



December 17, 2009

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition by Level 3 Communications, LLC, 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

Dear Ms. Dortch:

On December 16, 2009, John Ryan of Level 3 Communications, LLC (“Level 3”), Madeleine Findley and I, on behalf of Level 3, met with William Dever, Ian Dillner, Marcus Maher, Pam Megna, Al Lewis, Claudia Pabo, Jennifer Prime and Tim Stelzig of the Wireline Competition Bureau to discuss issues raised in Level 3’s petition for preemption pursuant to 47 U.S.C. § 253 and reply filings. Level 3 presented arguments previously set forth in its Petition and Reply Comments.¹

Level 3 explained that its Petition is not directed at the contract under which it purchased IRUs in the Backbone Network running the length of the Thruway, through which NYSTA has received and continues to receive substantial payments for use of that right-of-way. Instead, this dispute involves the additional connection and regeneration facility agreements are between Williams/Level 3 and NYSTA for rights of way that run from those already-paid-for longitudinal rights of way to the edge of NYSTA’s property. Thus, to the extent that NATOA and NYSTA argue that all the agreements have to be read together, they are incorrect. The Rider agreements with NYSTA are separate from the On-NYSTA and Off-NYSTA Agreements with Adesta.

Level 3 clarified that the Riders for additional connections to its Backbone Network require Level 3 to pay a recurring rent solely for the use of the land. This rent does not fund

¹ Level 3 Communications, LLC, Petition for a 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 Jul. 23, 2009); Reply Comments in Support of Level 3 Communications, LLC, Petition for a 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 Nov. 5, 2009).

materials, permits, costs of any required safety measures, maintenance, or the cost of splicing into the Backbone Network. Those are separate, additional expenses that Level 3 bears.

With respect to NYSTA's argument that Williams paid the additional access rents under the Riders for six years prior to Level 3 assuming control, Williams during that period struggled with reorganization through Chapter 11 and then with efforts to sell the company. Given these larger challenges facing Williams' management, Williams was not as focused on cost management as Level 3 was or is. Level 3 objected to NYSTA's rents after acquiring Williams and sought to negotiate a resolution. After thirteen months of silence, NYSTA rejected Level 3's settlement offer in mid-2009. Level 3 thereafter prepared its Petition for Preemption in this proceeding.

Contrary to NYSTA's suggestion, Level 3's Petition thus was not a response to NYSTA's lawsuit, but the culmination of a dispute with NYSTA that had been running for more than a year. Indeed, NYSTA did not file its suit until the day before it filed its Opposition, after Level 3 had filed its Petition and consented to NYSTA's request for an extension of time to respond.

Level 3 also discussed NYSTA's erroneous argument that NYSTA's rents cannot be exorbitant because Level 3 "expanded its network [along the Thruway] through the acquisition of Broadwing Communications and Genuity, Inc."² NYSTA, however, ignores the fact that Level 3 acquired those companies in their entirety, not just their operations along the Thruway. This was not a selective decision to expand Thruway operations – and in any event NYSTA had been indirectly paid by those entities for their use of the rights of way. Those acquisitions cannot shelter NYSTA's outrageous rent demands.

NYSTA's exorbitant rent demands also cannot be justified on grounds of safety. These demands for ground rent have nothing to do with safety – they are about money. Level 3 is still obligated to obtain permits and to observe necessary safety precautions.

A copy of this letter is being filed in the above-referenced dockets.

Sincerely,

/s/John T. Nakahata

John T. Nakahata

Counsel to Level 3 Communications

² See Opposition of New York State Thruway Authority, WC Docket No. 09-153, at 31 (filed Oct. 15, 2009).