

April 20, 2017

FINANCE & MANAGEMENT COMMITTEE
REPORT NO. 5

ALL MEMBERS PRESENT.

1. RESOLVED, the following items are hereby received and filed:
 - a. COMM. 5M-4 (2017)
PRESIDENT, AFSCME LOCAL 1095: "Letter to Chair Mills Regarding Fact Finder's Report"
(5-0)
 - b. COMM. 7E-11 (2017)
COMPTROLLER: "Sales Tax Update - 2016 Closeout and Jan. 2017"
(5-0)
 - c. COMM. 7E-12 (2017)
COMPTROLLER: "Report for Apportionment and Distribution of Net Collections from the 4.75% Sales and Compensating Use Tax for Dec. 2016., Jan. and Feb. 2017"
(5-0)
 - d. COMM. 7D-7 (2017)
CLERK OF THE LEGISLATURE: "Comments Received Regarding Fact Finder's Report Concerning EC, AFSCME Council 66 & AFSCME Local 1095"
(5-0)
2. COMM. 3D-6 (2017)
COUNTY EXECUTIVE AS AMENDED
WHEREAS, the Erie County Director of Real Property Tax Services has received applications for corrected tax billings and / or refunds for taxes previously paid in accordance with New York State Real Property Tax Law sections 554 and 556; and

WHEREAS, the Director has investigated the validity of such applications (see attached listing).

NOW, THEREFORE, BE IT

RESOLVED, that petitions numbered 217073 through 217080, inclusive be hereby approved or denied based upon the recommendation of the Director of Real Property Tax Services and be charged back to the applicable towns and/or cities.

FISCAL YEAR	2016	Petition No.	217,073.00
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	ASSESSOR	Refund	\$360.68	
S-B-L	103.16-2-40	111 Chateau Ct	143003 DEPEW	
	Acct. No. 112		\$0.00	County
	Acct. No. 132		\$360.68	
	Town/SpecialDist/School			
	<u>Charge To :</u> 143003 DEPEW			\$360.68
	Relevy Village			\$360.68
	RPTL 550(2): Failed to apply vet exemption			Village of DEPEW
	Refund to be issued to Eric M Krakkowiak.			

FISCAL YEAR	2016	Petition No.	217,074.00
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	ASSESSOR	Refund	\$639.90	
S-B-L	103.16-2-40	111 Chateau Ct	143003 DEPEW	
	Acct. No. 112		\$0.00	County
	Acct. No. 132		\$639.90	
	Town/SpecialDist/School			
	<u>Charge To :</u> 143003 DEPEW			\$639.90
	Relevy School			\$639.90
				143007 DEPEW

UNION-CHEEK

RPTL 550(2): Failed to apply vet exemption
Refund to be issued to Eric M Krakowiak

FISCAL YEAR	2016	Petition No.	217,075.00
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	ASSESSOR	Refund	\$387.87	
S-B-L	103.16-2-40	111 Chateau Ct	143003 DEPEW	
	Acct. No. 112		\$158.30	County
	Acct. No. 132		\$229.57	
	Town/SpecialDist/School			
	<u>Charge To :</u> 143003 DEPEW			\$229.57

RPTL 550(2): Failed to apply vet exemption
Refund to be issued to Eric M. Krakowiak

FISCAL YEAR 207 Petition No. 217,076.00

ASSESSOR Refund \$383.90
S-B-L 103.16-2-40 111 Chateau Ct 143003 DEPEW

Acct. No. 112 \$157.43 County
Acct. No. 132 \$226.47

Town/SpecialDist/School
Charge To: 143003 DEPEW \$226.47

RPTL550(2): Failed to apply vet exemption
Refund to be issued to Eric M Krakowiak

FISCAL YEAR 2016 Petition No. 217,077.00

ASSESSOR Refund \$616.53
S-B-L 57.15-2-13 5421 Raintree Ct 143200 CLARENCE

Acct. No. 112 \$0.00 County
Acct. No. 132 \$616.53

Town/SpecialDist/School
Charge To: 143200 CLARENCE \$616.53
Relevy School \$616.53 142203

WILLIAMSVILLE CENT

RPTL 550(2): Failed to apply Enhanced STAR
Refund to be issued to Linda V Brown

FISCAL YEAR 2017 Petition No. 217,078.00

ASSESSOR Cancel \$3,194.19
S-B-L 332.00-2-18.3 4690 Brown St 143689 COLLINS

Acct. No. 112 \$602.20 County
Acct. No. 132 \$2,591.99

Town/SpecialDist/School

36020 COLLINS FIRE PROTECT \$118.30
36023 HELMOUTH FIRE DISTRICT \$13.49

Charge To: 143689 COLLINS \$2,460.20
Relevy School \$2,064.42

RPTL 550(2): Duplicate entry
New tax bill to be issued.

FISCAL YEAR 2017 Petition No. 217,079.00

ASSESSOR Cancel \$80.29
S-B-L 321.00-2-3.2 Concord Rd 143889 CONCORD

Acct. No. 112 \$45.38 County
Acct. No. 132 \$34.91

Town/SpecialDist/School

38019 CONCORD FIRE PROTECT \$17.40
Charge To: 143889 CONCORD \$17.51

RPTL 550(2): Incorrect acreage
New tax bill to be issued.

FISCAL YEAR 2017 Petition No. 217,080.00

ASSESSOR Cancel \$120.64
S-B-L 142.37-5-41 42 Center St 140900 LACKAWANNA

Acct. No. 112 \$0.00 County
Acct. No. 132 \$120.64

Town/SpecialDist/School

9992 ECSD#6 SAN SEWER \$120.64
Charge To: 140900 LACKAWANNA \$0.00

RPTL 550(2): Incorrect sewer charge
New tax bill to be issued.

and be it further

RESOLVED, that certified copies of this resolution be forwarded to the Director of Real Property Tax Services.
(5-0)

3. COMM. 3D-6 (2017)
COUNTY EXECUTIVE AS AMENDED

WHEREAS Level 3 Communications, (“Level 3”) has submitted an application for Refund and Credit on form RP-556 pursuant to Real Property Tax Law Section 556 relative to a 2017 Erie County tax bill (“Application”), and

WHEREAS, Level 3 commenced actions for declaratory judgment and proceedings pursuant to Article 78 of the Civil Practice Law and Rules in the Supreme Court of the State of New York (“Level 3 litigation”) seeking, among other things, a ruling that fiber optic cable is not taxable as real property and/or to compel the appropriate tax levying bodies to determine and approve related applications, and

WHEREAS, the Erie County Real Property Tax Director (Director) has investigated the validity of such Application, and

WHEREAS the Director has transmitted a written report of such investigation and his recommendations for action thereon, and

WHEREAS the Director has determined that the Application is without merit and recommends that the Application be denied for multiple reasons, and

WHEREAS the Director recommends that the Application be denied for the following specific reasons:

1. The fiber optic cable constitutes taxable real property under multiple sections of Section 102 of the Real Property Tax Law as follows:

A. Fiber optic cable has been interpreted and taxed as real property for more than thirty years and should continue to be taxed as real property;

B. The fiber optic cable meets the definition of real property pursuant to Real Property Tax Law Section 102(12)(i) and is taxable under that Section. *T-Mobile v. DeBellis and City of Mount Vernon*, 143 A.D.2d 992 (2nd Dept. 2016);

C. The fiber optic cables constitute fixtures and are taxable real property pursuant to Section 102(12)(b) of the Real Property Tax Law;

D. The fiber optic cable constitutes property for the distribution of light and is taxable real property pursuant to Real Property Tax Law 102(12)(f);

E. The Real Property Tax Law does not provide any tax exemption for fiber optic cable;

F. Real Property Tax Law Section 102 does not contain any express or implied exclusion for fiber optic cable from the definition of taxable real property;

G. The Legislative History of Real Property Tax Law Section 102 (12) supports the position that fiber optic cable constitutes taxable real property and is subject to real property taxation;

H. The legislative history of Real Property Tax Law Section 102 supports a finding that outside plant be taxed as real property.

I. The research articles submitted by Level 3 in connection its litigation have no foundation, are not authoritative, were written many years after the New York State Legislature enacted the language contained in Real Property Tax Law Section 102 and there is no evidence the New York State Legislature considered those articles when the Legislation was enacted; and

J. The RCN case, which Level 3 references in its Application, is factually and legally distinguishable from the circumstances involving Level 3’s property located in Erie County. The RCN case involved property in New York City in a building, and not underground cables connected to taxable fiber optic cable in the right of way, as is the situation in Erie County. In addition, the RCN case is in a different department and is not binding on the Courts in the Appellate Division, Fourth Judicial Department, to which the Level 3 litigation in Erie County is pending. Moreover, in a later *RCN* Decision rendered by the Appellate Division, First Department, the Court expressly confirmed that telecommunications equipment is subject to real property taxation according to generally applicable provisions of the Real Property Tax Law. *Matter of RCN Telecom Services of NY, et al v. Frankel, et al*, 100 A.D.3d 538, 541-542 (1st Dept 2012).

2. The Application is procedurally improper. The Application fails to establish a clerical error, unlawful entry or an error in essential fact as those terms are defined by Section 550 of the Real Property Tax Law. Numerous Town tax assessors have also analyzed Level 3’s claims and confirmed the

Director's analysis that Level 3's allegations do not constitute an "unlawful entry" as that term is defined in Real Property Tax Law Section 550(7). There was no entry of assessed valuation on an assessment roll or tax roll made by an unauthorized person or body.

3. Level 3 failed to pay the taxes under protest. The Voluntary Payment Doctrine bars Level 3 from recovery of taxes paid without protest. *Matter of Level 3 Communications, LLC v Chautauqua County*, 2017 NY Slip Op 02322 (4th Dept. March 25, 2017); *City of Rochester v. Chiarella*, 65 N.Y.2d 92, 98 (1985); *City of Rochester v. Chiarella*, 98 A.D.2d 8, 9, 12 (4th Dept., 1983) aff'd 63 N.Y.2d 857 (1984).

A) Level 3's argument that Real Property Tax Law Section 556 allows recovery without protest is without merit since Section 556 does not state or provide an affirmative right to recover taxes without protest. *Matter of Level 3 Communications, LLC v Chautauqua County*, 2017 NY Slip Op 02322 (4th Dept. March 25, 2017); *Level 3 Communications, LLC v. Essex County*, 129 A.D.3d 1255 (3rd Dept., 2015); *Community Health Plan v. Burkard*, 3 A.D.3d 724, 725 (3rd Dept., 2004).

4. The RP 556 Application is time barred and untimely on the basis that it was filed after the expiration of the tax warrants.

5. The RP 556 Application is also time-barred and untimely because it was not filed within three years from the annexation of the warrants for such taxes as required by Real Property Tax Law, Section 556(1)(a).

6. Level 3's proper remedy is to bring a *tax certiorari* proceeding under Article 7 of the Real Property Tax Law challenging the assessments prospectively. No tax grievances or Article 7 proceedings have been filed by *Level 3*. The Application improperly seeks retroactive tax refunds under inapplicable sections of the Real Property Tax Law.

7. The Application should be denied on public policy grounds because Level 3 voluntarily deferred its challenges to the public assessments for multiple years and exposed the municipalities to unnecessary retroactive disruption of their budgets. *Press v. County of Monroe*, 50 N.Y.2d 695 (1980); *Solnick v. Whalen*, 49 N.Y.2d 224 (1979).

8. The Application is untimely and barred by the four-month statute of limitations because it was filed more than four months after the assessment rolls became final and binding. *See Press v. County of Monroe*, 50 N.Y.2d 695 (1980).

9. The Application contains only conclusory and hearsay allegations with respect to fiber optic cables and fails to contain detailed and sufficient evidence with respect to the identity, location, composition and usage of Level 3's property and lines. The Application fails to contain any information

from any engineer, expert, person or employee with personal knowledge with respect to the cable lines in question; and

WHEREAS the Erie County Legislature has carefully considered and fully agrees with the investigation and recommendations of the Director, and

NOW, THEREFORE, BE IT

RESOLVED, that the Level 3 Application for Refund and Credit submitted on form RP-556 pursuant to Real Property Tax Law Section 556 is hereby denied in their entirety for the reasons set forth above and based upon the recommendation of the Director of Real Property Tax Services

FISCAL YEAR	2017	Petition No.	217,085.00
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OWNER	Refund	\$0.00	
S-B-L	666.00-65-9	9 AA	140200 BUFFALO

Acct. No. 112	\$0.00	County	
Acct. No. 132	\$0.00	Town/SpecialDist/School	
<u>Charge To :</u>	140200 BUFFALO		\$0.00

RPTL550(7): Fiber optic cables are non taxable
Application Denied

and be it further

RESOLVED, that certified copies of this resolution be forwarded to the Director of Real Property Tax Services.
(5-0)

4. COMM. 3D-6 (2017)
COUNTY EXECUTIVE AS AMENDED

WHEREAS Level 3 Communications, ("Level 3") has submitted applications for Refund and Credit on form RP-556 pursuant to Real Property Tax Law Section 556 ("Applications") for various tax years and affecting multiple taxing jurisdictions, and

WHEREAS, Level 3 commenced actions for declaratory judgment and proceedings pursuant to Article 78 of the Civil Practice Law and Rules in the Supreme Court of the State of New York ("Level 3

litigation”) seeking, among other things, a ruling that fiber optic cable is not taxable as real property and/or to compel the appropriate tax levying bodies to determine and approve the Applications, and

WHEREAS, the Erie County Real Property Tax Director (Director) has investigated the validity of such Applications, and

WHEREAS the Director has transmitted a written report of such investigation and his recommendations for action thereon, and

WHEREAS the Director has determined that the Applications are without merit and recommends that the Applications be denied for multiple reasons, and

WHEREAS the Director recommends that the Applications be denied for the following specific reasons:

1. The fiber optic cable constitutes taxable real property under multiple sections of Section 102 of the Real Property Tax Law as follows:

A. Fiber optic cable has been interpreted and taxed as real property for more than thirty years and should continue to be taxed as real property;

B. The fiber optic cable meets the definition of real property pursuant to Real Property Tax Law Section 102(12)(i) and is taxable under that Section. *T-Mobile v. DeBellis and City of Mount Vernon*, 143 A.D.2d 992 (2nd Dept. 2016);

C. The fiber optic cables constitute fixtures and are taxable real property pursuant to Section 102(12)(b) of the Real Property Tax Law;

D. The fiber optic cable constitutes property for the distribution of light and is taxable real property pursuant to Real Property Tax Law 102(12)(f);

E. The Real Property Tax Law does not provide any tax exemption for fiber optic cable;

F. Real Property Tax Law Section 102 does not contain any express or implied exclusion for fiber optic cable from the definition of taxable real property;

G. The Legislative History of Real Property Tax Law Section 102 (12) supports the position that fiber optic cable constitutes taxable real property and is subject to real property taxation;

H. The legislative history of Real Property Tax Law Section 102 supports a finding that outside plant be taxed as real property.

I. The research articles submitted by Level 3 in connection its litigation have no foundation, are not authoritative, were written many years after the New York State Legislature enacted the language contained in Real Property Tax Law Section 102 and there is no evidence the New York State Legislature considered those articles when the Legislation was enacted; and

J. The RCN case, which Level 3 references in its Applications, is factually and legally distinguishable from the circumstances involving Level 3’s property located in Erie County. The RCN case involved property in New York City in a building, and not underground cables connected to taxable fiber optic cable in the right of way, as is the situation in Erie County. In addition, the RCN case is in a different department and is not binding on the Courts in the Appellate Division, Fourth Judicial Department, to which the Level 3 litigation in Erie County is pending. Moreover, in a later RCN Decision rendered by the Appellate Division, First Department, the Court expressly confirmed that telecommunications equipment is subject to real property taxation according to generally applicable provisions of the Real Property Tax Law. *Matter of RCN Telecom Services of NY, et al v. Frankel, et al*, 100 A.D.3d 538, 541-542 (1st Dept 2012).

2. The Applications are procedurally improper. The Applications fail to establish a clerical error, unlawful entry or an error in essential fact as those terms are defined by Section 550 of the Real Property Tax Law. Numerous Town tax assessors have also analyzed Level 3’s claims and confirmed the Director’s analysis that Level 3’s allegations do not constitute an “unlawful entry” as that term is defined in Real Property Tax Law Section 550(7). There was no entry of assessed valuation on an assessment roll or tax roll made by an unauthorized person or body.

3. Level 3 failed to pay the taxes under protest. The Voluntary Payment Doctrine bars Level 3 from recovery of taxes paid without protest. *Matter of Level 3 Communications, LLC v Chautauqua County*, 2017 NY Slip Op 02322 (4th Dept. March 25, 2017); *City of Rochester v. Chiarella*, 65 N.Y.2d 92, 98 (1985); *City of Rochester v. Chiarella*, 98 A.D.2d 8, 9, 12 (4th Dept., 1983) aff’d 63 N.Y.2d 857 (1984).

A) Level 3’s argument that Real Property Tax Law Section 556 allows recovery without protest is without merit since Section 556 does not state or provide an affirmative right to recover taxes without protest. *Matter of Level 3 Communications, LLC v Chautauqua County*, 2017 NY Slip Op 02322 (4th Dept. March 25, 2017); *Level 3 Communications, LLC v. Essex County*, 129 A.D.3d 1255 (3rd Dept., 2015); *Community Health Plan v. Burkard*, 3 A.D.3d 724, 725 (3rd Dept., 2004).

4. The RP 556 Applications are time barred and untimely on the basis that they were filed after the expiration of the tax warrants.

5. The RP 556 Applications are also time-barred and untimely because they were not filed within three years from the annexation of the warrants for such taxes as required by Real Property Tax Law, Section 556(1)(a).

6. Level 3's proper remedy is to bring a *tax certiorari* proceeding under Article 7 of the Real Property Tax Law challenging the assessments prospectively. No tax grievances or Article 7 proceedings have been filed by *Level 3*. The Applications improperly seek retroactive tax refunds under inapplicable sections of the Real Property Tax Law.

7. The Applications should be denied on public policy grounds because Level 3 voluntarily deferred its challenges to the public assessments for multiple years and exposed the municipalities to unnecessary retroactive disruption of their budgets. *Press v. County of Monroe*, 50 N.Y.2d 695 (1980); *Solnick v. Whalen*, 49 N.Y.2d 224 (1979).

8. The Applications are untimely and barred by the four-month statute of limitations because they were filed more than four months after the assessment rolls became final and binding. *See Press v. County of Monroe*, 50 N.Y.2d 695 (1980).

9. The Applications contain only conclusory and hearsay allegations with respect to fiber optic cables and fail to contain detailed and sufficient evidence with respect to the identity, location, composition and usage of Level 3's property and lines. The Applications fail to contain any information from any engineer, expert, person or employee with personal knowledge with respect to the cable lines in question; and

WHEREAS the Erie County Legislature has carefully considered and fully agrees with the investigation and recommendations of the Director, and

NOW, THEREFORE, BE IT

RESOLVED, that all of the Level 3 Applications for Refund and Credit submitted on form RP-556 pursuant to Real Property Tax Law Section 556 are hereby denied in their entirety for the reasons set forth above and based upon the recommendation of the Director of Real Property Tax Services

FISCAL YEAR	2016	Petition No.	217,081.00
OWNER	Refund	\$0.00	
S-B-L	555.00-75-1.1	Fiberoptics	144000 EDEN
Acct. No.	112	\$0.00	County

Acct. No.	132	\$0.00	Town/SpecialDist/School
<u>Charge To :</u>	144000 EDEN	\$0.00	

RPTL550(7): Fiber optic cables are non taxable
Application Denied

FISCAL YEAR	2016	Petition No.	217,082.00
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OWNER	Refund	\$0.00	
S-B-L	555.00-75-1.2	Fiberoptics	144489 EVANS

Acct. No.	112	\$0.00	County
Acct. No.	132	\$0.00	Town/SpecialDist/School
<u>Charge To :</u>	144489 EVANS	\$0.00	

RPTL550(7): Fiber optic cables are non taxable
Application Denied

FISCAL YEAR	2016	Petition No.	217,083.00
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OWNER	Refund	\$0.00	
S-B-L	Multiple Fiberoptics		145801 NORTH COLLINS

Acct. No.	112	\$0.00	County
Acct. No.	132	\$0.00	Town/SpecialDist/School
<u>Charge To :</u>	145801 NORTH COLLINS	\$0.00	

RPTL550(7): Fiber optic cables are non taxable
Application Denied

FISCAL YEAR	2016	Petition No.	217,084.00
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OWNER	Refund	\$0.00	
S-B-L	Multiple Fiberoptics		145889 NORTH COLLINS

Acct. No. 112 \$0.00 County
Acct. No. 132 \$0.00 Town/SpecialDist/School
Charge To: 145889 NORTH COLLINS \$0.00

RPTL550(7): Fiber optic cables are non taxable
Application Denied

and be it further

RESOLVED, that certified copies of this resolution be forwarded to the Director of Real Property Tax Services.
(5-0)

5. COMM. 7E-10 (2017)
COUNTY EXECUTIVE

WHEREAS, the Department of Public Works and Division of Budget and Management have been reviewing capital projects and have identified a number of projects where work has been completed and are ready to wholly or partially close; and

WHEREAS, this Honorable Body approved of the closure of dormant capital projects in the 2017 Budget, of which five received additional federal/state aid and other revenue contributions which were not budgeted.

NOW, THEREFORE, BE IT

RESOLVED, that authorization is hereby provided to accept the indicated federal/state aid and other revenue contributions in the following capital projects, adjust the project budgets accordingly, and to then close these projects as designated in the 2017 Budget Resolutions:

A.00051 – 2002 Asbestos Abatement and Environmental Remediation, Library and Other
\$50,000 in NYSERDA State Aid

A.11005 – 2011 Countywide Building and Facility Improvements
\$6,840 in Other Contributions

B.12004 – 2012 FEMA Road Reconstruction
\$14,793 in State Aid - SEMO and \$88,758.50 in Federal Aid - FEMA

B.13016 – 2013 Capital Overlay Program (Countywide)

\$4,537.64 in Federal Aid

B.20905 – 2009 East Robinson/North French – ROW only
\$153,050 in additional Marchiselli Aid

and be it further

RESOLVED, that authorization is hereby provided to the Division of Budget and Management and the Comptroller's Office to make any and all adjustments and budgetary and financial entries required to effectuate the capital project closing; and be it further

RESOLVED, that certified copies of this resolution be transmitted to the County Executive, County Comptroller, Director of Budget and Management, County Attorney and Commissioner of Public Works.
(5-0)

JOSEPH C. LORIGO
CHAIR