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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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Petitioner Level 3 Communications, Inc. respectfully submits this Supplemental Brief to address the points raised in the *Amicus* Brief of the United States.

* * * *

The petition for certiorari presents the critical and frequently recurring question of the extent to which Section 253 of the Telecommunications Act preempts barriers to entry into local markets. That question is the subject of twin circuit conflicts – one involving Section 253(a) and the other Section 253(c) – that are both widely acknowledged and squarely presented by this case. The Solicitor General's suggestion that certiorari should nonetheless be denied is unsound.

1. The unstated premise underlying the government's brief is the overriding desire of the Federal Communications Commission (FCC) to place the construction of Section 253(a) within its own control and out of the hands of this Court. The government thus argues that the FCC is the correct institution to resolve the conflict over the statute's proper construction. SG Br. 18. It also maintains that the conflict is manageable because – although there is an existing circuit split – the courts of appeals at least *cite* to FCC precedent. SG Br. 16. In reality, this Court's intervention is urgently required because there is no realistic prospect that the FCC will bring clarity to the construction of Section 253 within a reasonable period of time, if at all.

The government does not suggest that the FCC will take any action that would establish greater uniformity with respect to the proper construction of Section 253(a) within the next five years. The FCC interprets the statute through administrative charges instituted by telecommunications providers. *See* 47 U.S.C. § 253(d). But the Commission has never elaborated on the general standard set forth more than a decade ago in *California Payphone Ass'n Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Sec. 253(d) of the Commc'ns Act of 1934*, 12 F.C.C.R. 14,191 (1997), and it has not decided a single applicable case since that year (*see* SG Br. 11 (citing *Petition of Pittencrieff Commc'ns, Inc. for Declaratory Ruling Regarding Preemption of the Tex. Pub. Util. Regulatory Act of 1995*, 13 F.C.C.R. 1735 (1997))). The government does not indicate that a relevant complaint is even pending at this time, and petitioner is unaware of any. Even once (at some unknown and unknowable date in the future) a telecommunications provider initiates a new complaint before the Commission, it will then still take years to resolve.

The delay suggested by the government would exact too great a cost, and the far more sensible course is for the Court to grant certiorari and for the Solicitor General to present the FCC's views in a merits *amicus* brief. The petition collects the mass of litigation now pending around the nation – all in the courts, none before the FCC – over the application of Section 253, which is subject to tremendous uncertainty. Pet. 32-33 & n.6. The diverse municipal restrictions on telecommunications providers, when combined with the lack of clarity on the proper

interpretation of Section 253, directly inhibit competitive entry into local markets, which depends on providers' access to local rights of way. Pet. 19. The current "patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies." *In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21,396, 21,442 (1997). "It becomes extremely difficult for providers to create plans that gaze several years into the future when it is not certain the test by which a municipal ordinance will be examined." AT&T *Amicus* Br. 19.

Because there is no prospect that within a reasonable period of time (if at all) the Commission will "help correct and unify the interpretation and application of Section 253, obviating the need for this Court's intervention" (*contra* SG Br. 9), certiorari should be granted.

2. Certiorari is also warranted because the ruling below is erroneous. Indeed, the most telling feature of the government's brief is that it does *not* endorse the Eighth Circuit's holding that the St. Louis ordinance is not preempted by Section 253.

Chapter 23.64 imposes an array of regulatory constraints that obstruct any competitive telecommunications provider's ability to construct local facilities in St. Louis. The further $140,000 annual charge imposed by the City for petitioner's access to local rights of way is ten times the average per-foot fee paid by petitioner to other local governments, dwarfs all of petitioner's revenues from customers in the City, and would amount to a crushing burden of billions of dollars in yearly fees if

adopted by other municipalities. *See* Cert. Reply 7-8. The Eighth Circuit nonetheless sustained the ordinance without any demonstration that the regulatory scheme does not inhibit competition and that the fee constitutes fair and reasonable compensation for access to local rights of way. *See* 47 U.S.C. § 253(c). This Court should hold that the court of appeals erred and remand for the application of the correct legal standard, including (if necessary) the development of an appropriate record.

The Solicitor General's suggestion (at 13) that the test articulated by the Eighth Circuit is broadly consistent with the FCC's interpretation of the Telecommunications Act addresses only one-half of the inquiry under Section 253(a). The lower courts and the FCC have divided the statute's construction into two separate questions. First, is it sufficient to trigger preemption that a local requirement "may" at some point undermine competition? If not, then second, what present effect by the ordinance is required to trigger preemption?

The FCC agrees with the court of appeals' disposition of the first question: the Eighth Circuit held that a "potential" reduction in competition is insufficient, and the Solicitor General agrees that this "conclusion is consistent with the language of Section 253(a) and with the Commission's decisions applying that provision." SG Br. 10.

But the FCC misapprehends the Eighth Circuit's analysis of the second question, which addresses the present effect of the ordinance that suffices to trigger preemption. The bottom line of the Commission's decision in *California Payphones* is that Section 253(a) preempts local measures that materially

inhibit competition by any provider. As the Solicitor General explains, "a law 'has the "effect of prohibiting" the ability of *any* entity to provide' telecommunications service 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." SG Br. 2-3 (quoting *California Payphones*, 12 F.C.C.R. at 14,206 ¶ 31) (emphases added). The Solicitor General recognizes that this rule is consistent with this Court's conclusion that Section 253 "prohibits state and local regulation that *impedes* the provision of 'telecommunications service.'" *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 491 (2002) (emphasis added), *quoted in* SG Br. 2.

The Eighth Circuit's standard is materially different and far narrower in its application of federal preemption. The court of appeals did not look broadly to the effect of Chapter 23.64 on competition, but rather much more narrowly inquired whether Level 3 as the provider instituting the suit was itself effectively prohibited from providing a particular service. As the government recognizes, the Eighth Circuit construed the FCC's reference to "an existing material interference with the ability to compete in a fair and balance market" to require petitioner to prove that "the City's ordinance actually or effectively inhibited *Level 3's* ability to provide telecommunications services." SG Br. 13 (quoting Pet. App. 32a) (emphasis added). "In reaching that conclusion, the court *emphasized* Level 3's acknowledgment that *it* could not 'state with specificity what additional services *it* might have provided had it been able to freely use the money

that *it* was forced to pay to the City for access to the public rights-of-way." SG Br. 4 (quoting Pet. App. 32a) (emphases added). That is not a "substantially similar inquiry" to the Commission's standard. *Contra* SG Br. 13.

Indeed, the government recognizes that the court of appeals flatly erred – "accorded inordinate significance," it says – in finding respondent's ordinance not to be preempted because petitioner could not "'state with specificity what additional services it might have provided' if it were not required to pay St. Louis's license fee." SG Br. 13. But the Solicitor General hopes to recharacterize that required showing as something the "court of appeals seems to have regarded as emblematic of broader evidentiary deficiencies in Level 3's case" (SG Br. 13) and thus merely a "shortcoming in its explanation of its decision" (SG Br. 14). In reality, however, the decision on its face reveals that the Eighth Circuit's holding that petitioner "failed to carry that burden" is not a "case-specific determination[]" (*contra* SG Br. 8-9) but rather was the essence of its ruling – *i.e.*, that petitioner could not prevail under Section 253(a) unless it proved that it was effectively excluded from the St. Louis market with respect to some service: "*This admission* establishes that Level 3 has not carried its burden of proof on the record we have before us." Pet. App. 32a (emphasis added).

The Solicitor General notably does not take issue with petitioner's showing (Cert. Reply 3) that the Eighth Circuit's focus on the effect of a local regulatory scheme on the services offered by the particular provider that happened to bring suit cannot be reconciled with either the text of Section

253(a) or the purpose animating its enactment. The statute provides that "[n]o 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." 47 U.S.C. § 253(a). Congress moreover enacted Section 253(a) to uproot local monopolies. *See* Pet. 15. But the Eighth Circuit's interpretation of the statute is largely unconcerned with the challenged measure's overall anti-competitive effect and turns on the coincidence of the provider that happens to file suit.

For essentially the same reason, the First, Second, and Tenth Circuits are correct in their separate holding that Section 253(a) calls for an inquiry into whether a challenged local regulation has the potential to block competitive entry, even if it has yet to do so in practice. *Contra* SG Br. 10. Necessarily, the most appropriate gauge of whether a restriction undermines competition by a "*potential* competitor" (*California Payphones,* 12 F.C.C.R. at 14,206 ¶ 31 (emphasis added)) is whether it threatens to interfere with such a provider's entry into the market in the future.

Equally problematic, the court of appeals' ruling erects an essentially insuperable barrier to a claim that a local right-of-way fee is preempted under Section 253(a). Telecommunications providers pay such charges – however exorbitant – from ordinary corporate funds. As a practical matter, given the fungibility of money, there is no way for a provider such as Level 3 to trace those expenditures back to a particular service that it fails to provide in that

specific locality. In this case, for example, the $140,000 annual fee charged by St. Louis is unquestionably significant, and petitioner alleges that it will inhibit market entry by competitive telecommunications providers. But the court of appeals sustained the ordinance without inquiring into its anti-competitive effects because Level 3 failed to satisfy the impossible burden of proving that it would have offered some additional service in St. Louis if it had not been required to pay that specific fee.

The ruling below equally fails to account for the nature of providers' sunk investments into modern telecommunication infrastructure. Once Level 3 has physically constructed a network in a City such as St. Louis, the marginal costs of providing additional services to customers through that existing network are relatively small, because those services are heavily based on virtual computer code rather than the construction of expensive new physical facilities. The provider's principal costs thus lie in the initial construction of the network. Hence, the massive fees that St. Louis imposes can easily inhibit competitive entry without an existing provider such as Level 3 having any ready means of identifying services that it is effectively precluded from providing.

The court of appeals' error is highlighted by Section 253(c), in which Congress authorized local governments "to manage the public rights-of-way [and] to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis." In this case, St. Louis made no attempt to assess its own costs – which could provide a basis for setting a

"fair and reasonable" fee – but instead is avowedly extracting monopoly rents for access to local rights-of-way. BIO 7, 21 n.14.

Nor does the Solicitor General doubt petitioner's showing that the St. Louis scheme contravenes Section 253(c) because it discriminates against competitive providers such as Level 3 and in favor of incumbents. In contrast to the fees that petitioner pays, which far exceed the income it generates from customers in the city, the incumbent is required to pay only ten percent of its local revenues. *See* Pet. 7; Cert. Reply 12.

3. Certiorari is also warranted because, like both the Eighth and Ninth Circuits (Pet. App. 27a-28a; *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 577 (9th Cir. 2008)), the Solicitor General acknowledges the circuit conflict over the proper construction of Section 253(a). "The Eighth and Ninth Circuits correctly recognized that their view of the Section 253(a) preemption standard differs in some respects from that of the First, Second, and Tenth Circuits." S.G. Br. 15. That is the point of the Solicitor General's back-handed acknowledgment that, notwithstanding that they cite to the FCC's *California Payphones*, the latter "circuits have interpreted the Commission's standard through the lens of *Auburn*'s more-preemptive 'may' standard—contrary to the approach of the Eighth and Ninth Circuits' decisions here." SG Br. 9. In other words, the courts of appeals may cite the same FCC standard, but they interpret and apply it differently.

The "Second and Tenth Circuits" thus did not merely "*suggest* that Section 253(a) *can* preempt local

ordinances that grant municipal officials discretion to forestall or deny applications for required permits or franchises, even in the absence of any evidence that the officials have exercised their discretion in a manner that has harmed competitive entry." *Contra* SG Br. 16 (emphases added). To the contrary, that is the precise *holding* of those courts. As the government acknowledges, "the First, Second, and Tenth Circuits have applied the 'materially inhibits' standard" to hold that "a legal requirement was subject to preemption if it *might* have had the effect of prohibiting the ability of an entity to provide telecommunications services." SG Br. 16 (emphasis added). As detailed in the petition, the St. Louis ordinance in this case has all the features that the First, Second, and Tenth Circuits have invoked to find preemption under Section 253. Pet. 28-29.

The Solicitor General says that "it is significant that [in the cases giving rise to the circuit conflict], the providers bringing suit had made initial attempts to invoke the localities' permitting process, rather than challenging the ordinances on their face." SG Br. 17. But that is of course equally true in this case, in which petitioner challenged the application of Chapter 23.64 to it.

This Court's intervention is also warranted to resolve the acknowledged conflict between the ruling below and *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). Pet. App. 28a. Although the Sixth Circuit in *TCG Detroit* "ultimately concluded that Section 253(c) did not preempt the challenged law," the Sixth Circuit's decision was not in any respect "dicta." *Contra* SG Br. 19. The court of appeals considered "whether the fee assessed by the

City is 'fair and reasonable compensation'" under Section 253(c) only after specifically holding (i) that Section 253(c) "does confer" a separate private right of action, (ii) that "[a] violation of § 253(c) might well not involve violating § 253(a)" and (iii) that the provider's distinct claim under Section 253(a) was "sophistry." 206 F.3d at 624-25.

4. The Solicitor General finally contends that "there does not appear to be a fully developed record on the effect of St. Louis's ordinance" and that "key facts relevant to Level 3's preemption claims appear to be in dispute." SG Br. 20. But the government argues at cross-purposes with itself in asserting simultaneously that this Court should avoid "case-specific determinations" regarding the application of Section 253 but nonetheless await "a case with a better-developed factual record." SG Br. 9. In fact, the petition presents a pure question of law regarding the appropriate standard for determining whether a local ordinance is preempted under Section 253. The parties assembled a thorough record regarding the ordinance's effect on petitioner. That record thus establishes that the fees charged by St. Louis under Chapter 23.64 far exceed petitioner's revenues from the City and that the fees divert funds that petitioner would otherwise devote to the development of new telecommunications services. Cert. Reply 6-7.

To the extent that there is any gap in the record regarding the anti-competitive effect of the St. Louis ordinance, it arises entirely from the fact that the Eighth Circuit's legal standard turns on whether Level 3 itself was effectively prohibited from providing a specifically identified service. Petitioner was erroneously forbidden from developing a broader

record. Pet. App. 5a-8a, 15a-20a. Importantly, given the narrow focus of the legal rule adopted below and the standards applied by other circuits, there is no reason to anticipate that a later case will have a more fully developed record regarding the general anticompetitive effect of such ordinances. None of the cases giving rise to the circuit conflict appear to have explored that factual question. The appropriate course – common in this Court's precedents – is accordingly for this Court to articulate the correct legal standard and then remand the case for the application of that standard in light of whatever factual record is appropriate.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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