

Level 3 Communications v. City of St. Louis

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I. Overview

Earlier this year the Eighth Circuit overturned a decision handed down by the Eastern District of Missouri, which had struck down linear-foot based license fees imposed by the City of St. Louis on telecommunications companies using the City's rights-of-way. The district court had ruled that the City's ordinance governing the use of its rights-of-way by telecommunications providers contained several provisions that, taken in combination, had the effect of prohibiting the ability to provide telecommunications services and therefore violated 47 U.S.C. § 253(a). The district court then held that the license fee requirement was not saved under the safe harbor provisions of Section 253(c) because the fee was not based on the actual costs incurred by the City from the use of its rights-of-way by telecommunications providers, and therefore was not *fair and reasonable*, as required under Section 253(c).

The Eight Circuit reversed the district court, holding that Level 3 had failed to establish an actual or effective prohibition and therefore failed to carry its burden of showing a violation under Section 253(a). *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007). The Court held that under the plain reading of the statute, a challenger must show actual or effective prohibition, rather than the "mere possibility of prohibition." The Court never addressed the safe harbor provisions of Section 253(c) because it found that Level 3 had failed to meet its burden of establishing a violation under Section 253(a). The Eighth Circuit openly criticized the approach taken by its sister circuits, including the Ninth Circuit, which has held that it is enough to show that an ordinance "may" (*i.e.* might conceivably) result in an actual or effective prohibition. It is this apparent conflict between the 8th and 9th Circuits that could result in either/or both decisions being heard by the Supreme Court.¹

¹ Depending on how the Ninth Circuit ultimately interprets its own "may prohibit" standard, the difference may prove less substantial than at first appears. While plaintiffs argue that the "may prohibit" standard allows preemption where a harm can be imagined, another interpretation of the term "may" is merely that it allows a court to act not only in cases where a regulation has had a prohibitory impact on someone in the market, but also where a plaintiff contends it faces a barrier to *future* entry. Under that interpretation the phrase "may" refers to simply a

II. Level 3 Communications v. City of St. Louis – A Summary

Background

Level 3 Communications is a telecommunications company that provides services to customers in St. Louis and throughout the nation. The company uses the City's rights-of-way to place its fiber and equipment under the terms of a license agreement it entered into with the City in 1999. The City requires that all telecommunications companies who use the City's rights-of-way must enter into a license agreement with the City and pay a license fee that is based on the number of linear feet of conduit containing activated plant in the City's streets.² The license requirement and other requirements are set forth in a City ordinance governing telecommunications carriers who use the City's rights-of-way. In addition to the license fee, the ordinance contains certain other requirements and obligations, including a license application process, permit fees and requirements, the posting of a bond, insurance and indemnity requirements and other routine requirements typically found in right-of-way ordinances.

Level 3's Lawsuit

In 2005, after operating in the City uninterrupted for six years, Level 3 decided to stop paying the City the license fee and to challenge the City's license requirement and ordinance in federal court.³ Relying largely on *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) and the more recent (and local) *XO Missouri, Inc. v. City of Maryland Heights*, 256 F.Supp.2d 987 (E.D. Mo. 2003), Level 3 claimed that the City's ordinance violated 47 U.S.C. § 253(a) because its various provisions, in combination, were burdensome and therefore "may" have the effect of prohibiting telecommunications services. Further, again relying on *Auburn* and *XO Missouri*, Level 3 claimed that the linear-foot license fee was not saved under the safe harbor provisions of 47 U.S.C. § 253(c) because the fee was not based on the City's actual costs incurred from the use of its rights-of-way by telecommunications providers.

The City has never taken the position its linear-foot license fee is based on a strict accounting of the City's costs incurred from the use of its rights-of-way (although it is highly likely that the fee does not recover all costs). It is the City's position that nothing under the plain language of 47 U.S.C. § 253(c) limits the City to charging a fee that is based on its costs. The statute merely limits the City to charging a fee that is "fair and reasonable." The City believe its linear foot fee is fair and reasonable based on its review of what other owners of rights-of-way are charging nationwide, including municipalities, state transportation agencies, public transit districts, railroads, bridges, etc. The City hired an expert witness who studied right-of-way charges that

predictable, future event; and presumably, a plaintiff would have to show that challenges requirements make it economically infeasible to enter the market.

² The City actually has an alternative means for gaining access to the City rights-of-way for certain companies that are authorized by the Missouri Public Service Commission to provide both local exchange and long distance services to customers in the City and opt to pay a ten percent gross receipts tax in lieu of a license fee. This alternative was not challenged by Level 3.

³ The City filed a collection action in state court seeking unpaid license fees. That suit was removed to the district court and consolidated with Level 3's lawsuit.

were being paid nationwide by telecommunications companies, who concluded that the City's linear foot charge (then \$1.88 per linear foot) was well within the range of a reasonable fair market charge for the use of right-of-way and was therefore fair and reasonable.

With respect to the non-fee provisions of the City's ordinance, Level 3 claimed that the provisions it challenged were not saved by Section 253(c) because they were not related to the City's management of its rights-of-way. Level 3 went so far as to argue that the City's ordinance was "almost identical" to the Maryland Heights ordinance that had been overturned in *XO Missouri* and very similar to the ordinances that had been struck down in *Auburn*. The City maintained that all of the challenged provisions were reasonable right-of-way management provisions and it showed how different the ordinance was from the more onerous ordinances at issue in *XO Missouri* and *Auburn*.

District Court Decision

On cross motions for summary judgment, the district court ruled in favor of Level 3 with respect to the license fee and ruled in favor of the City with respect to all of the challenged non-fee provisions of the ordinance. In reaching its decision, the district court listed all of the challenged provisions of the ordinance (*i.e.* the one page license application, permit process, bond, insurance, indemnity requirements) and concluded that the various requirements, "in combination" "have the effect of prohibiting" the ability to provide telecommunications services under 47 U.S.C. § 253(a)." *Level 3 Communications v. City of St. Louis*, 405 F.Supp. 2d 1047, 1056 (E.D. Mo. 2005). In reaching this conclusion, the district court provided no discussion of how these various provisions actually prohibited or had the effect of prohibiting service. Instead, apparently relying on *Auburn* and *XO Missouri*, the court simply concluded that the effect of these various provisions, no matter how innocuous, when taken in combination had the effect of prohibiting service, and therefore violated Section 253(a).

The district court then turned to Section 253(c) to determine whether any of the provisions were saved. The Court followed *XO Missouri* in concluding that in order to be "fair and reasonable" and therefore saved under Section 253(c), the fee must be directly related to actual costs incurred by the City as a result of a telecommunications provider's use of the City's rights-of-way. Because the City did not present any evidence that its linear-foot fee was directly related to the City's costs, the court struck the fee provision. The Court, however, upheld all of the non-fee provisions that had been challenged by Level 3 and in several instances specifically described how the provisions were far less onerous and therefore not comparable to the provisions that had been stricken in *XO Missouri*. 405 F.Supp.2d at 1058-63.⁴

Eighth Circuit Decision

The City appealed the district court's holding invalidating the City's license fee and Level 3 cross-appealed the part of the decision upholding the City's non-fee requirements. During briefing, the parties spilled a great deal of ink presenting their arguments under Section 253(c)

⁴ The district court also rejected Level 3's claim for damages under 42 U.S.C. § 1983, holding that Level 3 had failed to demonstrate that Section 253 created a private right of action. *Id.* at 1065.

but in the end the Eighth Circuit never even addressed Section 253(c) because it held that Level 3 failed to meet its burden of establishing an actual or effective prohibition under Section 253(a). The Eighth Circuit held that under the plain reading of the statute, Section 253(a) requires that a plaintiff suing a city “must show actual or effective prohibition, rather than the mere possibility of prohibition.” 477 F.3d at 528.

The Court acknowledged that other courts have held that the mere possibility of a prohibition will suffice to establish a claim under Section 253(a), citing to Ninth Circuit decisions in *Auburn, Qwest Commc’ns Inc. v. City of Berkeley*, 433 F.3d 1253 (9th Cir. 2006), and *Qwest Corp. v. City of Portland*, 385 F.3d 1236 (9th Cir. 2004), as well as decisions from the Tenth Circuit, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), and the First Circuit, *Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006). However, the Court disagreed with these decisions because their interpretation – at least as interpreted by Level 3 -- distorted the plain language of the statute. The Court noted that while a plaintiff need not show an “complete or insurmountable prohibition,” it “must show an existing material interference with the ability to compete in a fair and balanced market,” 477 F.3d at 533 (adopting the FCC standing in *Cal. Payphone Ass’n*, 12 F.C.C.R. 14,191, 14,206 1997 WL 400726 (FCC) ¶ 31 (July 17, 1977)).

Turning to the record, the Court looked to whether there had been an actual or effective prohibition under the FCC standard that it had adopted. The Court found that there was no such showing. The Court found that by Level 3’s own admission in an interrogatory, that it could not identify with specificity any telecommunications services it might have provided had it not paid a license fee to the City. The Court rejected the district court’s summary conclusion that the City’s ordinance prohibited service, without looking to see if there had been any actual or effective prohibition and particularly in light of Level 3’s admission. The Court then concluded, based on its review of the entire record, that there was insufficient evidence of any actual or effective prohibition whatsoever, “let alone one that materially inhibits [Level 3’s] operations.” 477 F.3d at 534.⁵ The Court reversed the district court’s finding of summary judgment in favor of Level 3 on the issue of whether there had been a violation of Section 253(a) and remanded for further proceedings not inconsistent with the Eighth Circuit’s ruling.

Level 3 subsequently filed a petition for rehearing or rehearing en banc, which was denied by the Eighth Circuit. Level 3 has indicated that it will file a petition for a writ of certiorari with the Supreme Court and recently filed an application for a sixty day extension of the date to file its petition. If granted, the petition would be due on September 17, 2007.

⁵ The Court also held that because Level 3 failed to meet its burden under Section 253(a) the District Court’s analysis under Section 253(c) was premature. 477 F.3d at 534. The Court also declined to “join the fray over whether section 253 creates a private of action” because it was unnecessary given Level 3’s failure to show a Section 253(a) violation, and hence, the district court did not err by denying Level 3’s section 1983 claim. *Id.*