

At a Special Term of the Supreme Court,  
held in and for the County of Erie, at 25  
Delaware Avenue, Buffalo, New York, on  
February 5, 2018.

ALLEN

Presiding: Hon. Deborah A. Chimes, J.S.C

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ERIE

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In the Matter of the Application of LEVEL 3	: Index No.: 2015/806589
COMMUNICATIONS, LLC, BROADWING	:
COMMUNICATIONS, LLC, GLOBAL	:
CROSSING NORTH AMERICA, INC., and	: <b><u>ORDER AND JUDGMENT</u></b>
GLOBAL CROSSING	:
TELECOMMUNICATIONS, INC.,	:
	:
Petitioners,	:
-against-	:
	:
ERIE COUNTY, CITY OF BUFFALO, CITY OF	:
LACKAWANNA, VILLAGE OF NORTH	:
COLLINS, CITY OF LACKAWANNA SCHOOL	:
DISTRICT, EDEN CENTRAL SCHOOL	:
DISTRICT, LAKE SHORE CENTRAL SCHOOL	:
DISTRICT, and NORTH COLLINS CENTRAL	:
SCHOOL DISTRICT,	:
	:
Respondents.	:
	:
For A Judgment Under Article 78 of the Civil	:
Practice Law and Rules.	:
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A proceeding having been commenced by petitioners LEVEL 3 COMMUNICATIONS, LLC, BROADWING COMMUNICATIONS, LLC, GLOBAL CROSSING NORTH AMERICA, INC., and GLOBAL CROSSING TELECOMMUNICATIONS, INC. (collectively, "Petitioners") pursuant to CPLR Article 78 and CPLR Section 3001 against respondents ERIE COUNTY, CITY OF BUFFALO, CITY OF LACKAWANNA, VILLAGE OF NORTH COLLINS, CITY OF LACKAWANNA SCHOOL DISTRICT, EDEN CENTRAL SCHOOL

DISTRICT, LAKE SHORE CENTRAL SCHOOL DISTRICT, and NORTH COLLINS CENTRAL SCHOOL DISTRICT (collectively, "Respondents"), seeking a judgment (a) declaring that Petitioners' fiber optic cables and inclosures on private rights of way in Erie County ("Fiber Optic Installations") are not taxable as real property under the New York Real Property Tax Law ("RPTL"); (b) annulling the determinations by Respondents denying Petitioners' Applications for Corrected Tax Roll pursuant to RPTL 554, Applications for Refund and Credit of Real Property Taxes pursuant to RPTL 556, and Applications for Correction of Multiple Parcel Errors pursuant to RPTL 556-b (collectively "Applications") relating to real property tax assessments of Petitioners' Fiber Optic Installations for the tax years at issue; and (c) ordering Respondents to approve Petitioners' Applications and to provide refunds to Petitioners of the real property taxes that each respondent received for the tax years at issue based on the erroneous assessments of Petitioners' Fiber Optic Installations, with applicable interest;

NOW, upon reading and filing of:

- the Notice of Consolidated Amended Petition, dated December 4, 2017;
- the Verified Consolidated Amended Petition, dated June 15, 2017, with exhibits;
- the Affirmation of John G. Nicolich on behalf of Petitioners and in support of the Consolidated Amended Petition, dated June 21, 2017;
- the Affidavit of David Cooper on behalf of Petitioners and in support of the Consolidated Amended Petition, sworn to on June 16, 2017;
- the Memorandum of Law in support of Petitioners' Consolidated Amended Petition, dated June 22, 2017;
- the Certified Record of Consolidated Proceedings of respondent Erie County

sworn to on September 11, 2017;

- the Verified Answer of respondent Erie County, dated September 12, 2017;
- the Affirmation of Jennifer C. Persico on behalf of Erie County and in opposition

to the Consolidated Amended Petition, dated September 12, 2017;

- the Affidavit of Joseph L. Maciejewski on behalf of Erie County and in

opposition to the Consolidated Amended Petition, sworn to on September 11, 2017;

- the Memorandum of Law in opposition to the Consolidated Amended Petition,

filed on behalf of Erie County, dated September 12, 2017;

- the Affirmation of Joel R. Kurtzhalts on behalf of the City of Buffalo and in

opposition to the Consolidated Amended Petition, dated September 8, 2017;

- the Verified Answer of respondent City of Buffalo, dated September 8, 2017;

- the Affidavit of Martin F. Kennedy on behalf of the City of Buffalo and in

opposition to the Consolidated Amended Petition, sworn to on September 7, 2017;

- the Verified Answer of respondent City of Lackawanna, dated September 13,

2017;

- the Affirmation of Antonio Savaglio on behalf of the City of Lackawanna and in

opposition to the Consolidated Amended Petition, dated September 13, 2017;

- the Affidavit of Frank Krakowski on behalf of the City of Lackawanna and in

opposition to the Consolidated Amended Petition, sworn to on September 13, 2017;

- the Verified Answer of respondent Village of North Collins, dated September 5,

2017;

- the Affirmation of Richard M. Schaus on behalf of the Village of North Collins

and in opposition to the Consolidated Amended Petition, dated September 10, 2017;

- the Verified Answer of respondent City of Lackawanna School District, dated September 12, 2017;
- the Affirmation of Carl W. Morgan on behalf of the City of Lackawanna School District and in opposition to the Consolidated Amended Petition, dated September 12, 2017;
- the Verified Answer of respondent Lake Shore Central School District, dated September 12, 2017;
- the Affirmation of Meghann N. Roehl on behalf of Lake Shore Central School District and in opposition to the Consolidated Amended Petition, dated September 12, 2017;
- the Verified Answer of respondent North Collins Central School District, dated August 25, 2017;
- the Affirmation of Joel J. Terragnoli on behalf of North Collins Central School District and in opposition to the Consolidated Amended Petition, dated September 11, 2017;
- the Affidavit of George E. Sansoucy on behalf of North Collins School District and in opposition to Consolidated Amended Petition, sworn to on August 24, 2017;
- the Affirmation of Michael B. Risman on behalf of North Collins Central School District and in opposition to the Consolidated Amended Petition, dated August 25, 2017;
- the Memorandum of Law in opposition to the Consolidated Amended Petition, filed on behalf of North Collins Central School District, dated September 12, 2017;
- Petitioners' Notice of Objections to Documents filed by Respondents, dated October 3, 2017;
- the Affidavit of Alfonso Porras on behalf of Petitioners and in support of the Consolidated Amended Petition, sworn to September 19, 2017;
- the Reply Affirmation of John G. Nicolich on behalf of Petitioners and in support

of the Consolidated Amended Petition, dated September 29, 2017;

- the Reply Memorandum of Law in support of the Consolidated Amended Petition, dated October 3, 2017; and
- the letter of Jennifer C. Persico and Michael B. Risman on behalf of respondents Erie County and North Collins Central School District, dated October 11, 2017;

AND after hearing argument on December 20, 2017, in support of the Consolidated Amended Petition by John G. Nicolich of Ingram Yuzek Gainen Carroll & Bertolotti, LLP; and in opposition to the Consolidated Amended Petition by Jennifer C. Persico of Lippes Mathias Wexler Friedman LLP; Maura C. Seibold of Bennett DiFilippo & Kurtzhaltz, LLP; Antonio M. Savaglio; Richard M. Schaus of Schaus & Schaus; Carl W. Morgan of Carl W. Morgan, P.C; Meghann N. Roehl of Harris Beach PLLC; and Michael B. Risman and Joel J. Terragnoli of Hodgson Russ, LLP;

AND this Court having rendered rulings from the bench on December 20, 2017, as indicated on the transcript of proceedings annexed as Exhibit A;

**IT IS ORDERED, ADJUDGED AND DECLARED** that Petitioners' fiber optic cables and inclosures on private rights of way in Erie County would be taxable under RPTL Section 102(12)(i), barring any exception;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECLARED** that Petitioners' fiber optic cables and inclosures therefor on private rights of way in Erie County are not taxable as real property under RPTL 102(12)(i) due to the exclusion contained in RPTL Section 102(12)(i)(D);

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECLARED** that

Petitioners' fiber optic cables and inclosures therefor on private rights of way in Erie County are not taxable under RPTL 102(12)(b) or RPTL 102(12)(f);

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the

determinations by Respondents denying Petitioners' Applications for correction of tax rolls and for refunds of the tax payments paid under protest and identified on Table A below are hereby annulled, and Respondents are hereby ordered to approve Petitioners' Applications with respect to the assessments and tax payments paid under protest and identified on Table A below:

TABLE A

<u>Petitioner</u>	<u>Respondent</u>	<u>Tax Parcel</u>	<u>Payment Amount</u>	<u>Tax Year</u>	<u>Date Paid</u>
Broadwing Communications, LLC	City of Buffalo	666000065010000	\$436.16	2014/15	2/24/2015
Global Crossing North America, Inc.	City of Buffalo	666000065013000	\$1,484.09	2014/15	2/24/2015
Global Crossing Telecommunications, Inc.	City of Buffalo	66600006503200	\$13.32	2014/15	2/24/2015
Level 3 Communications, LLC	City of Buffalo	666000065009000	\$37,450.29	2014/15	2/24/2015
Level 3 Communications, LLC	City of Buffalo	666000065009000	\$34,536.05	2015/16	7/13/2015
Level 3 Communications, LLC	City of Buffalo	666000065009000	\$2,129.24	2015/16	9/14/2015
Level 3 Communications, LLC	City of Buffalo	666000065010000	\$402.20	2015/16	7/13/2015
Level 3 Communications, LLC	City of Buffalo	666000065010000	\$24.80	2015/16	9/14/2015
Level 3 Communications, LLC	City of Lackawanna	609.00-99 760.7/1881	\$7,153.96	2014/15	2/24/2015
Level 3 Communications, LLC	City of Lackawanna	609.00-99-760.7/1881	\$3,646.04	2015/16	8/18/2015
Level 3 Communications, LLC	City of Lackawanna	609.00-99-760.7/1881	\$3,475.50	2015/16	10/1/2015
Level 3 Communications, LLC	City of Lackawanna	609.00-99-760.7/1881	\$3,524.45	2016/17	10/3/2016
Level 3 Communications, LLC	City of Lackawanna (for Erie County)	609.00-99-760.700/1881	\$908.93	2015	2/4/2015

<u>Petitioner</u>	<u>Respondent</u>	<u>Tax Parcel</u>	<u>Payment Amount</u>	<u>Tax Year</u>	<u>Date Paid</u>
Level 3 Communications, LLC	Eden Central School District	555.00-75-1.1	\$819.53	2014/15	3/2/2015
Level 3 Communications, LLC	Eden Central School District	555.00-75-1.1	\$825.61	2015/16	10/7/2015
Level 3 Communications, LLC	Eden Central School District	555.00-75-1.1	\$827.32	2016/17	10/3/2016
Level 3 Communications, LLC	Erie County	666.00-65-9	\$7,611.83	2016	2/1/2016
Level 3 Communications, LLC	Erie County	666.00-65-9	\$8,261.60	2017	1/19/2017
Level 3 Communications, LLC	Erie County	555.00-75-1.1	\$431.77	2015	3/2/2015
Level 3 Communications, LLC	Erie County	555.00-75-1.2	\$192.44	2015	3/2/2015
Level 3 Communications, LLC	Erie County	666.00-65-9	\$6,975.61	2015	2/4/2015
Level 3 Communications, LLC	Erie County	658.001-9999-760.7/1882	\$751.62	2015	3/2/2015
Level 3 Communications, LLC	Erie County	658.001-9999-717./1882	\$23.09	2015	3/2/2015
Level 3 Communications, LLC	Erie County	658.001-9999-710./1882	\$63.95	2015	3/2/2015
Level 3 Communications, LLC	Erie County	658.089-9999-760.7/1882	\$3,044.98	2015	3/2/2015
Level 3 Communications, LLC	Erie County	658.089-9999-717./1882	\$326.03	2015	3/2/2015
Level 3 Communications, LLC	Erie County	658.089-9999-710./1882	\$292.25	2015	3/2/2015



<u>Petitioner</u>	<u>Respondent</u>	<u>Tax Parcel</u>	<u>Payment Amount</u>	<u>Tax Year</u>	<u>Date Paid</u>
Level 3 Communications, LLC	Lake Shore Central School District	555.00-75-1.2	\$336.66	2014/15	3/2/2015
Level 3 Communications, LLC	Lake Shore Central School District	555.00-75-1.2	\$322.32	2015/16	9/24/2015
Level 3 Communications, LLC	Lake Shore Central School District	555.00-75-1.2	\$320.93	2016/17	10/3/2016
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-710./1882	\$539.07	2014/15	3/2/2015
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-717./1882	\$601.35	2014/15	3/2/2015
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-710/1882	\$154.63	2014/15	3/2/2015
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-760.7/1882	\$5,616.47	2014/15	3/2/2015
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-717./1882	\$55.84	2014/15	3/2/2015
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-760.7/1882	\$1,554.59	2014/15	3/2/2015
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-710./1882	\$162.03	2015/16	9/24/2015
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-717./1882	\$58.51	2015/16	9/24/2015
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-760.7/1882	\$1,628.96	2015/16	9/24/2015
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-710./1882	\$564.86	2015/16	9/24/2015
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-717./1882	\$630.12	2015/16	9/24/2015

<u>Petitioner</u>	<u>Respondent</u>	<u>Tax Parcel</u>	<u>Payment Amount</u>	<u>Tax Year</u>	<u>Date Paid</u>
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-760.7/1882	\$5,885.17	2015/16	9/24/2015
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-710./1882	\$163.63	2016/17	10/3/2016
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-717./1882	\$59.09	2016/17	10/3/2016
Level 3 Communications, LLC	North Collins Central School District	658.001-9999-760.7/1882	\$1,645.08	2016/17	10/3/2016
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-710./1882	\$570.45	2016/17	10/3/2016
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-717./1882	\$636.36	2016/17	10/3/2016
Level 3 Communications, LLC	North Collins Central School District	658.089-9999-760.7/1882	\$5,943.40	2016/17	10/3/2016

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner LEVEL 3 COMMUNICATIONS, LLC, having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent CITY OF BUFFALO, having an address at 65 Niagara Square, Buffalo New York 14202, in the sum of Seventy-Four Thousand, Five Hundred Forty-Two and 58/100 Dollars (\$74,542.58) plus interest from the date of entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which LEVEL 3 COMMUNICATIONS, LLC shall have execution therefor;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner LEVEL 3 COMMUNICATIONS, LLC, having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent CITY OF LACKAWANNA, having an address at 714 Ridge Road, Lackawanna New York, 14218, in the sum of Seventeen

Thousand, Seven Hundred Ninety-Nine and 95/100 Dollars (\$17,799.95) plus interest from the date of entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which LEVEL 3 COMMUNICATIONS, LLC shall have execution therefor;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner LEVEL 3 COMMUNICATIONS, LLC, having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent EDEN CENTRAL SCHOOL DISTRICT, having an address at 3150 Schoolview Road, Eden New York, 14057, in the sum of Two Thousand, Four Hundred Seventy-Two and 46/100 Dollars (\$2,472.46) plus interest from the date of entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which LEVEL 3 COMMUNICATIONS, LLC shall have execution therefor;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner LEVEL 3 COMMUNICATIONS, LLC, having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent ERIE COUNTY, having an address at 95 Franklin Street, Buffalo York, 14202, in the sum of Twenty-Eight Thousand, Eight Hundred Eighty-Four and 10/100 Dollars (\$28,884.10), plus interest from the date of entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which LEVEL 3 COMMUNICATIONS, LLC shall have execution therefor;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner LEVEL 3 COMMUNICATIONS, LLC, having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent LAKE SHORE CENTRAL SCHOOL DISTRICT, having an address at 959 Beach Road, Angola New York, 14006, in the sum of Nine Hundred Seventy-Nine and 91/100 Dollars (\$979.91), plus interest from the date of

entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which LEVEL 3 COMMUNICATIONS, LLC shall have execution therefor;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner LEVEL 3 COMMUNICATIONS, LLC, having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent NORTH COLLINS CENTRAL SCHOOL DISTRICT, having an address at 2045 School Street, North Collins New York, 14111, in the sum of Twenty-Six Thousand, Four Hundred Sixty-Nine and 61/100 Dollars (\$26,469.61), plus interest from the date of entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which LEVEL 3 COMMUNICATIONS, LLC shall have execution therefor;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner BROADWING COMMUNICATIONS, LLC, having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent CITY OF BUFFALO, having an address at 65 Niagara Square, Buffalo New York 14202, in the sum of Four Hundred Thirty-Six and 16/100 Dollars (\$436.16), plus interest from the date of entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which LEVEL 3 COMMUNICATIONS, LLC shall have execution therefor;

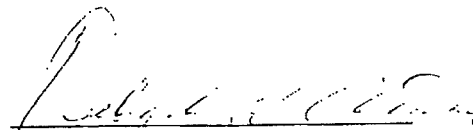
**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Petitioner GLOBAL CROSSING NORTH AMERICA, INC., having an address at 1025 Eldorado Boulevard, Bloomfield, Colorado 80021, have judgment against Respondent CITY OF BUFFALO, having an address at 65 Niagara Square, Buffalo New York 14202, in the sum of One Thousand, Four Hundred Ninety-Seven and 41/100 Dollars (\$1,497.41), plus interest from

the date of entry of this Order and Judgment, calculated at the overpayment rate of 3% per annum, which GLOBAL CROSSING NORTH AMERICA, INC. shall have execution therefor;

**AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that except as specifically set forth above, Petitioners' claims are DENIED.

Dated: <sup>February 2, 2018</sup> February 2, 2018

By:

  
Hon. Deborah A. Chimes, J.S.C

1 THE COURT: All right. First I want to  
 2 address the October 12, 2017 letter and counsel's  
 3 concern. The Court just wants to note for the  
 4 record that the letter was only considered insofar  
 5 that it addressed the objections that were raised,  
 6 but nothing further. So, I will decline your  
 7 request to yet submit another letter or memo or  
 8 whatever it was that you are going to submit.

9 Okay. So the Court is ready to make its  
 10 decision. The petitioner commenced this hybrid  
 11 Article 78 and declaratory action to challenge  
 12 taxation of its fiber optic cables located within  
 13 Erie County.

14 Petitioner seeks a declaratory judgment  
 15 pursuant to CPLR 3001 declaring that petitioners'  
 16 fiber optic installations on private rights of way  
 17 in Erie County are not taxable as real property  
 18 under the RPTL.

19 Petitioner also seeks judgment pursuant to  
 20 CPLR 7806 annulling respondents' determinations,  
 21 denying petitioners' applications on the ground  
 22 that those determinations were affected by an  
 23 error of law, because the assessments of  
 24 petitioners' fiber optic installations, which were  
 25 not taxable real property under RPTL, and were

1 based on an unlawful entry.

2 Petitioner finally seeks judgment pursuant to  
3 CPLR 7806 ordering respondents to approve  
4 petitioners' applications to correct the tax  
5 rolls, and to refund to petitioners the real  
6 property taxes paid to them for the tax years at  
7 issue with applicable interest, and also seeks  
8 costs and disbursements.

9 At issue are three sections of the Real  
10 Property Tax Laws RPTL 102 subsection 12(i)(b) and  
11 (f). RPTL Section 102 subsection 12 entitled  
12 definitions defines real property. Section 12(i)  
13 states in pertinent part that real property  
14 includes, quote, all lines, wires, poles,  
15 supports, and enclosures for electrical  
16 conductors, end of quote.

17 One of the issues presented to this Court is  
18 whether the phrase, quote, for electrical  
19 conductors, end of quote, modifies the entire list  
20 of terms, i.e., lines, wires, poles, supports and  
21 enclosures, or merely the final term, enclosures.

22 Based upon the legislative history and the  
23 Second Department decision in T-Mobile versus  
24 DeBellis, 143 AD3d 992, Second Department 2016,  
25 the Court finds that the term electrical

1 conductors refers only to the final term  
 2 enclosures. And therefore, fiber optic cables,  
 3 which are not electrical cables, would be subject  
 4 to taxation under RPTL 102 Section 12(i) barring  
 5 any exception.

6 The petitioner argues that the exclusion  
 7 contained in Section 12(i)(d) applies because their  
 8 fiber optic cables are, quote, property used in  
 9 the transmission of news or entertainment radio,  
 10 television, or cable television, end of quote.

11 Based upon the Cooper affidavit and the  
 12 promotional materials submitted by the  
 13 petitioners, the Court finds that the petitioners'  
 14 fiber optic cables are used to transmit video  
 15 content including the transmission of television  
 16 signals for broadcasters, cable T.V. channels,  
 17 local stations, and live television viewing.

18 It has been long recognized that, quote, when  
 19 the language of a statute is clear, the Court  
 20 should look no further than the unambiguous words  
 21 and need not delve into legislative history, end  
 22 of quote. RCN NY Communications, LLC, versus Tax  
 23 Commissioner of the City of New York, 95 AD3d,  
 24 456, comma 457, First Department 2012. Citing to  
 25 Matter of Lloyd versus Grella, 83 NY2d 537 comma,



1 545 to 546, 1994.

2 Quote, further, where the statute at issue is  
3 a tax statute, it must be narrowly construed and  
4 any doubts concerning its scope and application  
5 are to be resolved in favor of the taxpayer.

6 Internal citations omitted.

7 Here, the language of the exception is clear  
8 and unambiguous, and therefore, the Court need not  
9 refer to the legislative history of the statute.  
10 Section 12(i)(d) clearly states that excluded from  
11 taxation is, quote, property used in the  
12 transmission of news or entertainment radio,  
13 television or cable television, end of quote.

14 Respondents argue based upon an opinion of  
15 the State Board of Real Property Services, see 11  
16 Op. Counsel SBRPS Number 103, parenthesis, NY  
17 Board Real Property Service, 2007 WL 3318179, that  
18 if petitioners' equipment is not used exclusively  
19 to provide news and entertainment, then the  
20 exception does not apply. However, the opinion  
21 provides no support for its conclusion, and the  
22 Court declines to considers it.

23 With respect to respondents' argument on the  
24 issue of judicial estoppel, respondents rely on  
25 Level 3 Communications versus DeBellis, also 72

1 AD3d 164, Second Department 2001. However,  
2 respondents fail to show that petitioner has taken  
3 an inconsistent position between the two cases  
4 such that the doctrine of judicial estoppel would  
5 be applicable.

6 The next issue for the Court to decide is  
7 whether the fiber optic cables are taxable as  
8 fixtures under RPTL 102(b). It is noted that RPTL  
9 102(12)(i) specifically addresses the taxability  
10 of property used for telecommunication services,  
11 end of quote, and that subdivision I controls,  
12 quote, in the event of a conflict between the two  
13 provisions, end of quote. Level 3 Communications  
14 versus Clinton County, 144 AD3d, 115, comma 120,  
15 Third Department 2016.

16 The Court does not need to determine if the  
17 fiber optic cables are taxable as fixtures because  
18 they are not taxable under the controlling  
19 statute.

20 The issue of whether the fiber optic cables  
21 are taxable under RPTL 102(12)(f) was recently  
22 addressed by the Fourth Department in Level 3  
23 Communications versus Chautauqua County, 148 AD3d,  
24 1701, Fourth Department 2017, where the Court  
25 concluded that the petitioners' fiber optic

1 installations do not distribute light as the term  
2 distribute is used in the statute.

3 For the reasons stated above, the  
4 petitioners' fiber optic installations are not  
5 taxable under RPTL 102 (i), (b) or (f).

6 The Court next turns to the procedural  
7 objections raised by the respondents. Relying on  
8 Samuels versus Clarkson, 91 AD2d 836, 837, Fourth  
9 Department 1982. Respondents argue that  
10 petitioners' sole and proper remedy for  
11 challenging an annual tax assessment is a  
12 proceeding under Article 7 of RPTL. However,  
13 quote, the denial of a refund or correction  
14 application is reviewable pursuant to CPLR Article  
15 78, end of quote. See Level 3 Communications  
16 versus DeBellis, 72 AD3d, at 175. Here, as in  
17 DeBellis, petitioner makes its request for relief  
18 under RPTL Article 5 by way of its Article 78  
19 proceeding. That portion of the petition seeking  
20 Article 78 relief under Article 5 of the RPTL is  
21 therefore properly before the Court.

22 With respect to Article 5, respondents argue  
23 that their assessment of petitioners' fiber optic  
24 cables as real property cannot be challenged as  
25 an, quote, unlawful entry, end of quote, as

1 defined by RPTL Section 550(7)(c). Here, the  
2 alleged unlawful entry is taxation of petitioners'  
3 fiber optic cables.

4 In support of their argument, respondents  
5 cite to Rozz, R-O-Z-Z, versus Nassau County  
6 Department of Assessment, 96 AD3d, 952, Second  
7 Department 2012. The alleged unlawful entry in  
8 Rozz was an erroneous reclassification of property  
9 by a police officer who was not an official  
10 appraiser. Hence, the facts in Rozz are  
11 distinguished, and the case therefore, supplies no  
12 guidance under the facts of this case.

13 Petitioner, in support of its position, cites  
14 to an advisory opinion by the State Board of Real  
15 Property Services, 10 Op Counsel SBRPS Number 108,  
16 2000, WL 33340933 (2000). 2000 should be in  
17 parenthesis.

18 Pursuant to that opinion, if a nontaxable  
19 property is included in the assessment of real  
20 property, such assessment constitutes an unlawful  
21 entry per section 550(7)(c). Finding that opinion  
22 persuasive, the Court concludes that the taxation  
23 of petitioners' fiber optic cables was an unlawful  
24 entry and annuls respondents' assessments.

25 Accordingly, petitioner is entitled to an

1 order requiring respondents to approve  
 2 petitioners' applications requiring respondents to  
 3 correct the tax rolls and requiring respondents to  
 4 issue refunds for taxes paid under protest as  
 5 required by Level 3 Communications versus  
 6 Chautauqua County where such taxes were challenged  
 7 within the three-year statute of limitations  
 8 provided for in RPTL 556.

9 Last, the Court denies petitioners'  
 10 application for costs and disbursements.  
 11 Wherefore, the Court grants petitioners' motion  
 12 for declaratory relief and declares the  
 13 petitioners' fiber optic installations on private  
 14 rights of way in Erie County are not taxable as  
 15 real property due to the exclusions contained in  
 16 RPTL section 102(12)(i)(d) and grants petitioners'  
 17 motion pursuant to Article 78 as limited by taxes  
 18 paid under protest and challenged within the  
 19 statute of limitations.

20 Counsel for the petitioner is to prepare and  
 21 submit an order on approval of all counsel and  
 22 attaching a copy of the Court's decision. And  
 23 such submission should be made within 30 days.

24 Thank you.

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Certified to be a true and accurate transcript  
of the minutes and/or testimony taken herein  
transcribed into English text through Computer  
Assisted Transcription.

*Lisa G. Pazderski*  
\_\_\_\_\_  
Lisa G. Pazderski, Supreme Court Reporter