

COMMONWEALTH OF MASSACHUSETTS

In the Matter of Level 3 Communications, LLC  
and Level 3 Communications, Inc.

**SETTLEMENT AGREEMENT**

The Commonwealth of Massachusetts, by and through its Attorney General Maura Healey (the “Commonwealth”), the Massachusetts Department of Transportation (“MassDOT”), Level 3 Communications, LLC (“Level 3”), and Level 3 Communications, Inc. (“Level 3, Inc.”) enter into this Settlement Agreement to resolve fully and finally claims arising from Level 3’s non-payment of Fixed Rent<sup>1</sup> in connection with a 2000 Lead Company Agreement with the former Massachusetts Highway Department (the “MHD”), now a division of the Massachusetts Department of Transportation (“MassDOT”).

**I. COMMONWEALTH’S ALLEGATIONS**

On or about June 24, 2015, the Commonwealth initiated a formal investigation concerning Level 3’s non-payment of its Fixed Rent obligations under the 2000 Lead Company Agreement by issuance of Civil Investigative Demand 2015-FCD-03 to Level 3 (the “Investigation”). Based upon the Investigation, the Commonwealth alleges:

---

<sup>1</sup> All capitalized terms used herein are defined in the 2000 Lead Company Agreement to which this Settlement Agreement relates.

1. On July 12, 2000, Level 3 entered into a 30-year “Lead Company Agreement” (the “LCA”), which provided for the construction by Level 3 of a conduit system to run fiber optic cables along rights of way owned by MHD (the “Facility”).

2. Level 3, Inc. served as guarantor for Level 3’s obligations to MHD under the LCA.

3. The Facility is composed of multiple “Conduits” or “Innerducts” (these terms are used interchangeably in the LCA), which consist of 1¼ inch PVC tubes into which fiber optic cables (“fibers”) may be placed. The Innerducts run longitudinally adjacent to several highways, including Route 2, Route 128, I-95 South, and I-295.

4. Since construction, Level 3 has installed fibers in certain Innerducts.

5. The LCA obligates Level 3 to pay rent (“Fixed Rent”) for its use of the Facility. Fixed Rent is payable annually, in advance, starting on July 12, 2000, and on August 1 of each subsequent year through 2030.

6. The annual Fixed Rent is calculated in accordance with a schedule attached to the LCA as Exhibit B, based upon the number of fibers installed in each Innerduct and the length of those fibers, subject to a floor: the LCA requires Level 3 to pay for a certain, minimum number of fibers that are “deemed installed” in the first four Innerducts, as follows:

- a. On the Commencement Date of the LCA (July 1, 2000), a certain number of fibers are deemed installed in each of the first and second Innerducts.
- b. On the first day of the fourth year of the LCA term (August 1, 2003), a certain number of fibers are deemed installed in the third Innerduct.
- c. On the first day of the seventh year of the contract term (August 1, 2006), a certain number of fibers are deemed installed in the fourth Innerduct.

7. The LCA does not impose on Level 3 any Fixed Rent obligations for Innerducts other than the first four unless and until Level 3 installs fibers therein.

8. After the first payment, the Fixed Rent is subject to an annual increase based upon a Consumer Price Index Factor (“CPI Factor”) of 1.025 to 1.05.

9. The LCA provides that unpaid Fixed Rent “shall bear interest, compounded daily from the due date until such payment is received by the MHD, at a [12%] per annum rate (the “Default Rate”)[.]”

10. The LCA requires Level 3 to provide the MHD “a written certification... containing the exact number of fibers installed on the cables in their respective innerducts.” These certifications and “such other and further certifications and information respecting the Innerducts as the MHD may reasonably request” are due “[u]pon the commencement of each Year during the Term (other than the First Year) and on the date that any cable shall be installed in any Innerduct” and “at any time or from time to time during the Term” when requested, respectively.

11. The LCA contemplates potential offsets to the Fixed Rent if certain conditions or circumstances are present, but provides “[t]he Fixed Rent payable hereunder shall be absolutely net to the MHD, subject only to any abatement, deduction, set off or offset set forth or contemplated by this Agreement.”

12. Of the potential offsets expressly set forth or contemplated by the LCA, Level 3 is entitled to one: an offset arising from the MHD’s decision to exercise its infeasible right to use (“IRU”) certain dark fibers in a separate Level 3 facility owned by the Massachusetts Turnpike Authority (the “MTA Facility”), pursuant to Section 11H of the LCA (“IRU Offset”).

13. The IRU Offset entitles Level 3 to offset its Fixed Rent obligations by \$300,000 annually and to take a one-time, additional credit of \$300,000 “for the acquisition of the right and option for the additional twelve (12) single mode dark fibers and associated property.”

14. Level 3 made Fixed Rent payments in 2000, 2001 and 2002.

15. Level 3’s payment on September 6, 2002 was the last Fixed Rent payment it made under the LCA.

16. On March 10, 2004, Level 3 notified MHD it had failed to take the IRU Offsets to which it had been entitled in 2000 through 2003 resulting in an overpayment for those years. Other than the IRU Offsets, taken pursuant to Section 11H of the LCA, Level 3 did not identify or otherwise claim entitlement to any other credits or offsets.

17. After Level 3’s Fixed Rent obligations resumed, Level 3 stopped making Fixed Rent payments under the LCA and ignored multiple requests from MHD employees for information concerning the outstanding Fixed Rent.

18. Level 3 likewise failed to provide certifications of the “exact number of fibers installed” in the Facility annually or in response to MHD’s reasonable request.

19. At all relevant times, Level 3 has maintained internal records reflecting its Fixed Rent balance under the LCA, subject only to the IRU Offset.

20. Level 3’s non-payment under the LCA was part of a strategy to extract compromise on its LCA Fixed Rent obligations and reduce its cost of doing business.

21. By avoiding its Fixed Rent obligations under the LCA, Level 3 breached its contract and violated the Massachusetts False Claims Act, G.L. c. 12, §§ 5A-5O (the “MFCA”) by, without limitation: retaining possession, custody or control of Fixed Rent due to MHD and MassDOT pursuant to the LCA and delivering or causing to be delivered less than all of the

Fixed Rent due thereunder, § 5B (a)(5); and/or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to MassDOT, § 5B (a)(9).

## II. RECITALS

**WHEREAS**, the Commonwealth of Massachusetts, represented by the Attorney General, takes this action in the public interest pursuant to G.L. c. 12, §§ 5C & 10.

**WHEREAS**, the Massachusetts Department of Transportation is a body politic and corporate organized under G.L. c. 6C § 2, with a usual place of business at 10 Park Plaza, Boston, MA. *See* Chapter 25 of Massachusetts Acts of 2009. Effective November 1, 2009, the Massachusetts legislature consolidated various transportation agencies, including the former Massachusetts Highway Department (now known as the Massachusetts Highway Division), into MassDOT. At all times relevant to this Settlement Agreement, MassDOT and the former MHD are or were political subdivisions of the Commonwealth of Massachusetts within the meaning of G.L. c. 12, § 5A;

**WHEREAS**, Level 3 is a Delaware limited liability company with a usual place of business at 1025 Eldorado Boulevard, Broomfield, Colorado. Pursuant to a tolling agreement effective February 13, 2015 through December 1, 2015, Level 3 agreed to toll the statute of limitations and any other time-related defense applicable to a claim by the Attorney General relating to Level 3's alleged violations of Massachusetts law, including, but not limited to, Massachusetts General Laws Chapter 12, § 5B, relating to certain contracts between Level 3 and political subdivisions of the Commonwealth, including MassDOT;

**WHEREAS**, Level 3, Inc. is a Delaware corporation, with a usual place of business at 1025 Eldorado Boulevard, Broomfield, Colorado.

**WHEREAS**, in response to the Investigation, Level 3 and Level 3, Inc. have denied and continue to deny wrongdoing, fault and liability to the Commonwealth or MassDOT under the Massachusetts False Claims Act or otherwise;

**WHEREAS**, the Commonwealth and Level 3 seek to resolve fully and finally the Investigation without the need for litigation;

**WHEREAS**, MassDOT, Level 3 and Level 3, Inc. seek to resolve fully and finally claims arising from the alleged breach of the LCA;

**NOW, THEREFORE**, in consideration of the foregoing premises and covenants, terms and conditions contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, upon the consent of the Commonwealth, MassDOT, Level 3 and Level 3, Inc. (hereinafter collectively referred to as the “Parties”), it is hereby **STIPULATED** and **AGREED**:

### **III. RELIEF**

1. Within five business days of the execution of this Agreement, Level 3 agrees to pay the Commonwealth \$7,000,000 (the “Lump Sum Payment”). The Lump Sum Payment shall be allocated and distributed among MassDOT and the Commonwealth as directed by the Attorney General, within her reasonable discretion within 10 business days of receipt.

2. Level 3 further agrees to pay MassDOT an additional \$1,185,000 in four, equal, installments (“Installment Payments”) of \$296,250 on Aug. 1, 2016, August 1, 2017, August 1, 2018 and August 1, 2019. The Installment Payments shall become an obligation under the LCA, pursuant to the Amendment described in Paragraph 4, below.

3. Funds allocated to or other otherwise paid to MassDOT pursuant to this Section shall be in full satisfaction of outstanding Fixed Rent payments, through and including the Fixed

Rent payment due August 1, 2015, which covers the earned rental period for August 1, 2015 to July 31, 2016.

#### **IV. CONTRACT REFORMATION**

4. Upon execution of this Agreement, the Parties agree that the LCA amendment set forth in Exhibit 1 hereto and incorporated herein by reference shall be binding upon the Parties, in accordance with Section 34 of the LCA (Binding Effect/Waiver).

5. The Parties agree that, except as expressly provided in this Agreement, all other terms of the LCA and the exhibits thereto remain in full effect, as applied to Fixed Rent or otherwise.

6. Level 3 will not claim or assert that the instant reformation of the LCA entitles it to challenge, dispute or otherwise avoid rent or payment obligations due or owing under any other right-of-way contract or similar lease with the Commonwealth of Massachusetts or any political subdivision thereof, as defined in G.L. c. 12, § 5A.

#### **V. RELEASE**

7. In consideration of the foregoing and except for the obligations created herein, the Commonwealth and MassDOT forever discharge and release Level 3, Level 3, Inc. and their current and former employees, agents, representatives, officers, directors, successors and assigns from all claims and liability based upon or arising from Level 3's non-payment of Fixed Rent or any other violation of MFCA G.L. ch. 12 §§ 5A-5O under the LCA, from July 12, 2000 to the date of this Agreement.

8. Level 3 and Level 3, Inc. forever discharge and release MassDOT, its current and former employees, agents, representatives, officers, directors, successors and assigns from any and all claims or liability based upon or arising from the construction of the Facility, any tree

restoration activities undertaken by Level 3 pursuant to the LCA, and/or any claims regarding the LCA that arise under the Telecommunications Act of 1996 or any other Telecommunications Law, from July 12, 2000 to the date of this Agreement.

## **VI. NOTICES AND CHANGE OF ADDRESS**

9. Any notices or communications required to be transmitted between the Commonwealth, MassDOT, Level 3, and/or Level 3, Inc. pursuant to this Agreement shall be provided in writing by first class mail and email to the Parties or their successors, as follows:

Commonwealth of Massachusetts:

Gillian Feiner  
Assistant Attorney General  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108  
gillian.feiner@state.ma.us

Level 3 and Level 3, Inc.:

J. William Codinha  
Nixon Peabody LLP  
100 Summer Street  
Boston, MA 02110-2131  
jcodinha@nixonpeabody.com

MassDOT:

John Englander  
General Counsel  
MassDOT  
Ten Park Plaza, Suite 3510  
Boston, Massachusetts 02116

## **VII. MISCELLANEOUS**

10. The provisions of this Agreement shall be severable and should any provisions be declared by a court of competent jurisdiction to be unenforceable, the other provisions of this Agreement shall remain in full force.

11. Consent to this Agreement does not constitute an approval by the Commonwealth or MassDOT of any of Level 3 or Level 3, Inc.'s business acts and practices, and Level 3 and Level 3, Inc. shall make no representations to the contrary.

12. Consent to this Agreement does not constitute any admission of wrongdoing with respect to Level 3 and/or Level 3, Inc.'s business acts and practices, and the Commonwealth and MassDOT shall make no representations to the contrary.

13. This Agreement does not and is not intended to confer any rights or remedies upon any person other than the Parties.

14. This Agreement contains the complete agreement between the Parties. No promises, representations or warranties other than those set forth in this Agreement have been made by any of the Parties. This Agreement supersedes all prior communications, discussions, or undertakings, if any, of the Parties, whether orally or in writing.

15. This Agreement may not be changed, altered, or modified, except by written agreement of the Parties.

16. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which shall constitute one and the same Agreement.

17. Level 3 and Level 3, Inc. acknowledge that they are represented by counsel, J. William Codinha, Esq., with whom they have consulted concerning this Agreement.

18. The undersigned signatories acknowledge that execution of this Agreement is voluntary and authorized.

19. This Agreement becomes effective upon its execution by the Parties.

COMMONWEALTH OF MASSACHUSETTS  
MAURA HEALEY  
ATTORNEY GENERAL

Date: \_\_\_\_\_

\_\_\_\_\_  
Gillian Feiner, Assistant Attorney General  
Chief, False Claims Division  
Office of Attorney General Maura Healey

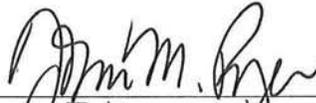
MASSACHUSETTS DEPARTMENT OF  
TRANSPORTATION, by its counsel

Date: \_\_\_\_\_

\_\_\_\_\_  
John Englander, General Counsel  
Massachusetts Department of Transportation

Level 3 Communications, LLC

Date: 2/26/16

  
\_\_\_\_\_  
Name: John M. Ryan  
Title: CHIEF LEGAL OFFICER

Level 3 Communications, Inc.

Date: 2/26/16

  
\_\_\_\_\_  
Name: John M. Ryan  
Title: CHIEF LEGAL OFFICER

COMMONWEALTH OF MASSACHUSETTS  
MAURA HEALEY  
ATTORNEY GENERAL

Date: \_\_\_\_\_

\_\_\_\_\_  
Gillian Feiner, Assistant Attorney General  
Chief, False Claims Division  
Office of Attorney General Maura Healey

MASSACHUSETTS DEPARTMENT OF  
TRANSPORTATION, by its counsel

Date: \_\_\_\_\_

  
\_\_\_\_\_  
John Englander, General Counsel  
Massachusetts Department of Transportation

Level 3 Communications, LLC

Date: \_\_\_\_\_

\_\_\_\_\_  
Name:  
Title:

Level 3 Communications, Inc.

Date: \_\_\_\_\_

\_\_\_\_\_  
Name:  
Title:

COMMONWEALTH OF MASSACHUSETTS  
MAURA HEALEY  
ATTORNEY GENERAL

Date: 3/3/10



Gillian Feiner, Assistant Attorney General  
Chief, False Claims Division  
Office of Attorney General Maura Healey

MASSACHUSETTS DEPARTMENT OF  
TRANSPORTATION, by its counsel

Date: \_\_\_\_\_

\_\_\_\_\_  
John Englander, General Counsel  
Massachusetts Department of Transportation

Level 3 Communications, LLC

Date: \_\_\_\_\_

\_\_\_\_\_  
Name:  
Title:

Level 3 Communications, Inc.

Date: \_\_\_\_\_

\_\_\_\_\_  
Name:  
Title:

**EXHIBIT 1**

**February 26, 2016 Amendment to the July 12, 2000 Lead Company Agreement**

1. Section 6B shall be amended to add the following sentences to the first paragraph, after the first sentence:

“The Fixed Rent during any Extended Terms shall be based solely upon the number and length of fiber optic cables installed in the Facility’s conduits. That is, during any Extended Terms, the Lead Company shall not be obligated to pay Fixed Rent for any vacant conduits or portions of conduits.”

2. The Lead Company’s Fixed Rent obligations set forth in Section 7A(a)(2) and (3) shall be amended to reflect that, effective August 1, 2016 and continuing through the end of the Term, Level 3 shall not be required to pay Fixed Rent for any fibers “deemed installed” (as opposed to actually installed) in the Third and Fourth Innerducts, as underlined below:

i. 7A(a)(2) shall read: “from ~~on~~ the Third Innerduct Determination Date through July 31, 2016, a cable containing 145 fibers ... shall be deemed installed in the Third Innerduct and shall be subject to the Participant Conduit Innerduct Offset;” and

ii. 7A(a)(3) shall read: “from ~~on~~ the Fourth Innerduct Determination Date through July 31, 2016, a cable containing 145 fibers...shall be deemed installed in the Fourth Innerduct and shall be subject to the Participant Conduit Innerduct Offset;”

3. Section 7 of the LCA shall be amended to add Paragraph F, which states:

F. “In addition to the Fixed Rent obligations described above, the Lead Company shall pay to MassDOT an additional \$1,185,000 in four, equal,

installments of \$296,250 on Aug. 1, 2016, August 1, 2017, August 1, 2018 and August 1, 2019.”

4. A spreadsheet reflecting the estimated, adjusted Fixed Rent due to MassDOT pursuant to ¶ 2 of this Amendment, together with the Installment Payments reflected in ¶ 3 of this Amendment, is attached hereto and incorporated by reference as Attachment A. The Lead Company understands that its Fixed Rent obligations are subject to increase based on usage increases and increases in the CPI Factor during the remainder of the Term.

5. The Lead Company shall provide the annual fiber certifications (“Annual Fiber Certification”) required by Section 7C in the form attached to this Amendment as Attachment B.

6. Section 17C shall be amended to add the following sentence to the end thereof:

“Effective August 1, 2016, if the Lead Company fails to pay in full its Fixed Rent within 45 days of the date it is due, it shall pay to MassDOT, in addition to the outstanding Fixed Rent and interest accrued thereon at the Default Rate, a disincentive payment equal to 25% of the total amount of past due Fixed Rent with interest, and the reasonable costs and expenses incurred by MassDOT in connection with a demand, upon MassDOT’s demand therefor.”

**SIGNATURE PAGE**

Lead Company and the Massachusetts Department of Transportation have executed this Amendment to the July 12, 2000 Lead Company Agreement as of this \_\_\_\_ day of February, 2016.

***On behalf of the Massachusetts Department of Transportation:***



\_\_\_\_\_  
Stephanie Pollack  
Secretary and Chief Executive Officer

***On behalf of Level 3 Communications, LLC:***

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

**SIGNATURE PAGE**

Lead Company and the Massachusetts Department of Transportation have executed this Amendment to the July 12, 2000 Lead Company Agreement as of this 26 day of February, 2016.

*On behalf of the Massachusetts Department of Transportation:*

\_\_\_\_\_  
Stephanie Pollack  
Secretary and Chief Executive Officer

*On behalf of Level 3 Communications, LLC:*

  
\_\_\_\_\_  
Signature  
Steven C. Gordon  
Senior Director

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

**Attachment A**

Spreadsheet reflecting estimated, Adjusted Fixed Rent

Attachment A

Annual Payment Year	Annual CPI Increase (utilized "Increase Floor" rate of 2.5% from 2016-2030)	Conduit #1 Deemed Accepted Cost	Conduit #2 Deemed Accepted Cost Plus Actual usage on I-295 (3.8 miles)	Less Credit for 12 Fiber IRU	Sub-Total	Settlement Installment	Total
		\$ 350,778.49	\$ 362,368.92				
2016	1.0250	\$ 359,547.95	\$ 371,428.15	\$ (300,000.00)	\$ 430,976.10	\$ 296,250.00	\$ 727,226.10
2017	1.0250	\$ 368,536.65	\$ 380,713.85	\$ (300,000.00)	\$ 449,250.50	\$ 296,250.00	\$ 745,500.50
2018	1.0250	\$ 377,750.07	\$ 390,231.70	\$ (300,000.00)	\$ 467,981.77	\$ 296,250.00	\$ 764,231.77
2019	1.0250	\$ 387,193.82	\$ 399,987.49	\$ (300,000.00)	\$ 487,181.31	\$ 296,250.00	\$ 783,431.31
2020	1.0250	\$ 396,873.67	\$ 409,987.18	\$ (300,000.00)	\$ 506,860.84	\$ -	\$ 506,860.84
2021	1.0250	\$ 406,795.51	\$ 420,236.86	\$ (300,000.00)	\$ 527,032.36	\$ -	\$ 527,032.36
2022	1.0250	\$ 416,965.40	\$ 430,742.78	\$ (300,000.00)	\$ 547,708.17	\$ -	\$ 547,708.17
2023	1.0250	\$ 427,389.53	\$ 441,511.35	\$ (300,000.00)	\$ 568,900.88	\$ -	\$ 568,900.88
2024	1.0250	\$ 438,074.27	\$ 452,549.13	\$ (300,000.00)	\$ 590,623.40	\$ -	\$ 590,623.40
2025	1.0250	\$ 449,026.13	\$ 463,862.86	\$ (300,000.00)	\$ 612,888.98	\$ -	\$ 612,888.98
2026	1.0250	\$ 460,251.78	\$ 475,459.43	\$ (300,000.00)	\$ 635,711.21	\$ -	\$ 635,711.21
2027	1.0250	\$ 471,758.07	\$ 487,345.92	\$ (300,000.00)	\$ 659,103.99	\$ -	\$ 659,103.99
2028	1.0250	\$ 483,552.03	\$ 499,529.56	\$ (300,000.00)	\$ 683,081.59	\$ -	\$ 683,081.59
2029	1.0250	\$ 495,640.83	\$ 512,017.80	\$ (300,000.00)	\$ 707,658.63	\$ -	\$ 707,658.63
2030	1.0250	\$ 508,031.85	\$ 524,818.25	\$ (300,000.00)	\$ 732,850.09	\$ -	\$ 732,850.09
					\$ 8,607,809.83	\$ 1,185,000.00	\$ 9,792,809.83

\*Conduit #1 Rental Amount Due based on Deemed Accepted fiber cable installation within Conduit #1

<b>CPI Rate</b>
2.50%

\*Conduit #2 Rental Amount based on Deemed Accepted fiber cable installation within Conduit #2 for full route, PLUS actual fiber utilization for 3.8 miles on Rt. 295

**Attachment B**

Annual Fiber Certification

**Attachment B**

**Section 7.C Certificate**

In accordance with Section 7.C of the July 12, 2000 Lead Company Agreement between Level 3 Communications, LLC and the Massachusetts Highway Department (now the Massachusetts Department of Transportation), Level 3 Communications, LLC, hereby certifies that, as of [DATE], fiber optic cable is installed in the Facility only as follows:

<b>Path Description</b>	<b>Distance</b>	<b>Fiber Count</b>	<b>Innerduct</b>
[Path Description One]	__ miles	__ count fiber optic cable	Innerduct No. __
[Path Description Two]	__ miles	__ count fiber optic cable	Innerduct No. __
[Path Description Three]	__ miles	__ count fiber optic cable	Innerduct No. __
[Path Description Four]	__ miles	__ count fiber optic cable	Innerduct No. __
[Path Description Five]	__ miles	__ count fiber optic cable	Innerduct No. __
[Path Description Six]	__ miles	__ count fiber optic cable	Innerduct No. __

I, [NAME], do hereby depose and state as follows:

I am [TITLE]. I am authorized to make this Certification on behalf of Level 3 Communications, LLC to the Massachusetts Department of Transportation.

I have read and assisted in the preparation of this Certification. I verify that the factual statements contained herein are true and accurate to the best of my information and belief, based upon my personal knowledge and on the basis of information that I have reviewed and that has been made available to me, through and after reasonable inquiry, for the purpose of making this Certification.

Signed under the pains and penalties of perjury:

Level 3 Communications, LLC

By: \_\_\_\_\_  
Name:  
Title:

Date: