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December 17, 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”) and pursuant to Section 1.1206(b) of the Commission’s Rules, 47 C.F.R. §1.1206(b), this will serve as *ex parte* notice that, on December 16, 2010, William Estes and Edna Goldsmith of NYSTA, and Charles Naftalin and I on behalf of NYSTA, met with Brad Gillen, legal advisor to Commissioner Baker, to discuss the status of the above-referenced Petition. NYSTA presented arguments previously set forth in its Opposition and subsequent written *ex parte* presentations, as summarized in the attached briefing sheet that NYSTA shared with Mr. Gillen.

A copy of this letter and the briefing sheet are being filed in the above-referenced docket.

Respectfully submitted,
HOLLAND & KNIGHT LLP

/s/ Leighton T. Brown
Leighton T. Brown
Counsel to the New York State Thruway Authority

cc: Brad Gillen



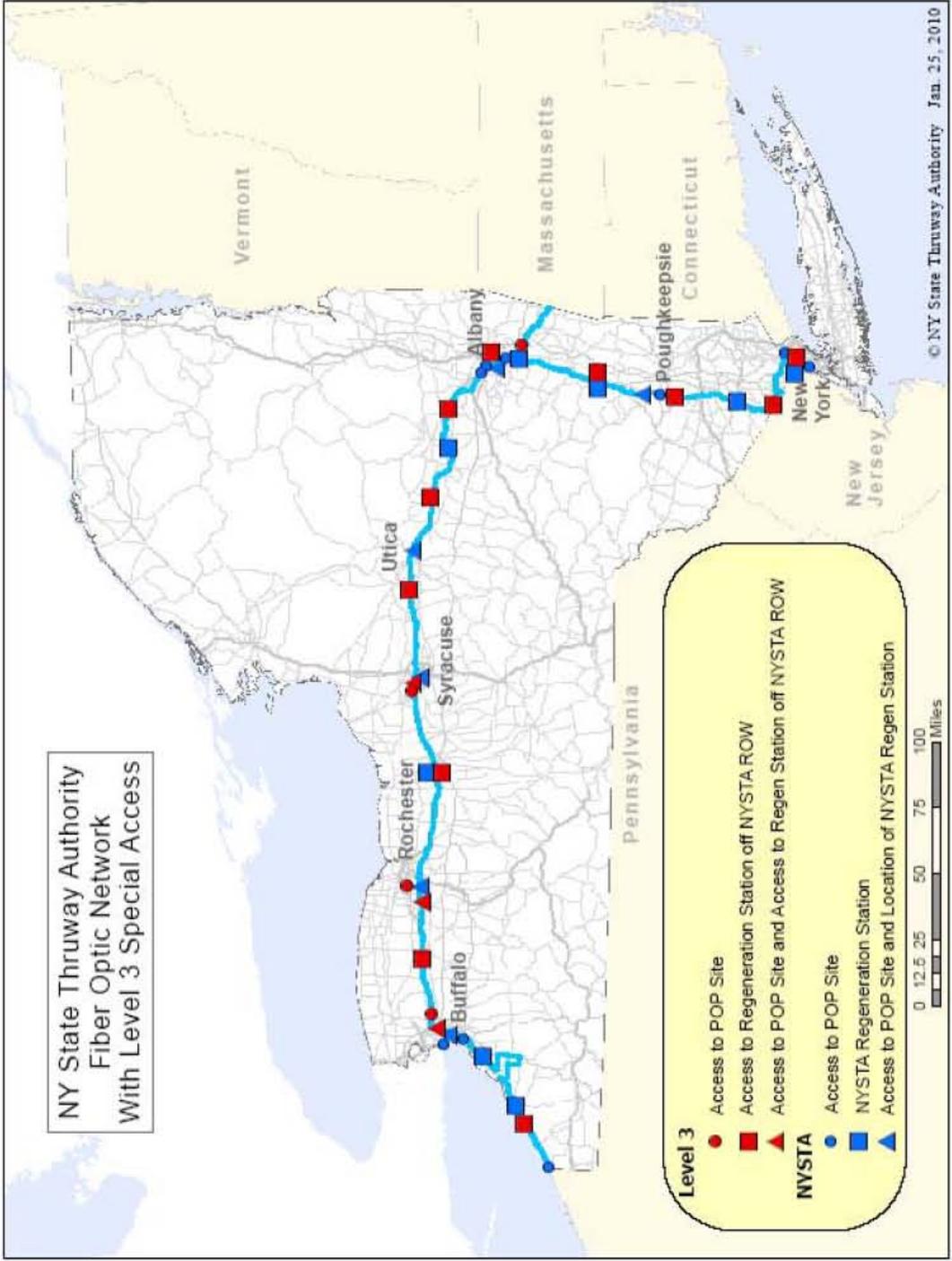
**Use of the New York State Thruway Authority Fiber
Optic Network By Level 3 Communications, WC 09-153
December 2010**

- **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. The amount currently owed exceeds \$3 million.**
- **On July 7, 2009, NYSTA, through the New York Attorney General, sent Level 3 a demand letter. On July 23, 2009, 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. Level 3 has provided nothing more than mere speculation that a barrier to entry 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. State agencies should not be forced to subsidize the 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 U.S. District Court for the Northern District of New York. That, 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 related to rights-of-way management.**
- **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.**

**NY State Thruway Authority
Fiber Optic Network
With Level 3 Special Access**





Texas Municipal League

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FCC PREEMPTION OF LOCAL RIGHT-OF-WAY RENTAL FEES?

A local controversy in New York State may have serious financial implications for cities across the nation, including Texas cities. A company called Level 3 Communications filed a petition with the Federal Communications Commission (FCC) last year seeking to overturn public property and right-of-way fees negotiated in a decade-old contract between Level 3's predecessor and the New York State Thruway Authority (NYSTA). Level 3's predecessor placed hundreds of miles of fiber optic cable in the NYSTA's right-of-way and paid the negotiated fee. Recently, when Level 3 sought to extend the network using federal stimulus dollars, the company claimed that the NYSTA fees for the extensions were "exorbitant."

The company claims that the high NYSTA fees are a barrier to providing service and are thus preempted by the federal Telecommunications Act. Level 3 makes the all-too-familiar argument that municipal right-of-way fees should be based solely on the costs of regulation, rather than being based on the fair market "rental" value for the use of public property by a private company. (Texas cities are required by the Texas Constitution and various state statutes to charge fair market rent for use of public property by private companies. When Congress enacted the federal Telecommunications Act, it made clear that the FCC is not authorized to set the level of local rental payments charged for use of public property.)

Whether the NYSTA fees in the contracts prohibit service or whether the fees are "reasonable" in this particular instance are legal and fact issues that a court, rather than the FCC, should decide as a contract dispute. The problem for Texas cities is that Level 3 filed a "Petition for Declaratory Ruling" with the FCC. An FCC order based on that type of petition could potentially apply to every city in the nation and could attempt to impose a national standard for the reasonableness of fees charged for right-of-way use.

In addition to considering the Level 3 petition, the FCC is in the process of developing a "National Broadband Plan (NBP)" that will "seek to ensure that every American has access to broadband capability." The plan is part of last year's federal stimulus bill and is scheduled for release on March 17, 2010. Some telecommunications and cable companies are urging the FCC, as part of the NBP and in conjunction with the Level 3 proceeding, to adopt a unilaterally-imposed, federal standard for compensation for use of public rights-of-way that would limit municipal fees to the actual costs of regulation rather than fair market value rents.

Considering the fact that right-of-way rental fees are almost ten percent of many Texas cities' general fund revenues, negative FCC action would be a financial disaster. In other words, if the FCC takes action to limit the ability of cities to require market-value rental fees, Texas cities would collectively lose several hundred million dollars in revenue.

The Texas Municipal League's national partners, including the International Municipal Lawyers Association, the U.S. Conference of Mayors, the National Association of Telecommunications Officers and Advisors, and the National League of Cities, have participated in various ways at the FCC to ensure that local right-of-way authority is not eroded. The League will continue to monitor and support the national associations' efforts.

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