

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 18-01575

PRESENT: WHALEN, P.J., SMITH, CARNI, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF LEVEL 3 COMMUNICATIONS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

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-DEFENDANTS-RESPONDENTS,

INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP, NEW YORK CITY (JOHN G.
NICOLICH OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), AND STEPHEN
M. ABDELLA, COUNTY ATTORNEY, MAYVILLE, FOR RESPONDENTS-DEFENDANTS-
RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court,
Chautauqua County (Joseph Gerace, J.H.O.), entered March 24, 2018 in a
CPLR article 78 proceeding and a declaratory judgment action. The
judgment dismissed the amended petition-complaint.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner) commenced this
hybrid CPLR article 78 proceeding and declaratory judgment action
seeking, inter alia, to annul respondents-defendants' determinations
that its fiber optic installations are taxable real property pursuant
to RPTL 102 (12) (i). Petitioner appeals from a judgment dismissing
its amended petition-complaint. We affirm. Initially, we note that
this is properly only a CPLR article 78 proceeding, not a declaratory
judgment action (see *Matter of Level 3 Communications, LLC v*
Chautauqua County, 148 AD3d 1702, 1703 [4th Dept 2017], lv denied 30
NY3d 913 [2018]). Furthermore, petitioner correctly concedes that its
fiber optic installations "are taxable as 'lines' under [RPTL 102 (12)
(i)] despite the fact that they do not conduct electricity" (*Matter of*
T-Mobile Northeast, LLC v DeBellis, 32 NY3d 594, 608 [2018], rearg
denied 32 NY3d 1197 [2019]). Petitioner nevertheless contends that
those installations are exempt from taxation as "property used in the

transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public" (RPTL 102 [12] [i] [D]). We reject that contention. Petitioner failed to establish that its fiber optic installations are "primarily or exclusively used for one of the exempt purposes in RPTL 102 (12) (i) (A) - (D)" (*Matter of Level 3 Communications, LLC v Erie County*, - AD3d -, - [July 31, 2019] [4th Dept 2019]).

Entered: July 31, 2019

Mark W. Bennett
Clerk of the Court