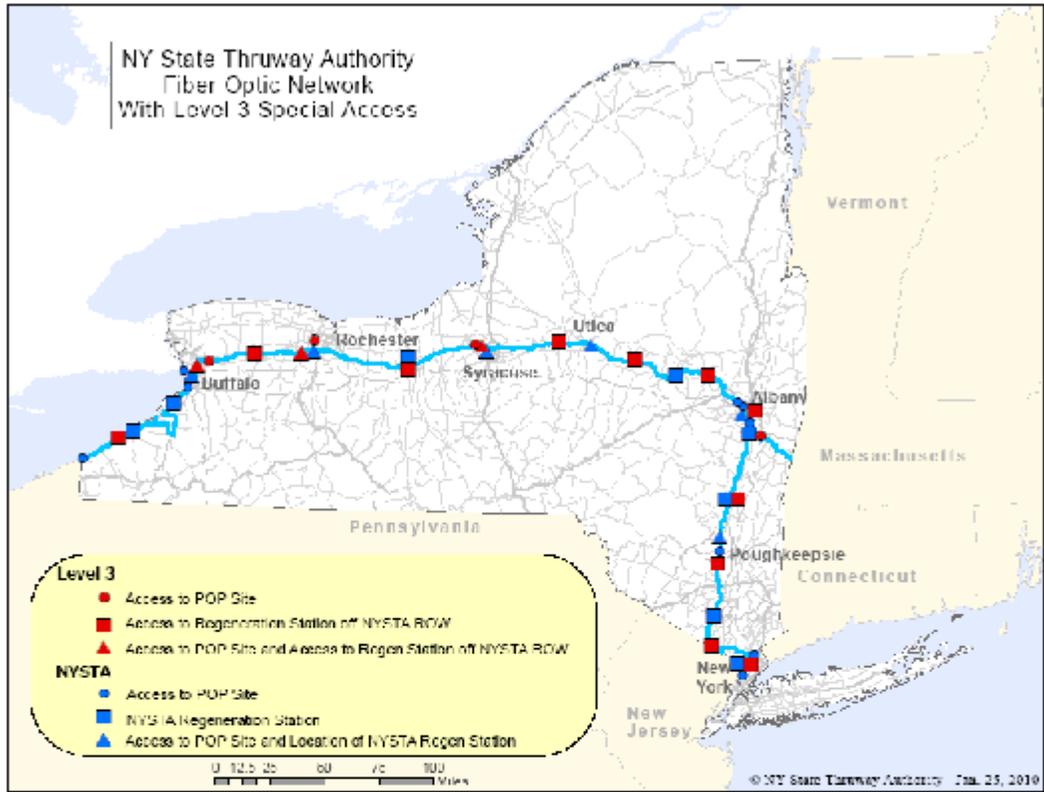




**Use of the New York State Thruway Authority Fiber Optic Network
By Level 3 Communications, WC 09-153**

- **NYSTA owns and operates a 550-mile fiber optic network that is among the first of its type in the nation. The network serves the broadband needs of NYSTA and the State, while providing a valuable resource to competing private companies that offer broadband service.**
- **Almost eleven years ago, Williams Communications entered into an agreement with NYSTA's contractor to use the fiber network infrastructure for installation of fiber consistent with the terms and conditions accepted by all other private company users.**
- **Five months later, Williams wanted a new agreement to authorize a unique and greatly expanded use of the fiber network infrastructure to implement its own specific business plan. NYSTA and Williams negotiated special contracts on terms that were substantially similar to those proposed by Williams. Williams made timely payments under the special contracts for six years.**
- **Level 3 acquired Williams in bankruptcy approximately five years ago and voluntarily assumed the special contracts. Level 3 stopped payments on the special contracts but enjoys the benefits by continuously providing service. As of 9/14/10, Level 3 owed NYSTA \$2,806,351.67. Recently Level 3 offered to pay NYSTA \$9,861.43 to settle the matter.**
- **On 7/7/09, NYSTA, through the New York AG, sent Level 3 a demand letter indicating legal action would be pursued if Level 3 did not pay what was owed. In response, to gain the tactical advantage of a forum perceived to be more favorable, on 7/23/09, Level 3 filed a petition with the FCC under Section 253 of the Act to preempt NYSTA's pricing. Level 3 argues that NYSTA's pricing is so high that Level 3 is unable to bring broadband to underserved areas in New York.**
- **Level 3 is attempting to evade its obligations under the Williams contract eleven years after the fact. In the meanwhile, Level 3 acquired two additional conduits on the NYSTA fiber system and expanded broadband service to Buffalo, Syracuse and Rome/Utica, so it is not being precluded from providing additional service. Level 3 fails to meet the required standard of providing "credible and probative evidence" that the special contract pricing has the effect of prohibiting service. The Commission is provided with nothing more than mere speculation that an effective prohibition of telecommunications service exists.**

- **NYSTA should be able to recover the fair market value of its fiber optic network asset, pursuant to the special contracts, and indeed, New York state law requires NYSTA to recover the fair market value of assets NYSTA chooses to make available to the private sector. User-supported state public authorities should not be forced to subsidize use of their assets by well-financed, publicly-traded companies, particularly in the midst of severe budget deficits.**
- **Level 3 attempts to demonstrate that NYSTA pricing is unreasonable by applying it to all of Level 3's other rights-of-ways throughout the country. That approach is hyperbole. Different rights-of-way in different geographic areas have different values. The value associated with uses of the Thruway conduit, located in a large, populous state along a 550-mile right of way, is substantial and unique.**
- **The same dispute between NYSTA and Level 3 is pending before the US District Court for the Northern District of New York. The Court denied Level 3's motion to stay the proceedings based on the argument that the FCC has primary jurisdiction over the matter, and declared its intent to proceed with the case regardless of whatever actions the FCC may choose to take because the Court views this as primarily a contractual dispute between Level 3 and NYSTA. The Court, rather than the FCC, is where this matter should be resolved. Breach of contract and collection matters are best handled by the courts, where formal processes for discovering the underlying facts and applying state law are available. The Court is also best positioned to provide Level 3 with the primary remedy it seeks: contract reformation. Under Section 253, the Commission may be empowered to preempt pricing but is without authority to substitute pricing Level 3 may prefer.**
- **Level 3's statutory arguments under Section 253 of the Communications Act can and should also be resolved by the District Court. The plain language of Section 253(d) and the accompanying legislative history make clear that the FCC lacks jurisdiction to handle disputes raising access to rights-of-way.**
- **The public interest would not be served by using Section 253 to retroactively invalidate contracts with local governmental entities that were negotiated in good faith, fully performed and then voluntarily assumed. Governmental entities engage in long-term budgetary planning that relies upon the reasonable assumption that revenue generated by long-term contracts will continue to be available. If planned funding is eliminated, budgetary gaps must be closed through reductions in services, postponement of necessary capital expenditures, increasing taxes or fees paid by the public, or some combination of these measures. Preemption under these circumstances creates unacceptable levels of risk and exposure for local governments and would open the floodgates to encourage any telecommunications provider to file a Section 253 petition to increase available capital.**
- **Action on the Level 3 Petition in advance of the Joint Taskforce on Rights-of-Way finishing its work would prejudge the outcome of the Joint Taskforce.**



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