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	)	

REPLY COMMENTS OF THE CITY OF NEW YORK

The City of New York ("City") hereby submits the following reply 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 has previously filed comments in this proceeding explaining why the Federal Communications Commission ("Commission") does not have authority to rule on Section 253(c) matters.[3] With regard to those legal matters not addressed in the City's initial comments, the City supports the legal posture presented in the comments of The National Association of Telecommunications Officers and Advisers ("NATOA").[4]

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

[2] 47 U.S.C. § 253.

[3] *See* Comments of the City of New York, WC Docket No. 09-153 (filed Oct. 15, 2009).

[4] *See* Comments of the National Association of Telecommunications Officers and Advisers, WC Docket No. 09-153 (filed Oct. 15, 2009).

NATOA correctly notes that application of Section 253 to arrangements that relate not to mere access to unimproved public rights-of-way, but rather to facilities constructed by government entities to offer needed public services (e.g., light poles, buildings, proprietary communications equipment) along public rights-of-way, is not appropriate. In this context, government entities are not acting as gatekeepers of the public rights-of-way, but as market participating users of the rights-of-way along with others. To construe Section 253 as restricting government entities in their authority to contract for the use of facilities built in this separate capacity is to simply discourage public investment in the very facilities that are sought to be used, and is any event inconsistent with the purpose and intent of Section 253.

NATOA's comments also properly describe the scope of the concepts of prohibition or effective prohibition as they are used in Section 253(a). Level 3 recently completed a long and futile attempt to convince the federal courts to adopt a different standard of Section 253(a) "prohibition" than the one described by NATOA. Level 3's new strategy of running to the Commission suggests that it is now looking for an alternative forum that it can persuade to use an alternative standard than that adopted by the courts. NATOA also correctly explains that reasonable compensation under Section 253(c) is not limited to incurred costs and that the fact that others have been ready, willing and able to pay a particular compensation rate is strong evidence that such a rate is both reasonable and not prohibiting in effect.

On all of these matters, the City urges the Commission to follow NATOA's accurate description of the legal issues being raised, to the extent that the Commission does not simply, as it should, decline to take jurisdiction over this matter in light of

Congress's express designation of the courts as the appropriate fora for review of such right-of-way issues.

Respectfully submitted,

/s/

THE CITY OF NEW YORK

New York City Department of Information
Technology and Telecommunications
75 Park Place, 9th Floor
New York, NY 10007

Mitchel Ahlbaum
Deputy Commissioner and General Counsel

Radhika Karmarkar
Senior Counsel for Legislative
and Regulatory Affairs

New York City Law Department
Office of the Corporation Counsel
100 Church Street
New York, NY 10007
(212) 788-1327

Michael A. Cardozo,
Corporation Counsel
By: Bruce Regal
Senior Counsel

November 5, 2009