

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CHAUTAUQUA

In the Matter of the Application of LEVEL 3
COMMUNICATIONS, LLC,

Petitioner,

Index No: K1-2016-661

DECISION AND ORDER

v.

CHAUTAUQUA COUNTY, CITY OF DUNKIRK
TOWN OF DUNKIRK, TOWN OF PORTLAND, TOWN
OF RIPLEY, TOWN OF WESTFIELD, VILLAGE OF
BROCTON, VILLAGE OF WESTFIELD, DUNKIRK
CITY SCHOOL DISTRICT, BROCTON CENTRAL
SCHOOL DISTRICT, FREDONIA CENTRAL SCHOOL
DISTRICT, RIPLEY CENTRAL SCHOOL DISTRICT,
and WESTFIELD CENTRAL SCHOOL DISTRICT,

Respondents.

For a Judgment Under Article 78 of the Civil
Practice Law and Rules

APPEARANCES OF COUNSEL

John G. Nicolich, Esq., Attorney for Petitioner

Michael B. Risman, Esq., Attorney for Respondents

Joel J. Terragnoli, Esq., Attorney for Respondents

Steven M. Abella, Esq., Chautauqua County Attorney

Kurt D. Gustafson, Esq., Attorney for Respondent Chautauqua County

GERACE, JHO:

DECISION AND ORDER

In this Article 78 proceeding Petitioner seeks a judicial determination that its fiber optic installations have been taxed illegally as real property by Respondent municipalities and is thereby entitled to appropriate refunds.

Petitioner is a telecommunications company with fiber optic installations situated in jurisdictions of Respondents Chautauqua County, City of Dunkirk, Towns of Dunkirk,

Portland, Ripley, and Westfield; Villages of Brocton and Westfield, and Central School Districts of Brocton, Fredonia, Ripley and Westfield.

Those installations are described in the March 2, 2018 stipulation with attached **Exhibits A, B and C**, signed by counsel for the parties.

In *Matter of Level 3 Communications, LLC, v Chautauqua County, et al*, _____ A.D.3d _____), 2017 NY Slip Op 1199 (4th Dep't March 24, 2017), the Fourth Departments determined that the fiber optic cables in the county were not taxable real property as fixtures pursuant to RPTL §102(12)(f) because Petitioner's fiber optic cables transmit light signals but such transmission do not result in the distribution of light as contemplated in §102 (12)(f).

The Fourth Department ended its analysis at that point which leaves open for this court whether Level 3's fiber optic cables and its other installations in the county are taxable as real property under RPTL 102(12)(1).

RPTL 102 (12) (i) recites in part that " the term "Real property" or "land" mean and include: ...all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street, or other public domain. . . .

The language of the statute, legislative history, evidence and submission of the parties leads this Court to the conclusions reached by the 2nd Department *Matter of T-Mobile Northeast, LLC v DeBellis*, 143 A.D.3rd 992, (2016) and an earlier decision by Judge Dickerson in *Matter of Nextel 4 Misc 3d 233, Supreme Court, Rockland County, February 2, 2004*, that the phrase "for electrical conductors" as used in RPTL 102(12)(1) does not modify the entire list "lines, wires, poles, supports and inclosures," but rather modifies only the final term "inclosures".

In *T-Mobile*, supra, in determining that the phrase "for electrical conductors" as used in RPTL 102 (12)(i) modifies only the final term "inclosures", the court held:

Consequently, T-Mobile's fiber optic, T-1, and coaxial cables, as well as the connections between T Mobile's equipment and that of the local exchange carrier, are "lines" or "wires" within the meaning of RPTL 102(12)(i) and, thus, are taxable real property.

Similarly, since T-Mobile's base transceiver station cabinets contain, among other things, primary and battery backup power systems and equipment for "landline retransmissions via separate electrical conductors or fiber optics" they can properly be characterized as "inclosures for electrical conductors" within the meaning of RPTL 102(12)(1).

That the phrase "inclosures for electrical conductors" was intended to encompass items such as a base transceiver station cabinet, shed and racks as a support or an inclosure for electrical conductors is supported by case law. *T-Mobile Northeast, LLC v Debellis*, supra, at 994-995; *Nextel of New York, Inc. Assessor of Village of Spring Valley*, 4 Misc 3d at 242 and *Voicestream Wireless Corporation vs Assessor of City of Troy*, 2 Misc. 3d 724, at 726-727.

A nationally known costing manual for contractors known as Electrical Costs with RSMMeans Data, 40 Annual Edition, includes equipment identified as "enclosures for electrical conductors" supports the conclusion that "inclosures for electrical conductors" is a reference to specific electrical equipment. See, *Schedule B, August 24, 2017 affidavit of George E. Sansoucy, P.E.*

The Court of Appeals in *Matter of Shannon*, 25 N.Y.3d 345, 351 [2015] laid out the ground rule that courts faced with interpreting a statute "should attempt to effectuate the intent of the Legislature".

In determining legislative intent, "[t]he plain meaning of the language of a statute must be interpreted 'in the light of conditions existing at the time of its passage and construed as the courts would have construed it soon after its passage'" (*People v Litto*, 8 N.Y.3d 692, 597 [2007], quoting *People v Koch*, 250 App Div 623, 624 [1937] cited In *Matter of T-Mobile Northeast, LLC v DeBellis*, 143 A.D.3rd 992, (2016).

The conditions that existed at the time passage are spelled out in the legislative history recited by Hon. Susan Cacace, Judge In **T-Mobile** 2013 NY Slip Op 34102(U) whose decision led to the appeal to the 2nd Department. She concluded the history with the rationale for enactment of RPTL Tax Law 102(12)(i):

Recognizing the likelihood of the success of a challenge, the legislature amended Real Property Tax Law § 102(12)(d) by including as taxable real property the outside plant of local telephone companies and adding

§102(12)(i) which defined as taxable real property the telecommunications outside plant of entities other than local telephone companies.

The legislative history attached as Exhibit E of the Risman Affirmation clearly shows the intent to tax fiber optics installations as Outside Plants. The Summary of Provisions in a July 17, 1987 letter from the Division of Equalization and Assessment relating to Senate Bill No. 6491 is just one example. It states:

“Bill section one would repeal paragraph (d) of subdivision 12 of the Real Property Tax Law and replace it with a new paragraph (d) which would define as taxable real property the outside plant (lines, wires and poles, etc.) of local telephone companies.

“Bill Section two would add a new paragraph (i) to RPTL, Section 102(12) which would define as taxable real property the telecommunications outside plant of entities other than local telephone companies except that used for fire and burglar alarms, news wire services, or new or entertainment radio, television or cable television.” (Risman Affirmation, pg 20).

At the October 16, 2017 proceeding, Respondents provided the Court with the 2010 Utility Advisory Appraisal Report addressed to Petitioner Level 3 Communications consisting of an advisory appraisal on its Fiber Optic “Underground Cable” and “Underground Conduit- 12 Ducts”. The report classified the property as “OUTSIDE PLANT”.

The report was prepared for the Respondent Town of Ripley by the Valuation Services Division of the NYS Office of Real Property Services (ORPS) as a result of a the Town’s total town revaluation of taxable real property.

The report, while not controlling, is a clear confirmation that underground fiber optics cables and underground conduits are considered “Outside Plants” and taxable unless they fall within the exceptions listed in 102(12)(i)(D).

The Court cannot be guided by the decision *In the Matter of RCN v. Tax Comm’n of the City of New York*, 95 A.D. 3d 456, (1st Dep’t 2012). The fiber optic cables in this RCN case were located within the buildings of their customers and in no way could be considered as the “outside plant”. Petitioner’s fiber optic cables in Chautauqua County are buried in private rights of way inside conduits. Secondly, the court not only added the

words “which are” “for electrical conductors” but instead of *direct evidence* of legislative intent or statutory ambiguity the court *deduced* that “the Legislature **chose** to limit assessments under this statute”. (*emphasis supplied*). As recited by the courts in the *Nextel* case, *supra*, and, *In the Matter of Voicestream Wireless Corporation v. Assessor of City of Troy*, 2 Misc.3d 723 (2003)

“The court is unaware of any precedent permitting courts, in the absence of either statutory ambiguity or direct evidence of legislative intent, to speculate and make deductions based on textural differences between statutes”.

In *Matter of Level 3 Communications, LLC, v. Clinton County*, 144 A.D. (3rd Dep't 2016) the Third Department in addressing the taxability of Levels 3's filter optic cables highlighted the fact that the legislature enacted RPTL 102(12)(i) “for the specific purpose of addressing real property taxation of telecommunications equipment.”

The Third Department then cited the First Department's decision in *Matter of RCN, supra*, 95 A.D.2nd 456 (2012) where that court *by deduction* reasoned that whereas the State Legislature was aware of fiber optic technology and the fact that fiber-optic cables transmit light and do not conduct electricity *the Legislature chose* to limit assessments under RPTL §102(12)(i) to wires and other related property “for electrical conductors”. (*emphasis supplied*).

Petitioner contends its fiber optic cables are expressly excluded from real property by virtue of RPTL 102(12)(i)(D) because its cables are used to transmit television signals. Paragraph D of the statute provides that the term “Real Property” shall not include “such property used in the transmission of news or entertainment radio, television or cable television signals. . . .

Petitioner offered no evidence of the number of fiber optic cables buried in Chautauqua County soil that are dedicated or used to transmit radio or television signals.

This court holds that in order to claim the exemption or exclusion spelled out in RPTL 102(12)(i)(D) Petitioner has the burden of identifying the number and presenting evidence of the percentage of its fiber optic cables passing through Chautauqua County that have been dedicated or used to transmit radio or television signals during the years in question.

Although the Court has indicated that Petitioner has not met its burden, an understanding of Level 3's installations in the County is useful. Those installations are described in detail in a **Stipulation Concerning Fiber Optic Cable** and attached Exhibits A, B and C signed by counsel for the parties dated March 2, 2018.

Level 3's fiber optic cables in Chautauqua County as illustrated in Exhibit B of the Stipulation generally are installed in groups of twenty-four (24) fibers placed in twelve (12) "ribbons" bundled with protective sheathing materials and a fiber core stiffener within a high density polyethylene jacket.

Simple multiplication would indicate that 12 ribbons containing 24 fibers translate into 288 Single-Mode and/or Multi-Mode fibers in each jacket shown on Exhibit B.

If the ten (10) polyethylene pipes or conduits depicted in Exhibit B represent the actual number buried in Chautauqua County, Exhibit B indicates a potential, if not the reality, of 2,880 fibers.

A depiction of Level 3's bundled fiber optic cable within a conduit such as that located in Chautauqua County is shown on Exhibit C to this stipulation, but there is no evidence of the number of fibers, or conduits, if any, dedicated to the transmission of television or cable television signals.

The Court notes that each of the installations shown in Exhibit A as well the depiction of Level's bundled fiber cable shown in Exhibit B of the stipulation indicate construction of multiple "Conduits".

The only indication of the actual number of conduits appears in the Utility Advisory Report of Level 3 installations in the Town of Ripley that as of year 2009 consisted of Underground Conduit – 12 Ducts. Submissions by the parties indicate Petitioner's fiber cable is primarily used for commercial and business purposes and not exclusively for entertainment signals or broadcasting.

It is obvious from the variety of business and government activities of Level 3 that not all of the fibers running through the 288 (or more) Single-Mode and/or Multi-Mode fibers in each jacket shown on *Exhibit B* would be dedicated to radio, cable or television signals.

The language of the statute, legislative history, case law, evidence and submissions of the parties leads this Court to the finding that Petitioner's Fiber Optic installations in Chautauqua County are taxable as real estate pursuant to RPTL 102(12)(i).

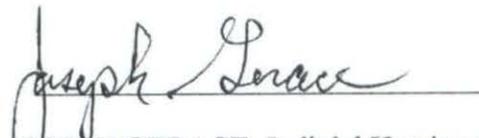
For all the above reasons and evidence and upon the papers and arguments considered by the Court and attached to this decision, it is hereby

ORDERED, that the Consolidated Amended Petition is hereby dismissed in its entirety without costs to any party on the grounds that Petitioner's fiber optic cables and installations in Chautauqua County are taxable as real property under RPTL 102(12)(i), and, it is further

ORDERED, that Petitioner has not met its burden of proving the number, if any, of its fiber optics installations passing through the County that meet any of categories that are excluded by virtue of RPTL 102(12)(i)(D), and it is further

ORDERED, that this constitutes the decision and order of this Court. Submission of an order by the parties is not necessary. The mailing of a copy of this Decision and Order by this Court **shall not** constitute Notice of Entry.

Dated: March 23, 2018
Mayville, New York

A handwritten signature in cursive script, reading "Joseph Gerace", written over a horizontal line.

JOSEPH GERACE, Judicial Hearing Officer
Retired NYS Supreme Court Justice