No. 08-626

IN THE

Supreme Court of the United States

LEVEL 3 COMMUNICATIONS, LLC

Petitioner,

v.

CITY OF ST. LOUIS, MISSOURI

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court should dismiss a claim to preempt local legal requirements under 47 U.S.C. § 253(a) when "a thorough review of the entire record" shows the plaintiff has not demonstrated that the challenged requirements materially interfere with its ability to compete in a fair and balanced market.

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RELEVANT STATUTORY PROVISIONS

This case involves Section 253 of the Telecommunications Act of 1996, 47 U.S.C. § 253. Section 253 is accurately set out in Level 3's Petition, except that Level 3 omits the word "publicly" from the last clause of subsection (c). The clause should read "if the compensation required is *publicly* disclosed by such government." The omission is not material to this dispute.

Also relevant is Section 601(c)(1) of the Telecommunications Act of 1996, 47 U.S.C. § 152 nt. It provides:

> **(c) Federal, State, and local law.--**
>
> **(1) No implied effect.**--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

STATEMENT OF THE CASE

The Telecommunications Act of 1996 (the "Act") preempts local legal requirements[1] that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Applying the FCC's standard for interpreting Section 253(a), the Eighth Circuit reversed a district court

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[1] In this brief, we use the term "requirements" as short-hand for "statute or regulation, or other State or local legal requirement." 47 U.S.C. § 253(a).

decision that had preempted the City's license fee requirement for the use of the City's rights-of-way. The Eighth Circuit ruled that a "thorough review of the entire record" showed "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." Pet. App. 32a. Summary judgment was ultimately granted in the City's favor because, "on the existing record" neither the license agreement nor the City's ordinance "prohibits or effectively prohibits Level 3's ability to provide telecommunications services." Pet. App. 22a.

1. A telecommunications service provider that wishes to provide service in St. Louis may do so in one of two ways. A company certified by the Missouri Public Service Commission ("PSC") to provide both local or exchange service, and toll or long distance service to customers in the City may choose to operate under Ch. 23.34 of the St. Louis Revised Code ("Ch. 23.34"), under which it pays a 10% gross receipts tax on local services. A company that opts to operate under Ch. 23.34 is considered to be franchised by the City. Court of Appeals Joint Appendix ("C.A.J.A.") 447.[2]

A telecommunications service provider that does not choose to operate pursuant to Ch. 23.34

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[2] Level 3 errs when it states, *e.g.*, Pet. 6, that Southwestern Bell Telephone Company ("SWBT"), is the only company authorized to operate under Ch. 23.34. There are three companies presently operating under a Ch. 23.34 franchise, including SWBT, and others may be eligible to do so. C.A.J.A. 450.

must obtain a license and pay a license fee under Ch. 23.64, titled "Communications Transmission Systems" (the "Ordinance" or "Ch. 23.64"). The Ordinance was adopted in 1991 in response to changes in the telecommunications industry that were resulting in new companies entering the market that were not anticipated in 1942, when Section 23.34 was adopted.[3]

Petitioner's Statement mischaracterizes the Ordinance, as found by the courts below. Broadly speaking, the Ordinance has four parts. First, the Ordinance establishes a process for obtaining a license. The City employs a one-page license application, which calls for minimal information about the applicant, an engineering site plan showing the proposed location, as well as a description of the size and types of facilities the applicant proposes to install (Ch. 23.64.050(A)). C.A.J.A. 451, 469-71, 529. This information allows the City to identify the entity responsible for the facilities, and provides initial information helpful in coordinating construction with other projects in the public rights-of-way. C.A.J.A. 469-71.

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[3] Ch. 23.34 only imposes a tax on local services. The tax is in lieu of a franchise fee for use of the rights-of-way. When Ch. 23.34 was adopted, one phone company, AT&T, provided both local services and interstate services. Now, of course, there are companies that provide only non-local services, which would pay nothing under Ch. 23.34. In order to ensure that these companies pay some compensation for use of the rights-of-way, and to address other issues presented by the new entrants into the market, the City enacted Ch. 23.64. C.A.J.A. 447.

Provided that a company is qualified under the Ordinance and its license application is complete, the City's Board of Public Service "shall approve execution of a license agreement with the applicant by the [City's Communications Division.]" 23.64.050(C). There is no evidence that the Communications Division has ever chosen not to execute a license agreement after it has been directed to do so by the City's Board of Public Service.[4]

Second, the Ordinance establishes requirements related to the management of the rights-of-way. Among other things, the Ordinance requires that a provider use only contractors who hold standard City business licenses for constructing, installing, or maintaining network facilities in the City. Ch. 23.64.140(D). As the district court noted, this provision is a "reasonable public safety requirement" that protects the City and other right-of-way users "from dangers arising from . . . work undertaken by unqualified contractors. Pet. App. 66a. The Ordinance also imposes what the district court found were "standard tools" for right-of-way management: bond, insurance, and indemnification requirements protecting against damage to the City and the public as a result of

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[4] Level 3 errs when it claims at Pet. 6 the City has unfettered discretion to deny a license request or withhold permits. Level 3 relies upon 23.64.080(G) for the premise that the City can withhold permits to a licensee. That section has nothing to do with permits; it addresses the installation of municipal conduit.

construction and occupation of the rights-of-way. Pet. App. 63A.[5]

The Ordinance also contains minimum technical requirements that allow the City to coordinate the placement of facilities in the rights-of-way. Ch. 23.64.140. Further, to minimize disruption and the number of cuts in the rights-of-way, the Ordinance requires a licensee to install conduit for the City if – and *only* if – the licensee is already engaging in construction. Ch. 23.64.080(G); C.A.J.A. 458. Should it exercise this option, the City is required to pay 100% of direct and indirect costs of the installation, including materials, labor, and additional construction expenses. *Id.*

Third, the Ordinance requires a licensee to pay a license fee as compensation for use of the rights-of-way. Ch. 23.64.090.

Fourth, the Ordinance contains a number of enforcement/monitoring provisions. For example, Ch. 23.64.170 requires the City's consent before a license is transferred to another entity. This ensures

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[5] Level 3 erroneously suggests that the City requires a telecommunications provider to indemnify the City for the City's own negligence, Pet. 5. Damages must arise out of the "installation, use, operation, maintenance or condition of [Level 3's] communications transmission system." 23.64.130(B). It is more accurate to state that Level 3 may not escape responsibility for its own acts and omissions by claiming contributory negligence. For example, if Level 3 uses an unqualified contractor in violation of the Ordinance, and harm results, Level 3 may not avoid its duty to indemnify by claiming the City was negligent in failing to enforce the Ordinance.

that the City knows who is in control of the various facilities in the rights-of-way and confirms that the person operating and maintaining a system in the rights-of-way accepts responsibility for doing so. C.A.J.A. 481-82.

The Ordinance also contains provisions that permit the City to revoke a license but those provisions only apply in the event that the licensee violates the Ordinance or the License Agreement. The district court found that the revocation provisions have built-in notice-and-opportunity-to-cure protections that ensure a licensee's due process. Pet. App. 59a.[6]

2. Under the Ordinance, competition in the St. Louis telecommunications market has flourished. When the City adopted the Ordinance, four telecommunications providers operated in the City: Southwestern Bell, AT&T, MCI, and Sprint. C.A.J.A. 446. At the close of the record in this case, there were sixteen facilities-based service providers operating in the City.

Among those who have successfully entered the market pursuant to the Ordinance is Petitioner Level 3. Level 3 and the City negotiated the terms of a license agreement over the course of several months. *See*, *generally*, C.A.J.A. 541-606. The relaxed pace of the negotiations was due at least in part to the fact that at the time, Level 3 was awaiting its PSC certificate of authority, which was

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[6] Level 3 thus errs in its Statement in claiming the City has "unfettered discretion" to revoke.

not issued until shortly before the license agreement was finalized. C.A.J.A. 909-17. Indeed, the correspondence between Level 3 and the City reflects no urgency on the part of the company. C.A.J.A. 224-26, 562-63, 597-600, 605-06. The City and Level 3 formally entered into a license agreement on April 13, 1999. C.A.J.A. 484. Under the contract, Level 3 promised to pay a linear foot charge in exchange for the valuable right to place its fiber optic cable and related facilities in the City's rights-of-way. C.A.J.A. 493-94.

Since 1999, the company has continuously provided service in the City. C.A.J.A. 384-85. The company now occupies approximately 176,500 linear feet of City rights-of-way. C.A.J.A. 192. The City has never attempted to limit in any way the types of telecommunications services that Level 3 can provide, C.A.J.A. 416, and in fact the company may provide any services in the City that are authorized by the PSC. C.A.J.A. 397-98. Since 1999, Level 3 has delivered a number of new services in the City. C.A.J.A. 424-25, 711-17.

Level 3's revenues in the City are disputed. The company itself admitted that revenues attributed to the St. Louis market were in excess of $38 million from 1999 through 2004 and just under $11 million in 2004 alone. C.A.J.A. 421. The annual license fee the company paid to the City in fiscal year 2004 was, by contrast, $140,000. C.A.J.A. 418. The basis for Level 3's claimed revenues of only $80,000 per year from customers in St. Louis is unclear. The number apparently includes only

services that take place within the St. Louis market and excludes revenues where a call or service may originate in St. Louis and terminate elsewhere, or vice versa, even where the transaction uses Level 3 facilities in St. Louis. C.A.J.A. 426-427. Level 3 also admitted that the company does not track specific revenues by market. C.A.J.A. 421.

3. In late July 2003, Level 3 stopped paying license fees and in July 2004, the company filed suit against the City seeking a declaration that the requirements in Chapter 23.64 and the license agreement are preempted by 47 U.S.C. § 253, and violate 42 U.S.C. § 1983 and state law. At around the same time, the City filed a state court declaratory judgment action asking that the license agreement be declared valid, C.A.J.A. 69-74, which was removed to the district court. The district court then consolidated the cases. C.A.J.A. 99-100. Ultimately, the parties filed cross-motions for summary judgment.

During the course of discovery, the City asked Level 3 to identify what services it was being or had been prohibited or effectively prohibited from providing by the Ordinance or the license agreement under which it had been operating for five years. No prohibitory effects were identified. According to Level 3, "it cannot be determined what services Level 3 might have provided or developed using the money that was otherwise paid to St. Louis under the licensing agreement, and whether those hypothetical services would have been developed in

St. Louis or elsewhere." C.A.J.A. 384.[7] The company "did not explore possible alternative uses of the funds." C.A.J.A. 384.

In analyzing Level 3's claims, the district court largely relied on *City of Auburn v. Qwest*, 260 F.3d 1160, 1176 (9th Cir. 2001) (since overturned by *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 577 (9th Cir. 2008) (*en banc*)) to find that the City's requirements ran afoul of Section 253(a). Pet. App. 48a-49a. Without analyzing the effect of the City's legal requirements on Level 3, the district court declared that it "believes" the provisions "have the effect of prohibiting" service under the statute. Pet. App. 49a. The court then turned to the safe harbor provided by Section 253(c), Pet. App. 50a, and found that the City's fee requirement was not saved from preemption because it was not limited to the City's costs. Pet. App. 54a. The court concluded, however, that each of the challenged non-fee requirements were protected as right-of-way management provisions and therefore not preempted. Pet. App. 56a-67a.

Both parties appealed the decision to the Eighth Circuit. Based on *Auburn* and its progeny, Level 3 defended the district court's decision by claiming that Section 253(a) preempts any local requirement that "may prohibit" the ability to

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[7] *See also* C.A.J.A. 442 ("Level 3 cannot 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.")

provide service. Level 3 Br. 22 (May 12, 2006). The Eighth Circuit disagreed. Pet. App. 30a. The court noted that "no reading results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services." Pet. App. 30a. Instead, the court turned to the guidance provided by the FCC:

> [A] plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market.

Pet. App. 31a (internal citation omitted) (citing *Cal. Payphone Ass'n*, 12 F.C.C.R. 14,191, 14,206 ¶ 31 (July 17, 1997).

Applying this standard, the court found that Level 3 had not carried its burden of proof under Section 253(a). Pet. App. 32a. The court noted that Level 3 "cannot 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." *Id.* In addition, the court conducted a "thorough review of the entire record," and found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." *Id.*

The court also ruled that Section 253(c) does not independently limit local government action. Pet. App. 28a-29a. The court reasoned that "requiring proof of a violation of subsection (a) before moving to subsection (c) is the only interpretation supportable by a plain reading of the section as a whole." Pet. App. 29a. Level 3 did not argue otherwise before the court of appeals.

Level 3 petitioned for panel rehearing and for rehearing *en banc*. The court of appeals denied the petition. Pet. App. E.

On remand, the district court entered summary judgment for the City (Pet. App. B), and the Eighth Circuit affirmed (Pet. App. A).

REASONS FOR DENYING THE PETITION

As we show in Part I, the Eighth Circuit's conclusion was dictated by Level 3's failure to show that the challenged ordinance has any material effect upon it. No appellate court has held that Section 253 permits a court to preempt a local law at the behest of an entity already competing in a competitive market if that entity can identify no "effect" of a challenged law on its ability to provide service.

Nonetheless, Level 3 contends that the interpretation of Section 253 is plagued by a "widespread and entrenched" conflict that is "ever-expanding" as to what it means to "prohibit" or "have the effect of prohibiting" the ability of an entity to provide telecommunications services. Pet. 11, 24. As we explain in Part II, while an early Ninth

Circuit decision, *Auburn*, misread Section 253(a)'s plain language, other courts of appeals have read Section 253 in accord with Congress's language and intent, and with the interpretation of the FCC. The Eighth Circuit's decision reflects this reading. Based largely on the decision below, the Ninth Circuit recently overturned *Auburn* in *County of San Diego*. There is no significant, remaining conflict among the courts of appeals regarding the interpretation of Section 253 that would dictate a different result on these facts. This is therefore not a case that requires the Court's intervention.

Finally, as we show in Part III, there is no significant conflict among the circuits regarding the question of whether Section 253(c) has independent preemptive force, or whether it only operates as a safe harbor. For some years, the courts of appeals have adopted the latter view, and the FCC is also of that view. In addition, because the decision below did not interpret or apply Section 253(c), the Court should not reach this issue in the first instance.

I. The Eighth Circuit's Decision Properly Applied Section 253(a) To the Facts After a Review of the Entire Record Showed No Actionable Claim.

A. Section 253(a) Must Be Read To Preempt Only Requirements That "Prohibit or Have the Effect of Prohibiting" the Ability To Provide Service.

Section 253 must be read to preempt local law narrowly, and in accordance with its plain language. By its terms, Section 253 preempts only state and local requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications service. This language must be read narrowly – not only pursuant to the Court's canons of preemption, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992);[8] but also because Congress specifically so instructed in the Act itself. Section 601(c) states that the Act may only be read to preempt local or state laws as "expressly so provided." 47 U.S.C. § 152 nt. Rather than reading Section 253 in strict accordance with its terms, Level 3 criticizes the Eighth Circuit and asserts that Section 253 must be read so that it promotes competition. In Level 3's view, this requires a broad preemption of any requirement that may be characterized as an "obstacle" to competition, even where there is no showing that the alleged "obstacle"

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[8] Courts must accept "the reading that disfavors preemption," *Altria Group v. Good*, ___ U.S. ___, 2008 WL 5204477 (2008).

has a material impact on the Plaintiff. *See, e.g.*, Pet. at 3.

However, the preemptive sweep of Section 253(a)'s plain language cannot be broadened merely to promote the abstract notion of competition. The Court came to a similar conclusion in finding that the FCC could not depart from the "ordinary and fair" meaning of "impair" in Section 251(d)(2)(B), even though the agency believed a broader definition would speed competition. *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). Congress's use of "prohibit or have the effect of prohibiting" must be given a meaning that reflects the use of those terms, rather than the less demanding "impair" standard in Section 251(d)(2)(B) or "impede" standard in Section 228(g)(4). *Cipollone*, 505 U.S. at 516 (1992).[9]

Nor can Level 3 otherwise justify departure from Section 253(a)'s plain language by referring to the general purposes of the Act. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). That observation is particularly apt here,

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[9] Level 3 errs in arguing that the Eighth Circuit erred by looking only to the effect on "the specific provider asserting preemption." Pet. 13. No circuit court has looked to an "effect" of a local requirement on an entity other than the plaintiff, perhaps because such an analysis would raise serious concerns under Article III. Even if such an analysis were appropriate, it is irrelevant here, as Level 3 did not show the effect of the City's requirements on any other entity.

given that the extended legislative history of Section 253 shows Congress's specific purpose is well-served through a focus on requirements that "prohibit" or have that "effect." As the First Circuit observed, Section 253(a), as adopted, was primarily concerned with uprooting regulatory systems that granted telephone monopolies:

> Congress apparently feared that some states and municipalities might prefer to maintain monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. § 253(a) takes that choice away from them, thus preventing state and local governments from standing in the way of Congress' new free market vision.

Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88, 97-98 (1st Cir. 1999); *see also Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., concurring in part, dissenting in part).

In fact, Level 3's argument is at odds with and is based upon a misreading of the legislative history. At Pet. 20, for example, Level 3 relies on a statement by Sen. Pressler for the proposition that the Act guaranteed "uniformity" and prevented providers from facing the "uncertainty of not knowing what every City will do." 141 Cong. Rec. S8176 (June 12, 1995). Sen. Pressler was speaking in favor of a version of Section 253 that did not pass, and that gave the FCC broad authority over all aspects of state and local regulatory systems. Better reflecting

the purpose of the Act is this statement from the House debate:

> As Republicans, we should be with our local city mayors, our local city councils, because we are for true Federalism, we are for returning power as close to the people as possible, and that is what the Stupak-Barton amendment does. It does not let the city governments prohibit entry of telecommunications services providers for pass through or for providing service to their communities. . . . [but] The Federal Government has absolutely no business telling State and local government how to price access to their local right-of-way. We should vote for localism and vote against any kind of federal price controls.

141 Cong Rec. H8460 (daily ed. Aug. 4, 1995) (statement of Rep. Barton); *see also id.*, S8306 (Statement of Sen. Gorton). Section 253 thus was not intended to uproot any and all local requirements that might *affect* a telecommunications company.

B. To Prove a Requirement Has the "Effect of Prohibiting," a Plaintiff Must Show a Material Impact.

Since the City's requirements did not "prohibit" Level 3 from providing service, the Eighth Circuit considered whether the requirements have a prohibitory "effect" on the company. The court

adopted the FCC's standard:[10] "The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market." Pet. App. 31a (citing *Cal. Payphone* 12 F.C.C.R. at 14206 ¶ 31.[11]

Under this test, as interpreted by the FCC, a fact-finder assesses the "practical effect" of a requirement. *Cal. Payphone*, 12 F.C.C.R. at 14204 ¶ 27. An evidentiary record is necessary in most cases:

> Parties seeking preemption of a local legal requirement such as the . . . Ordinance must supply us with *credible* and *probative evidence* that the challenged requirement

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[10] Even where statutory language is unambiguous, as here, courts may look to administrative agencies for guidance. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The FCC has been required to interpret Section 253(a) in several contested proceedings. That is because, in section 253(d), the FCC is given specific authority to receive complaints from telecommunications providers, and to determine whether a local ordinance or regulation prohibits or has the effect of prohibiting a provider's ability to provide service. However, the FCC cannot decide whether a local or state requirement is protected from preemption by Section 253(c). That is left to the courts.

[11] The FCC has defined a "prohibition" as a requirement that "expressly precluded an entity or class of entities from providing a particular service in a particular area," *Cal. Payphone,* 12 F.C.C.R. at 14206 ¶ 29. There is no serious contention that the St. Louis ordinance contains a direct "prohibition."

> falls within the proscription of Section 253(a) without meeting the requirements of section 253(b) and/or (c).

In re TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order, 12 F.C.C.R. 21396 at 21440, ¶ 101 (1997) (emphasis added). The FCC's *Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act*, 13 F.C.C.R. 22970 (1998), specifically ask the complainant to identify:

> *** What *specific telecommunications service or services* is the petitioner prohibited or effectively prohibited from providing? . . .
>
> *** What are the *factual circumstances* that cause the petitioner to be denied the ability to offer the relevant telecommunications service or services? . . .

The FCC has consistently required evidence that a provision, *as applied*, has prohibitory effects, and rejected challenges based on the mere possibility that authority *might* be exercised in a manner that arguably "prohibits or has the effect of prohibiting" the ability of a provider to offer services. *Cal. Payphone,* 12 F.C.C.R. at 14209 ¶ 38 (emphasis added). The FCC accordingly rejected a Section 253 petition because the complainant had failed to show that the challenged regulation made it "impractical and uneconomic" or eliminated any "commercially viable opportunity" to enter the market. 12 F.C.C.R.

at 14210 ¶ 41.[12] As the FCC's cases demonstrate, this reading of Section 253 provides ample protection against requirements that actually prohibit or "have the effect of prohibiting" market entry – it does not, as Level 3 claims, limit Section 253(a) to protecting against "far-fetched and entirely imaginary" ordinances.[13] As discussed, *infra*, the FCC test has been adopted in the First, Second, Eighth, Ninth, and Tenth Circuits.

C. The Eighth Circuit Properly Found That Level 3 Showed No Prohibitory "Effect."

The record before the Eighth Circuit made the resolution of this case rather simple. As an initial

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[12] This applies the primary and ordinary meaning of the term "prohibit," which is to "forbid by law," and not merely "impede," as Level 3 would have it. Black's Law Dictionary, 8th Ed. 2004.

[13] *In re Petition of Pittencrieff Communications, Inc.*, 12 F.C.C.R. 19491 (1997) (striking down Texas law based on evidence that it made competitive entry commercially unviable). Level 3 criticizes the Ninth Circuit for giving what Level 3 claims are far-fetched examples of requirements that could be deemed "effective prohibitions" on a *facial* challenge. The Ninth Circuit never claimed that only such requirements were "effective prohibitions." Rather, the point of its examples was that, on a *facial challenge,* it would have to be clear that an ordinance requirement would lead to a prohibition in all circumstances. This is, of course, a necessary result of the application of this Court's "facial challenge" rules, *United States v. Salerno,* 481 U.S. 739, 745 (1987). This is hardly grounds for criticism. In fact, elsewhere in the decision, *Sprint* suggested that an Ordinance that "impose[s] an excessively long waiting period" would "have the effect of prohibiting" under Section 253(a). 543 F.3d at 580.

matter, any analysis must begin with the recognition that franchising ordinances are in and of themselves *not* prohibitory or effectively prohibitory. Rather, by their nature such ordinances *permit* a company to use and occupy valuable property which it does not own. *In re Classic Telephone*, 11 F.C.C.R. 13082, 13097 ¶ 28 (1996). Because the City's requirements did not "prohibit" on their face, the question before the Eighth Circuit was whether the requirements nevertheless have "the effect of prohibiting" Level 3's ability to provide services. The court looked to the record. As indicated in the Statement of the Case, Level 3 was in the market, and had been operating pursuant to the St. Louis ordinance for some years and was rolling out new services in the City. There was no evidence that it was being forced to leave the market, or to cut back service. Level 3 was unable to identify any service it had been prohibited or effectively prohibited from providing, and admitted that, "it cannot be determined what services Level 3 might have provided or developed" with the money it paid the City. C.A.J.A. 384. The City further showed that it has never attempted to limit the types of telecommunications services that Level 3 can provide, C.A.J.A. 416. C.A.J.A. 397-98. It showed, more generally, that the market was highly competitive.

Level 3's response to this evidence was essentially to demur. It made general claims that the ordinance conferred "unfettered discretion" on the City (the district court found it did not), and asserted as a general matter that the ordinance was "burdensome," without evidence that it was. The

extent of the demurrer is emphasized by the Petition at 19, where Level 3 argues that the Eighth Circuit should have considered the impact of the City's right-of-way fees had they been adopted in every community served by Level 3. But Level 3 never presented such evidence, as should be obvious from the Petition's citation of a summary judgment motion filed in another case.[14] Ultimately, Level 3 did not support the allegations in it complaint, or rebut the evidence showing those allegations were groundless.

To be sure, Level 3 did complain that the annual license fee, approximately $140,000 in 2004, was in and of itself prohibitory, but the evidence was to the contrary. Had the fee truly been prohibitory

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[14] Certiorari cannot be justified based on facts never presented. *Witters v. Wash. Dept. of Servs. for the Blind,* 474 U.S. 481, 488 n.3 (1986) it is hardly a convincing citation in any case. First, the $2.79 overstates the fee in St. Louis as shown on the record, (C.A.J.A. 494, 379). Second, the fee in St. Louis was based on the value of the real estate in St. Louis, which is justifiably higher than in surrounding areas, just as other real estate rents are higher. C.A.J.A. 631-632. Level 3's claim that rents must be uniform is bad (and unsupported) economics. Third, the record shows how much Level 3 pays nationwide in right-of-way fees: $22 million. By way of comparison, the annual interest the company pays on debt service was $485 million in 2004. C.A.J.A. 424. There is no reason for the Eighth Circuit to suppose that every jurisdiction would or could impose the St. Louis fee. What the Level 3 argument does reveal is the essence of its approach to Section 253: Level 3 is suggesting that it must be allowed to claim a prohibition not based on the facts, but based on what might happen if the facts were different. This approach is obviously hard to square with Article III jurisprudence.

one would have expected Level 3 to raise the issue much sooner, and one would have expected Level 3 to be able to identify some impact from a fee it had paid for five years.

However, the main thrust of Level 3's argument (largely submerged in its Petition) was that Section 253(a) preempts any local requirement that "*may* [that is, might] prohibit" the ability of any entity to provide service under any hypothetical circumstances. Having properly rejected that argument for reasons explained *supra,* the court of appeals conducted a "thorough review of the entire record" and properly found "insufficient evidence from Level 3 of any actual or effective prohibition, let alone one that materially inhibits its operations." Pet. App. 32a.[15]

Level 3 is left to resort to a series of overblown claims as to the consequences that follow from the Eighth Circuit's holding. Level 3 argues that "under the Eighth Circuit's view, a local government's assessment of any outrageous and competition-inhibiting charge does not amount to a preempted 'prohibition' under Section 253(a) as long as it is paid, regardless of the disincentives and financial dislocations its creates." Pet. 16. That is not the case. What the court found relevant was the admission that the company could not identify any

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[15] Level 3 complains that the Eighth Circuit did not "accord[] . . . significance" to various facts. Pet. 18. Given Level 3's effective admission that the ordinance had no impact, however, the Eighth Circuit's findings are more than amply justified.

impact. Pet. App. 32a. Level 3 also claims that under the Eighth Circuit's decision, it could not bring a claim unless required to "abandon" the local market, Pet. 17, or if challenged provisions "literally preclude the plaintiff telecommunications provider from offering services." Pet. 19-20. But the decision expressly states otherwise: it was based on the whole record, and the failure of *this* company to show any material impact. Pet. 32a. Nor is it accurate that the Eighth Circuit's analysis "began and ended with the question whether Level 3 . . . determined to construct its fiber-optic network and to provide services". Pet. 18. It began and ended with the record, which contained more than ample evidence that showed there was *no* prohibition, "effective" or otherwise.

Level 3 claims that by requiring a showing of a prohibition or effective prohibition the Eighth Circuit reads "Section 253(c) out of the statute." (Pet. 20) The reverse is true. Under Level 3's reading, all local laws and regulations would be preempted unless they fell within the safe harbor of Section 253(c) – thus rendering the language of Section 253(a) surplusage. The court's reading gives effect to all parts of Section 253. By requiring a plaintiff to show, first, a prohibition or effective prohibition, and then permitting a locality to show that the challenged regulations fall within one or both of the safe harbors established by Sections 253(b)-(c), a court gives effect to all provisions of the act, as the FCC has consistently recognized. *Classic, supra.*

Nor is there a reason to create an exception to this rule where the challenge is to a provision requiring payment of compensation. Pet. 21. According to Level 3, a compensation scheme that is not based on costs ought to be treated as *per se* prohibitory. This makes no sense, economically or legally. Under that theory, *any* fee – 1 penny per year, for example – would "have the effect of prohibiting" the ability to provide service. In free markets, prices are not necessarily based on costs, as Level 3 uses the term; so it is unclear why a non-cost-based rate would be treated as inherently prohibitory.[16] Indeed, the basic thrust of the argument assumes Congress intended to establish a single, unified rate-regulation system for local and state governments, and to dictate, *sub silentio*, what could be charged for rights-of-way. Neither Section 253's plain language nor its legislative history supports such a far-reaching interpretation.[17]

To be sure, there may be cases where a prohibitory "effect" may be established with very

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[16] Landlord A may have a house that was acquired at no cost (through inheritance, for example) and requires nothing to maintain; Landlord B, next door, may have purchased the house at a very high cost, which requires much more money to maintain. In a free market, one would not consider Landlord A to be "prohibiting" renters by charging the going rate for rentals, or for charging the same amount as Landlord B.

[17] This Court has long recognized that localities may charge the fair value rent for use of rights-of-way. *St. Louis v. Western Union Telegraph*, 148 U.S. 92 (1892). Even assuming Congress had the power to eliminate this local authority, it is impossible to imagine Congress doing so in so cryptic a fashion.

little evidence – but this is not such a case. There is no reason for the Court to grant certiorari to review the Eighth Circuit's application of a standard it adopted in common with the FCC and other courts of appeals to a record wholly lacking in relevant facts supporting the claim.

II. The Interpretation of Section 253(a) Has Coalesced Around the Statute's Plain Language and the FCC's Guidance.

At its core, this case is thus about Level 3's failure to offer basic proof in the factual record. Contrary to Level 3's claim, the Eighth Circuit did not break new ground in Section 253(a) law, or create a conflict among the Circuits that requires the intervention of this Court.

The interpretation of Section 253(a) in the circuit courts and at the FCC has coalesced around the statute's plain language. To be sure, the Eighth Circuit "acknowledge[d] that other courts hold otherwise and *suggest* that *possible* prohibition will suffice." Pet. App. 29a (second emphasis in original) (citing the First, Ninth, and Tenth Circuits).[18] However, when the rulings in those Circuits are examined, it becomes obvious – particularly after the *Auburn* reversal – that there is no conflict as to the standards that determine the outcome of this case.

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[18] Level 3 also alleges a conflict with the Second Circuit. Pet. 25.

A. The Reversal of *Auburn* Eliminated the Case That May Have Presented a Real Conflict.

In *Auburn*, the Ninth Circuit stated that "Section 253(a) preempts regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that '*may* . . . have the effect of prohibiting' the provision of such services." *Id.* (quoting *Bell Atlantic v. Prince George's County*, 49 F. Supp. 2d 805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000)) (emphasis added). As convenient linguistic shorthand, the "may prohibit" formula is not problematic. It has been used by the FCC and other courts. However, in the Ninth Circuit, the formulation was soon applied as a substantive rule of interpretation. In *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), the appellate panel concluded that under the "may prohibit" test, Qwest was not required to make an actual showing of "a single telecommunications service that it is effectively prohibited from providing." On remand, the district court noted the potential breadth of a "may prohibit" standard read literally:

> [A]lmost any regulation, considered in the abstract without factual context, could be depicted as potentially prohibiting a telecommunications service. A $5.00 application fee would be prohibitory if the applicant had only $2.00. Unless the preemption analysis is somehow connected

> to reality, a telecommunications provider could rely on purely hypothetical scenarios to establish a violation of § 253(a).

Qwest v. Portland, 2006 WL 2679543 (D. Or. 2006). The district court struggled to define the "may prohibit" test in a way that would be consistent with the Ninth Circuit's precedents, and yet avoid making Section 253(a) a meaningless test in conflict with the FCC's decisions, *id.*; but it was quite clear that *Auburn* was, at the very least, creating substantial application problems that raised Article III concerns. Nevertheless, plaintiffs in that case and others urged the Ninth Circuit to confirm that under *Auburn,* a prohibition could be based on speculation, without proof of effect.[19]

Under a "preemption by speculation" test, there would have been a clear conflict between the Ninth Circuit and the Eighth Circuit. However, in *County of San Diego*, 543 F.3d 571, the Ninth Circuit *en banc* concluded that there was no room for a substantive "may prohibit" standard:

> In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations

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[19] This was the approach taken by Level 3 in this case. The district court cited *Auburn* and the "may prohibit" test, and found a Section 253(a) violation without looking for any prohibitive "effect." Pet. App. 47a-49a. Instead, the court declared that it "believes" the City's requirements to be prohibitive when considered as a whole, without examining their impact on Level 3. Pet. App. 49a.

> shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition."

543 F.3d at 577. The court noted that its revised interpretation of Section 253(a) was consistent with the FCC's. *Id.* at 578.

B. The Decision in This Case Does Not Present a Conflict With Other Appellate Decisions on Section 253(a).

Level 3 contends that there is nonetheless a conflict between the test adopted by the Eighth Circuit for finding a requirement has the "effect of prohibiting", and the test adopted by the First, Second, and Tenth Circuits, where (Level 3 claims) "ordinance provisions like those imposed by St. Louis are preempted *whenever* they impose a substantial burden or cost – albeit a surmountable one – on the telecommunications provider." Pet. 24, 28 (emphasis added). In other words, according to Level 3, "a substantial burden or cost" has, as a matter of law, the "effect of prohibiting" even if a defendant shows that the challenged requirements have no prohibitory "effect" whatsoever. That is not what the cases say: none found a violation of Section 253(a) in the face of evidence that the challenged ordinance

had no material "effect" on the plaintiffs. In each case, the appellate courts relied on the FCC's test adopted by the Eighth Circuit, and only preempted after concluding, based on record evidence, that the applicable requirements "prohibit or have the effect of prohibiting" the ability to provide service. While the cases cited *Auburn*, none adopted or applied the "preemption by speculation" test rejected in *San Diego*. None purported to expand the statute beyond its plain language.[20]

* * *

We begin with the Second Circuit. In *TCG N.Y. Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002), the Second Circuit applied the FCC's "materially inhibits or limits" test to preempt various provisions of the City of White Plains' ordinance under Section 253. 305 F.3d at 76 (quoting *Cal. Payphone*, 12 F.C.C.R. at 14209 ¶ 31). In that case, TCG had unsuccessfully negotiated for 18 months to obtain a franchise to provide services in the City. *Id.* at 71-72. The Second Circuit found a

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[20] Level 3 belittles the notion that Section 253(a) can be interpreted in accordance with its "plain language." There are certainly complexities involved in interpreting Section 253(a), as this Court recognized in *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132 (2004) (finding that the term "ability" complicates the interpretation of Section 253(a)). However those complexities are not implicated by this decision, which boils down to deciding that Level 3 was required to make an adequate showing that it was prohibited or effectively prohibited from providing service. The question of whether a prohibition or effective prohibition is required *is* decided by the plain language of the provision, and that language cannot be ignored.

Section 253(a) violation based on two factors, including the City's "right to reject any [franchise] application based on any 'public interest factors . . . that are deemed pertinent by the City,'" and the City's "extensive delays" in processing TCG's franchise application. *Id.* at 76. Thus, there was evidence that the City had exercised its discretion to cause the very harm that was at the center of the suit – the denial of TCG's market entry.

In the present case, Level 3 has demonstrated no such prohibitory "effect." Level 3's repeated references to negotiating delays are inaccurate, C.A.J.A. 541-606, and more importantly, irrelevant to the current dispute, as the company is complaining about the terms under which it is now *operating* in the market – not its initial application, which was granted long ago. Moreover, in contrast to *White Plains*, where the City could reject a franchise application for undefined public interest factors, the City of St. Louis can only reject an application if it is incomplete or if the proposed use of the rights-of-way is inconsistent with the requirements of Chapter 23.64 (*i.e.* a proposal to provide cable services as opposed to telecommunications services). Ch. 23.64.050(B).

There is also no conflict with the Tenth Circuit's decision in *Qwest Corp. v. Santa Fe*, 380 F.3d 1258 (10th Cir. 2004). There, applying the same "materially inhibit" standard, *id.* at 1271, the court made four findings. First, it declared that "the mere naked requirement of a registration or lease with the city is not prohibitive within the meaning of the

statute." *Id.* at 1269. Second, the court held that the City's cost-based fees did not run afoul of the statute. *Id.* Third, it held that the City had improperly retained the right to deny an application on any basis and to seek any information, without any standards or limits. This, the court stated, amounted to unlawful "unfettered discretion" inconsistent with Section 253(a). *Id.* at 1270, n.9. Finally, the court ruled that rent and appraisal provisions of the Ordinance ran afoul of Section 253(a) because they "create a massive increase in cost" for providers over the existing fee structure. *Id.* at 1271.

There is no conflict between *Santa Fe* and the Eighth Circuit's decision that justifies certiorari. In *Santa Fe*, unlike this case, the provider presented evidence that a proposed change in the law would result in massive increases in the cost of using the rights-of-way. Level 3 claims that this means that under *Santa Fe* any "substantial burden" is a *per se* violation of Section 253(a), regardless of contrary evidence regarding the burden's "effect." Pet. 28. That was not the holding of the court: as far as the record shows, the evidence presented by the provider as to the impact of the ordinance was largely unchallenged and there was no countervailing evidence comparable to that presented by the City here. At most then, it can be said that the Tenth Circuit concluded that *in the absence countervailing information*, proof of a massive increase in costs can be enough to show a requirement has a prohibitory "effect." Here, by contrast, Level 3 had been paying the license fee for five years before challenging it in

2004. The fee is also less than what Level 3 pays in other jurisdictions, C.A..J.A. 379, 428, and well within the range of fees paid by Level 3 and other providers for use of a right-of-way or transportation corridor nationwide. C.A.J.A. 621-642. The Tenth Circuit never suggested a prohibition could be found under such circumstances.

Level 3 tries to create a conflict with *Santa Fe* by arguing that St. Louis had the same "unfettered discretion" Santa Fe had. The district court in this case concluded otherwise. Pet. 57a-58a. The record shows that the City's discretion is not unfettered, and certainly not comparable to discretion reserved in the *Santa Fe* provisions the Tenth Circuit found troubling.[21]

The ruling in *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006), is also not in conflict with this case. There, the First Circuit preempted a municipal ordinance that required the payment of a five-percent fee on gross revenues, a ten-fold increase from the 0.5% fee

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[21] There may be a real question as to whether "unfettered discretion," standing alone, is enough to constitute a *per se* effective prohibition within the meaning of Section 253(a). While the Tenth Circuit implies in a footnote that it is, the decision never explains why discretion is inherently prohibitory. The Tenth Circuit relied on a similar phrase used in *Auburn,* but even the *Auburn* court expressly declined to find that discretion, standing alone, was enough to violate Section 253(a). Hence, the precise position of the Tenth Circuit on the discretion issue is unclear. The critical point for this petition is that there is no conflict justifying certiorari, because here there was no "unfettered discretion."

previously imposed. The court adopted the same FCC "materially inhibit" test that has been adopted by the Second, Eighth, Ninth and Tenth Circuits:

> As the [FCC] has explained, "in determining whether an ordinance has the effect of prohibiting the provision of telecommunications services, it 'considers whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"

Id. at 18 (citations omitted).

Applying this test, the First Circuit examined the record and found that the fee increase "would constitute a substantial increase in costs." *Id.* at 19. Puerto Rico Telephone Company ("PRTC") had provided unrefuted evidence that the fee increase would result in at least an 86% decline in the company's profits. *Id.* at 18. Further, the court found that PRTC would incur additional costs in having to change its accounting and records procedure to track calls originating in the Municipality. *Id.* at 19. Together, the court held that these costs would "place a significant burden on PRTC," which would "'materially inhibit[] or limit[] the ability' of PRTC to 'compete in a fair and balanced legal and regulatory environment.'" *Id.*[22]

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[22] The First Circuit did not decide that it was appropriate to assess the "effect" of other municipalities' requirements under a Section 253(a) challenge to the City of Guayanilla's

As with *Santa Fe,* there is no reason to suppose the First Circuit would find a prohibition where the evidence shows *no* increase in costs, and *no* impact on the company, as here.

No great or widening conflict exists here. Level 3 seems to believe that the Eighth Circuit (and now the Ninth Circuit) uniquely requires a plaintiff to show a requirement has an "effect of prohibiting" while other Circuits find *per se* violations liberally, without regard to the record, and based only on a plaintiff's listing of potential *causes* of such an "effect." That is not the case: Circuit decisions have been properly fact-driven (at least outside the Ninth Circuit), and the Eighth Circuit does not foreclose *per se* effective prohibitions. In this case, nothing in the City's ordinance was *per se* prohibitive, so Level 3 was required to demonstrate that the City's requirements "have the effect of prohibiting the ability of any entity to provide service." It is Level 3's failure to do so – not any novel or conflicting interpretation of law – that dictated the result.

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requirements. Instead, the court held that it was appropriate to consider Puerto Rico-wide information in order to extrapolate the impact in the Municipality of Guayanilla. *Id.* at 17-19 (finding "it is reasonable to conclude that that the effect of Ordinance No. 40 on the profitability of its operations *within the Municipality* would be similarly, or perhaps even more, substantial.") (emphasis added).

III. The Law of Section 253(c) Is Not in Conflict, and Was Not Addressed in the Decision Below.

Level 3's Petition appears to suggest that the Court should also resolve what it characterizes as conflicts in the interpretation of Section 253(c). Pet. 21, 29. No genuine conflict exists over the premise that Section 253(c) serves only as a safe harbor, and not an independent basis for preemption. While it is true that the Sixth Circuit held otherwise in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000), the courts, including every Circuit that has addressed the issue, have since been nearly uniform in holding that Section 253(c) serves as a safe harbor, to be applied only after finding a preemption under Section 253(a). *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1187 (11th Cir. 2001); *TCG N.Y. v. City of White Plains*, 305 F.3d 67, 77 (2d Cir. 2002); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004); *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006); *NextG Networks of NY, Inc. v. City of N.Y.*, 513 F.3d 49, 53 n.4 (2d Cir. 2008); *Sw. Bell Tel. Co. v. City of Houston*, 529 F.3d 257, 262 (5th Cir. 2008).

Nor does any genuine conflict exist on the question of whether fees for use of the rights-of-way must be based on cost. The Ninth Circuit in *Portland* made it clear it had not addressed the issue, 385 F.3d at 1243; the Second Circuit did the same in *White Plains*, 305 F.3d at 78-79. In *Santa Fe,* the district court specifically rejected the "cost"

claim Level 3 makes here. 224 F. Supp. 2d 1305, 1327-28 (D.N.M. 2002). The Tenth Circuit did not require the City to base fees on costs, but found the City's lease fees defective because there was no evidence that they actually reflected the "fair market value" of the property used. 308 F.3d at 1272. The First Circuit in *Guayanilla* recognizes that a majority of courts have rejected the claim that fees must be limited to costs. 450 F.3d at 21. The case refers to basing fees on costs in the context of a record where there was *no* evidence as to the fair market value of the property – leaving cost as a key element for determining whether rates were reasonable. But the fact that the reasonableness of rates may be proven through cost showings does not mean that rates cannot be justified in other ways.

Moreover, because the Eighth Circuit did not interpret or apply Section 253(c) to the challenged Ordinance, there is no need for the Court to do so now. The Eighth Circuit did not find a violation of Section 253(a), and therefore never reached the issue of whether the Section 253(c) safe harbor saves any of the City's requirements from preemption. Pet. App. 33a. The Court ordinarily does not "decide in the first instance issues not decided below." *Nat. Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999). It should not do so in this case.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.[23]

Respectfully submitted,

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December 19, 2008

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[23] The City notes that in a letter to General Suter, dated December 10, 2008, counsel for Sprint Telephony, PCS requested that the Court hold consideration of Level 3's petition in this case until such time as it can be considered with Sprint's petition in another case. The City strongly opposes this request and understands that Level 3 opposes it as well. The City also disagrees that the cases are "materially identical." To the extent there are overlapping issues between the cases, the Court can resolve those issues in one case without having to consider them together.