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August 16, 2010

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 behalf of the New York State Thruway Authority ("NYSTA"), we submit a copy of the decision of the Magistrate Judge for the United States District Court, Northern District of New York, in *New York State Thruway Authority v. Level 3 Communications, LLC*, Civ. No. 1:10-CV-154, filed August 11, 2010 ("*Decision*") in which the Court denied Level 3's motion, relying upon the doctrine of primary jurisdiction, to stay the court proceedings pending Commission action on the above-referenced Petition.

In the enclosed *Decision*, the Magistrate Judge found that none of the issues raised exclusively require the special expertise of the FCC for resolution. Specifically, the *Decision* states that:

...the Court agrees with NYSTA that FCC does not have special competence in this area and this matter does fall squarely within the conventional experience of judges. There is nothing presented that supports the notion that this agency is better equipped than the courts to resolve this issue in the first instance. *Decision*, pp. 15-16.

The *Decision* also states that the case primarily raises common law contractual issues that should be resolved by the Court and not by the Commission. *Decision*, pp. 19-20.

The *Decision* further notes that the FCC is continuing to determine whether it has jurisdiction over this matter, but that if the FCC does exercise jurisdiction, it would likely benefit from discovery in the litigation before the Court.

Accordingly, NYSTA proposes that the Commission give due consideration to dismissing the Level 3 petition without prejudice. As detailed most recently in NYSTA's *ex parte* filings of August 5th and 6th, 2010, the Commission is in any event without jurisdiction to grant Level 3 the relief it requests, and the Court will now serve as the appropriate forum for full resolution of this outstanding dispute, including issues of contract formation and interpretation. In addition, given the Court's intent to resolve the matters raised in this case, it is not an efficient or effective use of Commission resources to duplicate that effort.

Respectfully submitted,

/s/ Rosalind K. Allen

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