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Petitioner: Level 3 Communications, LLC
State Entity: New York State Thruway Authority
Date: July 23, 2009

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| LEVEL 3 COMMUNICATIONS, LLC | ) | |
| | ) | Docket No. _____ |
| Petition for Declaratory Ruling that Certain | ) | |
| Right-of-Way Rents Imposed by the New | ) | |
| York State Thruway Authority Are | ) | |
| Preempted Under Section 253 | ) | |

# PETITION FOR DECLARATORY RULING THAT CERTAIN RIGHT-OF-WAY RENTS IMPOSED BY THE NEW YORK STATE THRUWAY AUTHORITY ARE PREEMPTED UNDER SECTION 253

FILED/ACCEPTED
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Federal Communications Commission
Office of the Secretary


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July 23, 2009

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demanded that Williams agree to exorbitant annual rents for the seventeen occupancy permits necessary to connect to those signal regeneration stations and to fiber-based on-ramps to the backbone. In stark contrast to prevailing market rents for such permits (generally $0.50 to $2.00 per foot per year in those instances where state or local governments impose any rent at all), NYSTA demanded that Williams agree to pay lump sum annual rents that effectively range from $78 to more than $34,000 per foot per year—or 180 to 725 times more than the prevailing rates. NYSTA's demands for these particular rights-of-way exceeded its own rate schedule by as much as 25,000 percent. Its demands were blatantly discriminatory, as NYSTA charged (and continues to charge) other entities annual rents according to its scheduled rates, which are consistent with prevailing rates.

Although Williams initially resisted NYSTA's extraordinary demands, it was ultimately forced to accede in order to make use of its idle $31 million backbone investment. The impact in the intervening years has been ruinous. Because of these fees and the overall difficulty of dealing with NYSTA, neither Williams nor Level 3 (which acquired Williams in 2005) has sought to connect to the backbone network at any additional points. As a direct result, there have been no new fiber connections from the core Level 3 backbone to any of the dozens of mid-sized and smaller communities along the Thruway's route. Although Level 3 is currently undertaking a nation-wide project to expand its fiber-optic networks to additional communities, NYSTA's rent demands and the difficulty of working with NYSTA on permitting prevent any such new fiber on-ramps from being economically sustainable, even with possible support under the recently-enacted federal broadband stimulus program.

For example, Level 3 has analyzed the viability of building additional fiber middle-mile connections in the vicinity of Amsterdam, New York. Excluding NYSTA's rents, this additional fiber build-out would be justified, so long as there was federal stimulus support for the initial capital infrastructure investment. Adding NYSTA's onerous, recurring rents, however, swamps the financial justification for pursuing these network extensions. NYSTA's rents, in other words, directly undermine the middle-mile broadband deployment that the federal stimulus plan seeks to encourage.

Preemption in these circumstances is not discretionary. Section 253 eliminates all state and local legal requirements that have the "effect of prohibiting" the provision of telecommunications services, including through unfair, unreasonable or discriminatory demands for compensation in exchange for access to rights-of-way. *See, e.g., Petition of the State of Minnesota*, Order, 14 FCC Rcd 21,697, 21,703 ¶ 9 (1999) (noting that Congress included Section 253 "to ensure that state and/or local authorities cannot frustrate the 1996 Act's explicit goal of opening all markets to competition").

NYSTA's rents plainly violate Section 253(a), as they have the effect of preventing Level 3 from deploying the infrastructure necessary to provide telecommunications services to communities along the length of the Thruway. Neither of the narrow safe harbors identified in Sections 253(b) and (c) applies. NYSTA's rents are so excessive and divorced from prevailing market rates that they cannot possibly be fair and reasonable. Moreover, they are discriminatory, because NYSTA charges prevailing rents to other carriers and because it levies extraordinary rents only for connections to fiber-optic networks—not for right-of-way crossings. Accordingly, pursuant to Section 253(d), the Commission must preempt the rent provisions as currently in force, and it

must preclude NYSTA from requiring carriers to pay similar rents in the future to gain access to the existing fiber conduits. *See* 47 U.S.C. § 253(d) (stating that the Commission "shall" preempt violations of Section 253(a)). Establishing that there is a federal limit on right-of-way fees will also help facilitate broadband deployment and investment nationwide, not just along the New York State Thruway.

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**PETITION FOR DECLARATORY RULING THAT CERTAIN RIGHT-OF-WAY RENTS IMPOSED BY THE NEW YORK STATE THRUWAY AUTHORITY ARE PREEMPTED UNDER SECTION 253**

Pursuant to Section 253 of the Communications Act of 1934, 47 U.S.C. § 253, Level 3 Communications, LLC ("Level 3") respectfully petitions the Federal Communications Commission ("FCC" or "Commission") to preempt certain rent provisions that the New York State Thruway Authority ("NYSTA") levies on Level 3 (and has levied on its predecessors) for access to rights-of-way necessary to operate and connect to Level 3's fiber-optic backbone network. These rents are unfair, unreasonable, and discriminatory. They are so exorbitant as to materially impair Level 3's ability to provide interstate or intrastate telecommunications service, and in many cases prevent Level 3 from providing such services altogether. Of particular concern, NYSTA's rents preclude Level 3 from extending its fiber-optic IP networks to telecommunications, cable and wireless companies serving many small and medium-sized communities along the New York State Thruway (the "Thruway"), thus impairing the provision of broadband and other telecommunications services to these communities in conflict with Section 706

of the Telecommunications Act of 1996 (the "1996 Act"). Accordingly, pursuant to Section 253(d) and in concert with Section 706, the Commission is required to preempt these rent provisions.

When it passed the 1996 Act, Congress created "a procompetitive, deregulatory national policy framework," with the goal of using competition to "accelerate ... deployment of advanced telecommunications services and information technologies and services to all Americans." S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 1 (1996). Recognizing that many state and local governments had adopted laws and other legal requirements limiting competition, Congress enacted Section 253 to eliminate all state and local legal requirements that "may prohibit or have the effect of prohibiting" the provision of telecommunications services, including through unfair, unreasonable or discriminatory demands for compensation in exchange for access to rights-of-way. *See, e.g., Petition of the State of Minnesota*, Order, 14 FCC Rcd 21,697, 21,703 ¶ 9 (1999) (noting that Congress included Section 253 "to ensure that state and/or local authorities cannot frustrate the 1996 Act's explicit goal of opening all markets to competition").

Through Section 253(d), Congress commanded the Commission to preempt such barriers to the provision of telecommunications services whenever it found them. The FCC has no discretion once it finds that a legal requirement "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" if the requirement does not qualify for protection under either of two narrow safe harbors set forth in Section 253(b) or (c). *See* 47 U.S.C. § 253(d) (stating that the Commission "shall" preempt in such circumstances).

That is precisely the situation here. By holding a $31 million fiber-optic network hostage, NYSTA coerced Level 3's predecessor into agreeing to pay unreasonable and unjustified annual rents. By raising Level 3's costs to unsupportable levels, these recurring annual rental obligations have the effect of barring Level 3 from deploying the infrastructure necessary to provide telecommunications services to many communities along the length of the Thruway—from Yonkers to the Pennsylvania border near Lake Erie. The impact is particularly pronounced and troublesome with respect to broadband, as NYSTA's rents prevent Level 3 from deploying the middle-mile facilities necessary to offer competitive telecommunications service to retail broadband providers offering services to communities outside of urban areas.

Throughout the broadband stimulus hearings held by the FCC, the National Telecommunications and Information Administration, and the Rural Utility Service, speakers repeatedly highlighted the lack of high-speed-fiber middle-mile connections to the national fiber backbones that run past their communities. The exorbitant right-of-way rents charged by NYSTA directly contribute to that phenomenon by adding recurring annual charges that make it uneconomic to build new fiber on-ramps, even when stimulus funds are available to support the one time infrastructure investments. *See* Rural Utilities Service (Department of Agriculture) and National Telecommunications and Information Administration (Department of Commerce), Notice of Funds Availability and Solicitation of Applications, 74 Fed. Reg. 33104, 33112 (§ V.D.2.b.i.) (2009) (hereinafter "*NOFA*") (noting that recurring operating expenses are ineligible for stimulus funding). Rural communities will continue to be left off the national broadband networks if entities such as NYSTA are allowed to profiteer in this manner.

Accordingly, NYSTA's rents violate Section 253(a). Neither of the narrow safe harbors identified in Sections 253(b) and (c) applies. In particular, these rents, which range from $78 to over $34,000 per linear foot per year, are so excessive and divorced from prevailing market rates that they cannot possibly be fair and reasonable. Moreover, they are discriminatory, because NYSTA charges market-based rents to other carriers and because NYSTA levies these extraordinary rents only for connections to fiber-optic networks—not for right-of-way crossings or other "transverse" uses of the right-of-way. Thus, pursuant to Section 253(d), the Commission must preempt the rent provisions effective from their inception, and further preclude NYSTA from requiring carriers to pay similar rents in the future to gain access to the existing fiber conduits.

## I. STATEMENT OF FACTS

### NYSTA Used Its Chokehold Over the Backbone Network to Extract Unreasonable Annual Rents, Severely Impairing Level 3's Ability to Provide Telecommunications Services and Deploy Broadband Infrastructure.

The New York State Thruway, administered by NYSTA, runs the breadth of the State of New York—spanning approximately 570 miles from Yonkers (just outside New York City), running north through Albany, then west past Utica, Syracuse and Rochester, and then south along the shore of Lake Erie to the Pennsylvania state line.[1] The Thruway passes five communities with approximately 100,000 residents or more,[2] and dozens with

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[1] *See* New York State Thruway Authority, Travel Conditions and Maps, *available at* http://www.nysthruway.gov/maps/.

[2] Albany (pop. 95,658), Buffalo (pop. 292,648), Rochester (pop. 219,773), Syracuse (pop. 147,306), and Yonkers (pop. 196,086). The population figures are from the 2000 Census, *available at www.census.gov.*

much smaller populations.[3] Like many highways, it is a natural route along which to lay conduits for fiber-optic networks. Gordon Decl. ¶ 2 (attached as Exhibit 1). As long as communications companies can connect to it on reasonable terms, the backbone network constructed along the Thruway has great potential to provide high-speed, next-generation fiber-optic services to the communities that lie along its route. *Id.* ¶ 2.

A. The $31 Million Backbone Network

This dispute centers on access to a $31 million fiber-optic backbone network that runs the length of the Thruway. The network has its roots in an October 9, 1995 agreement between Adesta Communications, Inc. ("Adesta") (then known as MFS Network Technologies, Inc. ("MFSNT"))[4] and NYSTA. Under that agreement, NYSTA granted Adesta the general authority to develop, operate and maintain communications networks along the full length of the Thruway (including segments and networks to be owned and operated by other carriers). *See* Agreement between the New York State Thruway Authority and MFS Network Technologies (Sept. 27, 1995), Art. 1, Item 13 (defining right-of-way), Art. 2 (grant of right to Adesta) (attached as Exhibit 6). In exchange, Adesta agreed to pay NYSTA a share of the user fees that Adesta collected

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[3] Examples include Amsterdam (pop. 18,355), Auburn (pop. 28,574), Beacon (pop. 13,808), Canandaigua (pop. 11,264), Dunkirk (pop. 13,131), Geneva (pop. 13,617), Gloversville (pop. 15,413), Kingston (pop. 23,456), Newburgh (pop. 28,259), Oneida (pop. 10,987), Poughkeepsie (pop. 29,871), Rome (pop. 34,950), Schenectady (pop. 61,821), and Utica (pop. 60,651). The population figures are from the 2000 Census, *available at www.census.gov.*

[4] MFSNT changed its name to Adesta Communications, Inc. in 2002 following an asset acquisition. *See* About Adesta, *available at http://www.adestagroup.com/igsbase/igstemplate.cfm/SRC=DB/SRCN=/GnavID=12.* For simplicity, Level 3 refers to both MFSNT and Adesta Communications, Inc. as "Adesta."

from other carriers for their purchase of networks and segments on the Thruway rights-of-way. *See id.* Art. 10 (compensation to NYSTA).

The specific network at issue in this petition was developed pursuant to two interrelated agreements between Adesta and Williams Communications, Inc. ("Williams"), both dated April 12, 1999 and both pertaining to a new fiber-optic backbone network to be owned and operated by Williams along the Thruway. The first agreement—entitled "User Agreement for Innerduct"—covered the portions of the network to be deployed on rights-of-way controlled by NYSTA (the "On-NYSTA User Agreement," copy attached as Exhibit 7); the second—entitled "User Agreement for Innerduct and Dark Fiber"—covered the portions that would not be located on NYSTA rights-of-way (the "Off-NYSTA User Agreement," copy attached as Exhibit 8) (collectively, the "Agreements"). The backbone network covered by the Off-NYSTA User Agreement was to connect to the backbone network deployed under the On-NYSTA User Agreement, resulting in a fiber-optic network stretching from Cleveland, Ohio to New York City. Thus, both agreements were necessary for Williams to have a fully functioning network. *See* Elbert Decl. ¶ 4 (attached as Exhibit 2).

Under the On-NYSTA User Agreement, Williams acquired an indefeasible right of use ("IRU") covering two vacant 1-1/4" innerducts and 48 strands of dark fiber on a communications network Adesta was planning to build in the NYSTA-controlled rights-of-way.[5] *See* Exhibit 7 (On-NYSTA User Agreement), Art. 2, Item 1.a. In addition,

[5] Adesta represented that it had "obtained and will maintain, at its sole cost and expense, defensible property rights sufficient to permit it to install [the Backbone Network] and maintain [it] in place." Exhibit 7 (On-NYSTA User Agreement), Art. 4, Item 1.

Adesta agreed to install fiber-optic cable supplied and owned by Williams through one of the vacant innerducts. *See id.* At the time the agreement was signed, Adesta had already sold fiber within the backbone network to various third parties, and much of the network was complete. Elbert Decl. ¶ 5.

The On-NYSTA User Agreement required Williams to pay Adesta $25,737,500 for the IRU, and an additional $5,519,296 to install, splice and test the Williams-supplied fiber-optic cable, resulting in a total price of more than $31 million for the On-NYSTA portions of the network. *See* On-NYSTA User Agreement, Art. 3, Items 2.a., 2.c. NYSTA approved of the form, content and execution of the Agreements. *See* Letter from Michael J. Keogh (NYSTA) to Misty Stine (MFSNT) (Dec. 11, 1998) (attached as Exhibit 9). Pursuant to a letter from NYSTA signed on the same date as the On-NYSTA User Agreement, Williams was directed to make payment of the $25.7 million fee as follows: (a) approximately $10.75 million directly to Adesta; (b) approximately $8.25 million directly to the "NYSTA Revenue Fund;" and (c) approximately $6.76 million to an escrow account for the benefit of NYSTA. *See* Letter from John R. Platt (NYSTA) to William Parker (Williams) (April 12, 1999) (attached as Exhibit 10). Thus, of the $25.7 million fee paid by Williams, NYSTA directly received at least $8.25 million, and may have received as much as $15 million.

The resulting high-capacity fiber-optic network (the "Backbone Network") covers approximately 520 miles on NYSTA rights-of-way, running nearly the complete length of the Thruway from Yonkers to the Pennsylvania state line. Elbert Decl. ¶ 3.

B. Occupancy Permits for Additional Access Points

Even during negotiations of the On-NYSTA User Agreement, Williams believed that it would need additional interconnection points in order to operate the Backbone Network for its intended purposes. Accordingly, Williams had commenced plans acquire sites adjacent to the NYSTA right-of-way for the placement of "regeneration" facilities that would be used to regenerate the optical signals along the Backbone Network, and it ensured that the On-NYSTA User Agreement authorized additional access connections. *See* Elbert Decl. ¶ 6; On-NYSTA User Agreement, Art. 2, Item 1.b (granting "the right to have the User Route modified to allow connection at additional access points" beyond those original identified); Letter from Charles Plake (Williams) to Sharon O'Conor (NYSTA) (May 9, 2000) (hereinafter *Plake Letter*) (attached as Exhibit 11) ("As we have repeatedly stated in our ongoing discussions with MFSNT, [Williams] believes that it currently has all rights necessary in order to obtain the reasonable access required."). Because Williams was one of the last carriers to purchase fiber-optic and conduit capacity along the network, and because Williams had installed a high fiber-count cable (96 fibers) within the conduit that it had acquired, Williams (and its customers) needed more space and power in the regeneration facilities than was available from Adesta on the NYSTA right-of-way. Elbert Decl. ¶ 6.

Williams's engineers determined that the most efficient architecture for the Backbone Network required the addition of thirteen regeneration sites along the Backbone Network. Williams's technical team believed that, without the additional regeneration connections, the $31 million Backbone Network was technically unusable for Williams's intended purposes. In addition, Williams concluded based on its

interaction with NYSTA and Adesta that it would have far more operational flexibility, including room for expansion to allow delivery of higher quality and higher speed services to customers, if it had additional space off of the NSYTA right-of-way for the operation of its regeneration facilities. Elbert Decl. ¶ 7.

Williams also recognized that it would need to connect the Backbone Network to additional points-of-presence ("POPs") to serve certain customers and markets along the backbone route efficiently. Elbert Decl. ¶ 8. Without such connections, it would have been commercially infeasible for Williams to provide services even to many customers located near the Backbone Network, as Williams would have had to forego use of its own fibers, which it paid more than $31 million to acquire and install. *Id.* Instead, it would have been forced to purchase intermediate or long-haul off-net circuits from incumbent carriers to bridge the gap between a particular customer and the closest existing access point on the Backbone Network. Elbert Decl. ¶ 9. Because Williams was a competitive carrier offering services that compete largely with the incumbent carriers based on price (and because Level 3 is such a competitive carrier today), forcing Williams (and now Level 3) to purchase from the incumbent rather than connecting to its own more cost-effective fiber assets created (and creates) a material barrier to Williams's (and now Level 3's) ability to compete and deliver services in those areas. *Id.*

Although Williams believed that the On-NYSTA User Agreement authorized these additional connections, *see* On-NYSTA User Agreement, Art. 2, Item 1.b; *Plake Letter*, Adesta advised Williams that NYSTA would require Williams to obtain separate Occupancy Permits from NYSTA to obtain these additional connections to its Backbone Network. Elbert Decl. ¶ 10. In September 1999, Adesta delivered to NYSTA a letter

listing the interconnection points that Williams desired. *See* Letter from James Highsmith (MFSNT) to Michael Keogh (NYSTA) (Sept. 8, 1999) (attached as Exhibit 12). In a meeting in October 1999, NYSTA informed Williams directly that additional compensation would have to be paid to NYSTA in order to use the NYSTA rights-of-way to complete these connections. Elbert Decl. ¶ 11.

While Williams believed that the demands for compensation from NYSTA were unreasonable, Williams had few options available to challenge them. Fiber installation along the Backbone Network had been largely completed, and the major remaining obstacle to Williams's use of the Backbone Network was the completion of regeneration and POP connections. In Williams's business judgment, pursuing litigation against NYSTA and Adesta in order to compel access to the NYSTA rights-of-way or delivery of the interconnection facilities was unlikely to allow Williams to meet its customers' requirements, and might result in stranding more than $40 million invested in both the On-NYSTA and Off-NYSTA segments for years. *Id.* ¶ 12.

As a result, NYSTA had nearly unchecked leverage in the ensuing negotiations, which took more than a year to complete. NYSTA officials knew that Williams had sunk more than $31 million in the Backbone Network and, based on discussions with Williams personnel, they also knew that Williams would be unable to operate the Backbone Network as it had planned without the additional connections. *Id.* ¶ 11. NYSTA was therefore in a position to impose breathtaking demands—and it did so, demanding that Williams execute Riders imposing extraordinary annual rents (detailed in Section I.C. below and in Exhibit 14) in exchange for authorization for the additional connections. *Id.* ¶¶ 11, 13. NYSTA's demands marked a significant modification of its practices with

respect to a utility's use of the rights-of-way, as it demanded rent that far exceeded the fees charged to the same utilities for transverse (lateral) crossings of the NYSTA rights-of-way—even though Williams anticipated occupying far less of the right-of-way to make the connections it required. *See infra* part I.C.2.

After more than a year of negotiations while NYSTA held the network hostage, Williams gave in, agreed to NYSTA's exorbitant demands, and executed occupancy permits authorizing the use of rights-of-way for seventeen additional connections.[6] Elbert Decl. ¶ 13.

C. The Riders to the Occupancy Permits

Each of the additional occupancy permits, executed under duress to bring the $31 million network into usable condition, was accompanied by a Rider that identified the rent due with respect to additional access points. (A table presenting the rents and other key terms of each Rider is attached as Exhibit 14, and the Riders themselves are attached as Exhibits 15 – 31.[7] In general, NYSTA imposed single lump-sum fees for connections to regeneration facilities, and per-fiber fees for point-of-presence connections. *See* Exhibits 15 – 31). Each Rider also included a clause noting that Williams and NYSTA disputed Williams's existing rights to additional access points pursuant to the On-NYSTA User Agreement. *See, e.g.*, Exhibit 15, Rider at 3, Section A.10. As a condition

[6] Williams actually executed eighteen occupancy permits, but one covers a crossing (not a connection). As a result, there are seventeen rights-of-way (and seventeen rent provisions) at issue in this petition. Four authorize POP connections, ten authorize regeneration facility connections, and three provide for connections to both a POP and a regeneration facility. *See* Exhibit 14, Column C.

[7] Where available, the exhibits containing the Riders also contain a copy of the corresponding occupancy permit. Moreover, many of these exhibits also include a covering "Contract Brief" prepared by Williams and used solely for reference purposes within the company. *See* Exhibits 15-31.

of granting the permits necessary to enable Williams to use its $31 million network, NYSTA required that each Rider contain a purported release of claims grounded in the Riders or any other agreements. *See, e.g., id.* The State of New York now threatens litigation unless Level 3 pays approximately $2 million in unjustified and unreasonable rents to NYSTA. *See* Letter from Henry C. Collins (N.Y. Office of the Attorney General) to John M. Ryan (Level 3) (July 7, 2009) (attached as Exhibit 13).

As Exhibit 14 demonstrates, when converted to a per-foot basis the rents that NYSTA extracted vary wildly from permit to permit, and they bear no logical relationship to the right-of-way footage occupied by Williams or to NYSTA's costs. The rents suffer from a variety of grossly arbitrary and unreasonable shortcomings, including the following.

*1. Wild Variability*

First, on a per-linear-foot basis (the manner in which communications rights-of-way are typically priced), the rents vary significantly and without any apparent basis. The Riders impose recurring fees ranging from $78 per foot per year (on the low side) to more than $34,000 per foot per year. *See* Exhibit 14, Column G.

*2. No Relationship to Prevailing Rates*

The rates that NYSTA extracted from Williams bear no relationship to prevailing market rates. Prevailing rates for communications rights-of-way typically range from $0.50 to $2.00 per linear foot annually, depending on a variety of factors, and some states and municipalities do not charge any fees at all. Gordon Decl. ¶ 3. NYSTA itself imposes rates in this range for rights-of-way that do not involve the Backbone Network; it charged Williams (and now charges Level 3) just $1.45 per foot for a lateral

communications right-of-way permit that does not connect to the Backbone Network.[8] The rates NYSTA charges Level 3 (and used to charge Williams) for additional connections to the Backbone Network amount to an average of $364 per foot, *see* Exhibit 14, Row 18—which is approximately 180 to 725 times higher than typical market rates ($0.50 to $2.00) and 250 times higher than the per-foot rate ($1.45) that NYSTA charges Level 3 for a non-connecting right-of-way. NYSTA has not undertaken any form of cost study or market-value appraisal to support the rents it charges Level 3.[9]

NYSTA's decision to jettison prevailing rates in this context is decidedly discriminatory, as NYSTA has taken an entirely different tack with other applicants seeking permits for fiber-optic cables or other communications infrastructure. In many cases NYSTA has charged other carriers prevailing rents for rights-of-way permits,[10] and in others it has not charged any rent at all.[11]

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[8] *See* Exhibit 32 (occupancy permit for 792-foot lateral crossing right-of-way for an annual rent of $600); Gordon Decl. ¶ 9 (Exhibit 1) (Level 3's facilities in this portion of the NYSTA right-of-way cover 415 feet).

[9] Level 3 has requested such information from NYSTA in multiple New York Freedom of Information Law requests and has not received anything in response indicating that NYSTA has performed any kind of study or analysis to support these rents.

[10] Exhibit 33 contains the following sample of occupancy permits in which NYSTA has granted access to its rights-of-way at prevailing market rent levels for communications infrastructure such as fiber optic lines: Permit 3781 (annual rent of $252) (granted to Telergy Joint Venture, June 18, 1997); Permit 3782 (annual rent of $152) (granted to Telergy Joint Venture, June 18, 1997); Permit 3861 (annual rent of $258) (granted to Telergy Joint Venture, Aug. 12, 1998); Permit 3898 (annual rent of $100) (granted to Telergy Joint Venture, July 17, 1998); Permit 3929 (annual rent of $840) (granted to Frontier Communications International, Inc., May 28, 1999); Permit 3985 (annual rent of $600) (granted to TC Systems, Inc., Feb. 17, 2000); Permit 3999 (annual rent of $108.63) (granted to Telergy Central, LLC, March 14, 2000); Permit 4067 (annual rent of $100) (granted to Verizon New York, Inc., April 16, 2001); Permit 4076 (annual rent of $100) (granted to PARNOSSOS, L.P. d/b/a ADELPHIA, July 13, 2001); Permit 4078 (annual rent of $250) (granted to PARNOSSOS, L.P. d/b/a ADELPHIA, July 13, 2001); Permit 4083 (annual rent of $276) (granted to

### 3. *Conflict with NYSTA Rate Schedule for Right-of-Way Permits*

NYSTA had a rate schedule in place at the time that it imposed these rents, but it ignored the schedule completely when imposing its exorbitant fees on Williams. *See* Inter Office Memorandum from Richard K. Matters, Jr. to Real Property Management Committee at 5 & Attachment III (Jan. 14, 1997) (adopting rate schedule) (attached as Exhibit 35); *see also* Exhibit 14, Column H. The NYSTA rate schedule—designed to provide "a more accurate reflection of market value" and "a more equitable fee determination for any given utility occupancy, *see* Exhibit 35 at 5—applied rates that varied depending on the Thruway milepost where the right-of-way was located. A right-of-way located between mileposts 0.00 and 5.95, for instance, generated an annual fee of $0.3346 per square foot for an underground facility. *See id.* at Attachment III. Thus, a permit covering a 575-foot-long, 2-foot-wide underground right-of-way at that location would have resulted in an annual rent of $384.79. *See* Exhibit 14, Column H. NYSTA disregarded that rate completely when extracting rents from Williams, however, and instead imposed an annual rent of $96,000 (now $119,754.33 after inflation adjustments) for precisely such a right-of-way—a markup of nearly 25,000 percent. *See id.*, Row 1.

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Fiber Technologies Networks, L.L.C., Sept. 24, 2001); Permit 4167 (imposing an annual rent of $232.07) (granted to Adelphia Business Solutions, Dec. 17, 2001).

[11] Exhibit 34 contains the following sample of occupancy permits in which NYSTA has granted access to its rights-of-way <u>for no annual rent at all</u> for communications infrastructure such as fiber optic lines: Permit 3993 (granted to Cablevision Systems Corporation, May 15, 2000); Permit 4016 (granted to LEDCOR Communications, Inc., June 6, 2000); Permit 4101 (granted to Hudson Valley Data Net, Sept. 29, 2000); Permit 4110 (granted to Frontier Communications of New York, Dec. 6, 2000); Permit 4115 (granted to Hudson Valley Data Net, Dec. 22, 2000); Permit 4120 (granted to Cablevision of Wappingers, April 9, 2001); Permit 4121 (granted to Time Warner Cable, April 30, 2001); Permit 4122 (granted to Time Warner Cable, April 30, 2001); Permit 4123 (granted to Time Warner Cable, April 30, 2001); Permit 4146 (granted to Time Warner Cable, June 6, 2002).

With respect to each of the seventeen connections at issue, NYSTA levies annual rents totaling more than $700,000, rather than the total of $629.87 that would apply under NYSTA's rate schedule. *See id.*, Row 18.

In 2004—long after the rates at issue here were imposed—NYSTA's board of directors adopted a new policy under which it ostensibly changed its approach to fees for right-of-way permits to connect to networks installed along the Thruway. *See* NYSTA Resolution 5360 (Feb. 3, 2004) at 8 (copy attached as Exhibit 36; pertinent provision appears on the second page of the exhibit). Even though NYSTA had effectively abandoned the rate sheet four years earlier when negotiating with Williams, the 2004 resolution purported to announce a "new" policy under which "fees for fiberoptic connection permits are to be negotiated amounts" as opposed to amounts set by schedule. *Id.*; *see also id.*, Mem. Attach. at 3 (proposing that the NYSTA's board adopt the negotiated fee approach for fiber-optic connection permits). Through this *post hoc* justification, NYSTA effectively acknowledged that it had completely disregarded the then-governing policy when it imposed its rents on Williams, and that going forward it would continue to use its chokehold over fiber-optic networks to extract exorbitant rents.

The disparity between the rates NYSTA imposed on Williams for connecting and non-connecting right-of-way permits illustrate its willingness to hold the Backbone Network hostage. NYSTA charged Williams (and now charges Level 3) just $600 per year for a non-interconnecting lateral right-of-way permit running 415 feet, which amounts to $1.45 per linear foot. *See supra* n.8 (occupancy permit for lateral non-connecting right-of-way). NYSTA also charges Williams Level 3 $68,254.88 for a two-foot right-of-way connecting to the Backbone Network—or more than $34,000 per foot.

*See* Exhibit 14, Row 16. Thus, when it is in a position to exercise its chokehold over a network, NYSTA requires a utility to pay a per-foot rate as much as 23,000 times higher than the rate that would otherwise apply.

*4. Conflict with Rents Levied on Adesta*

The rents that NYSTA extracts for connections to the Backbone Network are grossly out of proportion to the rents it charges Adesta to maintain the network along the full length of the Thruway. If Adesta were subject to the same per-foot rates at issue here (*i.e.*, an average of $364 per foot, *see* Exhibit 14, Row 18), its annual rental payments would exceed $1 billion,[12] as would the rental payments for every other carrier with permits covering the length of the Thruway. NYSTA does not subject Adesta or any other carrier to rents anywhere close to that sum.[13]

*5. No Relationship to NYSTA's Costs or the Actual Use of the Right-of-Way*

NYSTA's rents have no connection to NYSTA's costs related to any particular right-of-way, nor do they reflect to the length of the right-of-way actually used by Level 3. Indeed, the rents are completely divorced from the width, breadth, or physical

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[12] NYSTA has granted Adesta the right to operate communications networks along the full length of the Thruway. *See* Exhibit 6, Art. 2 (grant of right); Art. 1, Item 13 (defining right-of-way). The Thruway extends approximately 570 miles, or 3,009,600 feet. *See* www.nysthruway.gov/about/factbook/index.html (excluding 71 miles of Interstate 84 that NYSTA manages under contract with the U.S. Department of Transportation). Multiplying that distance by $364, which is the average per-foot rent imposed on Level 3 for connections to the Backbone Network, *see* Exhibit 14, Row 18, results in a total annual fee of $1,095,494,400.

[13] The entire aggregate annual budget for NYSTA and the New York State Canal Corporation is just over $1.1 billion. *See* 2008 Budget, New York State Thruway Authority & New York State Canal Corporation, at I (2007), *available at* http://www.nysthruway.gov/about/financial/2008proposedbudget.pdf.

characteristics of the rights-of-way in question. For the additional connections allowing access to signal regeneration facilities (necessary to actually operate the entire Backbone Network, not just to connect to it), NYSTA has charged an annual rent of $18,000 per year (plus annual inflation adjustments), regardless of the length covered by the right-of-way permit or the physical conditions particular to any individual right-of-way. *See* Exhibit 14, Rows 2-4, 9, 11-15, 17 (Riders related to connections for regeneration facilities). Likewise, for connections to POPs necessary to serve particular communities, NYSTA typically employs a fixed rent formula ($400 per fiber per year for the first 96 fibers, $333 for each fiber per year thereafter) that yielded a minimum annual rent of $38,400 per year per connection point for Williams, regardless of the length, location, or physical characteristics of the right-of-way in question. *See id.*, Rows 5-8, 10, 15 (Riders for POP facilities). Due to inflation adjustment provisions in those Riders, the annual rent under these Riders has since risen to $48,795 per year. *See, e.g., id.*, Rows 6-8.

*6. Fiber-Based Fee*

NYSTA bases its rent calculations on self-serving assumptions about the number of lit fibers transiting any particular right-of-way. NYSTA's rents for POP connections (as opposed to regeneration facility connections) are calculated on a per-fiber basis (*i.e.*, $400 per fiber for the first 96 fibers). *See, e.g.*, Exhibit 19, Rider at 4, Section B.1.A.a.; Exhibit 20, Rider at 4, Section B.1.A.a. This appears at first blush to be a graduated formula that rises as capacity increases, but the Riders apply the rate to each of the 96 installed fibers, regardless of the number that actually are lit—meaning that the minimum annual fee for POP connections is $48,795 (after inflation adjustment) per year. *See id.*;

*see also* Exhibit 14, Rows 5-8.[14] In actuality, Level 3 has actually lit an average of only 62 percent of fibers on the seventeen access connections at issue, *see* Gordon Decl. ¶ 5, demonstrating that NYSTA's formula extracts exaggerated rents by ignoring actual active capacity.

7. *Disincentive to Expand*

The NYSTA rental formula imposes higher and higher rents as the number of lit fibers increases beyond the "deemed" level of lit fibers identified above, thereby discouraging further capacity expansion. *See, e.g.,* Exhibit 19, Rider at 4, Section B.1.A.b.; Exhibit 20, Rider at 4, Section B.1.A.b. But each additional lit fiber has no impact on NYSTA's costs, on the length of the right-of-way, or on the physical features of the location. The formula's rent-escalation feature is therefore demonstrably short-sighted, as it bakes in a financial disincentive for carriers to expand capacity beyond the number of fibers deemed to be lit. This disincentive has in fact been borne out, as Level 3 has not expanded capacity under any of the existing Riders beyond the number of fibers deemed to be lit. Gordon Decl. ¶ 5; *see also* Exhibit 14, Columns D and E (demonstrating that rents cover only the number of fibers deemed to be lit, and no more).

Unreasonable rents also siphon money away from incremental network expansion projects both within and outside New York. Allen Decl. ¶ 6. This is particularly true for Level 3 and other competitive communications companies looking to expand their networks. One of Level 3's top corporate priorities for the next five to ten years is increasing the geographic reach of its existing fiber-optic network by expanding where it

[14] Even more egregiously, one of the Riders at issue imposes an annual rent of $500 per lit fiber, and then presumes that 192 fibers are lit, regardless of the actual number. *See* Exhibit 15, Rider at 3, Section B.1.

makes economic and business sense. Like most competitive carriers, Level 3's cash is tightly managed, and the size of its annual capital budget for network expansions is a direct function of the amount of cash the business generates. *Id.* ¶ 5. Every dollar of expense therefore reduces the capital budget available for network expansion. As a result, Level 3 is focused on eliminating or reducing unnecessary or unreasonable expenses, so that the savings can be used to augment existing fiber-optic network facilities and permit delivery of additional telecommunications and enhanced services to additional communities, traffic aggregation points, and end user buildings. Eliminating even *one year* of the NYSTA rent expense would free up enough capital to allow Level 3 to extend its network to provide service to an additional eighteen end user locations in the United States. *Id.* Needless to say, eliminating these rent expenses over the remaining life of the Riders would allow Level 3 to redeploy capital to serve hundreds of additional locations nationwide.

* * * * *

In sum, NYSTA's rents reflect an opportunistic effort to reap windfall rents from a company that was over a barrel. NYSTA recognized that, having sunk more than $31 million in a network that was technically and financially inoperable without additional connections, Williams had no viable option other than agreeing to virtually anything NYSTA demanded.