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January 31, 2011

Ex Parte Submission – Filed Electronically Via ECFS

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

Re: *Level 3 Communications, LLC, Petition for Declaratory Ruling*
WC Docket No. 09-153

Dear Ms. Dortch:

The International Bridge, Tunnel and Turnpike Association (IBTTA), a worldwide membership organization founded in 1932 consisting of hundreds of toll operators and supporting businesses in more than 20 countries, hereby submits this letter in response to Level 3's petition for a declaratory ruling that certain right-of-way rents imposed by the New York State Thruway Authority (NYSTA)¹ should be preempted under Section 253 of the Telecommunications Act. As explained herein, Level 3 is pursuing a strategy it hopes will relieve it of lawful contractual obligations to the detriment of NYSTA, which is a public benefit corporation, the traveling public, and local jurisdictions and transportation systems throughout the United States.

IBTTA's mission is to advance toll-financed transportation. Acting as vital arteries of commerce, tollways are a key contributor to America's economic success. In fact, Moody's, a bond credit agency, states that NYSTA's "rating is based on the essential role played by the thruway in the state economy, linking all of the major population centers."² While IBTTA agrees with the FCC that "broadband is a key driver of economic growth,"³ IBTTA believes that a commonality of both thruways and broadband is that they have the ability to shrink "the distances that isolate remote communities,"⁴ which is what makes them so crucial in commerce and in advancing

¹ NYSTA is a member of the IBTTA.

² Moody's Investor Services, Global Credit Research, High Profile New Issue September 28, 2007. (A copy will be made available to the FCC's staff upon request).

³ <http://www.fcc.gov/broadband/>

⁴ <http://www.fcc.gov/broadband/>

society. In fact, in order to deliver broadband to its customers, Level 3 uses NYSTA's physical rights-of-way, which were built, and exist primarily for, transportation purposes.

The New York State Thruway, like other members of IBTTA, was among the Nation's first "superhighways" and was built without federal support. The NYSTA Act passed the New York legislature in 1950, several years before the establishment of the Interstate Highway System in 1956, which funded other interstate highways. NYSTA's roadway, as is the case with other IBTTA members, was constructed using capital borrowed pursuant to bond resolutions. These resolutions, which are a fundamental basis for numerous transportation systems nationwide, establish a fiduciary responsibility to ensure that bondholders will be repaid.

In recognizing the sanctity of NYSTA's bond covenants, the New York Legislature passed laws prohibiting the State from limiting or altering the rights of NYSTA to "establish and collect such fees, rentals and charges as may be convenient or necessary to produce sufficient revenue to meet the expense and operation and to fulfill the terms of any agreements made with the holders thereof."⁵ This relationship between tollway issuers and bondholders exists nationwide, allowing billions of dollars to be spent on constructing tollways and maintaining capital improvements. Although the New York Legislature has sought to protect this relationship through legislation, Level 3 now seeks to have the FCC alter this dynamic by undermining contractually agreed upon and previously-performed contracts. Altering streams of funding that exist to support NYSTA when the public purchased bonds impairs the existing covenant these bondholders have with NYSTA. Establishing a precedent of this nature would also destabilize this vital funding mechanism nationally.

Tollways rely on various streams of income to return principal and interest to bondholders, including tolls, rents, concessions, and other income. NYSTA is exclusively user-fee supported and receives no other source of revenue. As a user-fee supported system, all customers who use the New York State Thruway pay for its support, including non-traffic related businesses such as gas stations, food service facilities, gift shops, companies located on Thruway-owned cell towers, and lessees and permittees using NYSTA property. Level 3 is a beneficiary of the billions of dollars required to construct, operate and maintain NYSTA's roadway, so it should contribute fair market value for its use of NYSTA's property.

In fact, NYSTA recognized the need to earn revenue from its fiber optic infrastructure for the operations and maintenance of its roadway when it issued its Request for Proposal ("RFP") to design, install, operate and maintain the system. In addition, the RFP laid out in great detail the proprietary needs of NYSTA in creating the fiber optic system. It stated that NYSTA's goals in building the system included

⁵ N.Y. Public Authorities Law §373; *see* N.Y. PAL §354(8).

fulfilling NYSTA's current and near-term telecommunications needs and enhancing NYSTA's revenues through its rights-of-way.⁶

On December 8, 2010, IBTTA publicly endorsed a joint statement by the National Surface Transportation Infrastructure Financing Commission (NSTIFC)⁷ and the National Transportation Policy Project of the Bipartisan Policy Center (NTPP) which noted that our Nation's economy, global competitive advantage, and quality of life are at risk due to our deteriorating transportation system.⁸ To face these challenges by strengthening the nation's transportation network, NSTIFC and NTPP proposed several key principles, two of which exemplify the fairness and necessity of Level 3 paying fair market value for its use of NYSTA's conduits and rights-of-way.

The first principle advocated by NSTIFC and NTPP is to restore and improve user-based funding for roadways. In describing the transportation system as "under-priced," these organizations call for users to bear more of the full costs of the infrastructure. NYSTA's conduit is highly desirable and, as such, other telecommunications companies use it at market rates. Level 3, on the other hand, seeks to use the conduit for significantly less than fair market value. IBTTA asserts that Level 3's free-loader mentality is exactly the type of philosophy that leads to underinvestment in America's transportation system. Section 253 of the Telecommunications Act does not give the FCC a role in establishing "fair and reasonable compensation" for rights-of-way, and the FCC has never provided guidance on setting "fair and reasonable compensation" for the use of rights-of-way under Section 253. Accordingly, creating FCC regulation by reforming or voiding NYSTA's existing contracts would be inequitable to the parties who consensually entered into these agreements and unfair to bondholders and NYSTA users.

The second principle is a call by NSTIFC and NTPP for the federal government to remove barriers to increased state and local revenues from direct user fees. Clearly, any regulatory act by the FCC to impair the ability of toll operators to receive fair market value for the use of their system is a barrier to receiving revenue. IBTTA finds it troublesome that the FCC might choose to act on Level 3's petition without waiting for the final report of the rights-of-way committee that the FCC mandated in its National Broadband Plan. IBTTA agrees with the FCC's Local and State Government Advisory Committee (LSGAC) that right-of-way disputes between telecommunications companies and local governments should be resolved in local jurisdictions.⁹

⁶ New York State Thruway Authority; *Request for Proposal: Design Installation, Operation and Maintenance of a Fiber Optic Infrastructure Along the Thruway/Canals Rights-of-Way*; Issued October 24, 1994. (A copy will be made available to the FCC's staff upon request).

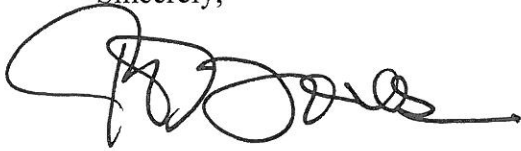
⁷ Section 11142(a) of SAFETEA-LU established NSTIFC and charged it with analyzing the future highway and transit needs and finances of the Highway Trust Fund, as well as making recommendations regarding alternative approaches to financing transportation infrastructure.

⁸ Joint Statement of NSTIFC and NTPP (Dec. 8, 2010).

⁹ See LSGAC Recommendation No. 23, p. 2; LSGAC Recommendation No. 1.

The Nation as a whole, and states and local jurisdictions in particular, are in a financial crisis acutely affecting authorities such as NYSTA and other tollways throughout the country that exist for the public's benefit. IBTTA recognizes that both transportation and broadband are important for America's financial strength. However, nothing positive will be gained by putting broadband ahead of transportation or by permitting private, for-profit corporations to appropriate assets created for the benefit of the public and financed by others for less than fair market value. IBTTA therefore respectfully requests that the FCC dismiss *Level 3 Communications, LLC, Petition for Declaratory Ruling*. A failure to dismiss Level's petition would undermine the financial integrity of America's public transportation systems.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patrick D. Jones', with a long horizontal line extending to the right.

Patrick D. Jones
Executive Director & CEO