

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF CENTURYLINK

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I. INTRODUCTION AND SUMMARY

This proceeding represents a key building block in the Commission's ongoing initiative to expand the reach and reduce the cost of broadband deployment for all consumers. Ensuring reasonable access to public rights of way is one of the most important steps the Commission can take to facilitate broadband deployment and adoption. As outlined in CenturyLink's initial comments, the Commission should take this step by exercising its authority under section 253¹ to codify the standard adopted in *California Payphone*² and clarify that charges for use of public rights of way are unreasonable under section 253(c) to the extent they exceed the costs incurred by the local government in managing and maintaining the rights of way.

CenturyLink has already provided numerous examples of local governments that have imposed excessive and discriminatory fees for access to public rights of way that have little or no relationship to the actual cost of maintaining their rights of way.³ As the Commission found,

¹ 47 U.S.C. § 253.

² *In re California Payphone Ass'n*, 12 FCC Rcd 14191 (1997).

³ CenturyLink Initial Comments at 7-11.

such right of way fees are a major cost driver in broadband deployments, potentially amounting to as much as 20 percent of the cost of broadband deployment.⁴ The level of these fees therefore can make or break the business case for deploying or upgrading broadband in a particular area.

Fortunately, the record reveals that many local governments have adopted right of way policies and fees that allow them to manage their rights of way and obtain compensation for that management, while providing competitively-neutral, cost-based access to the rights of way needed to deploy, upgrade and provide broadband services. That is not the case in all localities however. Some local governments openly acknowledge that they set their right of way fees well above the cost of managing and maintaining those rights of way, in order to fund government services as diverse as fire departments and libraries. While no one would dispute that these services are important, and sometimes critical, that does not mean that they should be funded through above-cost right of way fees – particularly when those fees can hinder broadband deployment, undermine broadband adoption and tilt the competitive landscape against those broadband providers who need access to public rights of way. The Commission should also not be held hostage by threats that by interpreting section 253 to prohibit above-cost right of way fees, as it should, the Commission will be responsible for budget cuts, employee layoffs or increased taxes.

These instances of governmental overreaching are not limited to municipal governments. In Washington state, a state park authority recently proposed a massive increase of the fees paid by CenturyLink in a right of way that had been conveyed to the state through a rails-to-trails program. At the federal level, the U.S. Forest Service has informed CenturyLink that it intends to increase dramatically the fees it charges the provider for access to rights of way along national

⁴ National Broadband Plan § 6.1.

forest roads. In both cases, these increases appear to have no relationship to increased cost of maintaining these rights of way.

The National League of Cities and its supporters raise numerous arguments in defense of local governments' purported entitlement to fund their operating budgets through above-cost right of way fees. However, none of these arguments justify policies that have such an inhibiting effect on broadband deployment and adoption. Despite these potential negative effects, there is no reason to believe that excessive right of way fees are constrained at the ballot box, as some cities suggest. Likewise, claims that implementing cost based fees are too complicated and expensive are belied by the fact that some cities already routinely tie their right of way fees to the cost of maintaining and administering their rights of way, and by the existence of a model rights of way ordinance for cost-based fees created by a consortium of Colorado municipalities.⁵

In addressing these issues, it is not necessary for the Commission to take radical action or to adopt detailed rules that micromanage local governments' oversight of public rights of way. Rather, the Commission can and should exercise its clear authority to adopt rules implementing section 253 in two simple but important respects.⁶

First, the Commission should codify the standard that it adopted in *California Payphone* that a right of way regulation is effectively prohibitive under section 253(a) if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and

⁵ http://www.gmtc.org/resources/row_ordinance.asp. While CenturyLink does not agree with certain aspects of this model ordinance, its existence demonstrates the relative ease with which local governments can establish cost-based right of way fees.

⁶ Nothing in the language or legislative history of section 253 suggests that the FCC lacks authority to reaffirm the *California Payphone* standard or interpret the statute to bar non-cost-based right of way fees. Indeed, Congress' focus was to prohibit unreasonable and discriminatory right of way fees, while allowing localities to recoup their costs related to the management and maintenance of rights of way. *See Verizon* at 34-37.

balanced legal and regulatory environment[.]”⁷ Adoption of this rule is necessary to provide further guidance to courts in light of contrary and problematic decisions in the Eighth and Ninth Circuits.

Second, the Commission should adopt a rule specifying that charges for use of public rights of way are unreasonable under section 253(c) to the extent they exceed the costs incurred by the local government in managing and maintaining the public right of way.

The Commission also should use its consultative powers to ensure that these same principles are being applied to rights of way controlled by other federal agencies. Taken together, these clarifications of section 253 will preserve local authority over rights of way while constraining excessive right of way fees and unreasonable right of way policies. Most importantly these policies will benefit consumers by increasing broadband investment in lower-density areas where broadband deployments or upgrades are not economically feasible today.

II. THE INITIAL COMMENTS HIGHLIGHT THE DRAMATIC RANGE OF RIGHT OF WAY FEES AND PRACTICES FOUND IN CITIES AND TOWNS ACROSS THE COUNTRY

The record reveals a wide range of right of way fees and practices. Many cities and municipalities appear to have right of way fees that are limited to recovering the cost of right of way management and maintenance. For example, Denver, Des Moines and Minneapolis all tie their right of way fees to the costs that the cities incur in managing and maintaining those rights of way.⁸ Des Moines states that “[t]he fees paid by the users of the right of way are used . . . to recoup the costs imposed upon the city attributable to such use. The City does not profit from its regulation of the Right of Way.”⁹ Denver charges a flat \$50 fee per permit application and

⁷ *In re California Payphone Ass’n*, 12 FCC Rcd at 14206 ¶ 31.

⁸ Denver at 11-12; Des Moines at 2; Minneapolis at 9.

⁹ Des Moines at 2.

imposes no recurring charges on broadband companies.¹⁰ Minneapolis' intent in setting fees is always to recover its fixed and variable costs.¹¹ In fact, nearly all of the 27 Minneapolis-St. Paul suburban municipalities have adopted ordinances consistent with Minnesota's model right of way management agreement.¹² Under the model agreement, permit fees and management fees must, among other things, be based on the actual costs incurred by the local government in managing the right of way and be imposed on a competitively neutral basis.¹³

However, other local governments openly acknowledge that their right of way fees are not tied to the costs they incur in administering and maintaining their ROWs, but rather are designed to raise revenue for the city's general operating funds.¹⁴ These jurisdictions use their monopoly control of their rights of way to extract large fees that are used to provide services that have nothing to do with managing and maintaining their rights of way.¹⁵ These excessive fees can take a variety of forms, but most often are tied to the total linear feet of right of way occupied by the provider or are set as a percentage of the provider's gross revenues. They may also be imposed as one-time permit fees.¹⁶

Instances of government overreaching are not limited to cities and municipalities, as illustrated by two recent situations encountered by CenturyLink. In Washington state, a state park authority has proposed a dramatic increase in right of way fees in a new rails-to-trail park.

¹⁰ Denver at 11.

¹¹ Minneapolis at 9.

¹² According to the League of Minnesota Cities, a significant number of the League's more than 850 members have done so as well. League of Minnesota Cities at 6.

¹³ *Id.*

¹⁴ Portland, Oregon at 18; Eugene at 5; San Antonio at 5.

¹⁵ *See, e.g.*, Salem, Oregon at 7 (police and fire).

¹⁶ CenturyLink Initial Comments at 5.

CenturyLink has long had facilities in the right of way along the decommissioned rail line. After the right of way was transferred to the state, the state park authority sought significantly higher right of way fees, particularly for fiber facilities. The \$11 per-linear-foot fees quoted by the park authority would represent a dramatic increase over the fees paid for that right of way today.¹⁷ CenturyLink is therefore considering legal action.

At the federal level, CenturyLink was recently informed by the U.S. Forest Service of a new policy that dramatically increases charges for rights of way in national forests. This policy, now to be implemented, would assess a different fee based on the number of facilities a telecommunications provider places in the right of way, even if these facilities share the same trench and do not increase the size of the easement. In particular, the policy would impose two charges if the provider installs both copper and fiber cable, whereas the current policy only incurs one charge based on the real estate encumbered, regardless of the number or type of facilities placed in the trench. Thus the new policy will penalize a broadband provider that upgrades its telecommunications plant to offer higher capacity services to consumers, even though the upgraded facilities will take no more space in the right of way. The Forest Service policy would also impose additional charges for spare conduit leased to third parties. Overall, this new policy could dramatically increase the right of way fees that CenturyLink pays in national forests, to the point where those fees could exceed potential revenue from some facilities.

¹⁷ For example, one of CenturyLink's cables in that right of way has up until now been subject to an annual fee of \$1.29 per linear foot. The park authority's new fee of \$11 per linear foot would thus represent nearly a ten-fold increase over the existing fee.

Given its large footprint in the West,¹⁸ and its scattered islands of service territories in thinly populated areas, this change would have a particular impact on CenturyLink and the consumers it serves. Increasing these right of way costs would serve only to discourage broadband deployment in areas adjacent to national forests, which are typically rural and face difficult investment calculus already. As a result of this policy change, CenturyLink may have no choice but to minimize its investment in facilities crossing Forest Service land, which would make it even more difficult to deploy or upgrade broadband infrastructure to serve consumers in adjacent areas.

Unfortunately the U.S. Forest Service is not the only federal agency that has instituted a policy change that undermines the objectives of the National Broadband Plan. Under a new Department of Defense policy, Eglin Air Force Base in Florida has required CenturyLink to renegotiate existing agreements for access to facilities and rights of way, including those that previously had nominal or no fees. The new policy requires "fair market value" for any land granted under, lease, license, permit or easement -- including rights of way previously granted and regardless of whether the facilities serve the base or the larger community. The new policy includes a lengthy six-step process and a large increase in the cost for access.

III. EXCESSIVE RIGHT OF WAY FEES AND UNREASONABLE RIGHT OF WAY PRACTICES HINDER BROADBAND DEPLOYMENT AND ADOPTION

As the Commission has found, right of way fees are not a trivial expense. The cost of obtaining permits and leasing pole attachments and rights of way can amount to 20% of the cost of fiber optic deployment.¹⁹ Right of way fees of such magnitude can materially inhibit the deployment or upgrading of broadband services in geographic areas with an already tenuous

¹⁸ Legacy Qwest has telecommunications facilities deployed in 59 Forest Service areas.

¹⁹ National Broadband Plan § 6.1.

business case. Likewise, right of way practices that cause unreasonable delays in accessing rights of way can also threaten broadband deployments.

A. The Existence Of Broadband Service In A City Does Not Demonstrate That The Right Of Way Fees Or Practices In That City Are Reasonable

Some cities misleadingly suggest that widespread broadband deployment in their cities demonstrates that their above-cost right of way fees have no impact on the availability of broadband services.²⁰ However, a broadband provider's determination whether to build out or upgrade broadband in a particular jurisdiction depends on a complex weighing of numerous factors related to expected revenues, expected expenses and capital constraints. Right of way fees are just one of many expenses incurred in providing broadband services. In a city or more densely populated town, it may make business sense to deploy broadband service, or upgrade existing broadband service, even if the right of way fees in that jurisdiction are excessive.

Not surprisingly, the local governments that push this self-serving argument tend to be jurisdictions where one would expect widespread deployment, such as Portland, Oregon, and San Antonio, Texas.²¹ It is well understood that consumers in cities and relatively densely populated

²⁰ Coalition of Texas Cities at 22-27; League of Oregon Cities at 3-45; Portland, Oregon at 2; Eugene at 8; San Antonio at 5; National League of Cities at 9-16. In apparent contradiction, Portland, Oregon, suggests that a lack of private investment prompted it to deploy its own broadband network. Portland, Oregon at 19-21. This argument ignores the discriminatory manner in which many such networks have been deployed and maintained. For example, Portland created the Integrated Regional Network Enterprise (IRNE) network by demanding in-kind facilities from Qwest and other providers in return for access to their rights. In Utah, the Utah Telecommunications Open Infrastructure Agency (UTOPIA) network financed itself through loans and subsidies that were not available to private carriers, until ultimately agreeing in a consent decree to observe appropriate separation between the government and the network. In general, CenturyLink has seen no example of a municipal broadband network that included a franchise fee on its bill or otherwise properly imputed right of way costs.

²¹Portland at 2; San Antonio at 5. *See also* National League of Cities at 12.

towns typically have access to multiple providers of broadband services today.²² That is not where the most significant broadband deployment problem generally lies. Rather, consumers in less densely populated areas are the ones who are more likely to be unserved or underserved by broadband services, because the cost of deployment or upgrade in those areas exceeds the revenues that can be expected from the infrastructure investment.²³ And that is where the level of right of way fees can make a difference. Excessive right of way fees – whether in the form of permitting charges, linear-foot charges or gross-revenue fees – effectively increase the cost of installing or upgrading broadband infrastructure for consumers, and therefore can ultimately make or break the business case for installing broadband infrastructure.²⁴ With broadband demand increasing by 30 percent per year, broadband providers must continually reinforce their networks simply to maintain existing service quality.

²² National Broadband Plan § 8.1. While the National League of Cities claim that right of way fees do not constrain broadband deployment, they also assert that local governments “compete vigorously with one another to attract and encourage deployment of advanced and reliable utilities” and therefore have a strong incentive “not to overprice right-of-way access.” National League of Cities at 12-13, 16 (citation omitted). These contradictory statements cannot both be true. If right of way fees have no impact on broadband deployment, it would be illogical for local governments to compete for broadband deployment by limiting their right of way fees.

²³ The National League of Cities’ broadband penetration comparisons among states prove nothing about the impact of state or city right of way policies on broadband deployment. For example, it should surprise no one that, on average, consumers in Rhode Island have access to more broadband providers than in Alaska (*see* National League of Cities at 12). Census Bureau, State Population – Rank, Percentage Change and Population Density (reflecting population densities of 1007.9 and 1.2 per square mile in Rhode Island and Alaska, respectively, in 2009).

²⁴ The National League of Cities submits an economic study purporting to demonstrate that constraining right of way fees to cost has no impact on broadband availability or adoption. *See* National League of Cities, Exhibit G, ECONorthWest Report. Given the very limited information provided, it is impossible to assess the reliability of the study or even understand its underlying methodology. In particular, it is not clear that the study properly accounted for all the many factors that can affect broadband deployment and adoption.

B. Excessive Right Of Way Fees In One Local Jurisdiction Can Inhibit Broadband Deployment In Other Nearby Jurisdictions

Most insidiously, the rights of way fees in one locality can negatively affect broadband deployment and adoption in other jurisdictions. The National League of Cities curiously suggests that “[t]here is no reason to suppose” that the fees charged by a particular city have an impact on customers in other areas.²⁵ Clearly those associations have little familiarity with the way in which broadband providers manage their finances. At CenturyLink and other broadband providers, network planning and budgeting are typically done on a regional basis, rather than municipality-by-municipality. Thus, excessive fees in one city or municipality can inhibit a broadband provider’s deployment in other municipalities or rural areas – because the excessive fees will increase the average cost to deploy broadband throughout that region and deplete the provider’s funds available for network deployment – even if it does not alter the business case for deploying or upgrading broadband services in the city or municipality that imposes the excessive charge.

As noted, the impact of these fees is most likely to be felt by consumers living in more sparsely populated areas, where the business case for broadband investment is already tenuous. In these fringe areas, the average increased cost resulting from excessive right of way fees in nearby jurisdictions may be enough to make it economically infeasible for a provider to deploy or upgrade broadband services in that area. As it stands, consumers in these areas sometimes lack access to the high-quality broadband services that are essential to so many aspects of modern life today. Again, CenturyLink is not asserting that excessive right of way fees are the

²⁵ National League of Cities at 14.

only hindrance to broadband deployment in these areas, but they are a significant hindrance and therefore one the Commission should address.²⁶

The National League of Cities acknowledges the problem of insufficient broadband deployment in rural areas,²⁷ but is unwilling to admit the way in which the policies it advocates can aggravate that problem. While CenturyLink agrees that “a provider simply has no incentive to devote resources to an unprofitable market[],”²⁸ it notes that the National League of Cities’ proposal would make more markets unprofitable and therefore undermine incentives for broadband deployment – ultimately denying consumers access to broadband services that otherwise would be provided. As recognized in the National Broadband Plan, this is particularly problematic because “[t]he timing of the process and fee calculations by one local government may not take into account the benefits that constituents in neighboring jurisdictions would receive from increased broadband deployment.”²⁹

C. Excessive Fees Negatively Affect Broadband Deployment, Adoption And Competition Regardless Of Whether, And How, They Are Passed Through To Consumers

The National League of Cities also downplays the impact of above-cost right of way fees on broadband investment, by claiming that broadband providers simply pass through those fees to end users through line-item charges. It is true that broadband providers attempt to pass

²⁶ The National League of Cities asserts that the Commission should do nothing about above-cost right of way fees because, according to its economist, reducing those fees to cost would not be enough to make deployment feasible in many currently unserved areas. Under that theory, the Commission should not address any factor that undermines broadband investment and adoption unless it determines it is the *sole* factor in deployment and adoption. National League of Cities, Exhibit G, ECONorthWest Report at 8-11.

²⁷ *Id.* at 9 (noting that the Commission “has repeatedly recognized that the major problem is the lack of broadband deployment in rural areas [citation omitted].”)

²⁸ *Id.* at 15 (citation omitted).

²⁹ National Broadband Plan § 6.6.

through as line-item charges at least some of the right of way fees that they incur. That does not mean, however, that excessive right of way fees have no impact on broadband deployment, adoption and competition.

1. Right of Way Fees Not Passed Through as Line-Item Charges

Certain types of right of way fees are not passed through to consumers via line-item charges. For example, linear-foot, permit and other administrative fees typically are not included in line-item charges because they are associated with shared transmission facilities that cannot be attributed to a particular customer or group of customers. Instead they become a general operating expense that increases the overall cost of providing service in that geographic area. Even revenue-based fees are sometimes not passed through as a line-item charge, due to state law restrictions or constraints imposed by competition from providers that are not subject to the same right of way expenses – such as wireless providers. For example, in Oregon, where right of way fees often reach seven percent of revenues, CenturyLink can pass through only three percent of those fees in a line-item charge on customers' bills. The remaining four percent constitutes an operating expense that must be recovered through CenturyLink's rates, assuming competitive conditions allow.³⁰ Fees that cannot be passed through to consumers also eat into the network budgets of broadband providers by reducing the funding available to deploy and upgrade broadband facilities.

2. Right of Way Fees that are Passed Through as Line-Item Charges

Fees that are passed through to end users as line-item charges effectively increase the price of broadband services and therefore inhibit broadband adoption. In the National Broadband Plan, the Commission found that facilitating broadband *adoption* is just as important,

³⁰ Wireless providers in that state generally pay no right of way fees.

if not more important, a priority as broadband *deployment*, in terms of furthering the availability of broadband services.³¹ It further concluded that the price of broadband services is one of the key factors affecting adoption levels.³² It therefore stands to reason that excessive right of way fees have a dampening effect on broadband adoption, ultimately contributing to the broadband availability gap that the Commission is working to close.³³ All of these rights of way fees also can place wireline providers at a competitive disadvantage relative their wireless competitors, which do not require access to public rights of way to provide their services.

D. Unreasonable Right Of Way Practices Can Also Undermine Broadband Investment

Imposing excessive right of way fees is not the only way in which a local government can undermine broadband investment and adoption. Lengthy delays and cumbersome processes can likewise translate into delays and missed opportunities in extending broadband services for the benefit of consumers.

For example, delays in securing permits to install facilities in rights of way on U.S. Forest Service land increase costs and frustrate and delay installation of facilities needed for broadband deployments and upgrades. For example, the Columbia Gorge National Scenic Area (Scenic Area) staff requires all of CenturyLink's lines to be placed underground, out of sight. Yet when CenturyLink applies for a permit to trench, it takes more than a year for approval, following an

³¹ National Broadband Plan, Chapter 9.

³² *Id.* at § 9.2. *See also* 2011 Section 706 Report at 2 (finding that affordability was a key factor in consumers not subscribing to broadband services).

³³ The National League of Cities simplistically asserts that if there are similar adoption rates in a state that constrains right of way fees and one that does not, this proves that excessive right of way fees have no impact on adoption rates. National League of Cities at 13. Once again, no one asserts that right of way fees are the *only* factor in broadband adoption. But, to the extent those fees raise the effective cost of broadband services, which the Associations' economist acknowledges, Exhibit G, ECONorthWest Report at 12, excessive fees will tend to hinder adoption.

onerous and expensive application and review process. On top of that, the Scenic Area has started requiring all counties to obtain the Scenic Area's consent before the counties issue any county building permits within the Scenic Area. This has doubled the timeframe to obtain a permit and added an unnecessary layer of bureaucracy and expense. In addition to adding costs, frustrating network investment and imperiling adequate service, this policy ironically delays the removal of aerial facilities in the scenic area as well.³⁴

E. Right Of Way Fees And Practices Are Not Constrained At The Ballot Box

Some local governments contend that voters in a city or town place an effective constraint on unreasonable right of way fees and practices.³⁵ As the argument goes, if elected officials in a city or municipality attempt to impose right of way fees that stifle broadband investment in that municipality, voters will punish those officials at the ballot box. This argument is flawed on several levels.

First, it wrongly assumes that most voters are aware of the right of way fees that are imposed on broadband providers in the municipality in which they live. As noted, certain types of right of way fees are almost never passed through as line-item charges on customer bills, and even percentage-of-revenue fees often are not passed through in their entirety as a line-item charge. In such cases, voters will not be able to tell from their broadband service bill that their elected officials are levying a right of way fee on broadband providers operating in that municipality. Moreover, even if a fee is passed through as a line-item charge, consumers will not necessarily understand that the line-item charge is a pass through of a government-imposed

³⁴ CenturyLink has also experienced a growing number of slow reviews at some military bases and on land overseen by the Bureau of Land Management and the Bureau of Indian Affairs. For example, permitting for access to tribal lands can take months or even years and can cost more than the project itself.

³⁵ Eugene at 9-10; San Antonio at 11.

charge. They are just as likely to believe that the charge originates with their provider and vote with their feet by shifting to another provider – such as a wireless competitor – that is not subject to the right of way fee.

Second, even if voters are aware of these fees, they have no way of knowing whether those fees have resulted in less broadband deployment than would have occurred in that municipality absent those fees.

Third, this argument assumes that consumers will be sufficiently motivated to challenge elected officials based on this particular issue. The assessment of right of way fees is just one of a multitude of issues – and most likely a relatively inconsequential one – that voters consider in determining whether to retain their local elected officials.

Finally, voters in a municipality may have no recourse against elected officials if the excessive right of way fee was imposed by a municipality other than their own, which, because of regional network budgeting, caused the loss or delay of a broadband deployment or upgrade that otherwise would have occurred.

In short, local government control over public rights of way gives them an unconstrained ability to impose above-cost right of way fees that undermine the Commission's goals of furthering ubiquitous broadband deployment and adoption. While many local governments have not exercised this ability, others have used right of way fees to fund their general operating budgets. It is therefore necessary for the Commission to exercise its authority to implement section 253 to eliminate these roadblocks to spreading the availability of affordable, high quality broadband services to all American consumers.

IV. THE FCC SHOULD TAKE STEPS TO CREATE REASONABLE UNIFORMITY IN RIGHT OF WAY FEES AND PRACTICES

As noted, the initial comments reveal that a large percentage of local governments have adopted enlightened right of way ordinances that recognize the immense benefits delivered to their citizens through services that are provided using their public rights of way. These ordinances seek merely to recover the costs that the local government incurs in administering and maintaining its rights of way. It therefore is not necessary for the Commission to disturb the right of way fees or practices of the vast majority of cities.

Instead the Commission should take two simple, but fundamental, steps to address the outliers – those local, state or federal government entities that have adopted right of way fees or practices that potentially undermine broadband deployment and adoption. The proposed narrow rules will allow the Commission to rein in excessive right of way fees and deleterious right of way practices, without interfering unnecessarily in local right of way policies.³⁶ A clear national standard for application of section 253 would provide the certainty necessary for investment by resolving the disparate interpretations of section 253 by federal appellate courts.³⁷ Most importantly, adoption of these rules would provide well defined benefits to consumers, by allowing broadband providers to redirect funds that are currently used to pay right of way fees to increased broadband investment, particularly in more sparsely populated areas with tenuous business cases. Thus, these rules would have a real and positive impact on consumers who

³⁶ In filing after filing, local governments warn the Commission of the dangers and injustice of overriding local authority over rights of way to the detriment of local citizens and ask the Commission to exercise a “basic respect for federalism.” CenturyLink’s proposed simple rules are fully consistent with these requests as they would preserve the primacy of local regulation of public rights of way.

³⁷ Level 3 at 21.

currently lack access to affordable, high-quality broadband services. The Commission clearly has the ability to adopt these policies pursuant to its authority to implement section 253.

A. The Commission Should Reaffirm Its *California Payphone* Standard

CenturyLink explained in its opening comments the way in which the courts have inconsistently applied section 253. In *California Payphone*, the Commission held that a local regulation effectively prohibits the provision of a telecommunications service under section 251(a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment[.]”³⁸

Following that decision, federal courts initially applied the “materially inhibits” standard and preempted various above-cost franchise fees and other excessive right of way charges.³⁹ In recent years, however, the Eighth and Ninth Circuits have misinterpreted section 253 to require a petitioner to demonstrate that the challenged ordinance has actually prohibited the petitioner from providing service in that local jurisdiction – a standard that rarely, if ever, will be satisfied, even in the case of exorbitant right of way fees or patently unreasonable right of way practices. While the federal government criticized these decisions in an *amicus curiae* brief in a petition for certiorari to the U.S. Supreme Court, there is no indication that this criticism will lead these courts to modify their current erroneous interpretation of section 253.

It is therefore necessary and appropriate for the Commission to codify its *California Payphone* standard to give section 253 its proper meaning and ensure basic national consistency.⁴⁰ Without a uniform standard, local governments in some states will retain the

³⁸ 12 FCC Rcd at 14206 ¶ 42.

³⁹ See CenturyLink Initial Comments at 12-13.

⁴⁰ See Level 3 at 21.

ability to adopt unreasonable fees and restrictions that hamper broadband investment and adoption.⁴¹

B. The FCC Should Clarify That Non-Cost-Based Fees Are Unreasonable Under Section 253(c)

Under the most logical reading of the statute, section 253(a) preempts any right of way fees that are not saved by sections 253(b) and (c).⁴² In order to provide more certainty to all parties, the Commission should adopt a rule clarifying that charges for use of the public right of way are “unreasonable” under section 253(c) if they exceed the costs the local government incurs in managing and maintaining the rights of way.

The language of section 253(c) itself evidences that there must be some limiting standard on right of way fees. Under that provision, a state or local government has authority to require “fair and reasonable compensation . . . for use of public rights-of-way.” The obvious standard for determining whether a right of way fee is “fair and reasonable” is whether it is reasonably related to the cost of managing and maintaining those rights of way.⁴³ A fee that vastly exceeds that cost – as do many percentage-of-revenue fees – is by no means “fair” or “reasonable.” It also bears no relationship to the extent of the carrier’s use of the municipality’s rights of way or the costs incurred by the municipality.

⁴¹ Local governments devote much of their comments advocating the uncontroversial proposition that local governments should continue to have a role in regulating access to their rights of way. *See, e.g.*, Select Minnesota Municipalities at 4-5; Springfield, Oregon at 3; National League of Cities (National League of Cities) at 17-41. CenturyLink does not dispute this contention or object to paying its fair share of the cost of managing and maintaining public rights of way.

⁴² Level 3 at 23-28; Verizon at 34.

⁴³ *See* Verizon at 36-37.

Right of way fees that exceed cost also violate the statute's requirement that right of way fees be "competitively neutral."⁴⁴ That is because mobile wireless providers do not incur the same level of government-imposed fees as do wireline providers. While wireline providers need access to many miles of right of way infrastructure in each jurisdiction, a wireless provider may need access to only a few tower sites, which often are available on private property. Moreover, unlike for rights of way, a wireless provider may be able to choose among different potential tower sites, thus constraining the price of those sites and driving that price closer to cost.

As a result, a right of way fee that dramatically exceeds cost will give wireless providers a permanent, government-initiated cost advantage over wireline providers. Wireline and wireless providers compete head-to-head today, as wireless substitution for wireline services continues to climb. According to the Centers for Disease Control, more than 45 percent of American households have either abandoned landline service altogether or still have that service but barely use it.⁴⁵ At levels of up to seven percent, percentage-of-revenue fees provide a significant cost advantage to wireless providers, artificially distorting the market for telephony and broadband services.

None of the arguments against cost-based right of way fees has merit. The National League of Cities' claim that adopting cost-based fees would be complicated and expensive ignores the fact that many cities have already done just that, in order to comply with state laws limiting right of way fees to the costs associated with those fees. In any case, the notion that local governments can levy right of way fees without limitation because it is too expensive to

⁴⁴ 47 U.S.C. § 253(c).

⁴⁵ As of December 2010, nearly 30 percent of customers had completely "cut the cord," while another 15 percent received all or nearly all of their calls on wireless telephones. *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2010*, Centers for Disease Control (rel. June 8, 2011).

determine the costs of managing rights of way rings hollow. The National League of Cities' claim that cost studies would total a billion dollars – or \$100,000 per city – has no basis other than a brief unsupported statement by an accountant.⁴⁶

As noted, some cities charging non-cost-based fees complain that tying right of way fees to cost would divert resources from key government functions. These claims merely prove that some local governments have become dependent on revenues from right of way fees to fund government services that have nothing to do with maintaining their rights of way. The solution to this situation is not to encourage other cities and municipalities to adopt similarly misguided policies, but for these local governments to fund their general operations through transparent assessments that tax all businesses and industries in an equitable manner.

Acknowledging the need for some type of limiting principle on right of way fees, the National League of Cities tries to manufacture one, claiming that right of fee ways should be pegged to the “fair market value” of rights of way. But there is no fair market value for public rights of way. In fact, there is no market at all, despite the conclusions in the National League of Cities' ECONorthWest Report. Except in limited circumstances, public rights of way are not a scarce resource. CenturyLink has not encountered situations where access to a city's right of way was denied because the right of way was “full.”⁴⁷ Thus, there is no opportunity cost for a municipality allowing a particular provider to obtain access to the municipality's right of way. A

⁴⁶ National League of Cities, Exhibit E, Declaration of Garth T. Ashpaugh ¶ 9.

⁴⁷ CenturyLink does not deny that the central business districts of large cities require planning to accommodate the needs of all utilities, but there is always adequate space even if flexible designs are required.

“fair market” approach to right of way fees also ignores the countervailing benefits that will be brought by broadband.⁴⁸

Likewise there is no justification to include so-called “external costs” – such as the cost of traffic disruption⁴⁹ – in right of way fees. CenturyLink does not object to paying actual costs associated with managing rights of way, including additional costs for managing more congested rights of way. However, the “external costs” cited by the National League of Cities are no more than a pretense to justify excessive right of way fees and are not legitimately recovered through these fees.

C. The Commission Should Apply These Principles To Federally-Controlled Rights Of Way

As noted, some federal agencies have begun imposing new or increased fees for access to rights of way on federal land.⁵⁰ Just like some local governments, these agencies are seeking to use their monopoly control of certain rights of way to extract above-cost right of way fees. These fees can significantly increase the cost of deploying and upgrading broadband facilities that cross federal lands – frequently to serve adjacent rural areas.

The Commission should work with its sister agencies to establish policies that further the Administration’s goal of affording all Americans access to high quality broadband services and the benefits that arise from them. This is consistent with the National Broadband Plan’s

⁴⁸ National Broadband Plan § 6.6 (“A fee structure based solely upon the market value of the land being used would not typically take into account the benefits that the public as a whole would receive from increased broadband deployment, particularly in unserved and underserved areas.”).

⁴⁹ The National League of Cities fail to explain how imposing traffic disruption “costs” on broadband providers will serve any useful purpose, particularly given that this fee will ultimately be passed through to the providers’ customers in one form or another. *See* National League of Cities at 40. *See also, id.* at Exhibit G, ECONorthWest Report at 23.

⁵⁰ *See* page 6, *supra*.

recommendation that Congress consider expressly authorizing federal agencies to set the fees for access to federal rights of way on a management and cost recovery basis.⁵¹

D. The Commission Possesses Adequate Legal Authority To Adopt These Policies

Some parties claim that the Commission lacks authority to adopt any rules relating to right of way fees and practices. That is not true. Section 201(b) of the Communications Act explicitly gives the Commission jurisdiction to make rules governing matters to which the Act applies.⁵² In *Iowa Utilities Board*, the U.S. Supreme Court held that section 201(b) conveyed the Commission sufficient legal authority to adopt rules implementing the local competition provisions of sections 251 and 252.⁵³ Unless specifically barred by statute, which it is not here, the Commission is therefore authorized to conduct a rulemaking to implement and interpret the terms of the federal statute – in this case section 253. This includes interpretation of section 253(c), which is an integral part of the statute.

CenturyLink is not advocating that the Commission adopt detailed right of way rules or that it dislodge local governments from their traditional role of administering their public rights of way in their jurisdictions. Rather the Commission should simply use its clear authority to adopt basic rules implementing this federal statutory provision, in order to establish a common interpretation of the statute's requirement that right of way fees and practices be reasonable and nondiscriminatory. These rules will provide all affected parties certainty in negotiating rights of way rates and terms and create a uniform standard for adjudicating preemption petitions filed in court or at the Commission. It would do so in a manner that preserves local control over public

⁵¹ National Broadband Plan § 6.9.

⁵² 47 U.S.C. § 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act].”)

⁵³ *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

rights of way and, within broad limits, gives local governments discretion to adopt right of way ordinances that meet their particular circumstances.

As the Second Circuit found in *White Plains*, courts owe deference to the Commission's decisions interpreting the scope of section 253(c).⁵⁴ The Commission has also concluded that it possesses this authority under the statute.⁵⁵ To the extent the Commission has authority to adjudicate claimed defenses under section 253(c), it also has authority to adopt rules interpreting those defenses.⁵⁶

V. CONCLUSION

For the reasons stated herein, the Commission should reaffirm and codify the interpretation of section 253(c) articulated in *California Payphone* and make clear that non-cost-based right of way fees are unreasonable under that statutory provision. In order to facilitate broadband deployment and adoption in all areas of the nation, these principles should apply to all levels of government – local, state and federal.

Respectfully submitted,

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⁵⁴ *TCG New York, Inc., et al. v. City of White Plains*, 305 F.3d 67, 75 (2d Cir. 2002), *cert. denied*, 538 U.S. 923 (2003).

⁵⁵ *See* Level 3 at 26.

⁵⁶ The legislative history also confirms Congress' intent for the Commission to have a central role in ensuring uniformity in the application of section 253. *See* Level 3 at 28-31.