

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OFFICE COPY

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NEXTG NETWORKS OF NY, INC.,

: 03-CV-9672 (RMB)

Plaintiff,

-against-

: NOTICE OF MOTION

CITY OF NEW YORK;

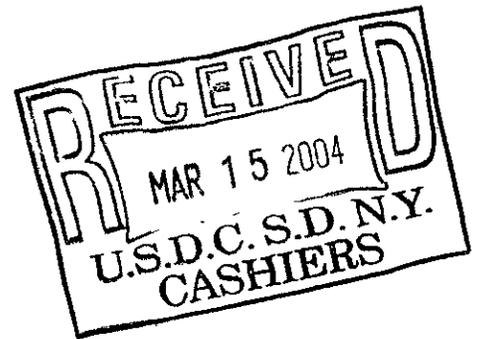
CITY OF NEW YORK

DEPARTMENT OF INFORMATION

TECHNOLOGY AND TELECOMMUNICATIONS;

and GINO P MENCHINI, in his official capacity,

Defendants.



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COUNSELLORS :

PLEASE TAKE NOTICE that, upon the annexed affidavit of T. Scott Thompson, and the affidavits of Robert L. Delsman and David Cutrer, and all prior proceedings in this action, the undersigned will move this Court, before the Honorable Richard M. Berman, at the Courthouse, 40 Centre Street, New York, New York 10007-1312, on the 21st day of May 2004, at 12 p.m., or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 65(a) of the Federal Rules of Civil Procedure granting plaintiff a preliminary injunction, enjoining Defendants City of New York, City of New York Department of Information Technology and Telecommunications, and Gino Menchini ("Defendants") from denying NextG the right to provide telecommunications services via fiber optic and related telecommunications facilities in the public rights-of-way in

the City of New York, including on utility, street light, and/or traffic signal poles installed therein, and for such other and further relief as to the Court appears just and proper.

Dated: New York, New York
March 15, 2004

COLE, RAYWID & BRAVERMAN, L.L.P.

By: 
T. Scott Thompson (admitted *pro hac vice*)
Attorneys for Plaintiff
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 659-9750

- and -

**INGRAM YUZEK GAINEN CARROLL &
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250 Park Avenue
New York, New York 10177
(212) 907-9600

To: **THE CITY OF NEW YORK LAW DEPARTMENT**
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Attorneys for Defendants
100 Church Street, Room 5-175
New York, New York 10007
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

-----X
NEXTG NETWORKS OF NY, INC.,

03 CIVIL 9672 (RMB)

Plaintiff, :

-against- :

**ATTORNEY'S AFFIDAVIT
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

CITY OF NEW YORK; CITY OF NEW YORK
DEPARTMENT OF INFORMATION
TECHNOLOGY AND
TELECOMMUNICATIONS; and
GINO P. MENCHINI, in his official capacity,

Defendants. :
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WASHINGTON)
: ss.:
DISTRICT OF COLUMBIA)

T. SCOTT THOMPSON, being duly sworn, deposes and says:

1. I am a partner in Cole, Raywid & Braverman, L.L.P. which along with Ingram Yuzek Gainen Carroll & Bertolotti, L.L.P., is counsel to Plaintiff NextG Networks of NY, Inc ("NextG") in this action. I submit this affidavit in support of NextG's Motion for Preliminary Injunction, pursuant to Fed. R. Civ. P. 65, enjoining Defendants City of New York, City of New York Department of Information Technology and Telecommunications ("DoITT"), and Gino Menchini (jointly "Defendants") from denying NextG its right to provide telecommunications services via fiber optic and related telecommunications facilities in the public rights-of-way in the City of New York, including on utility, street light, and/or traffic signal poles installed therein.

2 The grounds for NextG's Motion and the need for preliminary relief are fully set forth in its First Amended Verified Complaint, the accompanying brief in support of its Motion, and Exhibits 1 through 3 hereto (copies of the challenged enactments of the City). NextG's motion is also supported by the Affidavits of Robert L. Delsman and David Cutrer, and accompanying exhibits thereto.

3 As explained in the Affidavits of Robert L. Delsman and David Cutrer, NextG seeks to enter the telecommunications market in New York City. Its business is to provide telecommunications service to wireless communications operators by providing carriage of traffic via fiber optic lines from wireless equipment to points of interconnection with local and interstate telecommunications networks. In order to provide its services, NextG must have access to public rights-of-way and also to utility poles and/or street light poles which are located in and part of the public rights-of-way. However, the Defendants in this matter have prohibited NextG from constructing its facilities in the public rights-of-way and thus providing telecommunications services in the City.

4. Under the City's laws, specifically the City's Charter (pertinent excerpts attached hereto as Exhibit 1) and Resolution No. 957 of the City (attached hereto as Exhibit 2), before NextG may construct its facilities in the public rights-of-way, and thus provide service, it must obtain a franchise from the City. Under those laws, NextG cannot obtain such a franchise until the City's Department of Information Technology and Telecommunications ("DoITT") issues a Request For Proposals ("RFP") pursuant to authorizing legislation passed by the City Council

5. Since March 2002, NextG has sought to apply for the franchise Defendants asserts it must obtain. However, prior to the NextG's initiation of this Motion, DoITT had not issued the necessary RFP, so NextG could not even apply for a franchise. To this date, Defendants have refused to issue NextG a lawful franchise.

6. NextG seeks this preliminary injunction in order to remedy and prevent the irreparable harm that NextG has suffered and will suffer as a result of the Defendants' continued denial of NextG's right to provide telecommunications services in the public rights-of-way.

7. NextG has a substantial likelihood of success on the merits. Section 253 of the Communications Act, 47 U.S.C. § 253, prohibits the City from imposing any requirement on NextG that "prohibit[s] or ha[s] the effect of prohibit[ing] the ability of [NextG] to provide any interstate or intrastate telecommunications service." The City's requirements and its actions violate Section 253 both facially and as applied, under the Second Circuit's decision in *TCG New York, Inc v City of White Plains*, 305 F.3d 67 (2d Cir. 2002), *cert denied*, 123 S Ct. 1582 (2003). *See also New Jersey Payphone Assn, Inc. v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002).

8. The City's refusal even to allow NextG to apply for a franchise, much less provide service, is a blatant "barrier to entry." Moreover, the City's requirements, including the City Charter, Resolution No. 957, and the RFP issued by DoITT on February 9, 2004 (attached hereto as Exhibit 3), are substantively identical to those struck down in *White Plains*, and violate Section 253 on their face. Finally, like in *White Plains*, the City's failure to impose the franchise requirements on NextG's competitors

materially inhibits NextG's ability to compete on a fair and balanced basis, in violation of Section 253.

9. As explained in the Affidavit of Mr. Delsman, the City's actions are causing and will continue to cause NextG to suffer irreparable harm absent the requested injunction. As a threshold matter, the City's laws and actions enforcing them are denying NextG the ability to do business at all. In addition, the City's laws and actions enforcing them are irreparably harming NextG's goodwill and business reputation as a viable and reputable company that can actually operate and deliver its services. These harms cannot be reasonably calculated or adequately compensated by monetary damages, and constitute irreparable harm under Second Circuit precedent.

10. Accordingly, NextG seeks a preliminary injunction, enjoining the Defendants from denying NextG its right to provide telecommunications services via facilities to be constructed by NextG in the public rights-of-way. In light of the preliminary nature of the requested relief, NextG proposes that the injunction permit it to exercise its rights only in a defined portion of the City. The defined scope of the proposed construction, as well as NextG's compliance with City construction-related regulations, and providing insurance and bonding, will minimize or eliminate any potential harm to the City from the grant of the motion. Thus, the balance of harms weighs decidedly in NextG's favor.

WHEREFORE, based on the foregoing, the First Amended Verified Complaint, the attached affidavits, and brief in support, NextG should be granted a preliminary injunction, enjoining Defendants from denying NextG the ability to provide telecommunications services via fiber optic and related telecommunications facilities in the public rights-of-way in the City of New York, including on utility, street light, and/or traffic signal poles installed therein.



T. Scott Thompson

Sworn to before me this
12th day of March, 2004.



Notary Public

Judith A. Easterday
Notary Public, District of Columbia
My Commission Expires 6-14-04

Exhibit List for
Attorney's Affidavit of T. Scott Thompson

- Exhibit 1** -- Relevant excerpts of City of New York Charter
- Exhibit 2** -- City of New York Resolution No. 957
- Exhibit 3** -- Request For Proposals For Franchise For The Installation And Use, On City-Owned Street Light Poles, Traffic Light Poles And Highway Sign Support Poles, Of Telecommunications Equipment And Facilities, Including Base Station And Access Point Facilities, In Connection With The Provision Of Mobile Telecommunications Services (Feb. 9, 2004)

ensure that copies of city contracts and other standard information regarding city contracts and contractors are reasonably available for public inspection in accordance with provisions of section one thousand sixty-four of this charter.

§ 335. Centralized evaluation of contractor integrity, performance, and capability. The mayor may evaluate the integrity, performance, and capability of entities that contract with the city, are seeking to contract with the city, or may seek to contract with the city. The mayor may designate one or more agencies to participate in such efforts. The evaluations of the mayor and any agency designated by the mayor may include conclusions regarding whether the entity should be considered a responsible contractor. The mayor and any agency designated by the mayor may make such evaluations and conclusions available to agencies and the public through a centralized data base.

CHAPTER 14 FRANCHISES, REVOCABLE CONSENTS AND CONCESSIONS

§ 362. Definitions. For the purposes of this charter:

a. "Concession" shall mean a grant made by an agency for the private use of city-owned property for which the city receives compensation other than in the form of a fee to cover administrative costs, except that concessions shall not include franchises, revocable consents and leases.

b. "Franchise" shall mean a grant by an agency of a right to occupy or use the inalienable property of the city to provide a public service.

c. "Responsible Agency" shall mean (1) with respect to a franchise, the agency designated by the mayor pursuant to section three hundred sixty-three or three hundred seventy-eight as the agency having primary expertise and responsibility for the type of franchise involved, (2) with respect to a revocable consent, the agency authorized to grant a revocable consent of the type involved pursuant to section three hundred sixty-four, or (3) with respect to a concession, the agency granting a concession.

d. "Revocable Consent" shall mean a grant by the city of a right, revocable at will, (1) to any person to construct and use for private use pipes, conduits and tunnels under, railroad tracks upon, and connecting bridges over inalienable property, (2) to an owner of real property or, with the consent of the owner, to a tenant of real property to use adjacent inalienable property for such purposes as may be permitted by rules of the department of transportation or the department of information technology and telecommunications or (3) to a public service corporation for facilities ancillary to, but not within, a franchise granted prior to the effective date of this section.

§ 363. Franchises. a. Franchises shall be awarded only in accordance with the provisions of an authorizing resolution adopted by the council pursuant to the provisions of this section.

b. An initial determination of the need for franchises of a particular type shall be made by the head of the agency designated by the mayor as having the primary expertise and responsibility in the policy area covered by that type of franchise. Upon making such a determination, such agency, with the advice of the corporation counsel and such other agencies as the mayor shall determine, shall prepare a proposed authorizing resolution for that type of franchise and shall submit such proposed authorizing resolution to the mayor. Such a

proposed authorizing resolution shall set forth the nature of the franchise or franchises to be granted, the public service to be provided, the terms and conditions of the franchise or franchises, including any subsidies that will be given to a franchisee, the method by which proposals will be solicited for the franchise or franchises and the criteria to be used in evaluating the proposals submitted in response to such a solicitation.

c. The mayor may submit such a proposed authorizing resolution to the council. Promptly upon submission to the council, the text of any such authorizing resolution shall be published in the City Record. Within ninety days of receiving such a proposed resolution, the council or a committee of the council shall hold a public hearing on such resolution. The council may approve, approve with modifications or disapprove such resolution by majority vote. Any action of the council approving a modification to a proposed authorizing resolution or disapproving a proposed authorizing resolution shall be subject to the disapproval of the mayor in the same manner as a local law which is passed by the council, and any such disapproval shall be subject to reconsideration, repassing and adoption, notwithstanding the objections of the mayor, in the same manner as a local law which is disapproved by the mayor. The council may on its own initiative amend an authorizing resolution. The procedure for council review and approval of such a proposed amendment shall be the same as for an authorizing resolution.

d. No authorizing resolution or other action of the council may provide for any involvement by the council or any member of the council in the selection of a franchisee pursuant to such resolution.

e. Pursuant to an authorizing resolution adopted by the council, the responsible agency may issue one or more requests for proposals or other solicitations of proposals, provided that (1) the corporation counsel shall have determined that the request for proposals is consistent with the provisions of the authorizing resolution and (2) no such request or solicitation shall be issued unless either the department of city planning has determined that the proposed franchise would not have land use impacts or implications or such request or solicitation has been reviewed and approved pursuant to section one hundred ninety-seven-c and section one hundred ninety-seven-d. A community board may waive a public hearing and the preparation of a written recommendation with respect to any such request for proposals or solicitation which in its judgment does not involve a substantial land use interest. Any such request for proposals or solicitation issued in accordance with this subdivision shall set forth the criteria and procedures to be utilized in evaluating the proposals submitted in response to such request or solicitation.

f. The selection of a franchisee shall be in accordance with the provisions of the authorizing resolution covering franchises of the type involved. Each such selection and each franchise agreement shall be subject to the review and approval of the franchise and concession review committee pursuant to sections three hundred seventy-one, three hundred seventy-two and three hundred seventy-three.

g. Nothing in this section shall preclude any agency, prior to proposing an authorizing resolution, from issuing one or more requests for information or other solicitations of information regarding the availability of potential franchisees with expertise in the subject matter of a proposed type of franchise, suggestions regarding the appropriate terms and conditions which should be contained in an authorizing resolution for that type of franchise or any other information which would assist the agency in determining how to proceed

with regard to the public service involved.

h. All franchises shall be consistent with the following requirements:

(1) Every grant of a franchise or modification thereof must be by written agreement approved by the franchise and concession review committee and executed by the responsible agency under the authority of an authorizing resolution adopted by the council in accordance with the provisions of this chapter.

(2) No such agreement shall be for a longer period than twenty-five years except that in the case of a tunnel railroad it may be for a period not exceeding fifty years.

(3) The agreement may, at the option of the city, provide for giving to the grantee the right of renewals not exceeding in the aggregate twenty-five years on a fair redetermination of the compensation to the city to be made upon standards and methods as therein specified.

(4) At the termination of such agreement all the rights or property of the grantee in the inalienable property of the city to which the franchise relates shall cease without compensation.

(5) Any such agreement may provide that upon its termination the property, plant and equipment of the grantee shall, to the extent therein specified, thereupon be and become the property of the city, either without compensation to the grantee or on payment to the grantee of the fair value thereof as property, to be determined as provided in the contract, but excluding any value derived from the franchise. The city shall have the option either to take and operate on its own account the property, plant and equipment when so acquired, or to lease the same for a term not exceeding twenty years or to require that the property of the city be restored to its condition prior to the granting of the franchise.

(6) Every agreement granting a franchise for the performance of any public service shall contain an agreement by the grantee to recognize the right of its employees to bargain collectively through representatives of their own choosing, and at all times to recognize and deal with the representatives duly designated or selected by the majority of its employees for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment and not to dominate, interfere with or participate in the management or control of or give financial support to any union or association of its employees. This subdivision shall not apply to a contract providing for a modification or amendment of or extension of service under a franchise not containing a similar provision, provided that the term of such franchise is not extended thereby.

§ 364. Revocable consents. a. A revocable consent shall not be granted for a use that would interfere with the use of inalienable property of the city for public purposes, nor shall a revocable consent be granted for a purpose for which a franchise may be granted.

b. All revocable consents shall be revocable at any time by the responsible agency, shall be granted for a fixed term, and shall provide for adequate compensation to be annually provided to the city during the continuance of the consent.

c. Revocable consents, other than for telecommunications purposes, may be granted by the department of transportation with respect to property under its jurisdiction or by such other agency as may be authorized by law to grant revocable consents. Revocable consents for telecommunications purposes may be granted by the department of information technology and telecommunications. All revocable consents

shall require the approval of the department of transportation.

d. Every petition for the grant of a revocable consent shall be filed with the department of transportation. Each petition shall state the location of the proposed revocable consent and shall be in such form and contain such other information as the department of transportation and other responsible agencies, if any, shall require by rule. Petitions for each type of revocable consent shall be distributed to and reviewed by the agencies required to do so by local law or executive order of the mayor. If, in the judgment of the department of city planning, a proposed revocable consent has land use impacts or implications, the petition for the proposed revocable consent shall be subject to review and approval pursuant to section one hundred ninety-seven-c and section one hundred ninety-seven-d.

e. Notwithstanding any provision of this charter or the administrative code, revocable consents to construct and operate sidewalk cafes shall be reviewed pursuant to subchapter six of chapter two of title twenty of the administrative code.

§ 365. Terms of agreements; enforcement. a. Every agreement memorializing the terms and conditions of a franchise, revocable consent or concession shall contain adequate provisions by way of forfeiture or otherwise (1) to secure efficiency of public service at reasonable rates, if a public service is to be provided, (2) to assure the maintenance of the property of the city in good condition throughout the term of the agreement, and (3) to provide for adequate compensation to the city.

b. Every agreement memorializing the terms and conditions of a franchise, revocable consent or concession shall contain an agreement by the grantee that it will (1) permit the placement or display of the public health messages required by section 17-621 of the code, on any property subject to such franchise, revocable consent or concession, or any facility, plant, equipment or other property used in connection with such franchise, revocable consent or concession; and (2) bear any costs associated with the posting of such public health messages and any costs in terms of foregone advertising revenues associated with the placement or display of such public health messages.

c. The responsible agency shall also monitor the performance of the grantee and enforce the terms and conditions of any franchise, revocable consent or concession under its jurisdiction.

§ 371. Public hearing on proposed agreement; publication of notice. The franchise and concession review committee in the case of a franchise, or the responsible agency in the case of a revocable consent, shall hold a public hearing on the proposed agreement memorializing the terms and conditions of each proposed franchise or revocable consent before final approval of the proposed franchise or consent. Any such public hearing conducted by the franchise and concession review committee shall be held within thirty days of the filing with the committee by the responsible agency of a proposed agreement containing the terms and conditions of the proposed franchise. No hearing held by the franchise and concession review committee or by the responsible agency shall be held until after notice thereof and a summary of the terms and conditions of the proposed agreement shall have been published for at least fifteen days, except Sundays and legal holidays, immediately prior thereto in the City Record, nor until a notice of such hearing, indicating the place where copies of the proposed agreement may be obtained by all those interested therein, shall have been published

at least twice at the expense of the proposed grantee in a daily newspaper designated by the mayor which is published in the city of New York and having a circulation in the borough or boroughs in which the affected property of the city is located and a weekly newspaper or newspapers designated by the mayor which are published in the city of New York and have a circulation in the community district or districts in which the affected property of the city is located. In the event a franchise or revocable consent relates to property of the city located in more than one borough, notice of hearing in a weekly newspaper shall not be required; however, in that event, notice of hearing in two daily newspapers, and mailing by the grantee, no later than fifteen days immediately prior to the date of the public hearing, of such notice to the borough presidents and community boards and council members in whose districts the affected property of the city is located, shall be required. In the case of a franchise for a bus route which crosses one or more borough boundaries, notice of hearing in a weekly newspaper shall not be required; however, in that event, notice of hearing in two daily newspapers, and mailing by the grantee, no later than fifteen days immediately prior to the date of the public hearing, of such notice to the borough presidents and community boards and council members in whose districts the bus route is located, and posting of such notice in the buses operating upon such route, shall be required.

§ 372. Powers of the mayor. a. The separate and additional approval of the mayor shall be necessary to the validity of every franchise agreement revocable consent agreement.

b. Every such agreement shall before it takes effect be presented, duly certified, to the mayor for approval. Such agreement shall not be effective unless approved by the mayor within sixty days after it is presented to the mayor.

§ 373. Franchise and concession review committee. a. A franchise and concession review committee is hereby established. The committee shall consist of the following officials or their designees: the mayor, who shall serve as chair; the director of the office of management and budget; the corporation counsel; the comptroller; and one additional appointee of the mayor. Whenever the committee reviews a proposed franchise or concession or the procedures for granting a particular concession, the borough president of the borough in which such franchise or concession is located or his or her designee shall also serve as a member of the committee. If such a franchise, concession or procedure relates to more than one borough, the borough presidents of such boroughs shall designate one of such borough presidents or another individual to serve as a member of the committee for the purpose of considering such matter.

b. The mayor shall designate a public officer or employee to act as the clerk of the committee who shall be responsible for maintaining the records and minutes of the committee and performing such other duties as may be required.

c. The committee shall act by the affirmative vote of at least four members except that the affirmative vote of at least five members shall be required to approve a franchise agreement.

d. The committee shall:

(1) adopt rules establishing procedures for granting concessions through public bidding or by other means designed to ensure a competitive and fair process;

(2) review and approve the granting of concessions that are proposed

to be granted pursuant to procedures that differ from the procedures established by the rules of the committee; provided, however, that the committee need not review awards of concessions that are not subject to renewal and have a term of less than thirty days;

(3) determine whether each franchise agreement proposed by a city agency is consistent with the request for proposal or other solicitation pursuant to which such agreement was negotiated and require appropriate modifications to any such agreements to correct any significant inconsistencies; and

(4) review and approve the selection of franchisees pursuant to subdivision f of section three hundred sixty-three.

§ 374. Concessions. a. No city agency shall grant a concession without either complying with the procedures established by the franchise and concession review committee or obtaining the approval of the committee prior to granting the concession.

b. The city planning commission shall adopt rules that either list major concessions or establish a procedure for determining whether a concession is a major concession. A "major concession" shall mean a concession that has significant land use impacts and implications, as determined by the commission, or for which the preparation of an environmental impact statement is required by law. All major concessions shall be subject to review and approval pursuant to section one hundred ninety-seven-c and section one hundred ninety-seven-d.

§ 375. Registration with the comptroller. All agreements memorializing the terms of franchises, revocable consents or concessions shall be agreements subject to the applicable registration requirements and other provisions of section three hundred twenty-eight except that the terms "vendor" and "contractor" as used in section three hundred twenty-eight shall be deemed to apply to the holders of franchises, revocable consents and concessions.

§ 376. Central file. Copies of all franchise and revocable consent agreements shall be filed with the department of transportation. The department of transportation shall compile and keep up to date a listing of all current franchises and revocable consents which shall be available to the public and shall include the date, terms, names of the parties, description of the permitted use and location of each franchise and revocable consent. Such listing shall be arranged and indexed so as to enable a member of the public to determine what current franchises and revocable consents involving use or occupancy of streets and sidewalks have been granted for any location in the city and the identity of the holder of each such franchise or revocable consent.

§ 377. Bureau of Franchises. The bureau of franchises shall be discontinued as of the first day of July, nineteen hundred ninety. The records and staff of the bureau of franchises shall be transferred to the department of transportation, except that the records and staff of the bureau relating to telecommunications franchises shall be transferred to the department of telecommunications and the records relating to energy shall be transferred to such agency as the mayor shall designate.

§ 378. Transition. a. All franchises, revocable consents and concessions granted prior to the effective date of this section shall remain in full force and effect for the terms which they were granted.

b. Not later than the first day of March, nineteen hundred ninety, the mayor shall designate a single agency as the responsible agency for each type of franchise currently granted by the city. If such an agency intends to continue granting any such type of franchise, the agency shall submit to the council a proposed authorizing resolution for such type of franchise at least two years, or such shorter period as may be approved by the franchise and concession review committee, prior to the earliest expiration date of any existing franchise of that type; provided, however, that such an agency, with the approval of the franchise and concession review committee, may extend to the thirty-first day of December, nineteen hundred ninety-two the expiration date of any franchise which is scheduled to expire prior to that date, if such an extension is necessary in order to provide the agency with adequate time during which to prepare a proposed authorizing resolution for the type of franchise involved; and provided further, that the department of transportation, with the approval of the franchise and concession review committee, may extend the expiration date of the operating authority of any private bus company to a date not later than the thirty-first day of December, two thousand three; and provided further, that the department of transportation, with the approval of the franchise and concession review committee, may extend the expiration date of any franchise to operate and maintain bus shelters to a date not later than December 31, 2003.

CHAPTER 15
PROPERTY OF THE CITY

§ 381. Authority to acquire real property. The city may acquire title in fee to real property or any interest therein whenever required for any public or municipal use or purpose or for the promotion of public utility, comfort, health, enjoyment or adornment. Such title or interest shall be acquired according to law by purchase, condemnation or otherwise.

§ 382. Notice to owners of proceeding to acquire property. In addition to all other requirements of law, written notice of the application to have compensation for real property ascertained in any proceeding brought by the city to acquire title to real property shall be given by the corporation counsel to the owners of all property affected by the proceeding at least ten days prior to such application, by mailing the same to such owners at the address registered or filed with the commissioner of finance for the purpose of forwarding to them bills for taxes, assessments and frontage water rates. Such notice shall state the purpose for which the property is to be acquired and the date when such application will be presented and shall contain a copy of such application. Upon request by the corporation counsel, the commissioner of finance shall furnish a certified list of the registered or filed names and addresses of such owners. Failure to comply with the directions contained in this section shall not invalidate or affect the proceeding.

§ 383. Inalienable property. The rights of the city in and to its water front, ferries, wharf property, bridges, land under water, public landings, wharves, docks, streets, avenues, highways, parks, waters, waterways and all other public places are hereby declared to be inalienable; but upon the closing or discontinuance of any street, avenue, park or other public place, the property may be sold or

otherwise disposed of as may be provided by law, and leases of land under water, wharf property, wharves, docks and piers may be made as may be provided by law. Nothing herein contained shall prevent the granting of franchises, permits and licenses in respect to inalienable property.

§ 384. Disposal of property of the city. a. No real property of the city may be sold, leased, exchanged or otherwise disposed of except with the approval of the mayor and as may be provided by law unless such power is expressly vested by law in another agency.

b. Except as otherwise specifically provided by law:

1. The mayor may authorize the sale or lease only for the highest marketable price or rental, at public auction or by sealed bids and after advertisement for at least thirty days in the City Record, of any real property belonging to the city or any interest therein. No such sale or lease shall be authorized until a public hearing has been held with respect to such sale or lease after the publication of notice in the City Record at least thirty days in advance of such hearing. No such lease shall run for a term longer than ninety-nine years. Any conveyance or lease may provide for the restriction of the use of such real property.

2. Real property of the city may be leased only after appraisal made within six months prior to the authorization of the lease by the mayor, provided, however, that advertisement for a public auction or for sealed bids shall be commenced within sixty days of such authorization.

3. Real property of the city may be sold only after appraisal made within six months prior to the authorization of the sale and after a review of such appraisal by the department of citywide administrative services within thirty days prior to authorization of sale, provided that advertisement for the public auction for such sale shall be commenced within sixty days of such authorization.

4. Notwithstanding the provisions of this charter, or any general, special, or local law to the contrary, the mayor may, with the approval of a majority of the members of the borough board of the borough in which such real property is located, lease or sell any real property of the city, except inalienable property or any interest therein, to a local development corporation without competitive bidding and for such purpose or purposes and at such rental or for such price as may be determined by the mayor to be in the public interest, and no such lease shall run for a term longer than ninety-nine years.

5. Any application for the sale, lease (other than lease of office space), exchange or other disposition of real property of the city shall be subject to review and approval pursuant to sections one hundred ninety-seven-c and one hundred ninety-seven-d. Such review shall be limited to the land use impact and implications of the proposed transaction.

(a) A community board may waive the conduct of a public hearing and the preparation of a written recommendation with respect to any proposed lease of property which in the judgment of the board does not involve a substantial land use interest.

(b) The city planning commission may waive a public hearing on any application involving a lease of property.

CHAPTER 16 HEADS OF MAYORAL AGENCIES

§ 385. Heads of mayoral agencies. a. This chapter shall apply to heads of agencies holding office upon appointment of the mayor and to heads of

c. Participating agencies shall ensure that the employees of such agency do not make any statement to an applicant for services or client or take any action the purpose or effect of which is to lead the applicant or client to believe that a decision to request public health insurance or a public health insurance program options pamphlet has any bearing on their eligibility to receive or the availability of services or benefits provided by such agency.

d. Each participating agency shall request that any contractor of such agency operating pursuant to a contract which (i) is in excess of two hundred and fifty thousand dollars and (ii) requires such contractor to supply individuals with a written application for, or written renewal or recertification of services, or request for change of address form in the daily administration of their contractual obligation to such participating agency, fulfill the obligations of participating agencies under this section.

e. Each participating agency may establish procedures as they deem necessary to implement the local law that added this section. The commissioner or head of a participating agency, with the concurrence of the commissioner of the department of health and mental hygiene, may exclude a program in whole or in part from the requirements of this section upon determining that the inclusion of such a program would not substantially further the purpose of the local law that added this section. The commissioner or head of each participating agency that administers programs receiving funds under the workforce investment act of 1998, as codified at 29 U.S.C. § 2801 et seq., shall, with the concurrence of the commissioner of the department of health and mental hygiene, determine which workforce investment act offices providing workforce development services, including core and intensive services or substantive training funded in whole or in part by the city's share of funds provided under such workforce investment act, shall be required to fulfill the obligations of participating agencies under this section; such determination shall be based upon whether the inclusion of such offices would substantially further the purpose of the local law that added this section. A copy of each determination made pursuant to this subdivision shall be forwarded to the council and the mayor within thirty days of such determination.

• NB Repealed October 1, 2005

**CHAPTER 48
DEPARTMENT OF INFORMATION TECHNOLOGY
AND TELECOMMUNICATIONS**

§ 1070. Department; commissioner. There shall be a department of information technology and telecommunications the head of which shall be the commissioner of information technology and telecommunications and the chief information officer of the city.

§ 1071. Deputies. The commissioner may appoint four deputies, one of whom may be designated the first deputy commissioner.

§ 1072. Powers and duties of the department. Except as otherwise provided by law, the department shall have the following powers and duties:

- a. to plan, formulate, coordinate and advance information technology and telecommunications policies for the city;
- b. to develop, maintain and implement a long range telecommunications strategy;

c. to administer all franchises and revocable consents relating to telecommunications pursuant to the provisions of chapter fourteen, including, without limitation, proposing authorizing resolutions for telecommunications franchises, developing and issuing requests for proposals or other solicitations of proposals for telecommunications franchises, selecting telecommunications franchisees, reviewing and approving petitions for revocable consents relating to telecommunications, negotiating the terms of contracts or other agreements relating to telecommunications franchises and revocable consents, and enforcing the terms and conditions of such agreements; d. to develop municipal uses of cable television and coordinate interagency uses of cable television and other telecommunications; e. to ensure that priority is given on at least one municipal channel to the cablecasting of the public proceedings of the council and its committees, the city planning commission and other state and city agencies;

f. to provide to city agencies such land-based and wireless voice, data, video or other communications facilities, and technical assistance or other assistance with respect to such facilities, as they may require for the effective discharge of their responsibilities;

g. to participate in developing, maintaining and implementing a long-range computer systems and data communications strategy for the city of New York;

h. to assist in providing interagency coordination on matters related to data communications activities and interfacing of computers;

i. to provide appropriate, reliable, cost-effective and responsive computer and data communications services to agencies that require such services by purchasing and maintaining hardware, software and such other goods and services as may be necessary to effectively discharge the powers and duties of the department;

j. to provide assistance to agencies in meeting their data processing and data communications objectives;

k. to provide agencies using or proposing to use the services of this department with technical assistance in determining feasibility and resource requirements;

l. to simplify access to shared information, reduce communication costs and provide access to multiple computer systems by connecting computers and terminals of various city agencies, and of other public entities requesting such connection where such provision to such other entities would in the judgment of the commissioner be in the city's interests;

m. to plan and provide telecommunications coordination in support of disaster recovery;

n. to ensure security for data and other information handled by this department;

o. to institute procedures to assure restrictions of access to information to the appropriate individuals, where such restrictions are required by law; and

p. to perform such other responsibilities with respect to information technology and telecommunications matters, including responsibilities delegated elsewhere by the charter, as the mayor shall direct.

§ 1073. With respect to emergency communications facilities administered by another agency, the department shall exercise its powers and duties only as the mayor shall direct pursuant to subdivision p of section 1072 of this chapter, or at the request of such agency.

§ 1074. Telecommunications. "Telecommunications" shall mean the

transmission of writings, signals, pictures, numbers and sounds or intelligence of all kinds by aid of wire, cable, optical fiber, radio, satellite, electromagnetic wave, microwave or other like connection between points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services incidental to such transmission.

**CHAPTER 49
OFFICERS AND EMPLOYEES**

§ 1100. Head of department; whole time. Every head of an administration or department or elected officer except council members who receives a salary from the city shall give whole time to the duties of the office and shall not engage in any other occupation, profession or employment.

§ 1101. Deputies. a. Any head of a department established by this charter may appoint and, at pleasure, remove so many deputies as may be provided for by law and determine their relative rank, and may appoint and, at pleasure, remove a secretary to the department if so provided and, except as otherwise provided by law, shall assign to them their duties and may by instrument in writing filed in the department designate any deputy to possess any of the powers and exercise such of the duties of the head of the department and for such times and under such conditions as such head of a department may specify.

b. During a vacancy in the office of the head of an administration or a department established by this charter, or whenever by reason of illness or absence from the city such official shall be prevented from attending to the duties of office, the highest ranking deputy not absent or under disability shall act as the head of the administration or department.

c. The head of each mayoral department, including each such department within an administration, shall designate a deputy commissioner of the department or a senior officer reporting directly to the head of the department who shall be responsible for the personnel, management and budget administration functions of the department and for financial planning and management in the areas of payroll, purchasing, vouchering, accounting and related areas assigned by the head of the department.

§ 1102. Organization of department. a. Any head of an administration or a department established by this charter, to the extent to which the organization of the administration or department is not prescribed by law, shall by instrument in writing filed in the agency organize the administration or department into such divisions, bureaus or offices and make such assignments of powers and duties among them, and from time to time change such organization or assignments, as the head of the administration or department may consider advisable.

b. Except as provided in section eleven, where divisions, bureaus or offices have been established by law, the mayor may consolidate any two or more divisions, bureaus or offices in any agency under the jurisdiction of the mayor and change the duties of any such division, bureau or office and in like manner reverse or modify any such action.

§ 1109. Summary inquiry. A summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city may be conducted under an order to be made by any justice of the supreme court in the first, second or eleventh judicial district on

**NEW YORK CITY COUNCIL RESOLUTION NUMBER 957,
ADOPTED AUGUST 11, 1999**

THE COUNCIL OF THE CITY OF NEW YORK
RESOLUTION NO. 957

..Title

Proposed authorizing resolution submitted by the Mayor pursuant to Section 363 of the Charter for the granting of franchises for the installation of telecommunications equipment and facilities on, over and under the inalienable property of the City in connection with the provision of mobile telecommunications services.

..Body

By Council Members Eisland and McCaffrey (at the request of the Mayor)

WHEREAS, by Executive Order 25, dated August 23, 1995, the Mayor has designated the Department of Information Technology and Telecommunications as the responsible agency for granting of telecommunications franchises; and

WHEREAS, pursuant to Section 363 of the Charter (the "Charter") of the City of New York (the "City"), the Commissioner of the Department of Information Technology and Telecommunications has made the initial determination of the need for franchises for mobile telecommunications services in the City of New York; and

WHEREAS, pursuant to Section 1072 of the Charter, the Department of Information Technology and Telecommunications has proposed an authorizing resolution for the granting of franchises for mobile telecommunications services; and

WHEREAS, the City Council has determined that the granting of such franchises will promote the public interest, enhance the health, welfare and safety of the public and stimulate commerce by assuring the widespread availability of reliable mobile telecommunications services;

The Council hereby resolves that:

The Council authorizes the Department of Information Technology and Telecommunications, or any successor thereto, to grant non-exclusive franchises for the installation of telecommunications equipment and facilities on, over and under the inalienable property of the City, in connection with the provision of mobile telecommunications services in the City of New York.

For purposes of this resolution, "inalienable property of the City" shall mean the property designated as inalienable in Section 383 of the Charter.

For purposes of this resolution, "mobile telecommunications services" shall mean "mobile services" as defined in the Telecommunications Policy Act of 1996 (codified at 47 U.S.C. '153) and other voice and/or data telecommunications

services employing electromagnetic waves propagated through the atmosphere to serve portable sending and/or receiving equipment.

Only persons licensed by the Federal Communications Commission to provide mobile telecommunications services may be granted franchises pursuant to this resolution to the extent such licenses are required by Federal law.

The public service to be provided under such franchises shall be mobile telecommunications service.

All franchises granted pursuant to this resolution shall require the approval of the Franchise and Concession Review Committee and the separate and additional approval of the Mayor.

The authorization to grant franchises pursuant to this resolution shall expire on the fifth anniversary of the date on which this resolution is adopted by the Council (the "Expiration Date"). No franchise shall be granted pursuant to this resolution by the Department of Information Technology and Telecommunications, nor approved by the Franchise and Concession Review Committee, or the Mayor after the Expiration Date.

Prior to the grant of any such franchise, a request for proposals ("RFP") or other solicitation shall be issued by the Department of Information Technology and Telecommunications. Prior to issuing any such RFP or other solicitation, all necessary environmental and land use review shall be conducted in accordance with City Environmental Quality Review ("CEQR") and Section 197c of the Charter. The criteria to be used by the Department of Information Technology and Telecommunications to evaluate responses to such RFP's or other solicitation shall include, but not be limited to, the following:

- (1) the adequacy of the compensation to be paid to the City;
- (2) the financial, legal, technical and managerial experience and capabilities of the applicant(s);
- (3) the ability of the applicant(s) to maintain the property of the City in good condition throughout the term of the franchise;
- (4) the value and efficiency of the public service to be provided; and
- (5) the value of any telecommunications facilities and services offered by the applicant(s) to the City.

The Department of Information Technology and Telecommunications shall apply the City's McBride Principles and Local Law 33 of 1997 when granting a franchise pursuant to this resolution.

Any franchise granted pursuant to this authorizing resolution shall be by written agreement which shall include, but not be limited to, the following terms and conditions:

- (1) the term of the franchise, including options to renew if any, shall not exceed fifteen (15) years;
- (2) the compensation to be paid to the City shall be adequate and shall

include the payment of fees or the provision of facilities and services, or both. Such compensation shall not be considered in any manner to be in the nature of a tax, but such payment shall be made in addition to any and all taxes of whatsoever kind or description which are now or may at any time hereafter be required to be paid pursuant to any local law of the City, law of the State of New York, or law of the federal government;

(3) the franchise may be terminated or canceled, by the Department of Information Technology and Telecommunications in the event of the franchisee's failure to comply with the material terms and conditions of the agreement;

(4) a security fund shall be established to ensure the performance of the franchisee's obligations under the agreement;

(5) the City shall have the right to inspect the facilities of the franchisee and to order the relocation of such facilities at the direction of the Department of Information Technology and Telecommunications;

(6) there shall be adequate insurance and indemnification requirements to protect the interests of the public and the City;

(7) all franchisees shall be required to maintain complete and accurate books of account and records to the extent applicable to franchise compliance, which shall be made available on demand to the City for inspection at a location to be determined by the City in its sole discretion;

(8) there shall be provisions to ensure quality workmanship and construction methods;

(9) there shall be provisions containing the agreements required pursuant to paragraph 6 of subdivision (h) of Section 363 of the Charter relating to collective bargaining and other matters;

(10) there shall be provisions requiring the franchisee to comply with City laws, regulations and policies related to, but not limited to, employment, purchasing and investigations;

(11) there shall be provisions to ensure adequate oversight and regulation of the franchisee by the City;

(12) there shall be provisions to restrict the assignment or other transfer of the franchise without the prior written consent of the City and provisions to restrict changes in control of the franchisee without the prior written consent of the City;

(13) there shall be remedies to protect the City's interest in the event of the franchisee's failure to comply with the terms and conditions of the agreement;

(14) all franchisees shall submit to the City's Vendor Information Exchange System ("VENDEX") and the Integrated Comprehensive Contract Information System ("ICCIS");

(15) all franchisees shall obtain all necessary licenses and permits from and comply with all Regulations and Rules of the New York State Public Service

Commission, the Federal Communications Commission and any other governmental body having jurisdiction over the franchisee;

(16) there shall be provisions preserving the right of the City to perform public works or public improvements in and around those areas subject to the franchise;

(17) there shall be provisions requiring the franchisee to protect the property of the City and the delivery of public services from damage or interruption of operation resulting from the construction, operation, maintenance repair or removal of improvements related to the franchise;

(18) there shall be provisions designed to minimize the extent to which the public use of the streets of the City are disrupted in connection with the construction of improvements relating to the franchise; and

(19) there shall be provisions to protect the interest of the City in the event of (A) a subsequent finding by a regulatory body or court of competent jurisdiction that the agreement, or any portion thereof, is invalid and/or unenforceable, and (B) any change in applicable law.

The Department of Information Technology and Telecommunications shall file with the Council the following documents:

(1) within fifteen days of issuance, a copy of each RFP or other solicitation issued pursuant to this resolution;

(2) within fifteen days of approval by the Mayor, a copy of the agreement for each franchise granted pursuant to this resolution and any subsequent modification thereof; and

(3) on or before July 1 of each year, a report detailing the revenues received by the City from each franchise granted pursuant to this resolution during the preceding calendar year.

Adopted.

Office of the City Clerk, }
The City of New York, }

I hereby certify that the foregoing is a true copy of a Resolution passed by The Council of The City of New York on August 11, 1999, on file in this office.

.....
City Clerk, Clerk of Council