3 cites its own earlier pleadings fourteen times in its Comments in a bootstrap version of "factual support." The following are facts that are not in dispute:

- Williams entered into an agreement to use NYSTA's fiber optic system and its rights-of-way in 1999 which was identical in form to the agreements of other carriers.
- Not until several months later did Williams ask for substantial modifications to that agreement to provide it with an expanded network and increased access to NYSTA's system and rights-of-way.
- Williams and NYSTA negotiated new agreements to permit Williams to undertake these substantial expansions, which went into effect in 2000.

¹⁶ See, e.g., <http://www.csx.com/index.cfm/customers/maps/csx-system-map>.

¹⁷ See *Request for Proposals: Installation, Operation and Maintenance of Fiber Optics on Specified NYSDOT Freeways*, New York State Dep't. of Transportation, p. 1 (Mar. 11, 1996).

¹⁸ See *Level 3 Petition* at 9.

- Williams provided service under the revised arrangements, paying all fees, for approximately six years.
- Williams sought no relief, including under §253.
- Level 3 voluntarily assumed Williams' assets in 2005.
- Level 3 stopped making payments only a few months later.
- Level 3 has enjoyed the benefits under the NYSTA agreement continuously, providing service at all times and even expanding service.
- Level 3 sought no relief in any forum until NYSTA put it on notice that Level 3 could not continue to breach the contracts without consequence.
- The District Court denied Level 3's motion seeking a stay of the litigation pending an FCC determination, ruling that the matter is a contract-based dispute properly before a court, not the Commission.

As explained more fully below, the dispute between Level 3 and NYSTA is contract-based and being adjudicated in court. Despite Level 3's one-sided and misleading story, there is nothing credible in the eleven year history of the parties' agreements that warrants national-level rulemaking or would be a proper basis for FCC policy determinations.

II. THE DISPUTE BETWEEN NYSTA AND LEVEL 3 IS A HIGHLY FACT-SPECIFIC CONTRACTUAL MATTER THAT BELONGS IN COURT.

Even if §253 hypothetically provided the Commission with jurisdiction over NYSTA's rights-of-way management, which it does not, the *Level 3 Petition* fundamentally describes a contractual dispute, and thus is not a matter properly before the Commission:

[The] FCC does not have special competence in this arena and this matter does fall squarely within the conventional experience of judges.¹⁹

Moreover, the same dispute is pending as a collection matter in the District Court, which has jurisdiction to decide §253 issues. That court has assumed jurisdiction and ruled that it will

¹⁹ *Stay Order*, 734 F.Supp.2d at 265.

proceed with the case regardless of any FCC decision.²⁰ Under these circumstances, the most effective way to provide a complete resolution of the dispute is before the District Court:

A breach of contract claim rests exclusively within the ambit of the courts even if some components of the claim or defenses may be decided by another tribunal.²¹

Williams paid the negotiated fees for six years. In 2006, shortly after acquiring Williams' assets, Level 3 discontinued rent payments while still enjoying the benefit of the bargain through its continued use of the fiber optic network. Although Level 3 broadly claimed the fees were excessive, it made no effort to present its allegations to any forum until after receiving the demand letter.²² Two weeks after that letter, before NYSTA had an opportunity to sue for breach of contract, Level 3 filed its Petition with the FCC.²³ Level 3's basic argument is that the negotiated fees are excessive, Williams only agreed to the fees because it was under "duress," and thus the agreements should not be given force and effect. In other words, as noted by the District Court, Level 3 argues that the agreements are "contracts of adhesion."²⁴

Therefore, despite Level 3's arguments to the contrary, its Petition primarily concerns the validity and enforceability of contractual provisions – determinations unrelated to any jurisdiction or expertise of the Commission. In contrast, "courts have grappled with these sorts of claims for eons."²⁵ Denying the *Level 3 Petition*, and thereby allowing the federal litigation to

²⁰ *See id.* at 268 ("There is no cogent reason to await the FCC's decision regarding if it has jurisdiction, which decision has been longtime coming, nor to wait longer, should it conclude it has jurisdiction, in order for it to render findings on the Petition.").

²¹ *Id.* at 269.

²² *See id.* at 270 (This "failure to pay rent continued for three years and it appears that Level 3 was satisfied with the *status quo*.").

²³ *See id.* ("Presumably, NYSTA's Letter was the impetus for Level 3 to eventually file a Petition with the FCC.")

²⁴ *Id.* at 266.

²⁵ *Id.* at 267 (adding that a court is "better equipped and has more specialized competence to decide the issue than does an agency.").

continue without any prospect of an inconsistent agency determination, also would be in accord with FCC precedent,²⁶ and would conserve the resources of the Commission and the parties.

Consistent with its alleged contractual defenses, Level 3 essentially seeks contract reformation to substitute different pricing for the rates that Level 3 voluntarily assumed, a remedy beyond FCC authority as §253(d) only provides for preemption of a legal requirement. In addition, issues involving proper application of New York State law must be addressed. As a result, an “FCC decision would not completely resolve the issue before [the District] Court... There will be contractual claims and defenses raised before th[e] Court that will not be addressed by the FCC, even if the deferral [was] granted.”²⁷

Further, FCC action on the *Level 3 Petition* would reward Level 3 for its improper forum-shopping. Level 3 filed its Petition immediately after it was put on notice that NYSTA would enforce its contractual rights against Level 3’s long-term failure to make the negotiated payments. In other words, Level 3 “strategically waited until an opportunistic moment arose to seek redress, in an urgent haste to gain some conceived tactical advantage on the matter...”²⁸ The Commission therefore should not give any weight to Level 3’s claim that, because it filed the Petition before NYSTA filed suit, the Commission is the proper forum.²⁹

Policy concerns also dictate deferral to the District Court action. Although §253 provides redress for requirements that prohibit or effectively prohibit the provision of services, Congress did not intend for it to provide a means for challenging long-standing contractual agreements.

²⁶ *See id.* (“Even the FCC has recognized that oftentimes private contractual matters are most appropriately considered by the courts.”) (citing *Application of Cope Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14564, 14567 (1998)).

²⁷ *Id.* at 270.

²⁸ *Id.*

²⁹ *See id.* at 269 (“Level 3 erroneously presumes that ‘first-in-right’ filings automatically determine this factor. But the calculated race to a purportedly favorable forum does not necessarily translate into an auspicious view of these even for it.”).

Section 253 should be interpreted to provide governmental entities with the certainty that if a contract is not the subject of a §253 challenge when formed, there should be no possibility of preemption many years later because a successor-in-interest refuses to meet the contractual obligations it voluntarily assumed. With each acquisition, new providers agree to assume contracts in the context of their own business interests, which could differ significantly from those of the original contracting party. Sanctioning retroactive preemption, particularly when pricing is involved, creates powerful incentives for telecommunications providers to seek §253 relief after any acquisition to increase available capital. Governmental entities engage in long-term budgetary planning that relies upon the reasonable assumption that revenue from long-standing contracts will continue to be available. The public interest is not served if providers failing to meet their voluntary contractual obligations are subsidized by the public through increased fees and/or loss of services.³⁰

The Commission has neither the expertise nor legal authority to decide many questions at the heart of the dispute between Level 3 and NYSTA.³¹ Obviously, the District Court is the proper forum for the parties to resolve their differences and, unlike the FCC, is not foreclosed from considering all of their claims. Moreover, “[n]o matter how the FCC rules, discovery will have to be pursued in th[e] litigation.”³² Therefore, the Commission should dismiss the *Level 3 Petition* in full knowledge that the District Court has assumed jurisdiction over all controversies between the parties, including under §253 and with respect to their contractual rights. The public interest in timely resolution of disputes, avoiding conflicting decisions, and in conserving public and private resources requires such a dismissal. As the District Court noted:

³⁰ See Select Minnesota Municipalities Comments at 16-17 (“Select Minnesota”).

³¹ See *Stay Order*, 734 F.Supp.2d at 268 (“To reiterate, the FCC is not in possession of any specialized competence and expertise nor is this the kind of issue peculiarly suited for initial determination by it on the matter of reasonable and fair compensation.”).

³² *Id.* at 271.

[T]he valid litigation already in this Court should not be held hostage to an administrative process that is not proceeding with all deliberate speed, especially when there is a public interest in prompt adjudication.³³

III. THE FCC LACKS JURISDICTION OVER PUBLIC RIGHTS-OF-WAY.

Even if the Commission decides to treat the *Level 3 Petition* as more than a private contractual dispute, the agreements at issue involve NYSTA’s management of public rights-of-way. The Commission therefore lacks jurisdiction to consider Level 3’s challenge to those agreements. As a consequence, it must dismiss the Petition, and thereby allow the judicial proceeding to resolve all issues between the parties.

A. The Plain Language of §253(d) Withholds Commission Jurisdiction Over Public Rights-of-Way.

Level 3 correctly asserts that the plain language of §253(d), which is the sole statutory provision authorizing FCC preemption of certain local legal requirements, is clear on its face, and thus there is no need to resort to the legislative history.³⁴ But Level 3 misinterprets the provision’s plain meaning. Rather than analyze the actual language contained in §253(d), Level 3 instead offers its self-serving interpretation of the general policy considerations underlying §253.³⁵ In fact, in arguing that §253(d) is clear on its face, Level 3 fails to even reference the actual wording of that subsection, which provides that, if “the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt ...”³⁶

If Congress had intended to also permit the Commission to preempt management of the public rights-of-way, the authority for which is reserved to local governments pursuant to subsection (c), it would not have included the “subsection (a) or (b)” limitation on FCC

³³ *Id.* at 270.

³⁴ *See* Level 3 Comments at 22.

³⁵ *See id.* at 23.

³⁶ 47 U.S.C. §253(d) (emphasis added).

preemption authority.³⁷ Instead, it would have unequivocally expressed its intent to provide this authority to the Commission because such authority would impinge upon a power historically and traditionally reserved to local governments.³⁸ Because the Commission’s preemption authority arises solely from subsection (d), which expressly omits reference to disputes involving subsection (c) (*i.e.*, rights-of-way management), the statutory language itself clearly precludes FCC preemption of legal requirements relating rights-of-way management.³⁹

B. The Legislative History Further Demonstrates a Lack of FCC Jurisdiction.

Even if the Commission is inclined to look beyond the statute’s plain language, “[t]he legislative history of the Telecommunications Act indicates Congress anticipated that disputes under §253(c) would be addressed in the local federal district courts.”⁴⁰ As initially proposed, subsection (d) broadly specified that the FCC could preempt enforcement of legal requirements merely inconsistent with §253, including those relating to public rights-of-way.⁴¹ But several legislators objected to the breadth of this preemption and sought to restrict its reach.

³⁷ See *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”) (internal quotations and citations omitted).

³⁸ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (“Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”); *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1999) (“[I]f Congress intends to preempt a power traditionally exercised by a state or local government, it must make its intention to do so unmistakably clear in the language of the statute.”).

³⁹ See Coalition of Texas Cities Comments at 55, 61 (“Texas Coalition”); City of New York Comments at 11 (“NYC”); San Antonio, Texas Comments at 15; Eugene, Oregon Comments at 13; League of Kansas Municipalities Comments at 13 (“Kansas League”).

⁴⁰ *City of Chattanooga v. BellSouth Telecomm’ns, Inc.*, 1 F.Supp.2d 809, 815 (E.D.Tenn. 1998); see *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 1194 (2009) (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.”) (internal quotations omitted).

⁴¹ See 141 Cong. Rec. S8206, 8212 (daily ed. June 13, 1995) (statement of Sen. Gorton).

Senators Feinstein and Kempthorne proposed to eliminate subsection (d) and FCC preemption entirely, believing the proper venue for all §253 disputes was a local court.⁴² Senator Gorton responded with a proposal containing the current language of §253(d), which omits subsection (c) from the FCC preemption provision. Gorton designed his amendment to shift the permissible forum based upon the subject matter of a §253 claim.⁴³ Like Feinstein and Kempthorne, he believed that requirements concerning public rights-of-way are “a matter of primarily local concern” that should only be reviewed by local courts.⁴⁴ Gorton’s amendment therefore “retain[ed] not only the right of local communities to deal with their rights of way, but their right to meet any challenge on home ground in their local district courts.”⁴⁵ Senator Gorton consistently made clear that his second-degree amendment, like the Feinstein-Kempthorne amendment, prohibited FCC preemption of local requirements relating to public rights-of-way – *i.e.*, those requirements relating to the local authority retained under §253(c):

[M]y 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.⁴⁶

There is no preemption, even if my second-degree amendment is adopted, Mr. President, for subsection (c) which is entitled, ‘Local Government Authority,’ and which is the subsection which preserves to local governments control over their public rights of way. It accepts the proposition from those two Senators that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.⁴⁷

⁴² See 141 Cong. Rec. S8134, 8170-71 (daily ed. June 12, 1995) (statement of Sen. Feinstein).

⁴³ See 141 Cong. Rec. at S8212 (statement of Sen. Gorton) (“[The Gorton amendment] does not impact the substance of the first three subsections at all, but it does shift the forum in which a question about these three subsections is decided.”).

⁴⁴ See 141 Cong. Rec. S8305, 8308 (daily ed. June 14, 1995) (statement of Sen. Gorton).

⁴⁵ *Id.*

⁴⁶ *Id.* at 8306 (emphasis added).

⁴⁷ 141 Cong. Rec. at S8212 (emphasis added).

Level 3 contends that Senator Gorton’s second-degree amendment simply granted concurrent jurisdiction to federal district courts.⁴⁸ But under this interpretation, his amendment would have been unnecessary. As noted, the initially-proposed subsection (d) would have broadly permitted FCC preemption of any legal requirement merely inconsistent with §253, including those that fell within the scope of §253(c). Even this sweeping preemption authority, however, would not have removed jurisdiction from the courts. In other words, even as originally proposed, §253(d) provided for concurrent jurisdiction.⁴⁹ If Senator Gorton’s amendment did no more than permit concurrent jurisdiction, then his amendment had no effect, and no need existed to draft §253(d) to refer to subsections (a) and (b) while excluding any reference to FCC jurisdiction over disputes involving a subsection (c) analysis.

Level 3 itself recognizes that Senator Gorton’s “modification of the Feinstein amendment says that in the case of these purely local matters dealing with rights of way, there will not be jurisdiction on the part of the FCC...”⁵⁰ However, it then implies that Gorton in fact thought otherwise. But Level 3 intentionally or carelessly used certain remarks of Senator Gorton completely out of context in an attempt to support this contention. In fact, the quoted passages are not even the views of Senator Gorton, but merely his summation of the opposing arguments with respect to the proper scope of FCC preemptive authority. For instance, the first statements quoted by Level 3 simply summarize his understanding of subsection (d) as initially proposed, which would have permitted the Commission to preempt legal requirements merely inconsistent with §253, including those that fell within the scope of subsection (c). This fact is abundantly clear, as Gorton began by noting that he was referring to “[t]he argument in favor of the section

⁴⁸ See Level 3 Comments at 29.

⁴⁹ Sen. Feinstein was not concerned that §253(d), as initially drafted, would provide jurisdiction *only* to the FCC. Rather, she was concerned that, because it would be telecommunications providers that would initiate a proceeding, local decisions would consistently be challenged before the FCC rather than a local court. See 141 Cong. Rec. S8134, 8170.

⁵⁰ See Level 3 Comments at 29 (quoting 141 Cong. Rec. at S8308 (statement of Sen. Gorton)).

as it has been reported by the Commerce Committee...”⁵¹ Immediately thereafter, Gorton summarized the opposing argument, as set forth by Senators Feinstein and Kempthorne, whose amendment would have eliminated subsection (d) and FCC preemption entirely.⁵²

Level 3 notes Senator Gorton’s concern that the Feinstein-Kempthorne amendment could destroy the Commission’s ability to create national uniformity to imply he believed the FCC should possess jurisdiction over all §253 disputes.⁵³ However, by providing the context to this remark excluded by Level 3, it becomes clear that his concern arose simply because of the Feinstein-Kempthorne amendment’s “completely localized approach,” which would have removed FCC jurisdiction with respect to any §253 dispute. In other words, Gorton was referring to the absolute nature of that amendment. Although he believed their amendment had “a legitimate scope,” he thought it went “beyond its legitimate scope.”⁵⁴ But Gorton agreed with Senators Feinstein and Kempthorne that Congress should not provide for FCC authority to preempt local rights-of-way management.⁵⁵ Therefore, although Gorton sought to reduce the scope of the Feinstein-Kempthorne amendment, his proposal still addressed the Senators’ primary concern, which he believed was with respect to the purely local matters at issue in subsection (c).⁵⁶ In other words, he designed the second-degree amendment to find middle ground, not to totally subvert the Feinstein-Kempthorne amendment.⁵⁷

⁵¹ 141 Cong. Rec. at S8212 (statement of Sen. Gorton).

⁵² *Id.* (“On the other hand, the localism argument...”).

⁵³ *See* Level 3 Comments at 29-30 (quoting 141 Cong. Rec. at S8306).

⁵⁴ 141 Cong. Rec. at S8306 (statement of Sen. Gorton).

⁵⁵ *Id.* at 8308 (“I join with the sponsors of the Feinstein amendment in agreeing that the rules that a city or a county imposes on how its street rights of way are going to be utilized ... are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section.”).

⁵⁶ *See* 141 Cong. Rec. at S8212 (statement of Sen. Gorton) (“I have read the arguments that were made by the two Senators who sponsored the first-degree amendment. I agree with them, but almost without exception, their arguments speak about the control by cities and other local communities over their own rights of way, an area in which their authority should clearly be

If Gorton intended to provide for FCC jurisdiction over every §253 dispute, he would have simply supported the originally-proposed §253(d) rather than introduce a second-degree amendment. But Gorton sought to preserve local control over public rights-of-way by prohibiting FCC preemption of such matters⁵⁸ while permitting preemption of “State law which deliberately prohibited or frustrated the ability of any telecommunications entity to provide competitive service.”⁵⁹ In other words, his amendment prohibited FCC preemption in a §253(c) matter, but permitted preemption in a §253(b) matter.⁶⁰ With respect to the latter, Gorton retained FCC authority primarily because of his concern regarding deliberate legislation that hindered the primary goals of §253, such as monopolistic franchising.⁶¹ Senator Feinstein’s later statements confirm this proper interpretation of Gorton’s compromise amendment:

As for the issue of FCC preemption, while I favored the complete elimination of the preemption provision, I am pleased that the committee could accept the view that authorizes the Commission to preempt the enforcement only of State or local requirements that violate subsection (a) or (b), but not (c). The courts, not the Commission, will address disputes under section 253(c).⁶²

preserved, a field in which they should not be required to have to come to Washington, DC, in order to defend their local permitting or ordinance-setting actions.”).

⁵⁷ *See id.* (“[I]n order to try to balance the general authority of a single Federal Communications Commission against the specific authority of local communities, I have offered a second-degree amendment...”); *id.* (“More often than ... second-degree amendments are designed to totally subvert first-degree amendments... This is not such a case.”).

⁵⁸ *See* 141 Cong. Rec. at S8306 (“I am convinced that Senators Feinstein and Kempthorne are right in the examples that they give, the examples that have to do with local rights of way. And the amendment that I propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the jurisdictions which are affected.”).

⁵⁹ *Id.* at 8308 (statement of Sen. Gorton).

⁶⁰ *See id.* at 8306 (statement of Sen. Gorton) (“But if, under section (b), a city or county makes quite different rules relating to universal service or the quality of telecommunications services – the very heart of this bill – then there should be a central agency at Washington, DC, which determines whether or not that inhibits the competition and the very goals of this bill.”)

⁶¹ *See* 141 Cong. Rec. S8206, 8212 (statement of Sen. Gorton) (“I agree with those two Senators in that respect, but I do not agree that we should sweep away all of the preemption ... an action by a State or a city which says only one telephone company can operate in a given field ... should not be exempted from preemption and from a national policy...”).

⁶² 141 Cong. Rec. S687, 715 (daily ed. Feb. 1, 1996) (statements of Sen. Feinstein).

Clearly, Senator Gorton did not intend for the FCC to possess exclusive, or even concurrent, jurisdiction over every type of §253 dispute. The national uniformity he desired did not involve rights-of-way management, but rather those disputes for which the FCC possesses the relevant expertise. Gorton sought “national uniformity with respect to the very goals of th[e] bill, what constitutes a serious barrier to entry,” such as a local requirement with a “monopolistic purpose.”⁶³ As he summarized in urging the adoption of his compromise amendment:

Those who feel there should be no national policy, that local control and State control of telecommunications is so important that national policy should not be enforced by any central agency, should vote for the Feinstein amendment. But those who believe in balance, those who believe there should be one central entity to make these decisions ... when they have to do with whether or not there is going to be competition, when they have to do with the nature of universal service, when they have to do with the quality of telecommunications service or the protection of consumers, but believe that local government should retain their traditional local control over their rights of way, should vote against the Feinstein amendment and should vote for mine. It is the balance. It meets the goals that they propose their amendment to meet without being overly broad...⁶⁴

The legislative history of §253(d) thus leaves no doubt that challenges to local right-of-way management, and thus implicating §253(c), may only be submitted to a local court.⁶⁵

C. Courts Have Consistently Found a Lack of FCC Jurisdiction Over Public Rights-of-Way, and the Commission Has Never Exercised This Jurisdiction Nor Stated That It Possessed Such Jurisdiction.

Various federal courts have concluded that the plain language of §253(d), as well as its legislative history, demonstrates a lack of FCC jurisdiction over local rights-of-way. For instance, after a lengthy review of the congressional record, the Eleventh Circuit held that Senator Gorton’s amendment “was intended only to designate the forum in which challenges to statutes or ordinances governing particular matters were brought,”⁶⁶ and thus §253(d) “serves a

⁶³ 141 Cong. Rec. at S8306 (statement of Sen. Gorton).

⁶⁴ *Id.*

⁶⁵ *See, e.g.*, Texas Coalition at 61.

⁶⁶ *BellSouth Telecomm’ns, Inc. v. Palm Beach*, 252 F.3d 1169, 1189 (11th Cir. 2001). Contrary to the NOI’s suggestion, the cases discussed in *Palm Beach* did not take “differing approaches”

single purpose – it establishes different forums based on the subject matter of the challenged statute or ordinance.”⁶⁷ In addition, the Tenth Circuit found that the “legislative history indicates that some senators were concerned about where *preemption* challenges based on §253 would be decided” because “giving the FCC jurisdiction would impose a burden on city governments to travel to Washington D.C. in order to defend a local ordinance.”⁶⁸ The court therefore concluded that §253(d), as amended, “was designed to allow city governments to defend challenges to regulations in a local court.”⁶⁹ Similarly, the Sixth Circuit noted that “[t]he subsection of §253 authorizing Commission action, §253(d), pointedly omits reference to violations of §253(c).”⁷⁰

Significant district court precedent also supports this conclusion. For instance, in *Pacific Bell Tel. Co. v. City of Hawthorne*, the court concluded that “the plain language of §253(d) does not empower the FCC to preempt laws violating §253(c).”⁷¹ Similarly, in *BellSouth Telecomm’ns, Inc. v. City of Mobile*, the court found that “[t]he plain and unambiguous language of section 253(c) and its legislative history demonstrate that it was the clear purpose of Congress to leave undisturbed a local government’s traditional authority over construction on roads and other public rights-of-way.”⁷² And, in *City of Chattanooga v. BellSouth Telecomm’ns, Inc.*, the court concluded that “[t]he legislative history of the Telecommunications Act indicates Congress anticipated that disputes under Section 253(c) would be addressed in the local federal district

on whether §253 provides for FCC jurisdiction over public rights-of-way. Rather, those courts differed as to whether §253(c) created a private right of action.

⁶⁷ *Id.* at 1191.

⁶⁸ *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) (emphasis in original).

⁶⁹ *Id.*

⁷⁰ *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

⁷¹ 188 F.Supp.2d 1169, 1174 (C.D.Cal. 2001).

⁷² 171 F.Supp.2d 1261, 1270 (S.D.Ala. 2001) (emphasis added).

courts. As codified, subsection (d) tracks the Gorton amendment, giving the FCC jurisdiction over subsections (a) and (b) only.”⁷³

In addition, the FCC has recognized that “Section 253(d) does not ... on its face grant the Commission any direct authority over section 253(c).”⁷⁴ Moreover, only one FCC order has even suggested that it may possess jurisdiction over rights-of-way disputes. But in that decision, the Commission declined to rule on any of the petitions,⁷⁵ let alone exercise jurisdiction over right-of-way management. In fact, it questioned whether the subject agreement even constituted right-of-way management, and expressly stated that its limited “discussion of [the §253(c)] issues should not be interpreted as addressing potential issues involving the Commission’s jurisdiction under section 253(c).”⁷⁶ On other occasions as well, the Commission has declined to even address whether it possesses the jurisdiction necessary to preempt local actions taken pursuant to §253(c).⁷⁷ And the FCC’s own Local and State Government Advisory Committee

⁷³ 1 F.Supp.2d at 815; *see also Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F.Supp.2d 898, 908 (S.D.Cal. 2004) (“Senator Gorton’s remarks undoubtedly indicate that he envisioned challenges to section 253(c) taking place in district courts.”); *Qwest Comm’ns Corp. v. City of Greensboro*, 440 F.Supp.2d 480, 491 (M.D.N.C. 2006) (“[Senator Gorton] meant to give the federal district courts, rather than the FCC, authority to rule on the issue of preemption.”); *Qwest Comm’ns Corp. v. City of Berkeley*, 202 F.Supp.2d 1085, 1094-95 (N.D.Cal. 2001) (Gorton amendment does not allow FCC to enjoin right-of-way ordinances, which “would explain the absence of subsection (c) from the preemption provision in subsection (d) ... The main intention of the Gorton amendment appears to have been to immunize localities from FCC review of decisions that he referred to as ‘purely local matters.’”).

⁷⁴ *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking, 14 FCC Rcd 12673, 12713, ¶ 73 (1999).

⁷⁵ *Petition of State of Minnesota*, Memorandum Opinion and Order, 14 FCC Rcd 21697 (1999).

⁷⁶ *Id.* at 21729.

⁷⁷ *See, e.g., TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21443, n. 268 (1997) (“We are cognizant of the arguments ... that the Commission lacks jurisdiction under section 253(d) to preempt actions taken by the City pursuant to section 253(c) ... By our decision here, we leave that important issue for another day.”).

“LSGAC”⁷⁸ has explained that a §253 analysis relating to rights-of-way management “must be made by the courts, rather than by the Commission.”⁷⁹ Even with respect to the NOI, Commissioners Copps, McDowell, and Attwell Baker all expressly noted the FCC’s limited authority over public rights-of-way.⁸⁰

Although Level 3 alleges that “courts” have concluded that the Commission may undertake §253(c) analyses, it cites only to *TCG N.Y., Inc. v. City of White Plains*,⁸¹ which does not support this claim. In that case, the Second Circuit focused on FCC authority to determine whether a case involves management of a right-of-way within the bounds of §253(c) or whether a §253(c) defense was being raised simply to avoid FCC jurisdiction.⁸² That is not the issue here, where right-of-way management is central. Moreover, the language quoted by Level 3 is *dicta*. The court made the statements during its determination of the proper standard of review, including whether it should defer to FCC opinions.⁸³ Although the court expressed an opinion regarding §253’s jurisdictional component, it reached no conclusion on that issue – both because such a decision was unnecessary for a complete resolution of the case and because the parties

⁷⁸ The LSGAC (now the Intergovernmental Advisory Committee) “advises the Commission on a range of telecommunications issues affecting local, state, and tribal interests.” *Modification of Subpart G, Section 0.701 of the Commission’s Rules*, Order, 18 FCC Rcd 16810 (2003).

⁷⁹ *Advisory Recommendation No. 23*, WT Docket No. 99-217, p. 2 (Aug. 24, 2000) (“*LSGAC Recommendation No. 23*”); see LSGAC, *Advisory Recommendation No. 1: Policy Statement on State and Local Rights-of-Way and Telecommunications Service Competition* (June 27, 1997) (“*LSGAC Recommendation No. 1*”) (“Rights-of-way disputes between telecommunications companies and local governments should be resolved in local jurisdictions.”).

⁸⁰ See NOI (Statement of Commr. Michael J. Copps) (“[W]e need to be cognizant of the authority that local, state and Tribal entities have over rights-of-way... [W]e need to be mindful of not impinging on local rights...”); NOI (Statement of Commr. Robert M. McDowell) (“I caution, however, that the FCC should be mindful of its limitations and only use this information in areas where it has jurisdiction.”); NOI (Statement of Commr. Meredith Attwell Baker) (“[O]ur authority to act in this area is limited...”); Texas Coalition at 53-54.

⁸¹ See Level 3 Comments at 25.

⁸² 305 F.3d 67 (2d Cir. 2002). The Commission itself characterized its Section 253(c) authority this way in *Classic Telephone*, 11 FCC Rcd 13082 (1996).

⁸³ *TCG N.Y.*, 305 F.3d at 75.

had not provided sufficient evidence on the issue.⁸⁴ In fact, the court even declined to rule on the overarching issue of deference to the FCC.⁸⁵ And, with respect to its jurisdictional commentary, the court noted that, although it felt limiting jurisdiction may “create a procedural oddity,” “Congress could choose to apply a different rule under some circumstances, and indeed courts have recognized some exceptions [to the well-pleaded complaint rule].”⁸⁶ The *TCG* court’s cautionary language and explicit refusals to adopt holdings with respect to these issues make clear that the language quoted by Level 3 constitutes no more than non-binding *dicta*.

Moreover, the *TCG* court’s comment that permitting a defendant’s answer, rather than a complaint, to determine the appropriate forum would create a “procedural oddity” contradicts reality. As previously detailed by the City of New York, in the vast majority of cases, including the current proceeding, it will not be necessary to wait until a defendant raises a §253(c) defense to know that subsection is implicated because the complaint itself would make apparent whether the challenge is to a local decision regarding the management of public rights-of-way.⁸⁷

Level 3 also relies upon a supplemental amicus brief submitted by the Commission in the *TCG New York* proceeding.⁸⁸ But it again fails to provide context to the statements it quotes. For instance, immediately after noting it would “appear” the FCC has jurisdiction to adjudicate all claimed defenses, the Commission added that, “[o]n the other hand, section 253(d) itself explicitly mentions only subsections (a) and (b) in authorizing the FCC to preempt the enforcement of state or local government actions.”⁸⁹ The Commission also expressly recognized

⁸⁴ *Id.* at 76 (“[W]e will not assume that Congress made such a choice here without stronger evidence.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 75-76.

⁸⁷ See Comments of City of New York, WC Docket No. 09-153, pp. 6-7 (Oct. 15, 2009).

⁸⁸ See Level 3 Comments at 26.

⁸⁹ Supp. Br. of the FCC and the U.S. as *Amici Curiae* at 4, *TCG N.Y., Inc. v. City of White Plains* (2d Cir. Mar. 11, 2002) (Nos. 01-7213 & 01-7255) (“*TCG Amicus Brief*”).

that it had not come to a conclusion on this jurisdictional issue: “[T]he question is whether Congress – by omitting subsection (c) from section 253(d) – intended to specify the courts rather than the Commission as the forum for the adjudication of a defense asserted by a State or local government pursuant to section 253(c)...”⁹⁰ Significantly, the Commission then noted that “[s]uch an intention finds support in the legislative history of section 253(d)...”⁹¹

Further, the Commission did not state that no prior §253(c) assertions had “prevented” it from exercising jurisdiction as Level 3 implies.⁹² Rather, the Commission simply noted that it had “not yet had occasion to address” a “bona fide” §253(c) claim, and thus whether it could assert jurisdiction over this type of dispute.⁹³ The Commission then stated that, even if it chose not to dismiss a preemption petition involving subsection (c), all it could do is “issue a declaratory ruling as to whether the state or local restriction violated section 253(a) or satisfied section 253(b) *without resolving* the subsection (c) defense.”⁹⁴ This type of action clearly would lead to wasted private and public resources, particularly where the same dispute is before a court with full expertise and authority to provide a complete resolution.⁹⁵

⁹⁰ *Id.* at 5; *see* NOI at ¶ 58 (“The Commission has not taken action to resolve this [jurisdictional] issue...”). Even if the FCC had stated in the amicus brief that it could adjudicate rights-of-way disputes, this would not be controlling. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988) (“[W]e have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question, on the ground that Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.”).

⁹¹ *TCG Amicus Brief* at 5, n. 3.

⁹² *See* Level 3 Comments at 26.

⁹³ *See TCG Amicus Brief* at 6.

⁹⁴ *Id.* (emphasis added).

⁹⁵ *See Stay Order*, 734 F.Supp.2d at 269 (“Presuming for a moment that FCC renders a ruling as to whether the rent is unfair and unreasonable, or discriminatory, that ruling may not be as dispositive as Level 3 may think. As the Second Circuit has made crystal clear, an FCC ruling is entitled to ‘some deference’ but is not controlling.”) (citing *TCG N.Y.*, 305 F.3d at 706).

Finally, Level 3 incorrectly claims that the Commission’s “Suggested Guidelines” for §253 petitions evidence a determination of its authority to preempt right-of-way management.⁹⁶ Level 3 notes that the Guidelines state that the FCC requires a complete factual record, including information relating “to the possible applicability of subsections (b) and (c),” and interprets this as demonstrating the FCC considers both safe harbors in making preemption determinations.⁹⁷ But these Guidelines were not intended to serve as an internal guide for FCC decision-making. Rather, they were “designed to assist petitioners and commenters in preparing their submissions to the agency.”⁹⁸ Obviously, information indicating that a dispute arose from local right-of-way policies would assist a potential petitioner because it would inform the company that the contemplated challenge must be pursued in a local court, not before the FCC. Further, even if such a party mistakenly files an FCC petition, information demonstrating that the dispute arose from right-of-way management would allow the Commission to realize its lack of jurisdiction, dismiss the petition, and instruct the petitioner to instead pursue the matter in court.

Significantly, the Guidelines expressly acknowledge that part of the Commission’s determination relates to the threshold question of jurisdiction. Specifically, they pose several questions to determine “...whether preemption of the challenged statute, regulation, ordinance, or legal requirement *is within the scope of Commission jurisdiction.*”⁹⁹ This preliminary determination is consistent with the “approach the Commission has taken thus far,” which is “to make a preliminary evaluation of defenses claiming the protections of section 253(c) *for the limited purpose* of determining whether the defense is made in good faith and raises legitimate

⁹⁶ See Level 3 Comments at 26-27.

⁹⁷ Level 3 Comments at 27.

⁹⁸ See *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd 22970, 22970 (1998)

⁹⁹ *Id.* at 22972 (emphasis added).

questions under subsection (c).”¹⁰⁰ Thus, when put into proper context, the plain language of the Guidelines provides no support for Level 3’s jurisdictional argument. Rather, it recognizes that the Commission’s §253 jurisdiction is limited.¹⁰¹

D. A Lack of FCC Jurisdiction Over Rights-of-Way Management Does Not Deprive Service Providers of Federal-Level Review.

Level 3 incorrectly contends that divesting the Commission of jurisdiction over right-of-way compensation claims would insulate localities’ rents and fee ordinances from any federal-level review because the Tax Injunction Act (“TIA”) deprives federal courts of jurisdiction over such disputes.¹⁰² But Level 3 failed to support this claim. It is well-established that rents for the use of local rights-of-way are fees rather than taxes, the Act’s language and structure demonstrate Congress contemplated that rights-of-way fees are not taxes, and substantial judicial precedent compels the conclusion that the TIA does not apply when Congress provides for federal court jurisdiction in a subsequently-enacted federal statute. Moreover, even if Level 3’s contention had any basis, a public policy argument such as this cannot overcome §253(d)’s clear statutory mandate – that the FCC lacks jurisdiction to preempt local rights-of-way management.

First, Level 3 fails to adequately support its claim. For instance, Level 3 quotes the Ninth Circuit’s decision in *Qwest Corp. v. City of Surprise* to imply that federal courts uniformly conclude that rights-of-way fees are taxes for purposes of the TIA.¹⁰³ Particularly with respect to

¹⁰⁰ *TCG Amicus Brief* at 6 (emphasis added).

¹⁰¹ Moreover, even if the FCC finds that the Guidelines indicate a prior finding of authority to adjudicate right-of-way disputes, such a finding would not warrant deference. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.”); *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973) (finding that the deference owed to a statutory interpretation contained in regulatory guidelines “must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent...”).

¹⁰² *See* Level 3 Comments at 30-31.

¹⁰³ *See id.* at 30.

issues implicating §253(c), Level 3's reliance upon the Ninth Circuit's language is misleading. In *City of Surprise*, the court cited a total of three decisions to support its finding. However, both of the cited appellate-level decisions were issued prior to the enactment of §253.¹⁰⁴ Moreover, both the Second and Third Circuits, whose decisions were cited in *City of Surprise*, have exercised jurisdiction over disputes involving right-of-way fees without any suggestion that the TIA potentially deprived them of jurisdiction.¹⁰⁵ The First, Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits have done likewise.¹⁰⁶ In fact, the Ninth Circuit itself has issued several opinions on the merits regarding claims that right-of-way fees were preempted by §253, each time without any suggestion that the TIA deprives federal courts of jurisdiction over these matters.¹⁰⁷ The only other decision cited in *City of Surprise*, which Level 3 relies upon as well, is from the Eastern District of Tennessee,¹⁰⁸ but, as noted, the Sixth Circuit Court of Appeals has decided disputes involving §253(c) and right-of-way fees. This extensive precedent constitutes strong evidence that such actions are not barred by the TIA.

Second, fees imposed upon private companies for their exclusive use of public property cannot reasonably be construed as "taxes." "The classic 'tax' is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of

¹⁰⁴ See *Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1183-84 (9th Cir. 2006) (citing a Third Circuit decision from 1978 and a Second Circuit decision from 1991).

¹⁰⁵ See, e.g., *TCG N.Y.*, 305 F.3d 67; *N.J. Payphone Ass'n v. Town of W. New York*, 130 F.Supp.2d 631 (D.N.J. 2001), *aff'd* 299 F.3d 235 (3d Cir. 2002).

¹⁰⁶ See, e.g., *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 22-23 (1st Cir. 2006); *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d at 817, *vacated and remanded on other grounds*, 212 F.3d 863; *Southwestern Bell Tel., LP v. Houston*, 529 F.3d 257 (5th Cir. 2008); *TCG Detroit*, 206 F.3d at 624; *Level 3 Comm'n, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Santa Fe*, 380 F.3d at 1270-72; *Palm Beach*, 252 F.3d 1169.

¹⁰⁷ See, e.g., *City of Auburn*, 260 F.3d 1160, 1175-80 (9th Cir. 2001) (overruled on other grounds); *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1242-45 (9th Cir. 2004); *Qwest Comm'ns Inc. v. City of Berkeley*, 433 F.3d 1253, 1257-59 (9th Cir. 2006).

¹⁰⁸ See Level 3 Comments at 30, n.84 (citing *Chattanooga*, 1 F.Supp.2d at 814).

the entire community.”¹⁰⁹ In other words, “[a] tax is a charge imposed that is not related to the services rendered.”¹¹⁰ On the other hand, “a fee is related to a particular benefit or service.”¹¹¹ Unlike a tax, a fee “is incident to a voluntary act;” it “bestows a benefit on the applicant, not shared by other members of society.”¹¹²

Right-of-way fees are charges for particular locally-provided benefits – exclusive use of public property – and are exacted only from those who enjoy those benefits. Because right-of-way fees are a *quid pro quo* for the benefits provided, they simply are not “taxes” within the common understanding of that term.¹¹³ Instead, these fees are akin to contractual payments.¹¹⁴ Similar to a rent or lease payment, a telecommunications provider pays a local government for its exclusive use of public property for which it otherwise would have no right to appropriate.¹¹⁵ In

¹⁰⁹ *San Juan Cellular Tel. Co. v. Pub. Serv. Commn. of P.R.*, 967 F.2d 683, 685 (1st Cir. 1992).

¹¹⁰ *El Paso Electric Co. v. New Mexico Pub. Reg. Commn.*, 246 P.3d 443, 448 (N.M. 2010); see *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 522 (1937) (“A tax is not an assessment of benefits.”)

¹¹¹ *El Paso Electric*, 246 P.3d at 448.

¹¹² *NCTA v. U.S.*, 415 U.S. 336, 340-41 (1974); see *U.S. v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993) (“User fees are payments given in return for a government-provided benefit.”); *ACLU of Tenn. v. Bredesen*, 441 F.3d 370, 372-75 (6th Cir. 2006) (fee for specialty license plates held to be “most closely analogous to payments for simple purchases from the government” and not taxes under the TIA, even though part of the revenue was used to benefit the public at large).

¹¹³ See *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97 (1893) (“[T]he charge is imposed for the privilege of using the streets, alleys, and public places ... Clearly, this is no privilege or license tax.”).

¹¹⁴ See *Lipscomb v. Columbus Mun. Separate School Dist.*, 269 F.3d 494, 500, n.13 (5th Cir. 2001) (“The lease obligations are a creature of contract, not a mandatory obligation imposed by the state as taxes are.”); *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008) (“The transaction ... is more akin to a contractual debt than a state imposed tax.”); *Time Warner Ent.-Advance/Newhouse Partn. v. City of Lincoln*, 360 F.Supp.2d 1012, 1018 (D.Neb. 2005) (“[F]ees sought by the City are a contractual matter between the City and Time Warner. The deference given to states and local governments under 28 U.S.C. §1341 to assess, levy and collect their own taxes without interference by the federal courts is not applicable in this case...”).

¹¹⁵ See *City of Dallas, Texas v. FCC*, 118 F.3d 393, 397 (5th Cir. 1997) (“Franchise fees are not a tax, however, but essentially a form of rent; the price paid to rent use of public rights-of-way.”); *Western Union Tel.*, 148 U.S. at 98 (“The city has attempted to make the telegraph company pay for appropriating to its own and sole use a part of the streets and public places of the city. It is seeking to collect rent.”).

this situation, where a local government acts in a proprietary rather than governmental capacity, the fees it charges are never taxes.¹¹⁶

Moreover, construing right-of-way fees as taxes would exceed the contemplated scope of the TIA. Congressional intent¹¹⁷ and judicial precedent demonstrate that “[n]ot every assessment by the State constitutes a ‘tax’ for purposes of the TIA.”¹¹⁸ “Congress did not intend to remove federal court jurisdiction whenever some state revenue might be affected somehow. Rather, it sought to avoid interference that would threaten the flow of general revenue to or the budgets of state governments.”¹¹⁹ As a result, the Supreme “Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes.”¹²⁰ A telecommunications provider seeking preemption of right-of-way fees cannot reasonably be construed as a taxpayer attempting to avoid state taxes, and thus the TIA was not intended to address these fees.

Third, the Act’s plain language and structure demonstrate that right-of-way fees are not a “tax” subject to the TIA. Section 253(c) expressly permits local governments to require “fair and reasonable compensation” for the use of public rights-of-way.¹²¹ Had Congress intended for

¹¹⁶ See *Qwest Comm’ns Corp. v. City of Berkeley*, 146 F.Supp.2d 1081, 1092 (N.D.Cal. 2001) (“These rates essentially are rent for use of city-owned property, . . . which do not amount to taxes under the TIA.”); National League of Cities, et al. Comments at 17 (“NLC”).

¹¹⁷ See *Hibbs v. Winn*, 542 U.S. 88 (2004) (“Nowhere does the legislative history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration.”) (internal quotations omitted).

¹¹⁸ *Hawthorne*, 188 F.Supp.2d at 1176; see *Berkeley*, 146 F.Supp.2d at 1092 (“[A] fee that violates §253(c) does not necessarily amount to a tax as defined under the TIA.”).

¹¹⁹ *Hexom v. Oregon Dep’t of Transp.*, 177 F.3d 1134, 1135 (9th Cir. 1999) (internal quotations omitted); see *Bidart Bros. v. Cal. Apple Commn.*, 73 F.3d 925, 930 (9th Cir. 1996) (“In defining ‘tax’ under the TIA, other circuits have appropriately distinguished between assessments that if enjoined would threaten the flow of central revenues of state governments and assessments that are not so critical to general state functions.”).

¹²⁰ *Hibbs*, 542 U.S. at 107.

¹²¹ 47 U.S.C. §253(c).

federal courts to treat these fees as taxes, it would not have used the term “compensation.”¹²²

The language of §253(c) is directly relevant here because “[f]ederal law determines whether an assessment qualifies as a tax.”¹²³

Further, §601(c)(2) of the Telecom Act of 1996 states that its provisions must not “be construed to modify, impair, supersede, or authorize modification, impairment, or supersession of, any State or local law pertaining to taxation...”¹²⁴ Despite this savings clause, in §253(c), Congress unequivocally expressed its intent that federal courts should preempt unreasonable or discriminatory right-of-way fees. Section 601(c)(2) therefore demonstrates that Congress did not equate charges for the use of local rights-of-way with taxes.¹²⁵ A contrary interpretation of §601(c)(2) would conflict with the plainly-stated purpose of §253, and thus render one of the provisions superfluous.¹²⁶ But a savings clause, such as §601, cannot be read to defeat Congress’ intent in enacting §253 because “the act cannot be held to destroy itself.”¹²⁷

¹²² See *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

¹²³ *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000).

¹²⁴ 110 Stat. 143 (codified as note to 47 U.S.C. §152).

¹²⁵ See *Hibbs*, 542 U.S. at 101 (“[C]ourts are to interpret the words of a statute in context.”); *FDA*, 529 U.S. at 132 (“In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation.”).

¹²⁶ See *TRW*, 534 U.S. at 31 (“[A] cardinal principle of statutory construction is that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”); *Co-operative Grain & Supply Co. v. Commr. of Internal Rev.*, 407 F.2d 1158, 1162 (8th Cir. 1969) (“Congress in the enactment of a statute is presumed to have used no superfluous words.”).

¹²⁷ *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998) (holding that a savings clause does not apply to claims that are inconsistent with a preemptive provision); see *U.S. v. Menasche*, 348 U.S. 528, 538-39 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . .”); *FDA*, 529 U.S. at 133 (“A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.”).

Fourth, Congress' enactment of §253 decades after the TIA evidences its intent to provide for federal court jurisdiction. As a later, more-specific statute than the TIA, the Telecom Act controls the question of federal jurisdiction. Courts do not require an "unequivocal statement" of congressional intent to demonstrate federal jurisdiction pursuant to a later-enacted statute that could otherwise be barred by the TIA.¹²⁸ Rather, if the subsequent statute demonstrates that Congress simply "contemplated" that federal courts have jurisdiction, the TIA does not apply.¹²⁹ The legislative history detailed above clearly shows that, through the later-enacted §253, Congress intended to provide federal courts with jurisdiction over right-of-way disputes. Because of this clear congressional intent, the TIA's policy of preventing federal interference with state taxation does not apply with respect to right-of-way fees.

Regardless, even if the Commission incorrectly determines that some right-of-way fees could be "taxes," the TIA's jurisdictional constraints would not apply to the dispute between Level 3 and NYSTA.¹³⁰ First and foremost, the District Court already has determined that Level 3 and NYSTA have a contract dispute. Moreover, Courts primarily consider three factors in determining whether a particular assessment is a tax: "(1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed."¹³¹ Each factor indicates that NYSTA's fees are not taxes.

¹²⁸ See *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472-73 (1976).

¹²⁹ *Id.* at 473.

¹³⁰ See *Hexom*, 177 F.3d at 1137 ("[W]e ... emphasize that the cases, *Bidart* among them, take a practical and sensible approach. They do not apply a set of rigid rules or elements and then reach a mechanical conclusion.").

¹³¹ *Bidart*, 73 F.3d at 931 (assessment not a tax); see *City of Surprise*, 434 F.3d at 1183.

With respect to the first factor, courts hold that “[a]n assessment imposed directly by the legislature is more likely to be a tax...”¹³² NYSTA is a public corporation, not the state.¹³³ In fact, NYSTA lacks the authority to impose taxes. Second, “[a]n assessment imposed upon a broad class of parties is more likely to be a tax than an assessment imposed upon a narrow class.”¹³⁴ NYSTA and other managers of local rights-of-way charge fees only to those entities who voluntarily use a portion of these public lands for their exclusive use. Because these fees are “imposed on a very limited group of people,” they “bear[] very little resemblance to a tax.”¹³⁵ Third, the fees are not paid into New York’s general fund and are not expended for general public purposes. Rather, all users of the Thruway and its facilities contribute revenue to operating and maintaining the Thruway for their beneficial uses.¹³⁶ This type of assessment, which is “placed in a special fund and used only for special purposes is less likely to be a tax.”¹³⁷ NYSTA also notes that all of the cases Level 3 cites dealt with fees calculated as a percentage of gross revenues.¹³⁸ In contrast, Level 3 voluntarily assumed contractual rates agreed to in arms-length negotiations that are unrelated to its gross revenues.

¹³² *Bidart*, 73 F.3d at 931.

¹³³ *See id.* (“[A]lthough the current assessment at issue was imposed by the legislature, the independence of the Commission weighs in favor of a finding that the assessments are not taxes.”); *id.* at 930 (finding earlier judicial test “inappropriate to define a ‘tax’” because, in part, the “test is so broad that it would prohibit federal courts from adjudicating the proprietary of state assessment that are administered by entities only loosely related to a state legislature...”).

¹³⁴ *Id.*

¹³⁵ *Hexom*, 177 F.3d at 1138.

¹³⁶ *See San Juan Cellular*, 967 F.2d at 687 (“Whether a particular agency charge defrays the administrative costs of regulating a single regulated firm or a class of such firms has little, or nothing, to do with this problem.”).

¹³⁷ *Bidart*, 73 F.3d at 932; *see Hexom*, 177 F.3d at 1138 (“[T]he direct recipient of the amount is not a tax collector, or even the State’s general fund. It is the DOT...”).

¹³⁸ *See City of Surprise*, 434 F.3d at 1184 (“[W]e hold that where, as here, an ordinance requires that a telecommunications provider pay a percentage of its gross revenues to the municipality, and the revenue from that charge is directed to the municipality’s general fund, the charge constitutes a tax.”) (emphasis added).

Finally, even if particular right-of-way fees might be construed as “taxes” subject to the TIA, local governments still would be held accountable for any §253 violations. The only difference would be that determinations would be made by state rather than federal courts.¹³⁹ Level 3’s strained policy arguments therefore cannot trump Congress’ clear intent to withhold FCC jurisdiction with respect to §253 disputes involving local right-of-way management.

E. The Commission Also Lacks Authority to Regulate Local Governments’ Management of Public Rights-of-Way.

Although the NOI suggests otherwise,¹⁴⁰ the Commission’s general grants of authority do not empower it to adjudicate, preempt or otherwise regulate local right-of-way management, including by adopting rules that define what constitutes “fair and reasonable compensation” under §253(c).¹⁴¹ “The FCC, like other federal agencies, ‘literally has no power to act ... unless and until Congress confers power upon it.’”¹⁴² As a consequence, “the FCC’s power to promulgate legislative regulations is limited to the scope of the authority Congress has delegated to it.”¹⁴³ As detailed above, both the plain language and legislative history of §253(d) clearly demonstrate that Congress did not intend to provide the Commission with authority over public

¹³⁹ See 28 U.S.C. §1341; *City of Rome v. Verizon Comm’ns Inc.*, 362 F.3d 168, 179 (2d Cir. 2004) (“[T]he context of the legislators’ comments – a protest against FCC preemption – made the relevant opposition that between FCC and all other jurisdictions rather than that between federal and state courts.”); *Chattanooga*, 1 F.Supp.2d at 815 (“Although Congress intended local federal district courts to have jurisdiction over Section 253(c) disputes, there is a presumption that state courts have concurrent jurisdiction...”).

¹⁴⁰ See NOI at ¶ 57.

¹⁴¹ See NYC at 10; Comments of Middletown Township, PA at 16 (“Middletown”).

¹⁴² *Amer. Library Ass’n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)); see *id.* (“The Commission ‘has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress.’”).

¹⁴³ *Id.*; see *La. PSC*, 476 U.S. at 374 (“[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.”); *id.* at 374-75 (“To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.”); *NARUC v. FCC*, 880 F.2d 422, 428 (D.C. Cir. 1989) (“An agency may not act at all, let alone preempt state authority, in an area where Congress has explicitly denied it jurisdiction.”).

rights-of-way. Moreover, this authority cannot arise simply from Congress' failure to expressly impose limits because congressional silence "surely cannot be read as ambiguity resulting in delegated authority to the FCC..."¹⁴⁴ Thus, even if the Commission finds that Congress did not expressly withhold such authority, it still may not regulate or preempt local rights-of-way governance because Congress never delegated this power to it.¹⁴⁵

Further, where, as here, an expansive interpretation of agency authority would impinge upon a power traditionally reserved to the states,¹⁴⁶ any congressional grant of authority must be "clear and manifest."¹⁴⁷ If not, and even if the statutory language is found to be ambiguous and the agency's interpretation of it "reasonable," a court will construe the statute as allowing states to retain their traditional authority unless such construction plainly contradicts congressional intent.¹⁴⁸ Here, both the statutory text and legislative history clearly demonstrate that Congress intended for local governments to retain their traditional authority over the public rights-of-way.

¹⁴⁴ *Motion Picture Ass'n of Amer., Inc. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002); *see id.* at 802 ("We need not decide whether §713 positively forecloses agency rules mandating video description. Rather, we find that §713 does not authorize the FCC to adopt such rules.").

¹⁴⁵ *See Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("We refuse ... to presume a delegation of power merely because Congress has not expressly withheld such power."); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir.1994) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.") (emphasis in original).

¹⁴⁶ *See Promotion of Competitive Networks*, 14 FCC Rcd at 12714 (summarizing "decisions recogniz[ing] that State and local governments have an important interest in managing the public rights-of-way to promote the public good, and in obtaining fair and nondiscriminatory compensation for use of the rights-of-way."); *Minnesota*, 24 FCC Rcd at 21728-79 ("[T]he legislative history of section 253(c) indicates that Congress intended to protect the states' traditional regulation of rights-of-way."); *LSGAC Recommendation No. 23*, p. 3 ("Public right-of-way management is historically and properly a core function of local government.").

¹⁴⁷ *See Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("To displace traditional state regulation in such a manner, the federal statutory purpose must be 'clear and manifest.'").

¹⁴⁸ *See Solid Waste Agency of N. Cook County. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001); *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989) ("[I]f Congress

Due to the lack of congressionally-delegated authority, courts would not accord any *Chevron*-style deference to an FCC interpretation as to the extent of its authority of local rights-of-way.¹⁴⁹ Nevertheless, applying the *Chevron* analysis further demonstrates that the FCC cannot regulate, or adjudicate disputes regarding, local rights-of-way. *Chevron* requires courts reviewing an agency’s statutory construction to ask two questions. “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁵⁰ As detailed above, the plain language of §253(d) withholds jurisdiction from the Commission. Moreover, although the NOI implies otherwise,¹⁵¹ courts do not focus solely on the statutory language in determining congressional intent. Rather, a court will disturb agency interpretations if “it appears from the statute *or its legislative history* that the accommodation is not one that Congress would have sanctioned.”¹⁵²

intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.”); *Wyeth*, 129 S.Ct. at 1194-95 (“In all preemption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, ... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 420 (1999) (Breyer, concurring in part and dissenting in part) (“The most the FCC can claim is linguistic ambiguity. But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority.”); *Aid Ass’n for Lutherans v. USPS*, 321 F.3d 1166, 1177 (D.C. Cir. 2003) (“[W]hile ambiguity in a statute may imply a delegat[ion] to the agency [of] the power to fill those gaps, the agency must still stay within the bounds of the delegation in promulgating regulations under the statute.”).

¹⁴⁹ See *MPAA*, 309 F.3d at 801 (“*Mead* reinforces *Chevron*’s command that deference to an agency’s interpretation of a statute is due only when the agency acts pursuant to ‘delegated authority.’”); *id.* (An “agency’s interpretation of [a] statute is not entitled to deference absent a delegation of authority from congress to regulate in the areas at issue.”).

¹⁵⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁵¹ See NOI at ¶ 58.

¹⁵² *Chevron*, 467 U.S. at 837 (emphasis added); see *Aid Ass’n*, 321 F.3d at 1177 (“We find no real ambiguity when the statutory language is fairly construed using the normal tools of statutory construction.”); *Dallas*, 165 F.3d at 348 (legislative history contradicted FCC’s interpretation);

Because Congress directly addressed FCC authority over local rights-of-way, and clearly intended to withhold such jurisdiction, the *Chevron* inquiry comes to an end – *i.e.*, courts would not defer to any FCC interpretation.¹⁵³ After all, “[a]n agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress.”¹⁵⁴

Moreover, even if the Commission finds otherwise, any attempted rights-of-way regulation also would fail under the second step of the *Chevron* analysis. Under this step, if “‘Congress has not directly addressed the precise question at issue,’ and the agency has acted pursuant to an express or implied delegation of authority, the agency’s statutory interpretation is entitled to deference, *as long as it is reasonable.*”¹⁵⁵ The plain language and legislative history of §253(d),¹⁵⁶ as well as substantial judicial precedent, constitute “strong indications that agency flexibility was to be sharply delimited.”¹⁵⁷ The Commission therefore could not reasonably interpret §253(d) as bestowing upon it authority over local rights-of-way. Congress unequivocally expressed its intention that local courts, not the FCC, would possess authority over local governments’ management of public rights-of-way. In such a situation, courts do not defer to agency interpretations. Although broad, the deference “principle has its limits.

NARUC, 880 F.2d at 427-28 (“A federal agency acting within its statutory authority may preempt inconsistent or conflicting state actions ... unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”).

¹⁵³ See *Nat. Res. Def. Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (“[I]t is only legislative intent to delegate such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*. “); *Amer. Library*, 406 F.3d at 699 (“The agency’s self-serving invocation of *Chevron* leaves out a crucial threshold consideration, *i.e.*, whether the agency acted pursuant to delegated authority.”); *Aid Ass’n*, 321 F.3d at 1178 (“[A]gency’s statutory interpretation and its effect cannot survive *Chevron* Step One because the statutory language and legislative history unambiguously indicate...”).

¹⁵⁴ *MPAA*, 309 F.3d at 801.

¹⁵⁵ *Amer. Library*, 406 F.3d at 698-99 (emphasis added) (quoting *Chevron*, 467 U.S. at 843-44)).

¹⁵⁶ *Alliance for Community Media v. FCC*, 529 F.3d 763, 788 (6th Cir. 2008) (“A review of the legislative history as well the language of the provision at issue is the chief method by which we approach the second step of *Chevron*.”).

¹⁵⁷ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708 (1979) (refusing to defer to FCC judgment regarding scope of its authority).

Deference does not mean acquiescence...¹⁵⁸ Thus, under either step of the *Chevron* analysis, an FCC finding of authority to regulate local rights-of-way would not be entitled to deference.¹⁵⁹

Also contrary to the NOI's suggestion,¹⁶⁰ even if the Commission incorrectly determines that the congressional intent underlying §253(d) is ambiguous, judicial precedent does, in fact, bind any agency interpretation of that provision. As the Supreme Court held in *Brand X*, upon which the FCC relies, "judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."¹⁶¹ Here, because courts have concluded that Congress' clear intent was to remove FCC authority over local management of the public rights-of-way,¹⁶² the

¹⁵⁸ *Presley v. Etowah County Commn.*, 502 U.S. 491, 508 (1992); see *NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.").

¹⁵⁹ See *Aid Ass'n*, 321 F.3d at 1174 ("An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority. It does not matter whether the unlawful action arises because the disputed regulation defies the plain language of a statute or because the agency's construction is utterly unreasonable...")

¹⁶⁰ See NOI at ¶ 58.

¹⁶¹ *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005); see *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we must judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."); *Neal v. U.S.*, 516 U.S. 284, 295 (1996) ("In these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation ... against that settled law.").

¹⁶² See, e.g., *Palm Beach*, 252 F.3d at 1191 ("[I]t is *clear* that subsection (d) ... establishes different forums based on the subject matter of the challenged statute or ordinance.") (emphasis added); *id.* at 1189 ("[T]he legislative history pertaining to subsection (d) *clearly indicates* Congress's intentions when it drafted subsection (d).") (emphasis added); *Sprint Telephony*, 311 F.Supp.2d at 908 ("Senator Gorton's remarks *undoubtedly indicate* that he envisioned challenges to section 253(c) taking place in district courts.") (emphasis added).

Commission is bound by judicial precedent, and therefore must forego any attempt to regulate local rights-of-way or adjudicate disputes involving right-of-way management.¹⁶³

Moreover, the Act’s general rulemaking provisions do not grant the FCC authority to regulate local rights-of-way because “the allowance of ‘wide latitude’ in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority.”¹⁶⁴ For instance, §201(b) permits the Commission to regulate only if “necessary” to carry out the Act’s provisions.¹⁶⁵

With respect to public rights-of-way, Congress intended for courts, not the FCC, to enforce the restrictions imposed by §253(c). Accordingly, federal regulation is not “necessary” because courts possess the requisite jurisdiction to adjudicate disputes involving local rights-of-way.

The Commission relies upon *Alliance for Community Media* for the proposition that it possesses authority to adopt rules pursuant to §201(b) in the absence of a specific delegation of authority.¹⁶⁶ But this reliance is misplaced. *Community Media* involved rulemaking authority pursuant to §621(a)(1), which is silent as to the Commission’s role in the statutory scheme. In finding FCC rulemaking authority, the court rejected an argument that “equat[ed] the omission of the agency from section 621(a)(1) with an absence of rulemaking authority.”¹⁶⁷ In contrast, §253 expressly references the Commission in subsection (d), which intentionally withholds FCC

¹⁶³ See *Chevron*, 467 U.S. at 843, n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981) (“[T]he courts are the final authorities on issues of statutory construction.”).

¹⁶⁴ *NARUC*, 533 F.2d 601, 617 (D.C. Cir. 1976); see *FEC*, 454 U.S. at 31-32 (“[Courts] must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.”).

¹⁶⁵ See 47 U.S.C. §201(b).

¹⁶⁶ See NOI at n.58 (citing *Community Media*, 529 F.3d at 772-76).

¹⁶⁷ *Community Media*, 529 F.2d at 773.

jurisdiction over local rights-of-way.¹⁶⁸ Moreover, the *Community Media* court noted that other “courts’ deference to the FCC’s interpretations was an acknowledgement that the agency possessed the underlying regulatory authority to promulgate the rules construing section 621.”¹⁶⁹ Significantly, as already detailed, the Commission has no general jurisdiction over local governments, and, in granting it limited jurisdiction with respect to certain §253 matters, Congress intentionally withheld authority with respect to local rights-of-way. Accordingly, “[t]he insurmountable hurdle facing the FCC ... is that the agency’s general jurisdictional grant does not encompass the regulation of” local rights-of-way.¹⁷⁰ Moreover, the Commission may not simply rely upon past judicial precedent – namely, *Community Media* – finding regulatory authority over one type of communications to support its authority over an unrelated aspect of communications policy. Rather, the Supreme Court has “made clear that the permissibility of each new exercise of ancillary authority must be evaluated on its own terms.”¹⁷¹

In addition, with respect to regulating in the public interest, “[i]t has been repeatedly recognized that Commission power over the communications industries is not unlimited, either as to the construction of the ‘public convenience, interest or necessity’ standard as applied to activities clearly within its jurisdiction, or as to the extension of its jurisdiction to activities affecting communications.”¹⁷² Section 303(r) therefore “simply cannot carry the weight of the

¹⁶⁸ See Texas Coalition Comments at 56 (“[S]ubsection 253(d) does not function as ‘the absence of a specific delegation of authority;’ rather, it signifies the specific denial of authority...”).

¹⁶⁹ *Community Media*, 529 F.2d at 773 (discussing *Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) (“We are not convinced that for some reason the FCC has well-established authority under the Act but lacks authority to interpret the challenged statutory provision.”) and *NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994)).

¹⁷⁰ *Amer. Library*, 406 F.3d at 700.

¹⁷¹ *Comcast v. FCC*, 600 F.3d 642, 650 (D.C. Cir. 2010) (adding that “nothing in *Midwest Video I* even hints that *Southwestern Cable*’s recognition of ancillary authority over one aspect of cable television meant that the Commission had plenary authority over all aspects of cable.”).

¹⁷² *NARUC*, 533 F.2d at 617-18.

Commission’s argument. The FCC cannot act in the ‘public interest’ if the agency does not otherwise have the authority to promulgate the regulations at issue.”¹⁷³

Further, “[t]he FCC’s suggestion that §4(i), without more, gives the agency authority to promulgate the disputed rules cannot withstand scrutiny.”¹⁷⁴ This is because “section 4(i) is not a stand-alone basis of authority and cannot be read in isolation.”¹⁷⁵ In fact, the FCC may exercise ancillary jurisdiction only if “(1) the Commission’s general jurisdictional grant ... covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹⁷⁶ The Commission cannot make either of these requisite showings. First, Congress never provided for FCC authority over local rights-of-way. Rather, it intentionally withheld this authority. As a result, any attempt to exercise ancillary authority would founder on the first condition¹⁷⁷ because the rules would be “ancillary to nothing.”¹⁷⁸ Second, even if the FCC believes its general jurisdiction includes authority over local rights-of-way, any regulation in this respect would not be reasonably ancillary to the effective performance of its statutory responsibilities. It is insufficient that any rules may generally promote §253’s statutory objectives because, “without reference to the provisions of the Act *directly governing* [local rights-of-way], the Commission’s jurisdiction ...

¹⁷³ *MPAA*, 309 F.3d at 806 (“The FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r).”) (emphasis in original); *see FDA*, 529 U.S. at 161 (“[A]n administrative agency’s power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.”); Texas Coalition Comments at 56.

¹⁷⁴ *MPAA*, 309 F.3d at 806; *see* Texas Coalition Comments at 57.

¹⁷⁵ *Implementation of Video Description of Video Programming*, Notice of Proposed Rulemaking, 14 FCC Rcd 19845 (1999) (Powell, dissenting).

¹⁷⁶ *Amer. Library*, 406 F.3d at 691-92.

¹⁷⁷ *See id.* at 692.

¹⁷⁸ *Id.*; *see Comcast*, 600 F.3d at 653 (noting that, “[i]n *Midwest Video I*, the Court again made clear that it was sustaining the challenged regulation ... only because of its connection to the Commission’s Title II authority over broadcasting.”)

would be unbounded.”¹⁷⁹ Although “afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority.”¹⁸⁰

The Commission also seeks comment on its authority to adopt rules pursuant to the policy goal set forth in §706. That section, however, “does not contain a direct mandate,”¹⁸¹ and thus “does not constitute an independent grant of authority.”¹⁸² Instead, §706 simply “directs the Commission to use the *authority granted in other provisions* ... to encourage the deployment of advanced services.”¹⁸³ As detailed above, no statutory provision provides for FCC authority over local rights-of-way. Although encouraging broadband deployment is a laudable goal, “[r]egardless of how serious the problem an administrative agency seeks to address, ... it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”¹⁸⁴ Because FCC authority is explicitly denied in §253(d), the goal of a nationwide communications network cannot take precedence.¹⁸⁵ Accordingly, any attempted reliance on section 706 would fail.¹⁸⁶

¹⁷⁹ *Comcast*, 600 F.3d at 654 (emphasis in original) (noting that the FCC had argued that it could exercise ancillary jurisdiction “so long as the rules promote statutory objectives”).

¹⁸⁰ *Midwest Video*, 440 U.S. at 706; *see Amer. Library*, 406 F.3d at 692 (“Although somewhat amorphous, ancillary jurisdiction is nonetheless constrained.”).

¹⁸¹ *Comcast*, 600 F.3d at 658.

¹⁸² *In re Deployment of Wireline Servs. Offering Advanced Telecomm’ns. Capability*, 13 FCC Rcd 24012, 24047 (1998).

¹⁸³ *Id.* at 24045 (emphasis added).

¹⁸⁴ *FDA*, 529 U.S. at 125; *see Amer. Library*, 406 F.3d at 691 (“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”).

¹⁸⁵ *See NARUC*, 533 F.2d at 613; *Comcast*, 600 F.3d at 644 (“[U]nder Supreme Court and D.C. Circuit case law statements of policy, by themselves, do not create ‘statutorily mandated responsibilities.’”); *id.* at 654 (“Policy statements are just that – statements of policy. They are not delegations of regulatory authority.”); *Norfolk S. R. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (“[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”).

¹⁸⁶ *See La. PSC*, 476 U.S. at 370 (when two sections conflict, courts are “disinclined to favor the provision declaring a general statutory purpose, as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose.”).

IV. THE NEGOTIATED RATES DO NOT ACTUALLY OR EFFECTIVELY PROHIBIT LEVEL 3 FROM PROVIDING SERVICE.

Even if the Commission incorrectly determines that it has jurisdiction to adjudicate right-of-way disputes, it still must dismiss the *Level 3 Petition* because the negotiated fees do not actually or effectively prohibit Level 3 from providing service. Accordingly, the fees do not violate §253(a), and therefore cannot be preempted.¹⁸⁷ Level 3 simply decided, without justification or remedial efforts, to default on contracts negotiated at arms-length after it provided and expanded services made possible by those contracts for nearly 10 years.¹⁸⁸ Although Level 3 alleges that “but for” NYSTA’s fees it could expand service, it continues to make this claim only in general terms and without reference to any financial or other documentary evidence.

A. Level 3 Has Failed to Meet Its Burden Under Section 253(a).

The party seeking preemption has the burden of proof to show that a legal requirement violates §253(a).¹⁸⁹ In order to meet this burden, it “must show actual or effective prohibition, rather than the mere possibility of prohibition.”¹⁹⁰ The Commission further requires that “[p]arties seeking preemption ... supply [] *credible and probative evidence* that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) or (c).”¹⁹¹ The FCC “will exercise [its] authority only upon such fully developed

¹⁸⁷ See *Santa Fe*, 380 F.3d at 1269 (“First it must be determined whether the state or local provision is prohibitive in effect. If the provision is not prohibitive, there is no preemption...”).

¹⁸⁸ Apparently, breach of contract after enjoying the benefits of valuable rights-of-way for a number of years is part of Level 3’s business plan. See *Level 3/St. Louis*, 477 F.3d 528.

¹⁸⁹ See, e.g., *id.* at 532; *Minnesota*, 14 FCC Rcd at 21704, fn. 26; *American Comm’n Servs., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 21579, ¶ 17 (1999) (“ACS”) (“We emphasize that the burden of building a record sufficient to warrant preemption under section 253 rests principally on the party petitioning the Commission for such relief.”).

¹⁹⁰ *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008); see *Level 3/St. Louis*, 477 F.3d at 532-33; *Guayanilla*, 450 F.3d at 16.

¹⁹¹ *TCI Cablevision*, 12 FCC Rcd at 21440 (emphasis added); see *ACS*, 14 FCC Rcd 21579, ¶ 17.

factual records.”¹⁹² Level 3’s claims of markets it may otherwise serve and services it could conceivably provide but for the negotiated fees never rise above the level of mere speculation.¹⁹³

As it has in the past, Level 3 continues to broadly argue, without any factual support, that the rates Williams negotiated with NYSTA “prevent Level 3 from providing telecommunications service – including middle-mile transport – to communities in New York State.”¹⁹⁴ It contends that, “[a]ll else equal, Level 3 would like to introduce services to smaller cities and towns along the Thruway...”¹⁹⁵ Level 3 then correctly notes that “all else is not equal” with respect to providing service to unserved and underserved communities, but it incorrectly and without any factual support blames NYSTA for its failure to serve these communities.¹⁹⁶ In reality, the only inequalities with respect to small communities and rural areas are “the geographic, demographic, and geological obstacles that cause the private industry to hesitate before investing in broadband services.”¹⁹⁷ As the National Broadband Map demonstrates, “unserved and underserved areas are those areas located outside of areas deemed by private industry to be cost-effective.”¹⁹⁸ Clearly, “the real issue affecting broadband deployment is the economics of constructing to and serving low population density areas,” not local regulation.¹⁹⁹ In fact, “[a]ll of the evidence

¹⁹² *TCI Cablevision*, 12 FCC Rcd at 21440.

¹⁹³ *See Aventure Comm’n Technology, L.L.C. v. Iowa Utilities Bd.*, 734 F.Supp.2d 636, 660 (N.D.Iowa 2010) (“Aventure’s entire argument that the regulations impose illegal barriers to competition within the meaning of §253(a) depends upon hypothetical, speculative, or possible harms, not a showing of ‘actual or effective prohibition’ ...”).

¹⁹⁴ Level 3 Comments at 2.

¹⁹⁵ *Id.* at 15.

¹⁹⁶ *Id.* at 15-16.

¹⁹⁷ League of Oregon Cities Comments at 4.

¹⁹⁸ *Id.*; *see City of Renton, Washington Comments* at 8 (“The national broadband studies all arrive at similar conclusions; namely, that lagging broadband deployment is ‘one that predominantly exists outside of urban areas.’”).

¹⁹⁹ *Renton* at 4; *see Select Minnesota* at 14 (“[D]eployment is not slowed by ROW regulations, but rather by providers themselves due to...internal policies that will only authorize construction in densely populated areas where the provider can quickly obtain a return on investment.”).

shows that where there are high density population centers, there is nearly 100% broadband deployment and availability, regardless of local government regulations.”²⁰⁰

The reason for this is clear: “a business case for construction of broadband facilities to these typically remote rural areas cannot be made.”²⁰¹ And Level 3 admits as much, noting that its corporate priorities are only to “increas[e] the geographic reach of its existing fiber-optic network by expanding where it *makes economic and business sense to do so*.”²⁰² Therefore, it is Level 3’s desire to maximize profits, not the fees it must pay NYSTA and other custodians of local rights-of-way, that “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.”²⁰³

²⁰⁰ Renton at 6; *see* NLC at 10 (“Economic analysis confirms that there is no relationship between local right-of-way charges and broadband deployment...”); Local Government Lawyers Roundtable Comments at 2 (“LGLR”) (“National Broadband Map ... shows that there is no correlation between rights of way regulation and broadband deployment.”); City of Portland, Or. Comments at 2; American Public Works Association Comments at 2 (“APWA”); Comments of Montgomery County, Md. Comments at i (“Montgomery”); SCAN Comments at 3.

²⁰¹ Renton at 6; *see id.* at 7 (quoting service providers who admitted that “broadband deployment is based on economic analyses that evaluate return on investment” and that the “obstacles to deployment may include high capital and operating costs compared to likely revenue.”); *id.* (“[I]n many rural areas there is simply not sufficient demand (*i.e.*, revenue potential) for the service to justify the level of private investment needed...”); NLC at 15 (“Firms allocate capital investments that generate the highest returns.”); San Antonio, Eugene, and Kansas League at 8 (“The primary impediment to broadband deployment is instead on the expected revenue side of broadband providers’ investment decision equation: low potential subscriber density in rural areas means low anticipated revenue return per dollar of investment there.”).

²⁰² Level 3 Comments at 17 (emphasis added). Level 3 further admits that “[t]he cost of deploying middle-mile facilities poses a substantial challenge to network operators even absent any right-of-way access fees...” *Id.* In touting the breadth of its services, NextG Networks fails to even mention rural communities. *See* Comments of NextG Networks, Inc. at 42 (“NextG offers its services across the country and in localities of all sizes, from massive metropolitan areas such as New York City to suburban communities with much less dense populations.”).

²⁰³ Level 3 Comments at 16; *see* Springfield, Oregon Comments at 8 (“As every report on implementation of the National Broadband Plan demonstrates, deployment of broadband is much more intensive in urban and suburban areas, where the cost of permitting is higher, and the complexity of the permitting process is greater. Where there are fewer constraints, in rural areas, the rate of deployment is lower. It isn’t rocket science – there is more money to be made in urban areas, and that is where the industry efforts are concentrated.”); City of Arlington, Texas at 4 (“[T]he lack of broadband deployment is not in urban America where such regulations exist

This conclusion comports with the Commission’s finding “that a provider’s own business strategies – and its efforts to protect revenue streams – may hinder broadband investment.”²⁰⁴

In addition, although Level 3 argues that “[e]very dollar of expense ... reduces the capital budget available for network expansion,”²⁰⁵ it fails to provide details, let alone factual support, for this claim. On the contrary, Level 3, as “[a] private company, would not voluntarily take savings from right-of-way fees (if any) and fund less profitable deployment.”²⁰⁶ In all likelihood, Level 3 would instead “either return money to shareholders, or focus more dollars in what would now be even more profitable areas.”²⁰⁷

Level 3 also contends that NYSTA has “priced every provider out the [sic] market for additional access points,”²⁰⁸ but the only support for this claim is its misinterpretation of a statement made in NYSTA’s Opposition to the *Level 3 Petition*. Although Level 3 claims that NYSTA has stated that no provider has requested access to the fiber optic network since Williams and NYSTA negotiated their agreements, the statement cited by Level 3 simply notes that no other system user has requested the same “unusual and unique” modifications sought by

but rather in rural America where it just simply is not as financially profitable for the industry...”); Texas Coalition at 26; San Antonio at 7-8; Eugene at 8; Kansas League at 8.

²⁰⁴ NLC at 9 (citing *In re Comcast Corp.*, 26 FCC Rcd 4238, 4267 (2011)); see Arlington at 3 (“The Commission has found that areas unserved by broadband ‘appear to have lower income levels than the U.S. as a whole’ and ‘appear to be more rural than the U.S. as a whole.’”)

²⁰⁵ Level 3 Comments at 17.

²⁰⁶ NLC at 15; see Greater Metro Telecommunications Consortium, et al. at 42 (“[D]ecisions where to build are made wherever the company believes it can generate the best return...”).

²⁰⁷ NLC at 15; see San Antonio at 8, Eugene at 8-9, and Kansas League at 8-9 (“[W]here broadband is already ubiquitously and competitively deployed, any FCC preemption, or limitation, of local ROW or zoning requirements would yield only a windfall to broadband providers and their shareholders, at the expense of local communities and their residents, with no increase in broadband deployment.”); Arlington at 3 (“[B]roadband providers continue to be adverse to construction of their broadband system in non-lucrative areas by generally excluding construction in lower income areas or rural areas altogether as evidenced by Commission data.”).

²⁰⁸ Level 3 Comments at 16.

Williams.²⁰⁹ In reality, NYSTA subsequently received nine requests to negotiate additional access points, with each of these users paying the identical fee negotiated by Williams.

Notably, Level 3 has, in fact, *expanded* service along the Thruway in recent years. For instance, in June 2009, it began providing service to Buffalo, Syracuse, and Rome/Utica.²¹⁰ Level 3 also expanded fiber optic capacity along the Thruway from its acquisitions of Broadwing Communications and Genuity Inc.,²¹¹ and it recently asked Adesta for an additional access point to an existing regeneration facility.²¹² Such actions clearly demonstrate a lack of actual or effective prohibition on Level 3's provision of telecommunications services along the Thruway.

Level 3 likely failed to offer any proof that the negotiated rates effectively prohibit services because the facts do not support this claim. For the year leading up to Level 3 filing its Petition, the total amount owed for its expanded access to NYSTA's 550-mile fiber optic network passing areas of New York State with a population over 7,000,000 was \$706,468.²¹³ In comparison, the revenue Level 3 earned that year solely from its communications services was \$3.762 billion.²¹⁴ In other words, Level 3's substantial use of one of the most valuable rights-of-way in the nation represents less than 0.02% of the revenue derived from its communications services.²¹⁵ The revenue and profits Level 3 realizes as a result of NYSTA's fiber optic network – a factor highly-relevant to an effective prohibition determination – likely also would counter its prohibition claims, but Level 3 has failed to provide these figures, which are not publicly

²⁰⁹ See *NYSTA Opposition*, Ex. 2, ¶ 7.

²¹⁰ See *id.* at Ex. 9. This expansion was part of a mid-market initiative targeting only five areas of the country. Presumably, service would not have been expanded if it would be unprofitable.

²¹¹ See *Level 3 Petition*, Ex. 3.

²¹² See *NYSTA Opposition*, Ex. 4.

²¹³ See *Level 3 Petition* at 26.

²¹⁴ See Level 3 Communications Inc., Annual Report, Form 10-K for 12/31/10, File 0-15658, p. 75 (filed Feb. 25, 2011) (“*Level 3 10-K*”) (available at www.secinfo.com/dVut2.q1cd.htm).

²¹⁵ See *Guayanilla*, 450 F.3d at 23 (“[T]he burdens of the ordinance on the telecommunications providers ... is the focus of the §253(a) analysis.”).

available. Nevertheless, Level 3's overall revenues clearly show that it has the resources to implement its plans for expansion of service in New York State. Its arguments therefore have nothing to do with effective prohibition of service, but rather degrees of corporate profitability.

Level 3's annual reports provide further evidence that the negotiated fees do not effectively prohibit service. In its most recent annual report to the Securities and Exchange Commission (subject to the penalty of perjury), Level 3 does not even mention the ongoing litigation with NYSTA. As a result, that proceeding must be one of "many other legal proceedings" that Level 3 believes "will not materially affect the Company's financial condition or future results of operations..."²¹⁶ Looking beyond Level 3's unsubstantiated claims to the actual facts relevant to an effective prohibition determination, it becomes abundantly clear that the negotiated fees could not possibly have the effect of prohibiting its ability to provide telecommunications services.

B. Level 3's Novel Reinvention of §253(a) is Inappropriate and Unnecessary in Light of the Well-Established Interpretation Developed Through Precedent.

Under the guise of developing a test to demonstrate the "practical effect" of a particular legal requirement, Level 3 proposes that a particular legal requirement no longer be evaluated on its own merits in its specific factual setting. Rather, Level 3 asks the Commission to ignore the actual effects of the legal requirement at issue and instead estimate the requirement's hypothetical effect "if applied more broadly by a significant percentage of state and local governments."²¹⁷ But this proposal is contrary to the plain language and intent of section 253(a), as well as years of judicial and FCC precedent, and would not reflect any "practical effects" of a legal requirement because it rests entirely on the fiction that different rights-of-way are identical in value. In effect, Level 3's "clarified standard" would dramatically lessen the proper, and

²¹⁶ *Level 3 10-K* at 56.

²¹⁷ *Level 3 Comments* at 7.

universally-accepted, burden imposed upon §253 petitioners. Notably, Level 3 first proposed this standard in March 2010,²¹⁸ five months after NYSTA demonstrated in its Opposition that Level 3 had failed to prove an effective prohibition of services, and approximately three years after the Eighth Circuit rejected Level 3’s §253 preemption claim because of its failure to meet the requisite burden of proof.²¹⁹ The Commission therefore should reject Level 3’s self-serving efforts to shift or reduce the burden of proof imposed upon §253 petitioners.

The very nature of §253(a) confines the Commission and courts to considering only the prohibitory effects of a particular legal requirement, rather than entertaining hypothetical scenarios. Shifting the burden of proof as Level 3 proposes is particularly inappropriate because it contradicts the basic premise that preemption statutes must be read narrowly.²²⁰ Petitioners cannot meet their burdens arguing that requirements “might, or may at some point in the future,” have the effect of prohibiting service.²²¹ In other words, they “must show actual or effective prohibition rather than the mere possibility of prohibition.”²²² Accordingly, a mere “showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.”²²³ The hypothetical potential for a “significant percentage” of other jurisdictions to impose identical requirements in no way satisfies this burden. Moreover, Level 3’s proposal to

²¹⁸ See Letter from Wiltshire & Grannis LLP, Counsel for Level 3, to Marlene H. Dortch, FCC, WC Docket No. 09-153 (Mar. 9, 2010).

²¹⁹ See *Level 3/St. Louis*, 477 F.3d at 534 (finding “insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations.”).

²²⁰ See *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Altria Group v. Good*, 129 S. Ct. 538, 543 (2008).

²²¹ *Level 3/St. Louis*, 477 F.3d at 533.

²²² *Id.*

²²³ *Sprint Telephony*, 543 F.3d at 579 (emphasis in original).

expand the analysis to presumptions about other jurisdictions directly contradicts the *California Payphone* analysis, which focuses on “the relevant service market and geographic market.”²²⁴

In support of its proposed departure from the *California Payphone* standard, Level 3 claims that courts have applied that standard in divergent ways, which, according to Level 3, demonstrates the need for further clarification.²²⁵ However, as Level 3 recognizes, the Circuit Courts of Appeal have, in recent years, gravitated towards uniformly adopting the *California Payphone* analysis of what constitutes an effective prohibition.²²⁶ This uniform interpretation demonstrates that the *California Payphone* standard requires no further elaboration, making Level 3’s proposal unnecessary in addition to self-serving and contrary to law and precedent.

Level 3 then attempts to support its proposed standard by citing to an amicus brief filed by the Solicitor General on behalf of the FCC²²⁷ which explained that “the Commission has looked to the ‘practical effect’ of the requirement on the entity.”²²⁸ Although the Solicitor General did not expressly define the phrase “practical effect,” the commonly-accepted definition and every other assertion made by the Solicitor General directly contradict any claim that the amicus brief supports Level 3’s proposed standard. The *Merriam-Webster Dictionary* defines

²²⁴ *California Payphone*, 12 FCC Rcd at 14204 (1997); *see id.* at 14214 (Statement of Commr. Ness) (“Those who seek preemptive action by this Commission should be prepared to demonstrate, with particularity, precisely how the municipal or state action forecloses them or others from competing ...”).

²²⁵ *See* Level 3 Comments at 6.

²²⁶ *See id.* at 6, n.8 (quoting Brief of the U.S. as *Amicus Curiae* at 9, *Level 3 Commc’ns, LLC v. City of St. Louis*, Nos. 08-626 and 08-279 (S. Ct. May 2009) (“*Level 3 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.”); *see also* *TCG N.Y.*, 305 F.3d at 76; *Santa Fe*, 380 F.3d at 1270; *Guayanilla*, 450 F.3d at 18; *Level 3/St. Louis*, 477 F.3d at 533; *Sprint Telephony*, 543 F.3d at 577.

²²⁷ *See* Level 3 Comments at 6-7 (citing *Level 3 Amicus Brief* at 8, 11).

²²⁸ *Level 3 Amicus Brief* at 11.

“practical” as “of, relating to, or manifested in practice or action: *not theoretical* or ideal.”²²⁹

Moreover, the Solicitor General’s first use of “practical effects” cited by Level 3 refers to the type of evidence that a §253 plaintiff must present with respect to “the requirement *at issue*.”²³⁰

The Solicitor General made this reference to explain why the Eighth and Ninth Circuits “correctly held that a plaintiff seeking preemption under Section 253 *cannot meet its burden* simply by alleging that, under circumstances that might exist at some indeterminate future time, a legal requirement ‘*may affect*’ its ability to provide a telecommunications service.”²³¹

Common sense dictates that a plaintiff cannot “present evidence of the practical effects of the requirement at issue” by hypothesizing about effects that could arise if “a significant percentage of state and local governments” imposed an identical legal requirement.

The Solicitor General’s other use of the phrase “practical effects” cited by Level 3 is equally unavailing. In the preceding paragraph, the Solicitor General explained that “the word ‘may’ is properly read in [§253(a)] not to refer to the possible or conceivable effects of a regulation,” and added that “[n]othing in the text of Section 253(a) results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services.”²³² Moreover, in noting that the FCC has looked to the “practical effects” of legal requirements, the Solicitor General quoted the decisions in *California Payphone* (to violate Section 253(a), the city’s contracting conduct “would have to actually prohibit or effectively prohibit the ability of a payphone service provider”) and *Pittencrieff Communications* (declining to preempt where “there is no evidence on this record that these requirements actually have [the]

²²⁹ See www.merriam-webster.com/dictionary/practical (emphasis added).

²³⁰ *Level 3 Amicus Brief* at 8. (emphasis added).

²³¹ *Id.* (emphasis added).

²³² *Id.* at 11 (internal quotations and citations omitted).

effect” of prohibiting an entity from providing service).²³³ The Solicitor General then immediately stated that “[t]he mere possibility that a state or local requirement might prevent a telecommunications carrier from providing service is not sufficient to violate Section 253(a).”²³⁴

Level 3 also claims that the First Circuit, in *Guayanilla*, already employed the proposed standard.²³⁵ But Level 3 reads far too much into that single decision, which the Commission has described as a “record-specific determination.”²³⁶ In *Guayanilla*, the community was so small that information could not be developed that would show the specific impact of the fee on the company’s ability to provide services. The court concluded that the best proxy was to consider the effect of the fee if adopted across all of Puerto Rico, considering that the operations in Guayanilla were likely to be less profitable and the impact of the fee thus more significant in Guayanilla than elsewhere. The court effectively concluded that if the fee would be prohibitory if charged for access to more valuable property in Puerto Rico, it would also be prohibitory if charged in Guayanilla. The court did not say proxy information could be used where specific data were available, and it certainly did not suggest that one can set the value of a particular right-of-way by asking whether specific fees would be excessive if charged for access to rights-of-way in far less-valuable locations. *Guayanilla* does not provide any type of generic frame of reference for demonstrating the “practical effect” of a requirement, but instead takes an approach very much confined to the facts that were before the court.²³⁷

Significantly, a federal court has found an assumption identical to Level 3’s “significant percentage” of other jurisdictions construct to be “of little value.” In *Qwest Corp. v. Elephant*

²³³ *Id.* at 11, n.1.

²³⁴ *Id.* at 12.

²³⁵ See Level 3 Comments at 7 (citing *Guayanilla*, 450 F.3d 9).

²³⁶ *Level 3 Amicus Brief* at 16, n.3.

²³⁷ In fact, a federal district court recently found that the First Circuit, in *Guayanilla*, “distorted” the “most precise meaning of section 253(a).” *Aventure*, 734 F.Supp.2d at 660.

Butte Irrigation District,²³⁸ Qwest attempted to demonstrate that a legal requirement created an effective prohibition by noting its revenue reduction if every municipality within the state adopted fees equivalent to those being challenged. The court found that argument to be “of little value because it contains at least two glaring assumptions: (1) that every single ... municipality would choose the 2007 EBID fee schedule over a franchise fee, and (2) that every single municipality would adopt fees equivalent to EBID’s literally overnight.”²³⁹ Similarly, in *TCI Cablevision*, the FCC refused to “issue what would be a purely advisory opinion” after the petitioner acknowledged that it had “no present intention” to provide service in the city whose legal requirements it sought to preempt.²⁴⁰ These decisions aptly demonstrate that Level 3’s approach is untenable and unsupported by the *Guayanilla* decision, which was fact-specific.²⁴¹

Not surprisingly, Level 3 again ignores its own unsuccessful attempt to preempt rates set by the City of St. Louis. In response to interrogatories in that case, Level 3 admitted that it could not “state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way.”²⁴² As a result, the Eighth Circuit concluded that Level 3 had “not carried its burden of proof” because there was “insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations.”²⁴³ The court noted that “no reading [of §253(a)] results in a preemption of regulations which might, or may at some point in

²³⁸ 616 F. Supp. 2d 1110 (D.N.M. 2008).

²³⁹ *Id.* at 1125.

²⁴⁰ *TCI Cablevision*, 12 FCC Rcd at 21439 (“On the basis of TCI’s representations, the record does not demonstrate that the Troy Telecommunications Ordinance has had the impermissible effect of prohibiting TCI’s ability to provide telecommunications service in the City of Troy.”)

²⁴¹ *See, Level 3 Amicus Brief* at 16, n.3.

²⁴² *Level 3/St. Louis*, 477 F.3d at 533.

²⁴³ *Id.* at 534.

the future, actually or effectively prohibit services...”²⁴⁴ It therefore held that a plaintiff “must show an *existing material interference* with the ability to compete in a fair and balanced market” rather than a “mere possibility of prohibition.”²⁴⁵ Through its proposed standard, Level 3 attempts to avoid this holding by relying on speculation as to fees other jurisdictions could conceivably impose in the future that may prohibit services Level 3 may attempt to provide.

Despite the fact that Level 3’s proposal would force courts to hypothesize as to the practical effects of a legal requirement, Level 3 still contends that the standard would have several “objective” benefits.²⁴⁶ But Level 3 fails to explain how a standard focused upon hypothetical effects could conceivably increase the objectivity of a §253(a) determination. The *Merriam-Webster Dictionary* defines “objective” to mean “expressing or *dealing with facts* or conditions *as perceived without distortion* by personal feelings, prejudices, or interpretations.”²⁴⁷ But under Level 3’s proposal, the FCC and courts would not deal with facts. Rather, they would be forced to consider mere possibilities as to how other jurisdictions may act in the future and how these speculative actions could conceivably effect various unknown service providers.²⁴⁸

Level 3 also contends that its proposal “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.”²⁴⁹ But Level 3 ignores the fact that all rights-of-way are not of equal value, or provide service providers with the same level of benefits,²⁵⁰ so the compensation

²⁴⁴ *Id.* at 533.

²⁴⁵ *Id.* (emphasis added).

²⁴⁶ *Id.*

²⁴⁷ See www.merriam-webster.com/dictionary/objective (emphasis added).

²⁴⁸ See *City of Portland v. Electric Lightwave, Inc.*, 452 F.Supp.2d 1049, 1062, n.7 (D.Ore. 2005) (“The court is unable ... to find that the uniform 5% fee charged by the City must be preempted because it theoretically may prohibit some unidentified company from entering the telecommunications market in Portland. This is simply not what the FTA requires.”).

²⁴⁹ Level 3 Comments at 8.

²⁵⁰ See San Antonio at 4; Eugene at 3; Kansas League at 4.

required for the use of different rights-of-way need not be identical in order for each to be “reasonable,” and therefore permissible under §253(c).²⁵¹ The densely populated areas through which the Thruway runs are highly, perhaps uniquely, valuable. Level 3 alleges that a “contrary approach would create a race for states and 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.”²⁵² Apparently, Level 3 mistakenly believes that, even without its standard, effective prohibition determinations are based on an entity’s ability to provide service in any locality, rather than the particular locality whose fees are being challenged. This belief directly contradicts *California Payphone*’s focus on “the relevant service market and geographic market,”²⁵³ which has led the Commission and courts to analyze the specific fees or other requirements imposed by a particular local government, each of which must individually satisfy the restrictions imposed upon it by §253.

Finally, Level 3 argues that the proposed standard would account “for the risk that a rent regime adopted by one governmental agency can and does influence the charges imposed by other governmental agencies.”²⁵⁴ Again, Level 3 forgets that every jurisdiction must separately comply with §253, regardless of what requirements other jurisdictions have imposed. Level 3 attempts to support this alleged benefit by noting that it “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*.”²⁵⁵

However, even if this unsupported contention is true, it should come as no surprise because

²⁵¹ See *infra*, Section V.C.; *Western Union Tel.*, 148 U.S. at 104 (“[A]s applied in certain cases, a like charge for so much appropriation of the streets may be reasonable. If, within a few blocks of Wall Street, ...it would seem as though no court could declare that five dollars a pole was an excessive ... while, on the other hand, a charge for a like number of poles in a small village, where space is abundant and land of little value, would be manifestly unreasonable...”).

²⁵² Level 3 Comments at 8.

²⁵³ *California Payphone*, 12 FCC Rcd at 14204 (1997).

²⁵⁴ Level 3 Comments at 8.

²⁵⁵ *Id.* at 9 (emphasis added).

property values, and thus the market value of rights-of-way, in one locality typically do not differ significantly from those of an immediately adjacent area. Indeed, it is extremely common to compare like-to-like in making valuation judgments.

V. BECAUSE THE NEGOTIATED RATES ARE “FAIR AND REASONABLE” AND “COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY,” THEY SATISFY SECTION 253(C) AND CANNOT BE PREEMPTED.

Section 253(c) acts as “a safe harbor that protects the authority of state and local governments to manage public rights-of-way...”²⁵⁶ Accordingly, even assuming the Commission has jurisdiction over the dispute between Level 3 and NYSTA,²⁵⁷ and even assuming it finds that the negotiated rates effectively prohibit Level 3 from providing service, the Commission must deny the *Level 3 Petition* because the fees owed by Level 3 are “fair and reasonable” and were imposed on a “competitively neutral and nondiscriminatory basis.”²⁵⁸

A. Right-of-Way “Compensation” Cannot Be Limited to Costs.

“Neither the terms of Section 253(c), its legislative history, or relevant case law require that the fee charged ... be restricted by the municipality’s cost of maintaining the rights of way.”²⁵⁹ While §253(c) expressly permits local governments to require “compensation” for the use of public rights-of-way, the term “costs” appears nowhere in that provision. “[T]he fact that Congress used the word ‘compensation’ in lieu of the word ‘costs’ ... is strong evidence against construing the term to limit municipalities to strictly their costs related to telecommunications

²⁵⁶ *Qwest Comm’ns Corp. v. Maryland-Nat’l Capital Park & Planning Commn*, 598 F.Supp.2d 704, 706-07 (D.Md. 2009).

²⁵⁷ *But see* 141 Cong. Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Barton) (“The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way.”).

²⁵⁸ *See* 47 U.S.C. §253(c); *Electric Lightwave*, 452 F.Supp.2d at 1070 (“It is well-established that section 253(c) is a ‘safe harbor’ that provides ‘even if’ relief for the cities... [S]ection 253 preempts rights of way fees only if they would effectively prohibit provision of a telecommunications service and, even then, such fees are not preempted by section 253(c) if they qualify as fair and reasonable compensation for use of the rights-of-way.”).

²⁵⁹ *Electric Lightwave*, 452 F.Supp.2d at 1074-75.

providers use of their right-of-ways.”²⁶⁰ Further, “the common and ordinary meaning of ‘fair and reasonable compensation’ does not connote mere reimbursement of costs.”²⁶¹ For instance, *Black’s Law Dictionary* “defines the terms ‘just compensation’ and ‘adequate compensation’ for use of property as ‘the property’s *fair market value*.’”²⁶²

Moreover, “[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of its statutes, but omits it in another.” Relevant here, in §224, Congress referred to the “costs of providing pole attachments” rather than any level of compensation in defining “just and reasonable” rates.²⁶³ In contrast, in §253(c), “there is no apparent limitation of the kind the Pole Attachment Act uses in connection with ‘just and reasonable’ . . .”²⁶⁴ If Congress had sought to limit right-of-way fees to costs, it would have defined “fair and reasonable compensation” in the same manner it defined “a rate [that] is just and reasonable” in §224. However, it did not do so.²⁶⁵

In addition, “the legislative history supports the conclusion that there is a legitimate distinction between the terms cost and compensation . . .”²⁶⁶ The Barton-Stupak amendment, which became §253(c), was designed “to protect the authority of local governments to control

²⁶⁰ *TCG Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 789 (E.D.Mich. 1998), *aff’d*, 206 F.3d 618 (6th Cir. 2000); *see Electric Lightwave*, 452 F.Supp.2d at 1072 (“Congress chose the term compensation, rather than cost, to further its intent that local municipalities be permitted to recoup revenue in exchange for a telecommunications provider’s use of the public streets.”); NLC at 57-59.

²⁶¹ San Antonio at 15; *see TCG N.Y.*, 305 F.3d at 77 (“As ordinarily understood, ‘compensation’ often extends to more than costs.”); Eugene at 13; Kansas League at 13.

²⁶² San Antonio at 16 (citing *Black’s Law Dictionary* at 277 (7th ed. 1999) (adding emphasis)); Eugene at 13-14; Kansas League at 13-14.

²⁶³ *See* 47 U.S.C. §224.

²⁶⁴ *TCG Detroit*, 16 F.Supp.2d at 789.

²⁶⁵ *Id.*; *see* San Antonio at 16-17; Eugene at 14-15; Kansas League at 14-15.

²⁶⁶ *Electric Lightwave*, 452 F.Supp.2d at 1072; *see* LGLR at 5.

public rights-of-way and to be fairly compensated for the use of public property.”²⁶⁷ When he introduced the amendment, Rep. Stupak noted that, “[i]n our free market society, the companies should have to pay a fair and reasonable rate to use public property.”²⁶⁸ This demonstrates that “the issue of costs versus compensation was considered and rejected by Congress.”²⁶⁹

Federal courts also have consistently concluded that non-cost based fees are not *per se* invalid under §253(c).²⁷⁰ In fact, “no federal court has limited a governmental entity to the strict recovery of costs.”²⁷¹ These holdings with respect to §253(c) also are in accord with decades of judicial precedent regarding private use of public lands. For instance, “the Supreme Court, in an opinion dealing with the placement of telegraph poles over a hundred years ago, recognized the general right of a city to seek compensation from a user of the city’s land/right-of-way.”²⁷²

Finally, many governmental entities are prohibited by law from restricting right-of-way fees to merely costs. For instance, recent amendments to New York State law require authorities such as NYSTA to offer property for private use at no less than fair market value.²⁷³ NYSTA

²⁶⁷ 141 Cong. Rec. H8460 (statement of Rep. Stupak); *see id.* (statement of Rep. Barton) (“It explicitly guarantees that cities and local governments have the right to not only control access within their city limits, but also to set the compensation level for the use of that right-of-way.”).

²⁶⁸ *Id.* (statement of Rep. Stupak).

²⁶⁹ *Electric Lightwave*, 452 F.Supp.2d at 1072; *see San Antonio* at 18-19; *Eugene* at 16-18; *Kansas League* at 16-18.

²⁷⁰ *See, e.g., Guayanilla*, 450 F.3d at 21-22 (“Among the courts that have reached the issue, we agree that most have not found ... non-cost based fees to be *per se* invalid under § 253(c)”) (citing precedent from the Second, Sixth, Ninth, and Tenth Circuits).

²⁷¹ *Elephant Butte*, 616 F.Supp.2d at 1119, n. 8.

²⁷² *TCG Detroit*, 16 F.Supp.2d at 789; *see Omnipoint Comm’ns, Inc. v. Port Auth. of N.Y. and N.J.*, 1999 WL 494120, at 6 (S.D.N.Y. Jul. 13, 1999) (“[T]he term ‘compensation’ has long been understood to allow local governments to charge rental fees for public property appropriated to private commercial uses.”); *LSGAC Recommendation No. 23* (“[S]tate and local governments have an obligation ... to charge fair and reasonable compensation for rights conveyed to privileged users of these public resources.”); *LSGAC Recommendation No. 1* (“Rights-of-way are real estate property rights of substantial economic value and interest to local communities. The public has a right to fair compensation for occupancy and use of its property.”).

²⁷³ NYS PAL §2897(3), (7) (proscribing less than fair market value except in very limited circumstances).

therefore is without legal authority to enter into leases with Level 3 or any other entity that prevent it from obtaining at least fair market value. As a result, any FCC effort to force reformation of the special contracts at or below cost is untenable and contrary to New York law.

B. The Negotiated Fees are “Fair and Reasonable.”

The fees negotiated by NYSTA and Williams are “fair and reasonable,” and thus satisfy the first requirement for application of §253(c)’s safe harbor provision. Courts consider a variety of factors in determining whether compensation is “fair and reasonable,” including: (1) the extent of the use contemplated; (2) the dealings between the parties; (3) the amount other providers are willing to pay; and (4) whether the compensation sought is “so excessive that it is likely to render doing business unprofitable.”²⁷⁴ An examination of any of these factors makes clear that the negotiated rates are “fair and reasonable” within the meaning of §253(c).

First, contrary to Level 3’s assertion,²⁷⁵ with respect to the “extent of use” of a right-of-way, that determination is not restricted to actual distances measured on a per-linear-foot basis. Rather, local governments may consider the “type”²⁷⁶ and “scale”²⁷⁷ of the use, as well as a particular provider’s “varying use of the right-of-ways,”²⁷⁸ in setting compensation levels. As Level 3 has repeatedly noted, the increased number of access points and regeneration facilities greatly increased Williams own valuation of the Thruway network.²⁷⁹ In addition to this increase in the fair market value of NYSTA’s rights-of-way, Williams’ increased use was substantial. With ten new regeneration facilities, three combined regeneration/access point facilities, and four new access points, Williams expanded its access to the longitudinal right-of-way by well over 50

²⁷⁴ *TCG Detroit*, 16 F.Supp.2d at 790-91; see *Santa Fe*, 380 F.3d at 1272.

²⁷⁵ See Level 3 Comments at 13-14.

²⁷⁶ See *Electric Lightwave*, 452 F.Supp.2d at 1074.

²⁷⁷ See *TCG N.Y.*, 305 F.3d at 80.

²⁷⁸ See *TCG Detroit*, 16 F.Supp.2d at 792.

²⁷⁹ See *Level 3 Petition* at 5, 8, 9 and 20.

percent. In this respect, Williams was uniquely intensive in its use. No other system user, even those with the same number of fibers as Williams, required additional regeneration facilities, nor did any other user require such a large number of additional access points. NYSTA reasonably expected compensation for the significant and unique expansion sought by Williams.

Second, the prior dealings between the parties demonstrate that the negotiated compensation is fair and reasonable. When Williams negotiated the original user agreement with Adesta, there was no indication that it believed the established regeneration facilities and access points were in any way inadequate.²⁸⁰ Williams did not request to expand its use of NYSTA's rights-of-way until five months after signing the Adesta agreement. Moreover, through the negotiation process, during which Williams was represented by experienced counsel, it ended up with terms close to those it sought.²⁸¹ "Thus, the evidence indicates that far from originally objecting to such [an] agreement, [Williams] was actively negotiating the terms of the agreement which [Level 3] now objects to."²⁸²

Notably, Williams made timely payments for six years. Only after Level 3 assumed these agreements did anyone claim that the rates violated §253. "Therefore, to the extent that [Level 3] now contends that the terms of its previously negotiated agreement are not 'fair and reasonable compensation' for use of the right-of-ways, such a claim is belied by [Williams'] ... willingness to negotiate, and enter into, the agreement at issue. In fact, such evidence indicates quite the opposite, that the proposed agreement was reasonable, fair, and consistent."²⁸³

²⁸⁰ See *NYSTA Opposition*, Ex. 4.

²⁸¹ See *TCG Detroit*, 16 F.Supp.2d at 790 (noting that "[t]he last draft of that agreement, which the Plaintiff participated in negotiating, called for almost the exact same terms that TCG is objecting to now."); *U.S. v. Miller*, 317 U.S. 369, 374 (1943) (in the context of eminent domain, market value is "what a willing buyer would pay a willing seller.").

²⁸² *TCG Detroit*, 16 F.Supp.2d at 791.

²⁸³ *Id.*

Third, NYSTA entered into five agreements with other network users to obtain additional access points. Each agreement established an annual fee of \$400 per fiber with cost of living adjustments, which is identical to the fees charged Level 3. These entities' willingness to pay identical fees demonstrates that the compensation agreed to by Williams is fair and reasonable.²⁸⁴ Williams was the only system user seeking additional regeneration facilities specific to their fibers, and that remains the case. All other system users, including other network assets acquired by Level 3, rely on the regeneration facilities that were part of the initial fiber optic system. As a consequence, no identical comparison exists here with respect to others' willingness to pay. However, as detailed above, comparable uses and rates did exist, and NYSTA used this precedent in negotiating reasonable compensation for the additional regeneration facilities.

Fourth, Level 3 has failed to provide any evidence that the rates are so excessive as to render doing business unprofitable. Williams provided service and made payments for six years. Three other system users pay the same rents for additional access points, and yet continue to conduct their business.²⁸⁵ Subsequent actions of Level 3 also demonstrate that the rates are not so excessive as to render its business unprofitable. Level 3 has *expanded* service along the Thruway, *expanded* its network capacity through the acquisition of Broadwing Communications and Genuity Inc.'s assets, and recently requested an additional access point along the Thruway. Level 3 has failed to provide information about revenues realized from use of NYSTA's fiber optic network, or revenues denied because of the rates imposed. "Although it is clear that [Level 3] would like to have access to [NYSTA's] property without having to pay [NYSTA]

²⁸⁴ See *id.* at 790 (finding that similar agreements entered into by three other telecommunications providers "indicate[] that such conditions are neither unfair nor unreasonable."); *Electric Lightwave*, 452 F.Supp.2d at 1062 (finding no barrier to provision of services in part because "at least 13 other telecommunications companies are paying an identical 5% fee.").

²⁸⁵ See *TCG Detroit*, 16 F.Supp.2d at 790.

compensation, it is also clear that the simple fact that [Level 3] does not want to pay the amount set by [NYSTA] does not render that amount unreasonable or unfair...²⁸⁶

C. The Negotiated Fees are “Competitively Neutral and Nondiscriminatory.”

Although NYSTA imposes varying rates upon different telecommunications providers, these differences arise from the distinct, high-value and expanded use of the fiber network made by Level 3 and similarly-situated providers.²⁸⁷ In other words, NYSTA imposes identical rates for identical uses of its public rights-of-way. The fees for which Level 3 is contractually obligated to pay therefore are “competitively neutral and nondiscriminatory,” and thus satisfy the second requirement of §253(c)’s safe harbor provision.

Section 253(c) does not require absolute parity in setting compensation levels.²⁸⁸ Rather, a local government may establish different compensation levels so long as the distinctions are based on valid considerations.²⁸⁹ NYSTA was justified when it negotiated higher rates for Williams’ expanded and higher-value use of the network, and all similarly-situated users of the fiber network have agreed to the same rates.

NYSTA has consistently treated access to the fiber optic network burdening the longitudinal right-of-way as distinct from the rights-of-way covered by the fee schedule then in

²⁸⁶ *Id.*; see *Omnipoint Comm’ns*, 1999 WL 494120, at 6, fn. 10 (“Compensation is not rendered unfair or unreasonable simply because it does not fit [a] current business plan...”).

²⁸⁷ See 142 Cong.Rec S715 (daily ed. Feb. 1, 1996) (statement of Sen. Feinstein) (“[Section 253(c)] recognizes that State and local governments may apply different management and compensation requirements to different telecommunications providers to the extent that they make different use of the public rights-of-way.”).

²⁸⁸ See *Electric Lightwave*, 452 F.Supp.2d at 1075; *TCG N.Y.*, 305 F.3d at 80 (“The statute does not require precise parity of treatment.”); *AT&T Comm’ns. of the Southwest, Inc. v. City of Dallas*, 8 F.Supp.2d 582, 594 (N.D.Tex. 1998) (“Congress explicitly rejected the City’s argument that § 253(c) requires cities to impose identical fees on all telecommunications providers.”); *Minnesota*, 14 FCC Rcd at 21725 (“[I]t is not necessary for a state to treat all entities in the same way for a requirement to be competitively neutral.”).

²⁸⁹ See *N.J. Payphone*, 299 F.3d at 247.

effect.²⁹⁰ Under all circumstances involving users of the fiber optic network in the longitudinal right-of-way, the same rates have always applied to additional access points. But Level 3 continues to avoid any reference to the other network users who negotiated additional access points, each of which pays the same annual fee agreed to by Williams. Level 3 instead refers only to those providers leasing transverse or shorter longitudinal rights-of-way.²⁹¹ As a result, Level 3's contention that the rents imposed for its additional access points are discriminatory and not competitively neutral conflicts with the Commission's, the courts' and Congress's interpretations of §253(c), and therefore must be rejected.²⁹²

Further, Level 3's use of additional regeneration facilities and numerous additional access points is unique. This expanded use of longitudinal rights-of-way along a limited access highway is of significantly higher value than other types of rights-of-way one might find, such as in municipalities. As a consequence, Level 3 cannot justifiably convert its contractually-required rents for this unique, high-value use to a per-linear-foot rate and compare this rate to those contained in the fee schedule and imposed upon users of transverse or short longitudinal rights-of-way not connected to the fiber network. Similarly, it is inapposite to compare the rents

²⁹⁰ That fee schedule applied only to transverse and longitudinal rights-of-way that do not connect with the fiber network. These uses are easily distinguishable from substantial alterations to the network for a user's sole competitive advantage. In 2004, NYSTA's board adopted contractual negotiations as the mechanism for addressing unique, and thus unforeseeable, requests for alteration and expansion of the network, such as requested by Williams.

²⁹¹ If NYSTA had imposed the schedule's fees for Williams greatly expanded use, it likely would have violated §253(c)'s mandate to impose competitively neutral rates. *See Minnesota*, 14 FCC Rcd at 21725 (“[T]reating differently situated entities the same can contravene the requirement for competitive neutrality.”).

²⁹² *See, e.g., TCG Detroit*, 16 F.Supp.2d at 792 (“Nothing in the debate of the Stupak-Barton amendment, which became section 253(c), indicates that it was intended to force local authorities to charge exactly the same fees and rates, and, in fact, it explicitly rejects that proposition.”); 141 Cong. Rec. H8460 (statement of Rep. Stupak) (“Local governments must be able to distinguish between different telecommunications providers.”); *AVR, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 11064, 11072, n.48 (1999) (“[A] state legal requirement need not treat incumbent LECs and new entrants equally in every circumstance.”).

charged Level 3 with the “prevailing rates” it found by averaging all types of rights-of-way one might find throughout the country, including rights-of-way of far lower value.

Because Level 3 is the only network user to request additional regeneration facilities, and thus seek this significantly expanded use of the fiber network, the fact that these fees may be higher, when unreasonably converted to an irrelevant per-linear-foot rate, than users of transverse or short longitudinal rights-of-way is immaterial. Rather, the relevant fact, for purposes of §253(c), is that NYSTA will charge any party who seeks additional regeneration facilities a fee identical to that negotiated by Williams.²⁹³

VI. NYSTA HAS SUCCESSFULLY ADVANCED BROADBAND DEPLOYMENT WHILE ENSURING PROPER MANAGEMENT OF ITS RIGHTS-OF-WAY.

The Commission seeks certain qualitative information from right-of-way managers.²⁹⁴ NYSTA notes the importance of providing such information because of the assumptions upon which the Commission appears to base the NOI. For instance, the NOI begins with the assumption that broadband deployment will significantly expand “by improving government policies for access to rights of way and wireless facilities siting.”²⁹⁵ In other words, “[t]he FCC begins with an assumption that there is something wrong – that current right of way policies are somehow a major barrier to further deployment of broadband.”²⁹⁶ In doing so, the Commission ignores the primary driver and/or inhibitor of increased broadband deployment –

²⁹³ See *TCG Detroit*, 16 F.Supp.2d at 792 (“The legislative history clearly allows the City to account for the differences between providers and it is enough that the City imposes (*or plans to impose*) comparable burdens.”) (emphasis added).

²⁹⁴ See NOI at ¶ 22.

²⁹⁵ *Id.* at ¶ 1; see LGLR at 2 (“[T]he NOI make[s] clear the Commission assumes that right of way regulation ... is a significant impediment to the deployment of broadband ... and it begins its inquiry from this predetermined point.”).

²⁹⁶ Regional Fiber Consortium Comments at 3 (“RFC”); see LGLR at 1 (The NOI “suggests that the Commission has already reached the conclusion that changes in right of way policies will expand the reach, and reduce the cost of, broadband deployment.”).

telecommunications service providers.²⁹⁷ These companies strive to maximize profits, and refrain from deploying broadband facilities in low population density areas, where deployment would be less profitable.²⁹⁸

In contrast, NYSTA and other public right-of-way managers do not seek to maximize profits for shareholders.²⁹⁹ However, their fiduciary duties do require sound fiscal management.³⁰⁰ Right-of-way managers must receive adequate compensation to finance their operations and continue to provide vital public services.³⁰¹ Because NYSTA is a public corporation wholly financed by user fees, any restrictions on its authority to set reasonable, market-based rates would unjustifiably subsidize telecommunications providers, shifting costs to other right-of-way users, including the general public.³⁰² Moreover, New York State law generally requires NYSTA to receive at least fair market value for the disposal of its property.

In addition, right-of-way “matters are inherently fact-intensive and reflect unique local conditions and interests.”³⁰³ As a result, right-of-way management “has to be performed at the local level, where the knowledge of local infrastructure, right-of-way conditions, and special

²⁹⁷ See Springfield at 3 (“Notice of Inquiry appears to proceed from the assumption that there exist impediments to the deployment of advanced broadband services outside the control of the telecommunication providers.”); Renton at 5 (“The attention being spent by the Commission on local government regulations is misplaced.”); Select Minnesota at 2 (“The Commission’s operating premise in the NOI, that municipalities are standing in the way of broadband deployment and are serving as ‘barriers to entry,’ is unsupported and contradicts the facts…”).

²⁹⁸ As noted, the Commission itself has found “that a provider’s own business strategies – and its efforts to protect revenue streams – may hinder broadband investment.” NLC at 9 (citing *In re Comcast Corp.*, 26 FCC Rcd at 4267).

²⁹⁹ See San Antonio at 12; Eugene at 10; Kansas League at 10.

³⁰⁰ See Middletown at 5.

³⁰¹ See San Antonio at 12; Eugene at 10; Kansas League at 10.

³⁰² See Portland at 19; Philadelphia at 8; Montgomery at ii; San Antonio at 2; Eugene at 2; Kansas League at 2.

³⁰³ San Antonio at 20; see Eugene at 19; Kansas League at 19; APWA at 2; City of Alexandria, Va. Comments at 6; Henrico County, Va. Comments at 8-9; City and County of Denver, Co. Comments at 13; City of Ontario Comments at 11; City of Pasadena Comments at 10; Portland at 21; City of Philadelphia Comments at 7; Montgomery at 39.

knowledge is vested.”³⁰⁴ The Commission lacks expertise on local land use matters, so it “should not interfere with the careful balancing of community interests that these local policies represent.”³⁰⁵ The goal of increasing broadband deployment, no matter how important, cannot trump these local entities’ fiduciary duties.³⁰⁶

Finally, NYSTA notes that its right-of-way policies have been exceedingly successful, including with respect to helping New York State residents gain access to broadband access. For example, the percentage of New York State residents that have broadband access exceeds all but seven states, three of which are more densely populated than New York, which allows for greater broadband deployment to a larger number of residents at lower cost to providers.³⁰⁷ Moreover, in contrast to thirty-six states, every New York county has access to broadband service.³⁰⁸

VII. CONCLUSION.

The Commission has again been asked to use its processes to provide Level 3 with an escape clause from the consequences of its own voluntary business judgments. At issue are contractual obligations affirmatively assumed by Level 3. The underlying contracts were formed more than ten years ago, fully performed for six years, and negotiated in good faith through experienced counsel. Now, Level 3 seeks to preempt payment terms it finds objectionable, either leaving NYSTA with contracts lacking consideration, or asking the Commission to reform the

³⁰⁴ SCAN Comments at 5.

³⁰⁵ Montgomery at ii; *see* San Antonio at 20; Eugene at 19; Kansas League at 19; APWA at 3; Select Minnesota at 3.

³⁰⁶ *See* RFC at 3 (“The members of the RFC share a commitment to broadband deployment. But they also have many other commitments. Local rights-of-way ... are not merely locations for broadband facilities. The RFC members must protect these areas for multiple uses.”).

³⁰⁷ *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, Appendix A (2011).

³⁰⁸ *See id.* at Appendix B.

contracts by substituting Level 3's preferred pricing, a remedy well beyond its authority. To achieve a full and fair consideration of the many complex issues raised by the *Level 3 Petition*, and to have available all potential remedies, there is no alternative but to defer to the District Court. That result will best serve the public interest and prove the most efficient and effective means of resolving this long-standing dispute. The Commission therefore should dismiss the *Level 3 Petition*, and thereby allow for a final judicial resolution.

Respectfully submitted,
NEW YORK STATE THRUWAY AUTHORITY

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