

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**In the Matter of** )  
 )  
**Petition 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 COMPTTEL**

COMPTTEL, through counsel, hereby submits these comments in support of the above-captioned Petition of Level 3 Communications For Declaratory Ruling. Level 3 asks the Commission to preempt pursuant to Section 253(d) of the Communications Act, 47 U.S.C. §253(d), certain rent provisions that the New York State Thruway Authority (“NYSTA”) has imposed on Level 3 for access to the rights of way necessary to operate and connect to its fiber optic based backbone network. Level 3 has made a compelling showing that the prohibitively high rents that the NYSTA charges Level 3 for access to the public rights of way have effectively precluded it from expanding its 520 mile backbone network and deploying the middle mile infrastructure necessary to provide competitive broadband services to many communities throughout the state of New York.<sup>1</sup> COMPTTEL urges the Commission to grant Level 3’s Petition and use its Section 253(d) authority to preempt the NYSTA from imposing unfair, unreasonable and discriminatory annual rents for access to the public rights of way.

---

<sup>1</sup> Petition at 3.

Section 253(a) of the Act provides that no state or local legal requirement<sup>2</sup> may have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. In evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, the Commission looks at whether it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 at ¶98 (1997). While nothing in Section 253(a) undermines the authority of state governments to manage public rights of way or to charge telecommunications carriers for access thereto, Section 253(c) requires that any such charges be fair, reasonable, competitively neutral and nondiscriminatory.<sup>3</sup> Based on the documentation submitted by Level 3,<sup>4</sup> it does not appear that the NYSTA is allowing Level 3 to compete in a fair and balanced legal and regulatory environment. Nor does it appear that the \$706,468 annual rights of way fee that NYSTA imposes for access to the 1,941 linear feet occupied by Level 3 is fair, reasonable, competitively neutral or nondiscriminatory.

---

<sup>2</sup> The Commission has appropriately concluded that the term "other legal requirement" in Section 253(a) is meant to capture a broad range of state and local actions that could thwart the development of competition. *In the Matter of The Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, CC Docket No. 98-1, Memorandum Opinion and Order, FCC 99-402 at ¶3 (rel. Dec. 23, 1999).

<sup>3</sup> Section 253(c) states that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

<sup>4</sup> Petition at 11-18.

Section 253 does not require that a state legal requirement absolutely bar the provision of telecommunications service before it can be preempted. Preemption is also appropriate where, as here, a legal requirement materially inhibits a carrier from providing service by imposing significant costs. *See e.g., Qwest Corporation v. City of Santa Fe*, 380 F. 3d 1258 (10<sup>th</sup> Cir. 2004); *TCG New York, Inc. v. City of White Plains*. 305 F.3d 67 (2<sup>nd</sup> Cir. 2002); *Puerto Rico Telephone Company, Inc. v. Municipality of Guayanilla*, 450 F.3f 9 (1<sup>st</sup> Cir. 2005). Level 3 has demonstrated that NYSTA's average annual rental fee of almost \$49,000 per POP makes it uneconomical for Level 3 to add any additional POPs to provide backbone connectivity to unserved and underserved communities located along the New York State Thruway.<sup>5</sup> The \$6000 annual rental fee for a single 12 by 18 foot concrete pad on which to locate a 4 by 4 foot utility cabinet that was preempted by the Court in *City of Santa Fe* pales in comparison to the \$68,254 annual rental the NYSTA charges Level 3 for access to 2 linear feet of right of way at Milepost 426.43.<sup>6</sup>

Nor does Section 253(c)'s safe harbor protect from preemption state or local requirements that are not competitively neutral or that are applied in a discriminatory manner. Level 3 has submitted documentation showing that the NYSTA charges some cable and telecommunications companies no annual fee at all for fiber optic facilities occupying Thruway rights of way.<sup>7</sup> It has also submitted documentation showing that the NYSTA charges other telecommunications carriers and cable companies annual fees as low as \$100 for fiber optic facilities occupying Thruway rights of way.<sup>8</sup> In contrast, the NYSTA charges Level 3 a flat fee

---

<sup>5</sup> Petition at 21.

<sup>6</sup> Petition at Exhibit 14.

<sup>7</sup> Petition at Exhibit 34.

of \$18,000 for regeneration facilities and hundreds of dollars *per fiber* at each point of presence,<sup>9</sup> resulting in a total annual rent of almost \$49,000 for each point of presence installed on the network.

The Second Circuit has held that fees such as NYSTA's "that exempt one competitor are inherently not 'competitively neutral.'" *TCG New York, Inc. v. City of White Plains*, 305 F.3d at 80. In that case, the Court preempted a municipal legal requirement that treated competing carriers in a discriminatory manner. A municipal ordinance required a competitive carrier to enter into a franchise agreement and pay 5% of its gross revenues as a franchise fee, but the municipality did not require the incumbent carrier either to enter into a franchise agreement or to pay a franchise fee. The Court determined that in order to fall within the savings clause of Section 253(c), a franchise fee must constitute fair and reasonable compensation *and must be applied on a nondiscriminatory basis*. The Court concluded that subjecting incumbent and competitive carriers to such disparate treatment is not competitively neutral or nondiscriminatory. 305 F.3<sup>rd</sup> at 79. As the Court noted, "[i]f TCG is required to pay five percent of its gross revenues to the City and Verizon is not, competitive neutrality is undermined. Verizon will have the advantage of choosing to either undercut TCG's prices or to improve its profit margin relative to TCG's profit margin. Allowing White Plains to strengthen the competitive position of the incumbent service provider would run directly contrary to the pro-competitive goals" of the Act. *Id.* Similar to the municipal ordinance preempted in *City of White Plains*, the disparate treatment to which the NYSTA subjects companies installing fiber

---

<sup>8</sup> Petition at Exhibit 33. NYSTA Occupancy Permit Number 4067 issued to Verizon New York on April 16, 2001 states that Verizon will be charged an annual fee of \$100 for 1,225 feet of cable, 430 feet of which is installed underground and the balance overhead. *Id.*

<sup>9</sup> Petition at Exhibit 14.

optics in the rights of way cannot possibly fall within the savings clause of Section 253(c). The apparent unfettered discretion of the NYSTA to set annual rents for access to the rights of way allows it to pick winners and losers in the telecommunications market contrary to the pro-competitive goals of the Act.

The Commission has long recognized that problems in securing access to rights of way present a substantial operational barrier to constructing telecommunications facilities. *See, e.g., In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) at ¶¶133, 151 (“*TRRO*”), *aff’d sub nom. Covad Communications Company v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). More recently, the Commission acknowledged that “[t]imely and reasonably priced access to . . . rights of way is critical to the buildout of broadband infrastructure in rural areas.”<sup>10</sup> To the extent that the fees NYSTA charges Level 3 for access to the rights of way it needs to install its fiber optic facilities are so high that Level 3 has declined to extend or otherwise build out its broadband network to reach additional communities in New York State, the Commission must preempt. To do otherwise will thwart the availability of access to broadband and a competitive choice of providers, as well as condone NYSTA’s apparent discriminatory treatment of carriers that install fiber optic facilities along its rights of way.

NYSTA’s prohibitively high fees for access to rights of way not only work to price fiber optic backbone network providers like Level 3 out of the market but also disserve all residents of the state by frustrating accomplishment of the objectives of the New York State Council for Universal Broadband, which was created in 2008 to ensure that every New Yorker has access to affordable, high speed broadband. The Council reports that the highest levels of New York State

---

<sup>10</sup> Report on a Rural Broadband Strategy, GN Docket 09-29 at¶ 157 (rel. May 27, 2009).

government “have made it a priority to develop and implement a comprehensive statewide policy for broadband development and sustainability.”<sup>11</sup> Apparently, the word has not gotten to the NYSTA. The Council has adopted a strategy to “accelerate broadband infrastructure build out for residential, commercial and government institutions” and to provide “incentives to build broadband infrastructure.”<sup>12</sup> The Council has set a goal that areas near the New York State Thruway (the “Digital Corridor”) will have access to broadband speeds of at least 20 megabits per second in each direction by next year.<sup>13</sup> The Council also aims to (1) “adopt [a] platform-neutral position and ensure maximum technologies to accelerate broadband build out and adoption” and (2) “adopt [a] net neutrality position to provide for maximum competition for providers to create a level playing field and encourage investments in underserved and unserved areas.”<sup>14</sup> The build out inhibiting fees NYSTA charges Level 3 are at odds with the Council’s efforts to promote competition, create a level playing field, accelerate build out and encourage investment. The Commission can, and should, remedy the situation by exercising its Section 253(d) preemption authority.

---

<sup>11</sup> See New York State Council for Universal Broadband, *New York State Universal Broadband Strategic Roadmap* (June 2009) at 19, available at [http://www.oft.state.ny.us/oft/universalbroadband/final\\_broadband\\_strategy\\_June2009](http://www.oft.state.ny.us/oft/universalbroadband/final_broadband_strategy_June2009).

<sup>12</sup> *Id.* at at 14 and 15.

<sup>13</sup> *Id.* at 30.

<sup>14</sup> *Id.* at 43.

For the foregoing reasons and those set forth in Level 3's Petition for Declaratory Ruling, the Commission should preempt the unfair, unreasonable, discriminatory and competitively not neutral right of way rents the NYSTA charges Level 3.

Respectfully submitted,

October 15, 2009

Mary C. Albert  
COMPTTEL  
900 17<sup>th</sup> Street N.W., Suite 400  
Washington, D.C. 20006  
(202) 296-6650