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

In the Matter of	)	
	)	
Level 3 Communications, LLC	)	WC Docket No. 09-153
	)	
Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253	)	

COMMENTS OF THE CITY OF NEW YORK

The City of New York ("City") hereby submits the following comments in response to Level 3's petition for a declaratory ruling[1] that certain right-of-way rents imposed by the New York State Thruway Authority should be preempted under Section 253.[2] The City addresses in its comments Level 3's assertion that the Federal Communications Commission ("Commission") should claim jurisdiction over Section 253(c) matters.[3] Ruling in Level 3's favor on the jurisdictional issue would be contrary to the very words of Section 253, the unambiguous legislative history associated with that section, and the Commission's own approach in addressing Section 253 matters. Level 3 offers no compelling reason for the Commission to override Congress's clear directive on the appropriate forum for resolving Section 253(c) issues.

[1] Petition for Declaratory Ruling That Certain Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253, Docket No. 09-153 (filed July 23, 2009) ("Level 3 Petition").

[2] 47 U.S.C. § 253.

[3] The City may offer comments in reply on the substantive matters raised once it has had a chance to review the New York State Thruway Authority's response to Level 3's petition.

Section 253(a) states:

> "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Sections 253(b) and (c) then provide what have generally been viewed as safe harbors under which a statute, regulation, or legal requirement that violates (a) is saved from preemption.[4] Finally, Section 253(d) provides for preemption by the Commission in the event of a violation of either subsection (a) or (b), but not subsection (c).

According to Level 3, despite the clear and intentional omission of (c) from (d), the Commission should nevertheless claim authority to rule on Section 253(c) matters as if (c) were included in (d). Level 3 asserts that doing otherwise leads to a situation where "a state or local authority could automatically thwart Commission oversight [of subsection (d)] simply by raising a defense under subsection (c), whether or not meritorious."[5]

Yet ruling in Level 3's favor would not only flout the unambiguous words of the statute, it would also disregard the clear legislative history that shows Congress specifically excluded mention of (c) in (d) precisely to ensure that (c) matters were reviewed by federal district courts and not the Commission. Congress has already chosen the appropriate forum for (c) matters. Senator Gorton – the sponsor of the amendment that became the present version of Section 253(d) – stated that under his amendment "in

[4] A few courts have in the past treated (b) and (c) as separate enforceable requirements imposed on States and local governments (largely based on inartful drafting of a reference to (b) in subsection (d)), (*see, e.g., TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000)), an approach that has largely been rejected in more recent cases (*see, e.g., Qwest Corporation v. City of Santa Fe, New Mexico*, 380 F.3d 1258, 1266-67 (10th Cir. 2004); *Level 3 Communications, L.L.C. v. City of St. Louis, Missouri*, 477 F.3d 528, 532 (8th Cir. 2007)), although Level 3 appears to seek to revive it in its instant petition. The jurisdictional point that the City makes in these comments applies regardless of whether (c) is treated as a safe harbor or an independent basis for preemption.

[5] Level 3 Petition at 29.

the case of these purely local matters dealing with rights-of-way, there will be no jurisdiction on the part of the FCC immediately to enjoin the enforcement of those local ordinances."[6] According to Senator Gorton, his amendment "retains 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*."[7] (emphasis added). Thus, there is no question that Congress intended to exclude Section 253(c) matters from Commission review.

Contrary to Level 3's assertion,[8] the Commission has consistently taken a circumscribed approach in its handling of Section 253(c) matters, always acknowledging the omission of (c) from (d). Level 3 asserts that "the Commission itself has issued guidelines for Section 253 petitions demonstrating that it assesses whether a state or local provision is saved under subsection (c)."[9] Yet, in those very guidelines the Commission acknowledges its jurisdictional limitations by stating: "[i]n order to help the Commission determine whether preemption of the challenged statute, regulation, ordinance, or legal requirement *is within the scope of the Commission's jurisdiction* parties commenting on the applicability of sections 253(b) or (c), and especially parties seeking to invoke these sections, should include answers to . . . ." (emphasis added).[10]

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[6] *See* 141 Cong. Rec. S8306 (daily ed. June 14, 1995); *see also BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1190-91 (11th Cir. 2001) (describing legislative history, quoting remarks of Senator Gorton).

[7] *See* 141 Cong. Rec. S8308 (daily ed. June 14, 1995).

[8] Level 3 Petition at 29-30.

[9] *Id.*

[10] 13 FCC Rcd 22970 (1998).

Level 3 incorrectly relies on dicta from *TCG New York, Inc. v. City of White Plains* as support for the assertion that the supposed procedural anomaly associated with the exclusion of (c) from (d) leads to the conclusion that the Commission should claim jurisdiction over Section 253(c) matters. While the *White Plains* court did describe the exclusion as leading to a "procedural oddity,"[11] the ruling in that case did not turn on the Commission's jurisdiction to resolve (c) matters.

Moreover, in responding to the Court's request to brief the very issue of whether the Commission had jurisdiction over (c), the Commission declined to provide a specific response.[12] Instead, the Commission outlined the legislative history associated with (c) and (d), how the matter had been handled by the courts, and its own approach to addressing Section 253 matters – an approach that clearly contemplated that any substantive adjudication of the merits of a (c) argument cannot and will not be addressed by the Commission and may only be addressed by the courts. The Commission stated that its approach:

> "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 questions under subsection (c). In the event, the claimed defense does not rise to the level of a *bona fide* claim under section 253(c), the Commission has regarded itself as free to preempt the restriction as long it violated section 253(a) and was not saved by section 253(b). If the section 253(c) claim is *bona*

[11] *TCG New York, Inc., et. al. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

[12] See Supplemental Brief of the Federal Communications Commission and the United States as Amici Curiae, filed in *TCG New York, Inc., et. al. v. City of White Plains*. 01-7213, on Mar. 11, 2002 (2d Cir.) at 4-8 ("Supplemental Brief of FCC").

> *fide* and raises legitimate questions under that subsection – a situation that the Commission has not yet had occasion to address in its decisions adjudicating claims under section 253 – the Commission could decide not to preempt even if the action otherwise violated section 253(a) and was not saved by section 253(b). In such a case, the Commission either could dismiss the petition for preemption or, pursuant to the authority provided by section 253(d), 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." [13]

Note the significant difference between the Commission's own stated approach, in which the Commission's inquiry as to (c) is to be limited purely to whether a (c) defense is made *in good faith*, and Level's 3's purported standard in which the Commission inquiry would go to the question of whether a (c) defense is "*meritorious*." The difference between these standards is profound, and Level 3's petition is extraordinarily disingenuous in skating over that difference.

One can imagine a theoretical 253(a) preemption claim in which a 253(c) defense is made without any actual link to rights-of-way compensation or management issues. Such a claim would involve no request for rights-of-way or access by the claimant, but would include a right-of-way impact related defense made in bad faith merely for the purpose of escaping Commission jurisdiction. Such a scenario would lack any actual nexus between the matter at hand and right-of-way compensation or management issues. It is that type of circumstance that the Commission in its *White Plains* brief clearly had in

[13] Supplemental Brief of FCC at 6.

mind as being the basis for any jurisdiction it might have in the first instance on the purely threshold question as to whether a bona fide (c) defense has been raised. Level 3, however, proposes a profoundly different threshold in which the very merits of a (c) defense on reasonable compensation or right-of-way management grounds are to fall within the Commission's jurisdiction in utter disregard of the language and intent of the applicable Telecommunications Act provision.

Applying to the matter at hand the Commission's earlier own standard of inquiry, in which the initial, jurisdictional question is merely whether a particular matter raises a bona fide 253(c) issue, and if so then jurisdiction over the merits of the matter must be deferred to adjudication by the courts, leads to an unquestionably easy result for the Commission in the instant case, as indeed it will in most potential real-life disputes.

In this case, as in the vast majority of cases, it will not even be necessary to wait until the defendant raises a Section 253(c) defense to know that (c) is implicated. In most cases, as in this case, it will be apparent from the complaint itself whether there is a challenge to some form of right-of-way regulation, or right-of-way compensation demand, such that a Section 253(c) matter must be adjudicated. Indeed some complainants, *including Level 3 in the instant case*, cite subsection (c) as if it were an independent basis for preemption, separate from subsection (a). Such an approach (although mistaken as an understanding of the structure of Section 253) demonstrates how facially obvious it is to all parties that issues of right-of-way management and compensation are at the essence of the merits of such matters, including the instant petition. In most real world Section 253 disputes, as in the instant matter, the very nature

of the dispute itself will demonstrate that it must, as a matter of compliance with the statute and its intent, be adjudicated only by the courts, and not by the Commission.

As further evidence that there is a long-standing consensus that Section 253(c) matters must be handled by the courts only and not the Commission, one can contrast the large number of Section 253(c) decisions that have been issued by the courts since the 1996 Act was adopted and the absence of any Commission adjudications of Section 253(c) disputes over the same period. A recent Lexis search of federal court cases using the Boolean search protocol *"Telecommunications Act" and 253(c) and preemption* produced no less than 79 decision citations, issued by courts across the country. In contrast, Level 3 fails to cite a single example of the Commission ever adjudicating a dispute on the merits over whether a particular requirement or charge for use of public rights of way is or is not protected from preemption by Section 253(c). Real complainants all across the nation have recognized that Congress placed 253(c) decisions in the hands of the courts to the exclusion of the Commission. Level 3's belated attempt to buck this universal consensus in the industry must be recognized as unavailing.

Why would Level 3 now, after more than a decade of such disputes being universally handled in the courts, suddenly seek to turn to the Commission despite the obvious intentions of Congress? The timing of the instant petition suggests that a particularly egregious form of forum-shopping may be at work here. It took less than four weeks after the denial of Level 3's petition for a writ of certiorari, seeking to appeal to the U.S. Supreme Court an adverse Section 253(c) ruling from the Eighth Circuit,[14] for Level 3 to file the instant petition seeking to evade the Congressional mandate that these

[14] *Level 3 Communications, LLC v. City of St. Louis, Missouri*, 129 S.Ct. 2859 (2009).

matters are to be decided by the courts and instead to turn to the Commission in hopes of a better precedent. Apparently, Level 3 was content to follow the Congressional mandate to have 253(c) matters handled by the courts, so long as it was happy with the results. On being disappointed in the correct forum, however, Level 3 now appears to be shopping for a way to get a determination from the Commission that might help vitiate its adverse judicial results. Such forum-shopping in direct contradiction to Congressional mandate ought not be countenanced.

To summarize, Level 3 provides no compelling reason for the Commission to override Congress's words and intent regarding the appropriate forum for resolution of Section 253(c) issues. That a procedural mechanism clearly established by Congress does not appear convenient to Level 3 in the present instance does not justify a rewrite of Section 253 by the Commission.

Respectfully submitted,

/s/_____

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