Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	MB Docket No. 05-311

REPLY COMMENTS OF
THE VILLAGES OF LARCHMONT AND MAMARONECK,
AND THE TOWN OF MAMARONECK, NEW YORK

I. Summary

The Villages of Larchmont and Mamaroneck, and the Town of Mamaroneck, New York (the "Communities") respectfully submit these reply comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.[1] Specifically, the Communities seek to clarify that the Communities' presentations made to the New York Public Service Commission ("NY PSC") suggesting that Verizon should deploy its new cable-capable network with an eye toward meeting local community needs and interests as required by federal law should not, as Verizon has attempted, be unfairly turned into allegations of LFA delay and regulatory overkill.

[1] In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992, MB Docket No. 05-255, Notice of Proposed Rulemaking (November 18, 2005).

The Communities, unlike Verizon, will provide the Commission with the whole record, including the fact that the NY PSC ultimately agreed with the Communities' recommendations regarding cooperative pre-construction planning and franchising.[2]

II. Verizon's Allegations

In its Comments, Verizon states:

> [I]n a filing before the New York PSC, the towns of Larchmont and Mamaroneck asserted that once Verizon has a cable franchise in their communities, they will have regulatory authority to require Verizon to "entirely rebuild" its system (*e.g.* bury the entire fiber plant underground). And that these towns maintained that they could demand this "regardless of the impact on Verizon." (citations omitted).[3]

Verizon is correct that the Communities did suggest that Verizon's practice of deploying a network without considering its obligations to meet local needs and interests is fraught with peril.[4] Verizon is incorrect that the Communities would make such demands regardless of the impact on Verizon. In fact, the point of the filing and the accompanying communications between the Communities and Verizon has been to meet community needs and standards while minimizing the impact on Verizon. This, as the Communities stated in their filing at the NY PSC and repeat here, is best accomplished by requiring planning up front, not after the fact.

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[2] Copies of the Board's Comments in Support of Petition of Town of Babylon, dated May 5, 2005, and the NY PSC's Declaratory Ruling on Verizon Communications, Inc.'s Build-Out of its Fiber to the Premises Network, Case 05-M-0250 and Case 05-M-0247, dated June 15, 2005 are attached hereto as Exhibits A and B, respectively. While the NY PSC held, contrary to the Communities' submission, that an upgrade to a hybrid system that includes the ability to provide cable does not trigger the cable franchise requirements, it did declare that Verizon must first obtain a cable franchise before offering cable service or installing plant that can only be used exclusively for a cable television system. The NY PSC also agreed with the Communities' position that Verizon should work cooperatively with localities where it plans to eventually offer cable service, to take their needs into account in its system engineering. *See infra,* pp. 4-5, and Exhibit B.

3 Verizon Comments at 80-81; O'Connell Declaration at ¶ 53. The same claim is repeated in an ex parte filing made by Verizon on March 9, 2006 by letter from Dee May to Marlene H. Dortch, attaching a letter bearing the date February 24, 2006, reporting a meeting with Chairman Martin, Attachment 2 ("Section 621 Franchise Proceeding: Summary of Arguments") at p. 14.

III. The Whole Story

Verizon's plan for broadband deployment in New York State appears to be one of build the network first and then either ask for a franchise later or wait until Congress or other authority provides permission to provide cable service without a franchise. The risk inherent to such a plan is that in building out its network Verizon may not meet community needs and interests as currently required under federal law for a cable franchise. A second issue arises in that safety concerns and rights-of-way management are impacted by the upgrading of the network, regardless of the services provided. It was these two points that the Communities sought to impart in their filings with the NY PSC and their discussions with Verizon.

A. Community Needs and Interests

Verizon began deploying new fiber optic cable in the Communities in the summer of 2004. When a safety concern arose over the siting of the new facilities (discussed *infra*, III.C), the Communities also took the opportunity to enquire as to Verizon's intention for obtaining a cable franchise. This was more than an academic question as under NY PSC Rules a community has 30 days after an application is received to act.[5] The Communities, therefore, urged Verizon to file an application, or at least enter into serious negotiations for a franchise. These requests were reduced to writing, dating back to October, 2004, nearly two years ago.[6] To date, Verizon has not obtained a franchise in the Communities, nor made any serious effort to obtain a

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[4] The Tri-Municipal Larchmont-Mamaroneck Cable TV Board of Control (the "Board") made these comments in support of a petition filed by the Town of Babylon, New York, but Verizon takes these comments out of out of context, and greatly exaggerates their import.

[5] 8 NYCRR Part 894.

[6] For e.g., Letter dated October 14, 2004 from Kenneth M. Bialo, Mayor, Village of Larchmont to Ivan Seidenberg, Chairman, Verizon, which is attached hereto as Exhibit C. See also correspondence referred to in note 10, *infra*.

franchise from the Communities, despite its claim in 2004 that it would be contacting the Communities shortly to discuss such matters.[7]

In light of Verizon's apparent disinterest in working with the Communities towards obtaining a cable franchise, and as a means to express its concerns regarding Verizon's apparent strategy of deploying cable-capable network with no regard to community needs and interests, the Board filed comments in May 2005 in the Town of Babylon proceeding before the NY PSC. It is these comments that Verizon has unfairly characterized in the present Commission rulemaking.

B. What the Communities Did Say

Despite Verizon's claims, a review of the filing, a copy of which is attached, reveals that nowhere does the Board make any reference to requiring Verizon to bury its facilities.

Second, it is true that any company that chooses to build a system while ignoring local needs and interests does run the risk of additional investment being required to meet congressionally recognized needs and interests. For example, the Communities have several locations where PEG programming initiates. In order for the Verizon system to meet PEG needs, it needs to be designed so that these programs could be picked up and routed to the proper channels. It is not clear whether Verizon has made any effort to construct its system in a way that would meet these needs. The Board's position simply suggests that a major company with substantial market power cannot avoid public obligations through the tactic of changing the facts on the ground, *i.e.,* building a network oblivious to local needs and then claiming that such needs cannot be affordably addressed. Instead, the company should work with the local authorities.

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[7] Letter dated October 7, 2004 from William J. Balcerski, Senior Counsel, Verizon to Valerie Moore O'Keefe, Supervisor, Town of Mamaroneck, which is attached as Exhibit D hereto.

The NY PSC's decision in the Village of Babylon proceeding recommended Verizon do just that, concluding: "where Verizon has plans to eventually use its network to provide cable service, we strongly urge Verizon to work with local officials to understand their needs so that they can be engineered and met efficiently."[8]

In a later proceeding brought by Verizon to have its cable franchise with the Village of Massapequa Park, New York confirmed, the NY PSC also concluded that "Verizon has not demonstrated that following our minimum cable requirements would be burdensome. Indeed, Verizon indicates that the differences between telephone based right-of-way management requirements and practices vary only in "trivial" particulars from cable requirements. [citation omitted] Verizon has failed to demonstrate that adherence to our minimum franchise standards operate as a barrier to entry."[9]

C. Safety Concerns

Verizon's construction activities came to the attention of the Communities in the summer of 2004 when Verizon began installing fiber optic cable and large control boxes on multiple streets within the Communities. This construction was done without providing advance notice nor requesting permission of the Communities. As a result, the facilities deployed have in many cases proved to be a public hazard. Large control boxes deployed by Verizon in one community resulted in the obstruction of drivers' view within the intersection. In another instance, wires overhung public sidewalks at heights that presented a serious hazard to passersby. The

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[8] Exhibit B at p. 29.

[9] NY PSC Order and Certificate of Confirmation dated December 15, 2005, Case 05-V-1263, which is attached as Exhibit E hereto, at p. 19.

deployment became a significant enough public safety threat that a stop work order was issued. Only after substantial negotiations to resolve the construction problems was work begun again.[10]

IV. Conclusions

Once the real facts are revealed, it is obvious that there is no abuse here, at least on the part of the Communities. There is not even any delay. There is a sincere effort to promote competition, in a timely and cost-effective way. Not only is Verizon wrong when it claims that there is an issue here that requires Commission attention, but it is hard to imagine how the Commission can, from Washington, D.C., address the issues in any way that would simplify rather than complicate matters; any federal regulation will necessarily slow rather than speed resolution of disputes (unless the Commission has the staff to investigate every appeal from every decision of every public works department).

Respectfully submitted,

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Counsel for the Village of Larchmont, New York

March 28, 2006

[10] See Exhibit D which responds to Letters dated October 1, 2004 and October 4, 2004 from Valerie Moore O'Keefe, Supervisor, Town of Mamaroneck to Messrs. Butler and Seidenberg of Verizon, respectively.

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Reply Comments of Villages of Larchmont and Mamaroneck, and the Town of Mamaroneck, New York, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

March 28, 2006

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EXHIBIT A

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

2005 MAY -9 AM 11:58
FILED
PUBLIC SERVICE
COMMISSION
ALBANY

PETITION FOR AN EXPEDITED DECLARATORY RULING OF THE TOWN OF BABYLON, NEW YORK et al. CONCERNING UNFRANCHISED CONSTRUCTION OF CABLE TELEVISION SYSTEMS IN NEW YORK BY VERIZON COMMUNICATIONS INC IN VIOLATION OF THE PUBLIC SERVICE LAW

Case No. 05-0250
ID No. PSC-12-05-00012-P

RECEIVED
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BY:

COMMENTS IN SUPPORT OF PETITION OF TOWN OF BABYLON

INTRODUCTION AND SUMMARY

The Larchmont-Mamaroneck Cable Television Board of Control files these comments in support of the Petition filed by the Town of Babylon, New York. The Board of Control is responsible for regulating cable for the Town of Mamaroneck and the Villages of Larchmont and Mamaroneck. The three communities have one of the most vital public access operations in the State of New York. The operation is supported by franchise fees (which are dedicated almost entirely to PEG operations), and capital support payments from Cablevision. It relies on several system "links" provided by Cablevision which allow programming to be originated from several locations within the community and which carry programming from program origination points to the headend and then to subscribers.

As the Babylon Petition points out, allowing Verizon to construct a cable system without first obtaining a franchise effectively nullifies several explicit provisions of New York State law and associated regulations. That is reason enough to rule in favor of the Town. The proper

reading of New York State law is that a cable franchise is a prerequisite to the construction of a system (such as Verizon's) designed to provide cable service.[1] But, even if Verizon's view of state requirements were correct, state cable law plainly preserves local franchising powers, and thus preserves *local* authority to require Verizon to obtain a cable franchise prior to construction. Nor is federal law a bar to the exercise of state or local franchise requirements, as claimed by Verizon. The Fifth Circuit has expressly held otherwise, City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999) (elimination of federal franchising requirement for open video systems did not affect local authority to require a franchise).

Requiring a pre-construction franchise may be necessary if benefits traditionally protected in New York State are to remain protected. For example, it may be much more expensive – and certainly much more disruptive – to require Verizon to rebuild the systems it is now installing to ensure that adequate PEG links are in place than it would be to provide for those links now. This is a particularly important issue in the communities served by the Board of Control. It is likewise important that the unique PEG programming and channels in Larchmont and Mamaroneck be available to every subscriber in these communities. This too may be a function of system design (will the system as constructed be capable of delivering the right signals to the right homes? Will there be clear bidirectional connections that can be used to transmit signals up and downstream?). It is better to require or at least allow communities to address such issues before construction, rather than afterwards.

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[1] Verizon has indicated that its system is being constructed to provide cable television to New York residents. *See, e.g.*, Attachment 1, Verizon presentation to the Nassau Village Officials Association, "Fiber to the Premises Cable Service Introduction," January 11, 2005.

I. NEW YORK STATE LAW REQUIRES PRE-CONSTRUCTION FRANCHISING.

New York State law clearly contemplates that a franchise will be obtained prior to construction of a cable system. A franchise is defined as an authorization "*to construct,*" operate, maintain *or* manage a cable television system" in any municipality. N.Y. Pub. Serv. Law § 212(3). While the term "cable television system" refers to a system which "operates for hire," and which "serves" more than fifty subscribers" the definition of "cable television system" cannot be read simply in terms of operational status – otherwise a franchise would not be required *before* construction or even *after* operation until the fifty-subscriber threshold were passed. Rather, the term should be read to reach systems that are designed and being built to provide cable service.

A reading that limits the franchise requirement to operating systems is not only inconsistent with the definition of franchise, it is inconsistent with the franchising process as described in New York State statutes and regulations. Under Verizon's approach, one "constructs" a facility; the facility only becomes a "cable television system" after construction. This "operational" reading creates a direct conflict with N.Y.S. Pub. Serv. Law § 213, which refers to a cable television company which "constructs" a "cable television system."

N.Y. Pub. Serv. Law § 220 requires that every cable television system "constructed" after 1973 comply with Commission construction regulations – that provision is a nullity if a "cable television system" is not a system until after it is constructed and operating. N.Y. Pub. Serv. Law § 215(d) requires the Commission to prescribe franchising standards that promote "maximum penetration" of cable television systems, "interconnection with other systems," and "facilities to provide service in areas conforming to various community interests." In order to achieve those goals to the maximum extent possible "within the limitations of economic

feasibility," a pre-construction franchise is appropriate. For example, to meet the needs of the communities served by the Board of Control, the Verizon system must be designed so that it can provide the *local* Larchmont and Mamaroneck PEG programming to all households in the community on the proper channel.[2] PEG connections to the schools and to PEG control facilities will be required. The time to provide for those connections, and to ensure the design will achieve "maximum penetration" and serve community needs, is now. Similarly, the Board of Control is in the process of reviewing the communities' need for and interest in an institutional network. Meeting institutional network needs and interests becomes much more difficult, and potentially much more expensive, if the institutional network must be constructed separate from the portion of the network designed to serve residential subscribers.

New York State law has consistently protected the right of the public to participate in the franchise process, *see*, *e.g.* N.Y. Pub. Serv. Law § 215 (2)(a). The Commission is obligated to ensure that the public has a "reasonable opportunity" to express its views on a proposed franchise application, which must address build-out schedules, indemnity and other construction related provisions. The Commission has been directed to adopt procedural standards to "assure maximum public participation" – a task that is difficult to achieve if several issues likely to be of key concern to the community are effectively resolved, *fait accompli.*

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[2] The Larchmont-Mamaroneck communities receive almost completely different local programming than is received by subscribers in adjacent communities. This means that the Verizon system has to be designed so that the lines reaching homes within the communities will carry Larchmont-Mamaroneck local programming – even if a more economical engineering solution might be to connect the subscriber to portions of the system carrying local programming originating in adjacent communities. The best time to address the "geographic boundary" issue is during system planning – not post hoc.

The Board's concerns are not simply speculative. Verizon's commitments to PEG access in certain cable franchises it has negotiated in other jurisdictions are troubling.[3] David Young, a Verizon spokesperson, has suggested that Verizon will not be able to satisfy extensive build-out requirements – leading to accusations that the company's "pre-franchising" build-out will effectively result in redlining.[4] This underscores the importance of a pre-construction franchise in which municipalities will be better able to ensure that PEG access and other needs and interests of the community will be met.

Certainly the Commission's own rules contemplate a pre-construction franchise. N.Y.C.C.R. § 895.1(a) requires recitations that a "franchisee's *plans* for *constructing...and operating* the cable television system were considered and found adequate and feasible in a full public proceeding." How that recitation can be made once the system is already constructed is difficult to imagine. *See also* N.Y.C.C.R. § 895.1(b) (requiring full description of stages of construction); N.Y.C.C.R. § 895.1(c) (provision in franchise must state that franchisee *shall construct* its system using materials of good quality, and in a safe, thorough and reliable manner); *see also* N.Y.C.C.R. § 896.2. The latter is particularly interesting because Babylon's

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[3] *See, e.g.,* Cable Franchise Agreement by and between City of Keller, Texas and GTE Southwest, Inc. d/b/a Verizon Southwest, at § 6 (no public access channel commitment; no requirement to build return paths or origination points; requiring the local franchising authority to mediate interconnection negotiations between Verizon and the incumbent, and relieving Verizon of all PEG carriage obligations in the event Verizon determines that interconnection is unreasonable from a cost and/or technical perspective). Of course, the Board recognizes PEG requirements can vary community to community.

[4] "Verizon, SBC Clash in Converging Marketplace" Mediaweek, April 4, 2005, http://www.mediaweek.com/mw/news/cabletv/article_display.jsp?vnu_content_id=1000865153. Verizon CEO Ivan Seidenberg is questioning payment of franchise fees on pay services, an issue also of obvious concern to the Villages of Larchmont and Mamaroneck and the Town of Mamaroneck, which depend on those fees to support PEG. "Verizon CEO calls for pay-TV rule changes," C|NET News.com, April 18, 2005, http://news.com.com/Verizon+CEO+calls+for+pay-TV+rule+changes/2100-1037_3-5675359.html?tag=nl.

experience is similar to that of the communities served by the Board of Control. The Village of Mamaroneck was forced to issue a stop work order – subsequently lifted – because Verizon's system was being installed unsafely, in ways that blocked lines of sight at intersections. [5]

N.Y.C.C.R. § 895.4 contemplates that localities will have an opportunity to review and consider the design of the system *pre-construction*, in part to ensure that the system has adequate capability to support local programming origination. For reasons noted above, that is of particular concern to the communities served by the Board of Control.

We believe only two conclusions are possible in light of these provisions. The first, and most logical, is that a pre-construction franchise is required. The second is that *post hoc,* and regardless of the impact on Verizon, Verizon could be required to entirely rebuild its system to meet local needs and interests: that is, Verizon must assume all risks associated with construction prior to franchising. We see no evidence that Verizon is prepared to accept that risk, and Verizon should not be permitted to evade local obligations contemplated under state law by sidestepping the franchising process.

Finally, any claims that pre-construction franchising requirements will unreasonably delay Verizon's entry are spurious, because recently-revised Commission rules explicitly provide for an expedited 30 day franchising process where a second entrant agrees to the terms and conditions of the incumbent operator's franchise. N.Y.C.C.R. § 894.7(e).

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[5] The Villages of Larchmont and Mamaroneck and the Town of Mamaroneck believe that they have the independent authority to control the placement of Verizon's facilities whether or not Verizon has a franchise. However, the mere fact that Verizon proceeded with construction without following basic rules applicable to other cable systems is itself disturbing.

II. EVEN IF THERE IS NO STATE LAW REQUIREMENT, LOCALITIES MAY REQUIRE A FRANCHISE PRIOR TO CONSTRUCTION

Even if one assumed that New York *State* cable law only requires a franchise at the time a system goes into operation, that would not preclude localities from requiring a franchise prior to construction. N.Y. Pub. Serv. Law § 219 explicitly grants localities authority to require a franchise of "any cable television system providing service within the municipality," in subsection (2),[6] but goes on in subsection (3) to make it clear that "nothing" in state law prevents "franchise requirements in excess of those prescribed by the commission," unless the requirements are inconsistent with state or federal law.

As Section I suggests, there is absolutely nothing inconsistent with a local pre-construction franchise requirement and any state laws or regulations. As the Town of Babylon suggests, a pre-construction franchise helps ensure cable construction requirements are satisfied. As we have noted, a pre-construction franchise may be important in the Villages of Larchmont and Mamaroneck and the Town of Mamaroneck in order to ensure that adequate PEG facilities and connections are timely provided. To put it another way, state law establishes a *minimum* franchising requirement; but nothing prevents a locality from exercising its control over rights of way to require a more rigorous franchise standard, if that is appropriate in the public interest.[7]

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[6] The distinction here is between a system that may have facilities that pass through one community in order to provide service to another, and a system that is designed to provide service within a community. It is the latter that is the focus of the provision cited above.

[7] In its Supplemental Brief in Opposition to the Petition at 11-12, Verizon points out that its authority to use municipal rights of way for telephone lines without obtaining municipal permission is not at issue in this proceeding. That caution is worth noting: the Commission cannot assume here that Verizon has some inherent right under Art. 27 to use municipal rights of way without authorization, and certainly not for purposes of installing an FTTP system for video. Article 27 has never been read to trump cable franchising requirements. Moreover, since at least 1926, even a company seeking to construct telephone lines in a town or village has required municipal permission, Laws 1926 c. 762, "AN ACT to amend the transportation corporations law, sec. 27. Verizon may assert it holds some preexisting rights of the 1896-incorporated New

III. A PRE-CONSTRUCTION FRANCHISE REQUIREMENT CAN BE IMPOSED CONSISTENT WITH THE CABLE ACT.

Verizon claims that a franchise requirements cannot be imposed upon it consistent with the Cable Act, 47 U.S.C. § 522(7), which excludes from the definition of "cable system" a common carrier facility subject in whole or in part to Title II of the federal act "except that such facility shall be considered a cable system...to the extent such facility is used in the transmission of video programming directly to subscribers." In the first place, Verizon fails to show that the facilities it is constructing are common carrier facilities. But more importantly, the Fifth Circuit has squarely rejected the preemption claim made by Verizon, finding that state and local franchising requirements can be imposed even where federal franchise requirements do not apply.

In 1996, Congress amended the Cable Act to permit local exchange carriers to enter the video market as open video systems ("OVS"). The amendments made it clear that the Cable Act's franchise requirements did not apply to an OVS. In fact, the very provision cited by Verizon, 47 U.S.C. § 522(7), was amended to make it clear that an open video system was not a cable system. The FCC read the law to prohibit localities from enforcing local franchise

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York Telephone, but that is certainly not proven here, and the scope of those rights is hardly obvious. *See, e.g.* Laws. 1881 ch. 483, "AN ACT to amend chapter three hundred and ninety-seven of the laws of eighteen hundred and seventy-nine, entitled 'An act to provide for the laying of telegraph wires underground,'" Sec 1 (requiring municipal permission to lay lines underground). As far as we can determine, Art. 27 applies to lines necessary for telephonic and telegraph communications; the very fact that lawmakers distinguished between the two types of communications lines suggests that Art. 27 was not intended to reach <u>any</u> facility used for any type of communication. (See Attachment 1, p. 5 characterizing FTTP network as a "quantum change" from a phone line). Of course, as a matter of law, any grant claimed by Verizon has to be read narrowly, and must be interpreted against Verizon and in favor of the public. We note the issues not because it is necessary for the Commission to decide them here, but merely to emphasize that Verizon's claims are controversial, requiring far more significant consideration than Verizon has given the issue in its briefs.

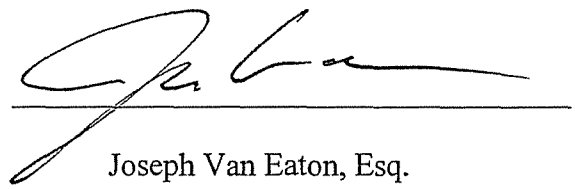
requirements against an OVS, arguing that any other reading would conflict with the franchising provisions of the Cable Act. In City of Dallas v. FCC, 165 F.3d 341, 347 (5th Cir. 1999), the Fifth Circuit rejected that argument. The Fifth Circuit recognized that the Cable Act's franchise requirement is merely a minimum *federal* requirement that does not eliminate local and state franchising authority. There is no conflict between a federal law that eliminated a federal franchise requirement with respect to OVS and application of local and state franchising requirements to OVS; *ipso facto*, there would be no conflict between imposition of a state or local franchise requirement pre-construction even if the *federal* cable franchise requirement would only apply once a system becomes operational.

In fact, cable franchising typically occurs pre-construction, and federal law contains a number of provisions (including facilities and equipment provisions) that show that there is no conflict between a federal franchise requirement and a requirement that a franchise be obtained prior to construction: *see, e.g.*, the definition of franchise, 47 U.S.C. § 522(9) (franchise is authorization to construct or operate system); 47 U.S.C. § 541(a)(2) (franchise authorizes construction of cable system over public rights of way and through easements); 47 U.S.C. § § 541(a)(2)(A)-(C) (establishing conditions on use of compatible easements in connection with system construction). The Cable Act establishes a duty to prevent redlining, 47 U.S.C. § 541(a)(3). That duty becomes more difficult to satisfy post-construction, as does 47 U.S.C. § 552(a) (franchising authority may establish construction schedules and other construction-related requirements). Indeed, we believe that it is appropriate to read the Cable Act as requiring a franchise prior to construction. The key point, however, is that there is no conflict between the Cable Act and a state or local pre-construction franchising requirement.

CONCLUSION

For reasons suggested above, the Commission should either rule that a pre-construction franchise is required of Verizon under state law, or at the very least clarify that the Town may require Verizon to obtain a franchise prior to construction.

Respectfully submitted,



May 5, 2005

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Fiber to the Premises (FTTP) Cable Service Introduction

Prepared for the
Nassau County Village Officials Association

January 11, 2005

Attachment 1

Meeting Objectives

Fiber to the Premises

verizon

- Introduce VZ team and VZ Overview

Susan Hayes, Director Verizon Government Affairs
[illegible] 212 395-6540
Christopher Levendos, Director Verizon Network Engineering
[illegible] 631 447-8500
Janet Jones, Director Verizon Community Affairs, Long Island
[illegible] 631 208-1172

- Provide an overview of the FTTP initiative
- Provide a status of the FTTP network build-out in Nassau County communities
- Provide a status update of Verizon's cable service offering development
- Establish a plan to expedite a fair and competitive agreement between the communities and Verizon
  - Nassau communities will be one of the first areas in the U.S. to receive the benefits of competition for cable service

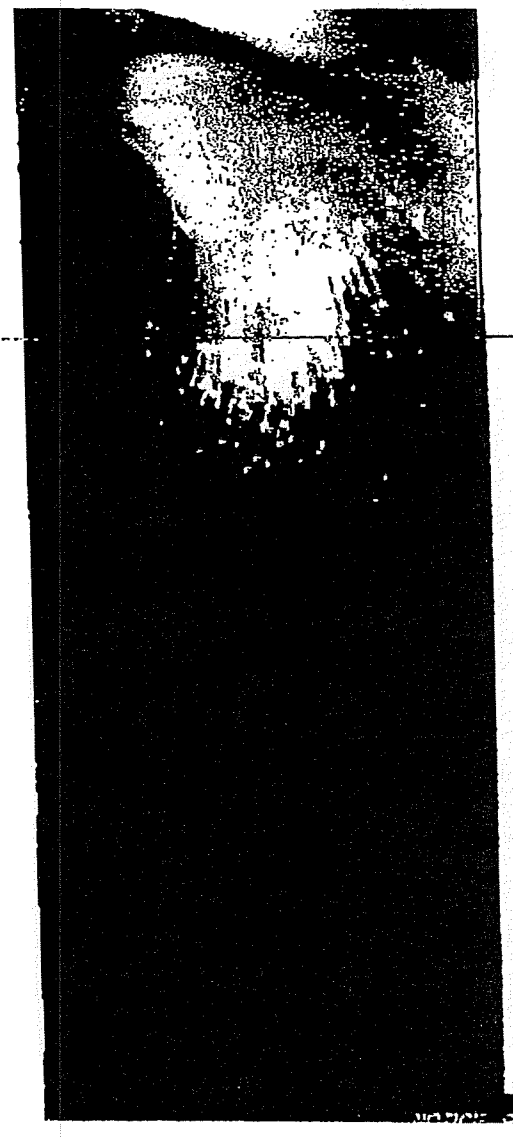
NOTICE: Proprietary and Confidential [illegible]

Verizon Overview

verizon

- A Dow 30 company, Verizon Communications is one of the world's leading providers of communications services, with approximately $68 billion in annual revenues.
- Verizon has invested over $55 billion in infrastructure this millennium -- more capital than any other telecom company in America from 2000 to 2003 -- to move toward our vision of an integrated, multi-megabit network that will fuel the growth of the entire high-tech industry in the future. In New York, invested over $12 billion in last five years.
- In New York, Verizon employs more than 35,000 workers making Verizon one of the largest private employers.
- Paid over $1 billion in taxes, own or lease over 1700 properties and operate a fleet of vehicles of approximately 13,000.

What is Fiber-to-the-Premises?



- FTTP is Verizon's next-generation broadband network that will deliver voice and high-bandwidth Internet services and applications to residences and businesses.
- While Verizon has been using fiber-optic systems in our network for years, FTTP is a major extension of fiber optics, using next-generation technology, all the way to our residence and business customers' premises.
- Cable Service is the FTTP network's next advancement, one that will require the granting of a cable franchise to Verizon.

How big is FTTP's bandwidth?

verizon

Fiber to the Premises

A Quantum Change...

Phone Line up to 56K

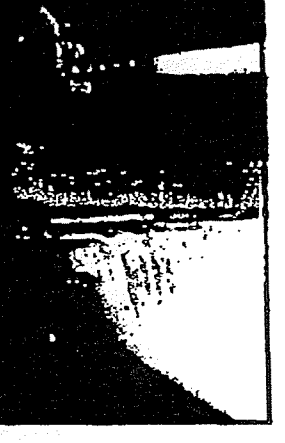
Voice (Local & LD)
Dial-Up Internet

Straw

Cable 3.0M - 10.0M

Voice (Local & LD)
High Speed Internet
Cable Video 750 Mhz shared bandwidth

Firehose



FTTP up to 30M

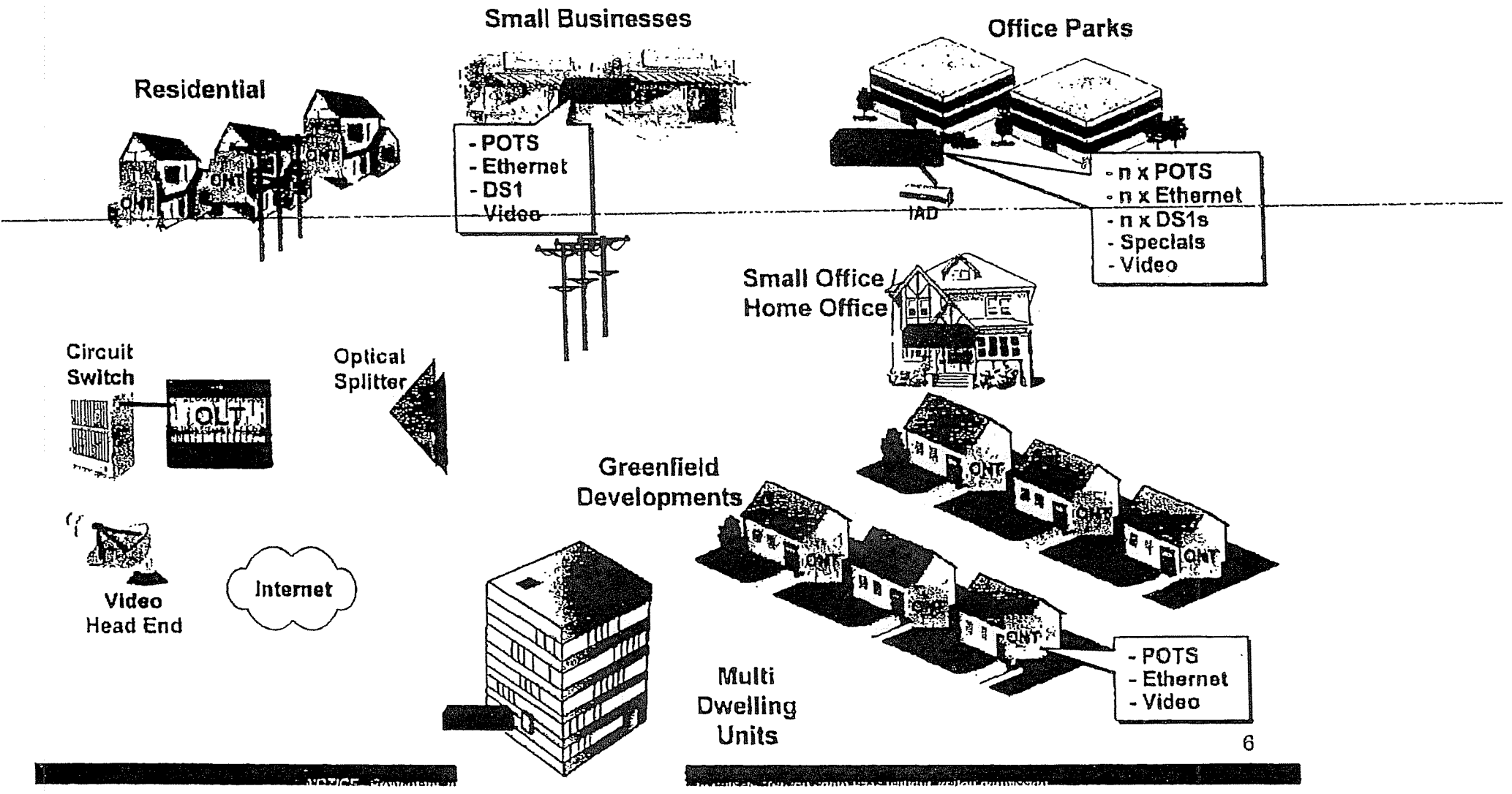
Voice (Local & LD)
High Speed Internet
Cable 860 Mhz dedicated bandwidth
Future Integrated & Interactive Applications

FTTP is a quantum leap above existing copper and cable networks - the bandwidth provided allows for the first time extensive high-definition video, and enables a whole new era in communications

FTTP Architecture for Homes & Businesses

verizon

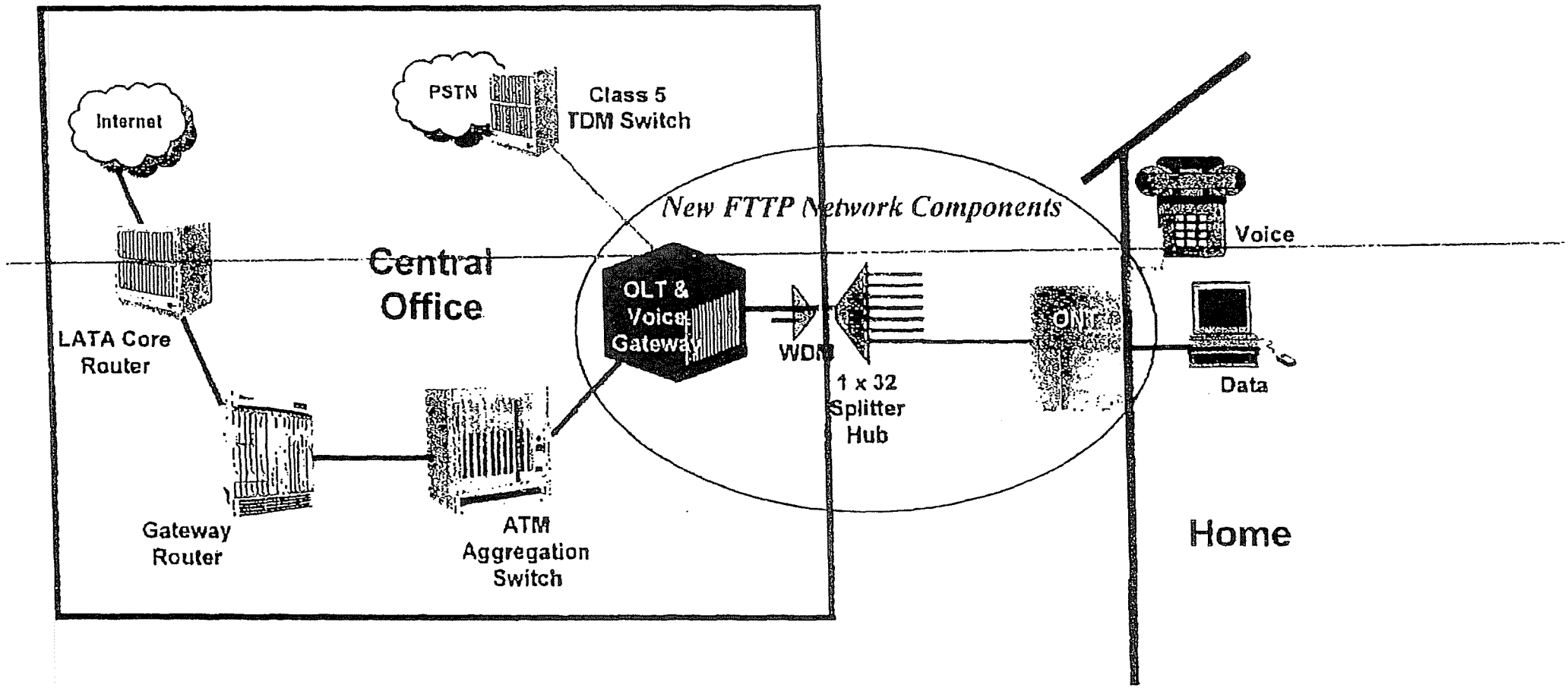
Fiber to the Premises



FTTP Reference Architecture

verizon

Fiber to the Premises

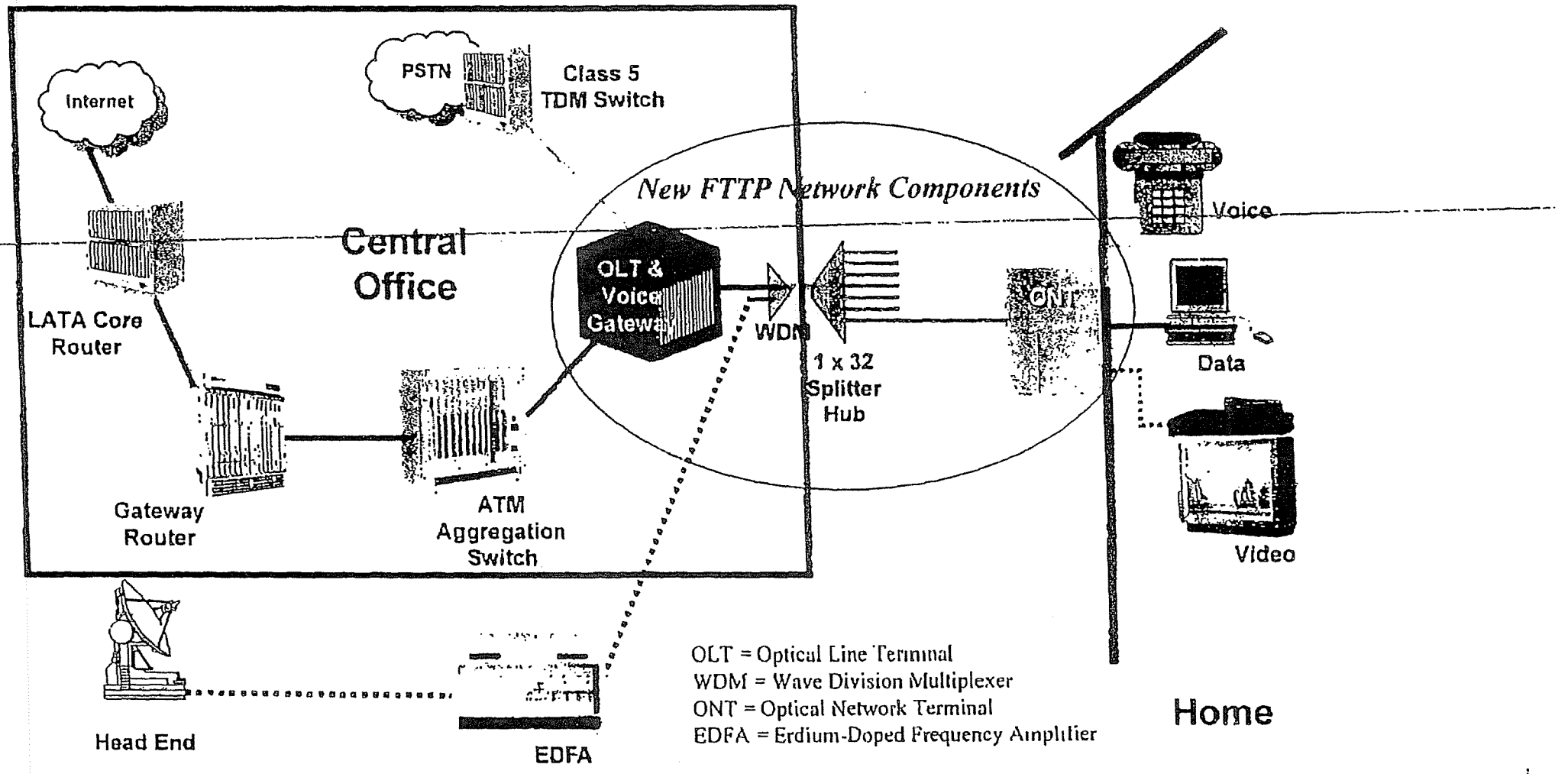


OLT = Optical Line Terminal
WDM = Wave Division Multiplexer
ONT = Optical Network Terminal

FTTP Reference Architecture

verizon

Fiber to the Premises



OLT = Optical Line Terminal
WDM = Wave Division Multiplexer
ONT = Optical Network Terminal
EDFA = Erdium-Doped Frequency Amplifier

Verizon Video Offering

Fiber to the Premises

verizon

Fiber network and 860MHz dedicated bandwidth will allow VZ to provide a first-rate channel line-up

- Programming will exceed current offerings of cable and satellite providers
- Initial offering anticipated to include over 100 channels in excess of the existing provider
- Project approximately 400 channels, including:
  - analog channels which will be dual carried on digital
  - > 300 digital channels
  - 20 HDTV channels
  - 45 digital Music channels
  - Cutting edge IPG (Interactive Program Guide)

FTTP Customer Experience

Fiber to the Premises

verizon

For our customers, FTTP means a new network, new products, new systems and processes and a new customer experience...

- One Company, One Bill
- Proven reputation for service to our customers
- Quality service provided over an all fiber network
- Competitive choice in cable service
- Premium channel line
- Cutting edge technology and potential for new services

Execution and delivery that upholds the promise of next-generation technology

NOTICE: Privileged and Confidential. Not to be distributed or reproduced without the express consent of Verizon.

FTTP Benefits

verizon

Fiber to the Premises

Benefits to the Nassau County Communities....

- Next generation technology for the residents and businesses
- Ability to attract and retain new businesses and skilled jobs
- Natural by-products of competition for cable subscribers:
  - More Services
  - Competitive Rates
  - Improved customer service to residents (fewer complaints)
- Additional franchise fee revenue from new subscribers and increased purchases in higher tiers

Next Steps

Fiber to the Premises

verizon

To expedite the rollout of cable service, Nassau Communities and VZ need to cooperate to fast track the cable franchising process

- Meeting with local town officials
- Public Service Commission Expedite Process (Waiver)
- Prepare negotiations schedule

Verizon Fios℠ Product Offering

Fiber to the Premises

verizon

Verizon's new suite of fiber-optic services over FTTP will be called Verizon Fios℠ (FYE-ose)

Verizon will offer superior broadband speeds at very competitive prices along with existing wireline and wireless, local and long distance telephony services and, in some areas, new video services –

A new "Grand Slam" suite of products and services for Verizon customers

Pricing for the Fios broadband service will be:

- **5 Mbps/2 Mbps - $34.95 a month as part of a calling package, or $39.95 a month stand alone**
- **15 Mbps/2 Mbps - $44.95 a month as part of a calling package, or $49.95 a month stand-alone**
- **30 Mbps/5 Mbps at pricing to be announced later**

Website:

http://www22.verizon.com/FiosForHome/channels/Fios/HighSpeedInternetForHome.asp?promotion_code=&variant=

Bringing the 21st Century to the Communities of Nassau County

Certificate of Service

I hereby certify that I have caused to be mailed this 6th day of May, 2005, copies of the foregoing Comments In Support of Petition of Town of Babylon, by first-class mail, postage prepaid, to the following persons:

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Washington, D.C.
May 6, 2005

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EXHIBIT B

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 15, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 05-M-0250 - Joint Petition of the Town of Babylon, the Cable Telecommunications Association of New York, Inc. and CSC Holdings, Inc. for a Declaratory Ruling Concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc.

CASE 05-M-0247 - Petition of the City of Yonkers for a Declaratory Ruling Concerning the Installation by Verizon New York Inc. of a Fiber to the Premises Network.

DECLARATORY RULING ON VERIZON COMMUNICATIONS, INC.'S BUILD-OUT OF ITS FIBER TO THE PREMISES NETWORK

(Issued and Effective June 15, 2005)

BY THE COMMISSION:

INTRODUCTION

On March 2, 2005, the Town of Babylon, the Cable Telecommunications Association of New York, Inc. (CTANY) and CSC Holdings, Inc. (Cablevision)(collectively the Petitioners) filed a Request for a Declaratory Ruling (Joint Petition) alleging that: (1) Verizon New York Inc.'s (Verizon) construction of its fiber to the premises (FTTP) network constitutes a "cable television system" under the New York State Public Service Law (PSL) and (2) that Verizon has not obtained the necessary cable

franchises required by Article 11 (applicable to cable television companies) of the PSL (Article 11), and has, therefore, violated various statutes, rules and Commission policies.

Specifically, the Petitioners request that we: (1) declare that state law requires Verizon to obtain cable franchises prior to the construction of its FTTP network in each municipality in which Verizon seeks to provide service, (2) order Verizon to show cause why such construction activity should not be suspended until this issue is resolved, and (3) take any further action necessary to mitigate the effects on local municipalities where Verizon has deployed its FTTP network.[1]

Prior to the filing of the Joint Petition, on February 24, 2005, the City of Yonkers filed a Letter Petition (Yonkers Petition) with the Commission requesting similar declaratory relief with regard to Verizon's FTTP build-out. The City of Yonkers argues that in its view such a network constitutes a cable television system under New York law, thus, requiring Verizon to obtain a cable franchise before it commences construction.

On April 1, 2005, the Town of Eastchester (Eastchester) filed a separate Petition for Declaratory Ruling with the Commission concerning Verizon's alleged unfranchised construction activities. Eastchester asserts that Verizon's FTTP build-out meets the definition of a cable television system under state law, and is, therefore, required to obtain a cable franchise before commencing construction. Eastchester raises concerns over right-of-way disturbances, its ability to comment

[1] Joint Petition at p. 31.

on and approve the design of Verizon's network, and redlining.[2] In addition, on May 10, 2005 and May 25, 2005, respectively, the Village of Tuckahoe (Tuckahoe) and the Town of Poughkeepsie (Poughkeepsie) filed their own Petitions seeking similar declaratory relief.[3]

Verizon filed its Brief in Opposition (Opposition Brief) to the various petitions on March 24, 2005. In addition, Petitioners filed a Reply Brief on April 4, 2005 and Verizon filed a Supplemental Brief in Opposition (Supplemental Brief) on April 11, 2005.[4] A summary of these pleadings is provided below.

The issues presented here are ones of first impression. While Verizon may not construct or operate a stand-alone cable television system without first obtaining the necessary cable franchises, this case involves the application of the PSL insofar as when cable authorization is required for upgrading a pre-existing network that can ultimately provide multiple services, including cable. In making our decision, we recognize that it is in the public interest to encourage the deployment of Verizon's FTTP network, but at the same time are cognizant of the concerns of local municipalities and their authority to manage their rights-of-way and negotiate cable franchises.

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[2] Redlining is the practice of providing service to high income areas while avoiding low income areas.

[3] While these petitions were assigned different case numbers by the Commission, because the issues raised therein are identical to the issues raised by the Joint Petition and the Yonkers Petition, this ruling will resolve these petitions as well.

[4] The Reply Brief and Supplemental Brief are accepted by the Commission in the absence of any clear authority to file, in order to achieve a fully-informed record on which to base our decision.

Based on our review of the record and the numerous comments and letters received to date, we find that Verizon FTTP network is not subject to the laws and rules of Article 11 at this time. However, we conclude that Verizon must first obtain cable franchises from affected municipalities if it installs plant in its network that is to be used exclusively for cable service or seeks to offer broadcast programming.

In sum, we declare that Verizon's FTTP upgrade is authorized under its existing state telephone rights because the upgrade furthers the deployment of telecommunications and broadband services, and is consistent with state and federal law and in the public interest. In contrast to a company seeking to build an unfranchised cable television system, Verizon already has the necessary authority to use the rights-of-way to provide telecommunications service over its existing network, and should, therefore, not be required to seek additional authority to enhance its offerings related to that specific service.[5]

We do, however, caution Verizon to adhere to all applicable local rights-of-way management requirements with regard to public safety, aesthetics, pole attachments and other

[5] There is no state or federal requirement to obtain a separate franchise to deploy broadband over a telecommunications system.

legitimate municipal concerns.[6] Notwithstanding Verizon's authority under its state telephone rights, deployment of its FTTP network is subject to municipal oversight and supervision. We fully expect Verizon to cooperate with those affected municipalities.[7]

BACKGROUND

Verizon's Upgrade

The upgrade at issue here consists of a fiber optic-based network that will be capable of deploying telephone, broadband and cable services. While fiber optics has been deployed ubiquitously for long distance and inter-city communications, Verizon's FTTP network is among the first to begin deploying directly to local homes and businesses. Verizon's network should enhance its ability to offer reliable services in wet weather, which, historically, has hampered the reliability and service quality of its copper network. The

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[6] The Joint Petition cites examples of alleged violations by Verizon of certain safety standards. Specifically, requirements with respect to spacing of attachments on poles and weight limitations. We expect Verizon to follow and adhere to industry standards and code requirements. These standards include certain minimum spacing requirements from other attachments unless the other carrier consents. Having said that, we agree with Verizon that this proceeding is not the proper forum to review specific allegations of pole attachment irregularities and we understand that Verizon and Cablevision have been reviewing these concerns on a business to business basis. At least in the first instance, that is the approach the parties should pursue. To ensure that these issues are timely resolved consistent with the public interest, however, we expect the Department staff to closely monitor this situation and ensure that relevant industry standards and code requirements are properly adhered to.

[7] Our understanding is that a number of municipalities have issued formal and informal directives to Verizon regarding its activities in the rights-of-way and that Verizon has been responsive to those concerns.

upgrade is being carried out primarily in parts of Westchester county and Long Island. It is also taking place in parts of Albany and Onondaga counties and other surrounding areas.

Rights-of-way Management

Local governments play a key role in overseeing construction within their public rights-of-way, and that role is recognized under both state and federal law.

If the construction consists of a telecommunications network, then pursuant to PSL §99(1), no telephone company "shall begin construction" of its network "without first having obtained the permission and approval of the commission and its certificate of public convenience and necessity **and the required consent of the proper municipal authorities"** (emphasis added). Further, under Transportation Corporations Law (TCL) §27, a company needs municipal "permission to use the streets within such city, village or town…." Although the Commission does not specifically approve telephone franchises pursuant to the PSL, it is our understanding that municipalities have granted consent to Verizon to use the rights-of-way for telecommunications. Finally, §253 of the Federal Telecommunications Act of 1996 (the Act) specifically acknowledges a local government's ability to police its right-of-way.[8] Section 253(c) states that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way …." In this proceeding, Verizon has acknowledged that it is subject to local review for purposes of telecommunications.

Under PSL Article 11, a key requirement for construction or expansion of a cable television system is the local cable franchise. Public Service Law § 219(1) specifically requires that no cable television system may "commence

[8] 47 U.S.C. § 253.

operations or expand the area it serves unless it has been franchised by each municipality in which it proposes to provide or extend service." A franchise shall mean "any authorization granted by a municipality … to construct, operate, maintain, or manage a cable television system…." (PSL §212(3)).

Thus, municipal consent and oversight for construction activities in the public rights-of-way are maintained whether the network is for telephone or cable service.

PLEADINGS AND COMMENTS

On March 2, 2005, the Petitioners filed their Joint Petition. As a factual matter, Petitioners claim that it is undisputed that Verizon is building a FTTP network designed to provide cable service and that it is obtaining cable franchises in other jurisdictions where it is deploying this network.[9] The Petitioners further alleged that this activity is burdening local rights-of-way and Verizon is violating various state and industry pole, safety and zoning requirements.[10]

As a legal matter, Petitioners contend, that the fact that Verizon's system will also be capable of providing telephone and broadband services is not dispositive on the issue of whether Verizon must obtain cable franchises before it constructs this network.[11] Petitioners claim that because Verizon's network meets the definition of a cable television system under the Title VI of the federal Cable Act (Title VI or the federal Cable Act) and Article 11 of the PSL Verizon is required to obtain cable franchises before it commences construction.[12] Petitioners claim that the legislative intent of

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[9] Joint Petition at pp. 10-14.

[10] Id. at pp. 16-17.

[11] Id. at pp. 18-19.

[12] Id.

Title VI makes clear that a system designed to provide cable satisfies the definition of a cable television system.[13] Similarly, under state law, a system designed to provide cable service meets the definition of a cable television system under Article 11 and triggers the cable franchising requirements.[14] Accordingly, the Petitioners urge the Commission to apply an intended use or economic but for test to determine whether Article 11 is invoked.[15]

Finally, if Verizon is allowed to "bypass" state cable requirements, the Petitioners claim that the construction standards and municipal oversight of cable television systems are nullified. Furthermore, Petitioners claim that an exemption from the cable requirements for Verizon results in discrimination against existing incumbent cable providers who have been required to meet and confer with the local franchising authorities (LFAs) prior to commencing construction of a cable television system.[16] Consequently, Petitioners assert that certain cable regulations are rendered meaningless, and Verizon gains an unfair competitive advantage over existing cable providers.[17]

On March 24, 2005, Verizon filed its Opposition Brief. Verizon claims that its FTTP network is not a cable television system as defined under federal and state law.[18] Rather, Verizon asserts that it is conducting a network upgrade to its existing telecommunications system for voice and broadband services.

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[13] Id.

[14] Id. at p. 20.

[15] Id. at pp. 5, 12.

[16] Id. at pp. 21-22, 28.

[17] Id.

[18] Opposition Brief at p. 2.

Verizon argues that it has the requisite authority to conduct this upgrade under its existing state telephone rights.[19] Verizon further claims that while its FTTP network may, at some future point, give it the capability to provide video or cable service, the Article 11 cable franchise rules and regulations do not apply, unless and until the network is actually "used" as a cable television system, which, Verizon submits, at this time it is not.[20] Therefore, Verizon urges this Commission to apply an actual use test in determining whether Article 11 applies.[21]

Specifically, Verizon asserts that under federal law, the relief sought by the Petitioners is preempted because the federal Cable Act exempts common carriers from cable franchising requirements unless and until they begin offering video programming directly to subscribers.[22] According to Verizon, since state and local governments cannot impose franchise related requirements that are inconsistent with Title VI, any such requirements are preempted.[23] Moreover, Verizon contends this interpretation of Title VI is supported by the Federal Communications Commission's (FCC) interpretation of Title VI.[24] However, even if this preemption argument is not controlling, Verizon argues that because its system is not being used to deliver video programming, it is not a cable television system

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[19] Id. Verizon states that the New York TCL, §§26, 27, grants it the right to install, maintain and repair its telephone facilities in public streets.

[20] Opposition Brief at pp. 1-2, 17-18.

[21] Id. at pp. 2-4.

[22] Id. at pp. 5, 7-11.

[23] Id.

[24] Id. at pp. 10-14.

as defined under state law.[25] Therefore, Article 11 does not apply.[26]

Moreover, Verizon submits that the Petitioners' discrimination claims are unfounded.[27] First, Verizon asserts that the cable franchising requirements as they relate to this construction are beyond the limits set by federal and state laws.[28] Second, Verizon objects to the imposition of cable franchising requirements upon its FTTP network until Verizon actually enters head-to-head competition with cable companies, because Verizon is already subject to entirely different regulatory regimes.[29]

Finally, Verizon asserts that issues regarding safety, aesthetics, redlining and other cable franchising concerns do not give rise to the franchising requirements under state and federal laws, and are not within the scope of this proceeding.[30] Verizon suggests that a proceeding seeking a declaratory ruling as to the application of a rule or statute enforceable by this Commission is not the appropriate forum in which to consider factual allegations concerning Verizon's construction activities.[31] Similarly, Verizon suggests that this is not the appropriate proceeding to address allegations concerning terms and conditions of future cable franchises.[32]

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[25] Id. at pp. 15-16.

[26] Id. at pp. 16-17.

[27] Id. at pp. 20-23.

[28] Id. at pp. 20-21.

[29] Id.

[30] Id. at pp. 20-23.

[31] Id.

[32] Id. at pp. 23-24.

On April 4, 2005, the Petitioners filed a Reply Brief to Verizon's Opposition Brief. Petitioners assert that Verizon's statutory construction of state and federal law is misplaced. Specifically, 47 U.S.C. §522(7)(definition of a cable system) explicitly contradicts Verizon's interpretation of the phrase "is used", which has a descriptive role that applies to present, as well as future use of the subject cable system.[33] According to the Petitioners, because Verizon's FTTP network is currently designed to provide cable service and capable of being used as a cable television system in the future, it is a cable television system under federal law.[34] Similarly, Petitioners assert that §212 of the PSL, which defines a cable television system as one that "operates" to provide service and is, therefore, governed by all applicable pre-construction and cable franchising obligations under state law, makes no distinction between current and future use.[35] Finally, Petitioners submit that Verizon's authority to offer telephone service in New York does not override the federal mandate that a provider of cable service be subject to the local franchising requirements including those instances where the system is constructed by a common carrier.[36]

On April 11, 2005, Verizon filed its Supplemental Brief, asserting that Petitioners' arguments on statutory interpretation should be rejected. Verizon states that Petitioners' interpretation of the term "is used" under federal law is inaccurate because Congress clearly distinguished between a facility that "is designed" and one that "is used" to provide

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[33] Reply Brief at pp. 6-10.

[34] Id. at pp 10-11.

[35] Id. at p. 11.

[36] Id. at p. 13.

video programming under 47 U.S.C. §522(7).[37] Further, Verizon asserts that Petitioners' analysis is inconsistent with the FCC's interpretation of the federal Cable Act.[38]

Because the Petitioners sought relief beyond the request for a declaratory ruling, notice of the Petitioners' request for declaratory ruling and additional relief was published on March 8, 2005, pursuant to the State Administrative Procedure Act (SAPA). The following comments were received in response to that SAPA Notice.

Numerous towns, cities and villages submitted letters requesting expedited treatment of this issue and advocating support, in whole or in part, for the Yonkers Petition and the Joint Petition.[39] Because those various letters request similar, if not identical, relief as the Joint Petition and the Yonkers Petition under consideration, we will treat the issues generically herein as opposed to dealing with them on a case-by-case basis.

By letter dated March 23, 2005, Time Warner Cable, Inc. (Time Warner) supports the Petitioners' request that we

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[37] Supplemental Brief at pp. 2-5.

[38] Id.

[39] Those Towns, Villages and Cities are as follows: Villages of Malverne, Spencerport, Hempstead, Westbury, Amityville, Bayville, Mount Kisco, Great Neck Estates, Hewlett Bay Park, Hewlett Neck, North Hills, Oyster Bay Cove, Saddle Rock, Thomaston, Woodsburgh, Rockville Center, Flower Hill, Great Neck, Great Neck Plaza, Kensington, Kings Point, Lake Success, Munsey Park, Plandome, Plandome Heights, Plandome Manor, Southampton, Northport and Russell Gardens, and the Towns of Conesus, LeRoy, Goshen, Henrietta, Liberty, Rosendale, Romulus, Bethel, New Windsor, Blooming Grove, Byron, Hilton Smithtown, Oyster Bay, Mount Kisco, North Salem, Poughkeepsie, and Greenburgh, and the Cities of Rome, Rye and New Rochelle and the Dutchess County Supervisors and Mayors Association.

find that Verizon's activities violate state law and are, therefore prohibited. Further, Time Warner asserts that Verizon should be subject to the same basic regulatory requirements as all cable companies, and warns against redlining by Verizon.

The Association of Towns of the State of New York (the Association) and the Conference of Mayors and Municipal Officials (the Conference) support the various petitions to declare Verizon's construction activities a cable television system thereby invoking the protections afforded under Article 11 and the cable franchising requirements. The thrust of their opposition to Verizon's build-out, and hence their support for the petitions, concerns the municipalities' ability to govern their rights-of-way, including but not limited to proper indemnification and construction safety and ensuring aesthetically compatible infrastructure. Moreover, there is concerned that Verizon may attempt to circumvent the cable franchise regulations when it is ready to offer cable service, specifically, the provisions pertaining to public, educational and government (PEG) access channels, redlining, and franchise fee payments. At that point, the Association and the Conference suggest that Verizon may be unwilling or unable to make the necessary modifications to its FTTP system to accommodate those concerns.

The City of New York Department of Information Technology and Telecommunications (the City), does not take a definitive position regarding Verizon's build-out.[40] Rather, it raises four related concerns. First, the City objects to

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[40] It should be noted that Verizon and the City are involved in litigation concerning Verizon's authority to use its streets and roads; that matter has not been resolved. However, the City has not sought to enjoin Verizon from installing and maintaining certain facilities.

Verizon's argument that federal law is preemptive of state and local franchising rights. The City asserts that pursuant to the City of Dallas[41] case (overturning the FCC's attempt to preempt local franchise authority for Open Video Systems (OVSs)), franchise requirements arise from state and local authority and the federal Cable Act is merely an overlay that establishes an additional franchise requirement.

Second, the City opposes Verizon's assertion that it somehow has the authority to build its FTTP network under §27 of the TCL. The City asserts that §27 merely grants Verizon the right to exist as a corporation, while the privilege to use the streets and roads is a right granted by the municipality. The Commission does not, here, render a determination as to the effect of §27 over Verizon's right to access rights-of-way.

Third, the City asserts that Verizon's FTTP upgrade is conditional on abiding by all applicable local requirements. The Commission agrees with this requirement and that position is reflected herein.

Fourth, the City is concerned that Verizon's large capital expenditure in upgrading its network will somehow place it in a position where it cannot adhere to cable franchise obligations once it becomes necessary to engage in cable franchise negotiations and, therefore, the City calls for the Commission to have Verizon certify that it will be able to support its pre-franchise FTTP investment without affecting its wireline network viability. The City's position speculates that Verizon's adherence to the cable franchise regulations might make its investment untenable and could potentially affect its wireline business. Because safeguards currently exist that

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[41] City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999).

adequately protect the wireline infrastructure, we conclude that additional certification is not warranted at this time.

New York State Assemblymen Brodsky and Rivera and the New York State Assembly Puerto Rican/Hispanic Task Force (the Task Force) assert that the Commission has essentially closed this proceeding to public participation. They urge for hearings to be conducted to further explore Verizon's build-out. Assemblyman Rivera and the Task Force also express concern over potential redlining by Verizon.

The original petitions came in as requests for a declaratory ruling and are subject to the procedural rules governing declaratory rulings (16 NYCRR Part 8). Although declaratory rulings are not subject to SAPA, we nevertheless issued a SAPA because additional relief was requested beyond the request for declaratory ruling, and we received comments from stakeholders, villages, towns and cities totaling over 35 municipalities and municipal representatives encompassing over a million constituents. The comments come from essentially the same areas where Verizon has begun building-out its FTTP network. This broad input demonstrates to us that the Commission's process is robustly open and we, therefore, do not see the need to augment the process further. A determination at this time is also beneficial in that we have received numerous requests from various municipalities that the Commission decide this issue expeditiously.

The Larchmont-Mamaroneck Cable Television Board of Control (the Board) claims, similarly to the City, that despite Verizon's preemption argument, local franchising power is preserved. The Board goes on to assert that pre-construction cable requirements are necessary to allow communities to address such issues as PEG access before construction rather than after. Further, the Board asserts that because the definition of

franchise under Article 11 contemplates that a cable franchise is obtained before construction begins, Verizon should be required to obtain cable franchises. The Board emphasizes that if the Commission allows Verizon to continue its construction activities, the Commission's construction regulations will be a nullity. However, should the Commission declare that Verizon's system is not yet a cable television system, the Board argues in the alternative that Verizon runs the risk of re-building an entirely new network (or making extensive modifications to its FTTP network) prior to obtaining cable franchises because municipalities may require specific changes before they enter into a cable franchise agreement.

The Board further asserts that Verizon's pre-construction franchising requirements will not be unnecessarily delayed because Verizon can avail itself of the 30-day franchising process where a second entrant agrees to the same terms and conditions of the incumbent operator under the Commission's new cable regulations.[42] This argument does not directly bear upon the interpretive question presented.

Lastly, the Board argues that because state law does not specifically preclude localities from requiring franchises prior to construction, the Commission should declare that it is up to the respective municipalities as to when to exercise that requirement.

Finally, under the veil of the SAPA notice, on May 9, 2005, the Petitioners[43] seek to supplement the underlying record with a factual allegation regarding Verizon's deployment plan and request an evidentiary hearing to explore Verizon's

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[42] NYCRR § 894.7(e).

[43] The May 9 letter indicates that it is being submitted by Cablevision and CTANY only and, therefore, it does not appear that the Town of Babylon joins in this request.

characterization of its FTTP build-out. On May 12, 2005, Verizon objected to this filing as an abuse of the Commission's rules. On a substantive basis, Verizon further contends that no factual issues exist, that warrant further Commission review.

DISCUSSION

The threshold question here is whether Verizon's upgrade converts its telecommunications system into a "cable television system" as defined under § 212(2) of the PSL. If it does, then Verizon is subject to the applicable laws, rules and regulations established under Article 11, including the requirement to obtain a cable franchise before the construction and operation of a cable television system commences. If it does not, then Article 11 is not triggered, unless and until Verizon's activities constitute a cable television system.

The Petitioners urge us to apply an intended use or economic "but for" test to Verizon's FTTP network.[44] In other words, but for the intended use or economic benefits of a FTTP network to provide cable service, Verizon would not build it. Therefore, Petitioners claim that we should declare Verizon's network a cable television system and require it to obtain the necessary cable franchises prior to construction.

Conversely, Verizon urges the Commission to apply an actual use test.[45] Verizon contends that merely because the upgraded system will be capable of deploying cable service, Article 11 does not attach until the network is actually used to provide cable. Verizon submits that it is already subject to the panoply of local, state and federal laws and regulations in its capacity as a telecommunications provider and, therefore, it

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[44] Joint Petition at pp. 5, 12.

[45] Opposition Brief at pp. 2, 4, 13.

makes no sense to add an additional layer of franchising as a precondition to its build-out of its FTTP network.[46]

We decline to adopt either test. Based on our review of the PSL and the federal Cable Act, we conclude that because Verizon's construction activities enhance and improve its voice and data offerings, a separate cable franchise is not mandated. However, before Verizon offers for hire broadcast programming or installs plant exclusively for a cable television system, it must comply with Article 11 including the requirement of obtaining cable franchises. This finding applies the PSL in a manner that balances the state's interest in ensuring that local governments have the ability to manage their rights-of-way and negotiate cable franchises with the goal of promoting the deployment of advanced technologies, and is consistent with federal law.

Public Service Law

The Petitioners claim that Verizon's FTTP network is a cable television system under state law because it will be capable of providing a multi-channel video programming delivery system.[47] Petitioners further claim that because Verizon is an entity owning and controlling this system, it is also a cable television company as defined under state law.[48] Therefore, Petitioners submit that Verizon is required to obtain the necessary cable franchises prior to commencing construction of this network.

Verizon explains that its FTTP network will be capable of providing telecommunications and broadband services and

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[46] Id. at p. 18.

[47] Joint Petition at p. 18.

[48] Id.

acknowledges that it may be used to provide video.[49] However, Verizon maintains that its network will only be used to deliver voice and broadband services at this time.[50] When, and if, Verizon seeks to use the network to provide video programming, it is committed to obtaining the necessary municipal and state approvals under Article 11.[51] Thus, because it is not currently "using" its network to "transmi[t] video programming directly to subscribers" (and it will not do so until it obtains the requisite municipal and state approvals), its current activities do not constitute the operation of a cable television system.[52]

The PSL does not precisely mandate when a cable franchise is required for upgrades to an existing network that can deploy multiple services. A cable television system is defined as a system that "operates … the service of receiving and amplifying programs…" (PSL § 212(2)). PSL § 219(1) states in pertinent part that "…no cable television system … **may commence operations** or expand the area it serves unless it has been franchised by each municipality in which it proposes to provide or extend service (emphasis added)." Article 11 of the PSL applies to "every cable television system and every cable television company including a cable television company which constructs, operates and maintains a cable television system in whole or in part through the facilities of a person franchised to offer a common or contract carrier service." (PSL § 213(1)).

Verizon argues that because its system does not currently receive and amplify programming it does not satisfy

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[49] Opposition Brief at pp. 2, 16; Supplemental Brief at p. 1.

[50] Id.

[51] Opposition Brief at pp. 2, 24.

[52] Id. at pp. 2, 16.

the definition of a cable television system.[53] Further, it is not using its system for the delivery of cable. Petitioners claim that these arguments are "clever wordsmithing" and Verizon should be required to obtain cable franchises consistent with Article 11.[54]

In the past, we have interpreted Article 11 to require municipal and state approvals of a cable franchise for a company constructing or extending a cable television system.[55] Those cases involved the construction or extension of a system that was used exclusively to deploy cable service. In those cases, obtaining a cable franchise was essential to ensuring local authorization to use the various rights-of-way. Article 11 does not, however, provide the exclusive means by which construction can take place for a system that is capable of providing multiple services, including cable. Indeed, we have never considered whether prior approval of a cable franchise is required for the upgrade of a pre-existing network capable of deploying multiple services. Moreover, Article 11 does not specifically mandate that a cable franchise must be obtained for the construction at issue here.

Verizon has already obtained the legal right to use the rights-of-way to upgrade and maintain its existing telephone system. Verizon has maintained its telecommunications network

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[53] Id. For similar reasons, Verizon states it is not yet a cable television company pursuant to PSL §212(2) because it does not yet own, control, operate, manage or lease a cable television system.

[54] Joint Petition at p. 5.

[55] *See e.g.;* Case 97-V-0122 - Application of Castle Cable TV, Inc. for Approval of a Certificate of Confirmation for a Cable Television Franchise for the Town of Theresa (Jefferson County), Order Granting Certificate of Confirmation (issued June 2, 1997).

for years under its existing authorizations and consents. The record here suggests that Verizon has the requisite authority from local governments to use the public rights-of-way and that municipalities have sufficient legal authority over Verizon's upgrade activities as a telephone company to properly manage their rights-of-way. Verizon has represented in its pleadings that it is subject to local oversight. Municipal governance over rights-of-way is still in effect and Verizon must adhere to those requirements.

Accordingly, to the extent the network upgrade to further Verizon's telecommunication service is consistent with pre-existing rights-of-way authorizations, and inasmuch as Verizon's activities are subject to municipal oversight and do not involve plant used exclusively for cable nor do they involve the offering of broadcast programming for hire, we do not construe Article 11 as mandating that Verizon must first obtain cable franchises to construct its FTTP network. Thus, we conclude that Verizon does not need to obtain a cable franchise at this time. However, should Verizon seek to install plant in its network that can only be used exclusively for cable or offer for hire broadcast programming, we conclude that Verizon's network would then constitute a cable television system requiring cable franchises prior to any further build-out.[56]

Federal Law

The Petitioners claim that Verizon's FTTP network should be considered a cable television system under federal law because Verizon's network will consist of a set of closed transmission paths and other specific architecture that meet the

[56] Verizon indicates in its Brief in Opposition that its FTTP network will "require the installation of significant additional equipment before it could be considered "video-capable."" See p. 14, fn. 33.

definition of a cable system under 47 U.S.C. §522(7).[57] The Petitioners argue that notwithstanding the fact that Verizon's network can be used to deploy data and telephone, because it is designed to deploy cable, Title VI applies. Petitioners further argue that Verizon's interpretation of federal law - that a system such as Verizon's is not a cable system until it is actually used as one - is misleading because federal law clearly mandates that a system designed to provide cable falls under the ambit of Title VI, as opposed to one that is actually used to provide cable.[58]

Under federal law, a cable system is defined as a "facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that **is designed** to provide cable service … but … does not include … a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility **is used** in the transmission of video programming directly to subscribers…."(47 U.S.C. § 522(7)) (emphasis added).

Petitioners claim in their Reply Brief that the distinction in the phrases "is used" and "is designed" in §522(7) was meant to make clear that a common carrier's network does not become a cable system simply because its facilities are used to transport video programming on behalf of a third party. Petitioners suggest that Congress reaffirmed this intent under §571(a)(2) which states that "[t]o the extent that a common carrier is providing transmission of video programming on a

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[57] Joint Petition at pp. 18-19.

[58] Reply Brief at pp. 2-4.

common carrier basis, such carrier shall be subject to the requirements of subchapter II …. This paragraph shall not affect the treatment under section 522(7)(C) of this Title of a facility of a common carrier as a cable system." By contrast, the Petitioners argue that a telephone company that designs and constructs facilities to provide video programming to subscribers directly, owns and operates a cable system as defined under federal law.

Verizon counters that its FTTP network is not a cable television system under federal law. Pursuant to the various definitions of cable service, cable system, and cable operator under Title VI, Verizon argues that its network does not fall under the scope of Title VI unless and until its network is actually "used" to deploy cable service.[59] Until that time, the cable franchising requirements of Title VI do not attach.[60] Further, Verizon submits that Petitioners' interpretation of Title VI, and more precisely §522(7), is misplaced because Congress' deliberate choice of the words "is designed" rather than "is used" makes it clear that the main clause of that section refers to the characteristics and capabilities of the system, not the manner in which the system is employed at a particular time.

Moreover, Verizon claims that the Petitioners' arguments are inconsistent with the FCC's interpretation of Title VI. Specifically, Verizon asserts that the FCC's analysis in its Telephone Company-Cable Television Cross-Ownership

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[59] Opposition Brief at pp. 7-9.

[60] Id.

proceeding[61] makes clear that mere ownership of a video capable network is not sufficient to trigger the cable franchising requirements unless the network is also being used by the network owner to provide video programming directly to subscribers.[62] Finally, Verizon maintains that the relief sought by Petitioners is preempted by federal law which specifically exempts common carriers from cable franchising requirements unless and until they begin offering video programming directly to subscribers.[63]

We agree with Verizon that Congress' choice of words in §522(7) is dispositive. The phrase "is designed" versus "is used" demonstrates to us a clear intent to distinguish a hybrid system from one that is constructed exclusively to provide cable. We do not agree with Petitioners that Congress intended these phrases to carry the same meaning in the statute.

Petitioners' argument that distinctions between design and use in §522(7)(C) merely exempt common carriage of video traffic is unavailing. The common carriage of video programming is specifically addressed in §571(a)(2), where the law clarifies that third-party use and provision of video over common carriage is subject to Title II. This exception is expressly different than the carve-out recognized in §522(7)(C) which addresses the issue here: when Verizon's system is considered a cable television system.

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[61] Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.5-63.58, CC Docket No. 87-266, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, 7 FCC Rcd 300 (1991); *id*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069 (1992).

[62] Opposition Brief at p. 14.

[63] Id. at pp. 5-6.

Like New York law, Title VI does not specifically mandate that a cable franchise must be obtained before a common carrier upgrades its common carrier network to a hybrid system that includes the ability to provide cable. 47 U.S.C. §541(b)(1) states that "a cable operator may not provide cable service without a franchise." There is no guidance as to when the cable franchising obligations of Title VI are triggered. Accordingly, we believe our interpretation here is consistent with federal law.

However, we are unwilling to accept completely Verizon's position. Verizon argues that federal law contemplates that Title VI does not attach until it actually uses its FTTP network to deliver cable service. We disagree. Our conclusion requires that cable franchises must be obtained before any plant that is used exclusively to provide cable is installed, because such plant would not be subject to the common carrier requirements and the exception in §522(7) would not apply. Thus, our conclusion is consistent with federal law.

Discrimination and Rights-of-way Management

Petitioners claim that Verizon's build-out is discriminatory and affects local rights-of-way management.[64] Specifically, Petitioners assert that, if Verizon is not required to obtain cable franchises, the affected municipalities are deprived of their rights to analyze and approve the construction of the proposed cable system and prepare the necessary environmental reviews. Moreover, Petitioners claim that not requiring cable franchises in these circumstances limits the management and oversight of municipal rights-of-way. Ultimately, Petitioners assert that not requiring cable franchises gives Verizon an unfair advantage over incumbent

[64] Joint Petition at p. 25.

cable providers by not holding Verizon to the same set of regulations and standards.[65]

Verizon responds that neither federal nor state law was intended to impose an added layer of franchising on a company that already has a franchise to conduct certain activities in which it is lawfully engaged.[66] Verizon further submits that the pre-construction and construction regulations of Article 11 are not rendered "meaningless." Rather, they apply in certain circumstances: "where a new network is being constructed solely for the purpose of offering video programming directly to subscribers; and not in others - *not* where a pre-existing network subject in whole or in part to common carriage regulation subsequently is enhanced for the provision of video programming."[67]

Verizon further suggests that the issues raised by the Joint Petition regarding safety violations are not properly the subject of this declaratory review.[68] Finally, Verizon asserts that Petitioners' discrimination claim is unfounded. Verizon states that the law actually supports fair competition by forbearing from imposing cable regulations upon a telephone company before it actually competes head-to-head with incumbent cable companies.[69]

Our conclusion does not undermine Article 11. Verizon's network upgrade is authorized under its existing statewide telephone rights. Moreover, if Verizon offers cable service or installs plant in its network that can only be used

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[65] Id. at pp. 25-27.

[66] Opposition Brief at pp. 18-19.

[67] Id. at p. 20.

[68] Id. at p. 22.

[69] Id. at p. 20.

exclusively for a cable television system, then Verizon is required to obtain cable franchises. This includes adherence to all of the attendant rules and regulations established under Article 11. Thus, the municipalities are not deprived of their rights under state law. Our rules remain in effect and Verizon remains subject to Article 11. Finally, we agree with Verizon that this is not the appropriate forum to raise factual issues concerning Verizon's alleged pole safety issues.[70]

For these reasons, we also conclude that there is no discriminatory effect. If Verizon opts to construct a cable television system, it will be required to adhere to the applicable rules and regulations that incumbent providers are subject to. Further, Verizon is required to obtain all necessary permits and adhere to all relevant ordinances while working in the respective rights-of-way. The key practical effect of our conclusion is that Verizon need not obtain cable franchises under these narrow circumstances, until it seeks to install cable specific plant or offer cable service directly to subscribers.

Having addressed the issues presented in the Joint Petition and various other petitions, we now turn to the comments received pursuant to our SAPA notice summarized above.

While the City objects, *infra*, to Verizon's characterization that federal law preempts local franchising rights, our decision here does not rest on any federal preemption. The City of Dallas case cited by the City dealt with a very narrow FCC ruling seeking to explicitly preempt local franchising requirements over OVSs, whereas here, the Commission recognizes a municipality's right to govern its streets and roads as it relates to cable television systems. We

[70] See *infra* fn. 6.

declare that the cable franchising obligations are not triggered, however, until Verizon installs cable exclusive plant or offers cable for hire to the public. Thus, local franchising rights are not revoked.[71]

While the Board argues, *infra*, that state law does not preclude localities from requiring cable franchises prior to construction, in casting the scope of the cable franchising requirement under the PSL, our ruling balances the state's interest in ensuring that local governments have the ability to manage their rights-of-way, while promoting the deployment of advanced technologies. We believe our findings here best accomplishes this balance. The Commission is not preventing the localities from exercising their franchise rights; it merely is declaring that the Article 11 cable franchising requirements are not invoked at this particular time.

Finally, the Petitioners' attempt to supplement the record with a request for an evidentiary hearing is misplaced.[72] As a matter of procedure, the Petitioners' attempt to use SAPA to supplement their Request for a Declaratory Ruling is inappropriate. Moreover, the Commission is acting well within its discretion to base its ruling upon the assumed set of facts in the Joint Petition.[73] However, even if that were not the case, and the Commission considered the Petitioners' request on the merits, it would not change the underlying determination herein which is based on legal conclusions regarding the application of Article 11 and when it is applied to the type of

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[71] Time Warner supplemented its earlier letter comments and essentially echoed the City's position regarding Verizon's preemption argument.

[72] See *infra*, p. 16.

[73] See Power Authority of the State of New York v. NYDEC, 58 NY2d 427 (1983).

network Verizon is deploying. The issues raised by the Petitioners at this late stage are more appropriately dealt with once the legal findings are made. However, it is certainly not clear from the affidavit submitted in support of the Petitioners' request that there is any merit to the allegations that would warrant further review.

CONCLUSION

Based upon the foregoing, the Joint Petition, the Yonkers Petition and related Petitions are denied, consistent with the discussion above. We clarify that Verizon must first obtain cable franchises from affected municipalities before it offers cable service or installs plant in its FTTP network that can only be used exclusively for a cable television system. Further, because the network upgrades can introduce significant construction activities in certain localities, we expect Verizon to work cooperatively with municipalities to ensure that local officials are timely informed of construction plans so that local officials are able to effectively manage their respective rights-of-way. Finally, where Verizon has plans to eventually use its network to provide cable service, we strongly urge Verizon to work with local officials to understand their needs so that they can be engineered and met efficiently.

The Commission Finds and Declares:

1. The relief requested in the Joint Petition for Declaratory Ruling and the Yonkers Petition for Declaratory Ruling is denied consistent with this ruling.

2. Verizon New York Inc. is required to obtain municipal cable franchises in affected areas prior to installing plant used exclusively for a cable television system or prior to offering broadcast programming.

3. These proceedings are closed.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

EXHIBIT C

OFFICE OF
KENNETH M. BIALO
MAYOR

VILLAGE OF LARCHMONT
MUNICIPAL BUILDING
LARCHMONT, N.Y. 10538
TEL.: (914) 834-6230
FAX: (914) 833-2170

October 14, 2004

BY FACSIMILE AND U.S. MAIL

Mr. Ivan Seidenberg,
Chairman and Chief Executive Officer,
Verizon Communications, Inc.,
1095 Avenue of the Americas,
New York, New York 10036.

Dear Mr. Seidenberg:

Based on statements made by Verizon personnel working in our Village, it has come to our attention that Verizon is constructing facilities in our rights of way that fit the definition of a cable system under federal law and also fit the definition of a cable television system under New York State law.

Verizon will need a franchise from us before it can use and occupy our rights of way to construct such a system.

A franchise is critical now because we are entitled to establish appropriate facilities and equipment requirements, including institutional network requirements, and requirements related to PEG access, among other reasons. Based on initial work in a community needs and interests assessment, currently underway, our Village has various requirements in this regard, including immediate needs for multiple connections between program origination points and operator control facilities. If Verizon were to build now but wait until later to negotiate a franchise, that might make it difficult to obtain such facilities in a timely manner, or require Verizon to incur additional costs that could be avoided, or impose burdens on the public and public property that should be avoided. By way of precedent, Cablevision's predecessor obtained its franchise prior to constructing its cable system.

If Verizon declines to seek and obtain a franchise immediately, we may well refuse to grant a request for a franchise later, on that ground alone. And of course, we would remain free to take other actions against Verizon.

RECYCLED PAPER

In a nutshell, we would welcome a competitive cable system in our market, but the appropriate procedures for obtaining a franchise must be followed. We would be happy to meet with Verizon to discuss a franchise agreement, the characteristics of the system Verizon is building, and the process for obtaining a franchise for the Village of Larchmont.

Please provide a prompt response to this letter.

Very truly yours,

Kenneth M. Bialo
Mayor

cc: William M. Flynn, Chair, NYSPSC - U.S. Mail only
Mr. Joseph DeMauro, Verizon - U.S. Mail only
Mr. John Butler, Verizon - U.S. Mail only
Village Board of Trustees
Village Attorney James Staudt
Joseph Van Eaton, Esq.

EXHIBIT D

10/15/04 cc. TA. MAD CO G TB

William J. Balcerski
Senior Counsel

verizon

Room 3805
1095 Avenue of the Americas
New York, NY 10036

Phone 212 395-8148
Fax 212 840-1110
William.J.Balcerski@Verizon.com

October 7, 2004

Valerie Moore O'Keeffe, Supervisor
Town of Mamaroneck
740 West Boston Post Road
Mamaroneck, New York 10543

Re: Verizon Utility Boxes

Dear Ms. O'Keeffe:

This is in response to your October 1 and 4 letters to Mr. Butler and Mr. Seidenberg regarding Verizon's installation of utility boxes in the Town.

Verizon is in the process of upgrading its telecommunications network in the Town in order to provide enhanced voice and broadband services to our customers which require the installation of these utility boxes. The new technology that we are installing will have many benefits for the residents and business of the Town. While much of our deployment work will be transparent to your residents, there will be a short period of increased activity over the next few months.

Verizon is sensitive to the fact that the Town may have legitimate concerns about our work, including the aesthetics and safety of the utility boxes that are being deployed. We will work closely with the Town to mitigate any such concerns to the fullest extent possible. The Town should contact John Butler (914-686-2701) to discuss its concerns in greater detail.

While Verizon will make every effort to work with the Town to address safety and aesthetic concerns, and provide the Town with advance notice of our deployment plans, the Town does not have the authority to prohibit Verizon from placing telecommunications facilities in the public rights of way. Verizon's right to install its utility boxes and other facilities in the Town's streets derives from Section 27 of the New York Transportation Corporations Law. The law grants Verizon the right to place its facilities upon, over or under any public streets within the State of New York (Section 27 grants "an unconditional privilege to install, maintain and repair" telephone lines in public streets).

Federal and state cable franchising requirements apply only to the provision of "cable service" by an entity over a "cable system." Unless and until Verizon provides video programming to multiple subscribers within the Town, it is not providing "cable service" in the Town, its network does not constitute a "cable system," and it need not obtain a cable franchise. However, please be advised that if Verizon decides to act as a cable operator, by providing cable video services to multiple subscribers in the Town, Verizon will apply for and seek to obtain a cable

franchise from the Town before providing such services to customers in the Town. In fact, we will be contacting you shortly to discuss such matters.

Verizon appreciates your willingness to work with us on these issues. We are hopeful that we can achieve a mutually satisfactory resolution.

Very truly yours,

William J Balcerski

EXHIBIT E

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on December 14, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin
Patricia L. Acampora

CASE 05-V-1263 - Petition of Verizon New York Inc. for a Certificate of Confirmation for its Franchise with the Village of Massapequa Park, Nassau County.

ORDER AND CERTIFICATE OF CONFIRMATION

(Issued and Effective December 15, 2005)

BY THE COMMISSION:

BACKGROUND

The above-captioned application was submitted by Verizon New York Inc. (Verizon or franchisee) on October 6, 2005. A copy of same was served on the franchisor, the Village of Massapequa Park (LFA or Village). All local notice requirements were met.

This application is governed by Section 221 of the Public Service Law (PSL), which requires our approval of a Certificate of Confirmation unless we find specific violations of law, Commission regulations, or the public interest. Section 221(4) of the PSL provides that we may approve the application contingent upon compliance with certain standards, terms or conditions set by the Commission determined not to have been met by the applicant, system or franchise as proposed. After reviewing the subject petition, and all the comments, in the context of the applicable statutory and regulatory standards, we have determined to approve the Certificate of Confirmation subject to the

conditions set forth herein. Because this confirmation will promote consumer choice and enhance competition in the cable market, our determination furthers the public interest.

A public notice of Verizon's application for a Certificate of Confirmation from the Commission was published in two newspapers of general circulation in the Village on October 12, 2005 and October 14, 2005, as required pursuant to 16 NYCRR § 897.2(g). Comments were received from Cablevision Systems Long Island Corporation (Cablevision or incumbent) and the Cable Telecommunications Association of New York, Inc. (CTANY) on October 24, 2005. Verizon filed reply comments on November 2, 2005, and Cablevision and CTANY filed additional comments on November 8, 2005.[1]

Cablevision contends that the proposed franchise agreement between Verizon and the Village, as approved by the Village Board, is deficient in numerous respects.[2] Specifically, it claims that the proposed franchise agreement violates the Commission's newly-enacted Level Playing Field rule,[3] fails to comply with several of the Commission's mandatory franchise requirements contained in 16 NYCRR Part 895 (Part 895), misapplies the Commission's June 15, 2005 Declaratory Ruling,[4] and disregards the requirements of SEQRA.

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1 We also received letter comments from several entities and municipalities, filed outside the 10-day comment period, that reiterate arguments outlined in this Order and we will, therefore, not summarize those comments separately.

2 On October 14, 2005, Cablevision filed suit against the Village and Verizon in Nassau County Supreme Court, challenging the Village Board's failure to adhere to the requirements of the Open Meetings Law and Village Code and alleging violations of due process. We will not consider the merits of Cablevision's lawsuit in this Order, as it pertains to issues that fall outside our jurisdiction.

3 16 NYCRR § 895.3.

4 Cases 05-M-0250 and 05-M-0247, Joint Petition of the Town of Babylon, Cable Telecommunications Association of New York, Inc. and CSC Holdings, Inc. for a Declaratory Ruling concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc. (Declaratory Ruling) (issued June 15, 2005).

Accordingly, Cablevision urges the Commission to either: (1) grant a Certificate of Confirmation conditioned upon the removal of provisions deemed unlawful and the insertion of substitute language conforming to the requirements of the Commission's rules;[5] or (2) reject the franchise and remit the matter back to the Village with clear instructions on how to modify the alleged defects.

CTANY echoes many of the comments made by Cablevision, arguing that the proposed franchise agreement is deficient in a variety of respects including adherence to the Level Playing Field rule, universal service and Public, Educational and Government (PEG) obligations, property restoration, facility relocation and customer service requirements. CTANY also argues that Verizon misinterprets and misapplies the Commission's Declaratory Ruling. Accordingly, CTANY requests that Verizon's application for a Certificate of Confirmation be denied and remanded to the Village for further consideration, consistent with the Commission's laws, rules and regulations.

In reply, Verizon asserts that a central goal of both federal and state law is encouraging competitive entry in the video market. Verizon states that it is impossible to conduct a meaningful comparison of the relative economic and regulatory burdens applicable to Verizon and Cablevision and to evaluate Verizon's compliance with New York's regulatory requirements without acknowledging that its fiber to the premises (FTTP) network will continue to be subject to federal and state telecommunication regulation.[6] In light of the distinction in the way Cablevision's and Verizon's networks are regulated, Verizon submits that comparing the respective franchise agreements term for term would result in New York law acting as a barrier to competitive entry. Rather, the comparison has to be made in light of the "totality" of the regulatory environments under

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[5] In this regard, Cablevision asserts that because the process of ensuring a level playing field invokes local considerations, the modification process should require that any revised agreement be presented to the Commission for confirmation in accordance with the Commission's rules and procedures.

[6] Verizon reply at pgs. 10 and 22.

which the companies operate.[7] When considered in that context, Verizon states that Cablevision's claim that an un-level playing field exists, and that Verizon's proposed franchise does not satisfy Commission rules or fully comport with the Declaratory Ruling is false. Verizon further asserts that Cablevision's various SEQRA allegations are without merit. Accordingly, Verizon urges the Commission to reject the comments of Cablevision and CTANY and grant its pending application for a Certificate of Confirmation.[8]

As discussed in detail below, we approve the Certificate of Confirmation but it will be a condition of the Certificate of Confirmation that Verizon's mixed-use facilities used in the deployment of cable television service be subject to regulation under Article 11 of the PSL. Further, it will be a condition of the Certificate of Confirmation that certain provisions contained in the proposed franchise agreement be modified or stricken to satisfy the minimum franchise standards contained in the Commission's rules.

STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)

Under SEQRA (Article 8 of the Environmental Conservation Law) and its implementing regulations (6 NYCRR Part 617 and 16 NYCRR Part 897), all state agencies must determine whether the actions they are requested to approve may have a significant impact on the environment. SEQRA (6 NYCRR § 617.6(a)(3)) requires applicants to submit a completed environmental assessment form (EAF) describing and disclosing the likely impacts of the proposed actions. Verizon submitted an EAF for our review.

We have reviewed Verizon's application for its impact on the environment. We find that the proposed action does not meet the definitions of either a Type I or Type

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[7] Id.

[8] On November 8, 2005, Cablevision and CTANY filed additional comments in response to Verizon's reply comments that essentially take issue with Verizon's holistic approach to the Commission's Level Playing Field rule and application of its franchise standards. These comments also reference previous arguments raised in their initial comments.

II action contained in 6 NYCRR §§ 617.4, 617.5 and 16 NYCRR § 7.2, and, therefore, is an "unlisted" action. We assume "Lead Agency" status and pursuant to an "uncoordinated" review determine that our approval and construction of the proposed cable system will not have a significant impact on the environment.[9]

In determining that the proposed action will not result in any significant adverse environmental impacts, we note that the Commission has previously recognized that Verizon has the independent authority to upgrade its existing telecommunications network with FTTP. We have assessed the environmental impact of our action on the entire franchise area. The action here is limited to the confirmation of a cable franchise which authorizes the construction of equipment used exclusively for cable and the offering for hire of broadcast programming. The offering of broadcast programming may result in an increase in requests for fiber drop wires and limited extensions of the already upgraded FTTP network. This incremental installation activity will be associated with customers that presumably already have service from Verizon. Verizon has represented to staff that 97% of the fiber optic cable is already installed within the Village. Moreover, Verizon has represented that any additional exclusively cable-related equipment necessary to provide cable service will be installed within existing Verizon central offices and that no other purely cable-related equipment need be installed. Further, based upon our review of the EAF, we have determined that the Village does not contain land uses such as agriculture or historic buildings or facilities or structures listed on the National Register of Historic Places that might be adversely impacted by the type of construction proposed. However, should future extensions of the system entail construction in Coastal Zone Management Areas, the franchisee shall seek consultation and/or permitting from the New York State Department of State.

A Notice of Determination of Significance, Negative Declaration, for this unlisted action is approved in conjunction with this Order. The Notice and EAF will be retained in our files. A copy of the Notice is annexed to this Order.

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[9] We note that rule 16 NYCRR § 897.7(a) incorrectly refers to 6 NYCRR § 617.19 the prior subsection for the EAF form, which is now § 617.20.

Finally, the issue of compliance by the Village with SEQRA is not properly before the Commission.

SUMMARY OF COMMENTS

Declaratory Ruling

Cablevision states that the proposed franchise agreement violates the Commission's Declaratory Ruling by insulating Verizon's FTTP network from a cable franchisor's compliance with several Commission cable requirements under Part 895. Cablevision claims that Verizon has "hijacked" the video-only portion of the Declaratory Ruling, which was relevant only in determining what sort of construction and deployment activity would trigger the cable franchising rules under Article 11, and transformed it into a jurisdictional barrier that permanently limits local regulation over mixed-use facilities. Cablevision contends that the intent of the Declaratory Ruling was not to prevent or curtail localities from exercising cable franchising rights over mixed-use facilities but instead, to establish when those rules would be invoked.

In reply, Verizon asserts that Cablevision's suggestion that the proposed franchise agreement contravenes the Commission's Declaratory Ruling by undermining a municipality's authority to govern its rights-of-way is incorrect. Verizon contends that the Commission recognized that Cablevision and Verizon stand on different footing with respect to the sources from which their respective authority to operate in the public rights-of-way derives. Verizon submits that the Commission correctly recognized that a distinction exists between a company that seeks to construct a system designed to deploy cable service exclusively and one that already has the requisite authority to use the public rights-of-way. Accordingly, Verizon argues that the Declaratory Ruling supports the distinctions outlined in Verizon's proposed agreement. However, notwithstanding the distinctions in the cable systems at issue here, Verizon asserts that both companies remain subject to substantially similar local oversight. Verizon goes on to argue, however, that applying cable regulations to facilities used to provide telecommunication services, would

impose redundant, confusing and potentially conflicting requirements and transgress federal law.[10]

Franchise Standards

Cablevision argues that key franchise terms in the proposed agreement fail to meet the minimum cable franchise standards as specified in Part 895 of the Commission's rules. According to Cablevision, adherence to these substantive obligations is nondiscretionary.

First, Cablevision alleges that the proposed franchise agreement incorrectly applies Part 895.1(c) construction standards, which requires that the cable system be constructed and maintained with durable materials and good quality and that the system work be performed in a safe, thorough and reliable manner. The proposed agreement subjects Verizon's Title II[11] (telephone) facilities to only common-law standards governing quality of materials and work safety.[12] Cablevision maintains that compliance with the Commission's rules is not satisfied by shielding certain portions of Verizon's FTTP network from the scope of those rules.

Second, Cablevision argues that universal service obligations set forth in the Verizon franchise agreement are inconsistent with the Commission's rules under Part 895.5, which requires that a cable operator provide service to all residents in a franchise area (other than areas falling below minimum density requirements) within five years. Verizon agrees to provide service to all residents, but subject to certain exceptions.[13] These exceptions to Verizon's build-out requirements include certain buildings and developments to which Verizon is unable to obtain access under "reasonable terms and

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[10] Verizon comments at pgs. 25-26 fn. 57.

[11] Communications Act of 1934 (Title II).

[12] Verizon franchise at § 13.19.3.

[13] Id. at § 3.1.1.

conditions" as well as areas where Verizon cannot provide service for "technical reasons."[14]

Third, Cablevision claims that the Commission's indemnification rules are incorrectly applied in the proposed franchise agreement.[15] The Commission's rules require indemnification for all liability arising from personal injury or property damage occasioned by any conduct undertaken pursuant to the franchise. In Verizon's proposed franchise agreement, Verizon only indemnifies the Village for "negligent" conduct caused by the "cable system," which, as defined by Verizon, excludes plant that is subject to Title II. Moreover, Cablevision alleges that Verizon's indemnification provision is narrower than the scope of the Commission's rule because Verizon's obligation to pay is limited to only "negligent" conduct.

Fourth, under the Commission's rules, 16 NYCRR §§ 895.1(f) and 895.4, a franchise agreement must contain a provision on PEG access, facilities and support. Cablevision claims that the proposed franchise agreement violates our PEG access rules by exempting Verizon from any obligation to provide PEG access facilities, training, support and technical assistance. Specifically, the agreement fails to specify an entity that will operate and administer Verizon's public access channel requirements and does not require Verizon to provide any PEG programming insertion equipment or playback capability. The proposed agreement simply allows Verizon to satisfy its PEG obligations by interconnection with existing operations, which, according to Cablevision is not authorized under the Commission's rules.

Fifth, Cablevision states that under the Commission's rules a provision regarding restoration of Village property must be deemed a part of any franchise agreement.[16] Cablevision claims that the proposed franchise agreement is deficient in this

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[14] Id.

[15] 16 NYCRR § 895.1(i)(1).

[16] 16 NYCRR § 895.1(j).

regard since Verizon's agreement obligates it to only restore property damaged by its "Title II" facilities pursuant to "Village regulation," consistent with New York Transportation Corporation Law (TCL) § 27.[17] This limitation is, according to Cablevision, a violation of the Commission's rules requiring a straightforward commitment to restore municipal property.

Sixth, Cablevision asserts that Commission rules require a provision allowing for inspection of all of the franchisee's pertinent books and records.[18] According to Cablevision, Verizon's agreement violates the rules by limiting the Village's right to inspect records pertaining to its cable service to the extent that it is reasonably necessary to ensure compliance with the franchise. In addition, 30-days notice is required as well as specification of franchise provisions to which the request is relevant. Moreover, Verizon may withhold certain confidential information.[19]

Seventh, Cablevision maintains that Commission rules require a system description of the cable system be a part of the franchise agreement.[20] Cablevision alleges that Verizon's proposed agreement does not include a sufficient system description, including location of all trunk and feeder plant and does not set out stages at six-month intervals of system completion.[21]

Eighth, Cablevision states that Commission rules require that all rates adhere to federal rate regulation.[22] Verizon's proposed agreement purportedly grants it a permanent waiver from federal rate regulation, even though those rules could change

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[17] Verizon franchise at § 13.19.4.

[18] 16 NYCRR § 895.1(m).

[19] Verizon franchise at § 8.1.

[20] 16 NYCRR § 895.1 (b).

[21] Cablevision comments at p. 36.

[22] 16 NYCRR § 895.1(e).

during the term of the franchise agreement.[23] Cablevision asserts that this term violates the Commission's rules on rates.

In reply, Verizon submits that contrary to Cablevision's position, Part 895 does not require strict adherence to every Commission rule. Rather, Commission approval is subject to substantial compliance with Part 895. Based on this standard, Verizon submits that its proposed agreement with the Village complies with the Commission's franchising rules.

First, Verizon states that its agreement is in substantial compliance with Section 895.5(b)(1) of the Commission's rules requiring universal service to all subscribers requesting service in a primary service area. According to Verizon, it will be providing universal service to the Village in compliance with Commission obligations. Moreover, any semantic distinction between the language in the proposed franchise agreement and the Commission's rules is not fatal in placing it outside the scope of being in substantial compliance with those rules.

Second, Verizon asserts that Cablevision's claim that its indemnification provisions are not in accordance with the Commission's rules is not correct. Verizon maintains that nothing in the Commission's rules prevents a franchisee from limiting the scope of the indemnification provision to a cable system as defined under federal law. Expanding the scope of the indemnification would, according to Verizon, improperly extend those obligations to its Title II facilities and services.

Third, Verizon states that Cablevision's contention that the proposed franchise agreement does not comply with the Commission's rules on construction and maintenance standards is without merit. Verizon contends that because its franchise agreement subjects its Title II facilities to the requirements of the Commission's rules and other regulations pertaining to telephone plant, and there is no plant in the right-of-way that is used solely to deliver cable services, the proposed agreement substantially complies with the Commission's rules. The proviso in the proposed agreement regarding

[23] Verizon franchise at § 13.15.

common law identifies the source of the obligation and does not, according to Verizon, limit the scope.

Fourth, according to Verizon, Cablevision's claim that its franchise provisions do not comply with the Commission's PEG access programming provisions is false. In conformance with the Commission's rules, Verizon claims that the proposed agreement states that it shall provide one dedicated Public Access Channel, one dedicated Educational Access Channel and one dedicated Government Access Channel. In addition, the proposed agreement sets forth the manner in which Verizon will seek interconnection to effectuate its PEG obligations. Accordingly, Verizon proffers that it is in substantial compliance with the Commission's rules in this regard.

Fifth, with regard to restoration of municipal property, Verizon asserts that Cablevision's objection to Verizon's limitation of this provision to Title II facilities is misleading. The proposed franchise's reference in § 13.19 to existing telecommunication regulations does not limit in any way the scope of its obligations imposed by § 13.19.4, which require restoration of municipal property. Accordingly, Verizon submits that it is in full compliance with the Commission's rules.

Sixth, Verizon states that Cablevision's assertion that the proposed franchise does not satisfy the Commission's requirement that all franchise agreements include a provision for the inspection of all pertinent books and records is misleading. Verizon argues that the obligations contained in § 8.1 of the proposed agreement are consistent with the Commission's rules requiring inspection of only pertinent books and records and, therefore, no violation exists.

Seventh, Verizon contends that Cablevision's position that the proposed franchise does not include the appropriate construction and design requirement is frivolous. Verizon claims that this requirement presupposes a situation where a cable system is constructed by an entity that can only commence construction pursuant to a cable franchise, whereas here, Verizon is not proposing to construct any such facilities, and, therefore, this rule is inapplicable.

Eighth, Verizon responds that Cablevision's concern regarding rate regulation is misguided. Because the proposed franchise agreement in § 2.5 provides that

the franchise is subject to "all applicable provisions of federal law as it may be amended," Cablevision's position is unsupported.

Level Playing Field

Cablevision argues that the proposed franchise agreement violates the Commission's Level Playing Field rule by failing to ensure that Verizon is subject to economic and regulatory burdens which, when taken as a whole, are equivalent to those imposed on Cablevision under its franchise agreement with the Village. These alleged disparities include myriad differences between the Verizon franchise and the incumbent's franchise.

First, Cablevision asserts that the Village's oversight over Verizon's facilities used to provide cable service is far less burdensome than that of the Cablevision franchise. According to Cablevision, its franchise allows the Village unequivocal oversight over all of the "...tangible physical plant deployed in public rights-of-way that is used in connection with the provision of cable service...."[24] In contrast, Cablevision asserts that the Verizon agreement limits the definition of "cable system" to exclude facilities subject to Title II or used in the deployment of information services. Cablevision argues that these exclusions are contrary to state and federal law. According to Cablevision, a mixed-use facility owned and operated by a common carrier, which is used to provide cable service, should be subject to regulation as a cable system.[25] Moreover, under state law, Article 11 of the PSL applies to "every cable television system and every cable television company including a cable television company which

[24] Cablevision comments at p. 12.

[25] 47 U.S.C. § 602(7)(c).

constructs, operates and maintains a cable television system in whole or in part through the facilities of a person franchised to offer a common or contract carrier service."[26]

Second, Cablevision asserts that the Verizon franchise agreement is silent regarding several obligations that exist in Cablevision's franchise. For instance, Cablevision asserts that Verizon's proposed franchise contains no such provisions regarding restoration of subscriber property, facilities relocation, customer service standards, and adherence to applicable safety codes. Cablevision submits that its franchise contains provisions on all of these requirements.[27]

Third, Cablevision alleges that Verizon's franchise agreement contains a loophole that could exempt it from any franchise obligation that imposes a financial hardship or practical difficulties, whereas Cablevision's franchise contains no such escape clause.[28] Cablevision alleges that § 13.4.1 of the Verizon franchise could excuse non-performance of any obligation in the proposed agreement and effectively eliminates costs and penalties associated with failing to meet obligations required under the franchise.[29] Cablevision, on the other hand, has no similar clause, but, rather, a conventional force majeure clause, which, Cablevision argues, encompasses a far broader range of events that excuse performance under the franchise; thereby giving Verizon more favorable treatment.

Fourth, Cablevision claims that the universal service obligations are not equal in the respective franchise agreements. Cablevision's agreement contains a commitment to universal service to "any and all persons who are owners or tenants of residential property within the Municipality."[30] In contrast, Verizon's franchise states that

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[26] N.Y. Pub. Serv. Law § 213(1) (McKinney's 2000).

[27] Cablevision franchise at §§ 6.3, 6.8, 11.1 and 30.1.

[28] Cablevision comments at p. 25.

[29] Id.

[30] Cablevision franchise at § 15.1.

it need only serve "significant numbers" of subscribers within 12 months of the Commission's approval, and, then, offer service to all residential areas within the next 5 years, subject to certain exceptions.[31] Consequently, Cablevision claims that these exceptions violate both state and federal redlining laws, and create disparities in the respective agreements.[32]

Fifth, Cablevision alleges that Verizon's commitment to PEG access and local origination programming provisions are far less burdensome than those contained in its franchise with the Village. Verizon's franchise offers no commitment to staff and manage a studio or provide Village residents with any means to produce PEG access programming. Under Cablevision's franchise agreement, Cablevision alleges that Village residents are provided with access to PEG studio facilities, production equipment, training and support. Cablevision contends that the absence of any commitment by Verizon to provide PEG access and support for local programming violates competitive neutrality provisions contained in Section 895.3 of the Commission's rules, resulting in an un-level playing field.

Sixth, Cablevision alleges that the triggering of the indemnification clause in the Verizon franchise agreement is tied to a defective definition of "cable system" that excludes network facilities used for telecommunication or information services.[33] No such distinction exists in the Cablevision franchise. Moreover, Cablevision claims that the scope of the Verizon indemnification obligation overall is far narrower than that of Cablevision.[34]

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[31] Verizon franchise at § 3.1.1

[32] 16 NYCRR § 895.5; 47 U.S.C. § 541(a)(3).

[33] Verizon franchise at §§ 9.2.1 – 9.2.3.

[34] *Compare* Verizon franchise at § 9.2.1 and Cablevision franchise at § 19.2.

Seventh, Cablevision submits that the Verizon franchise agreement includes: certain restrictions on a municipality's right to review transfers, less onerous reporting requirements on franchise fees, the ability for Verizon to unilaterally terminate the franchise due to changes of law, and a provision which modifies the law governing how the franchise will be interpreted.[35] Whereas, the Cablevision agreement does not constrain municipal review of transfers from a merger involving the parent of the franchisee or an affiliate, contains far broader reporting requirements on franchise fee payments, provides for termination in only "extreme circumstances," and contains no such restriction on franchise construction (meaning the document will be applied consistent with New York law).[36]

Verizon disagrees with Cablevision's application of the Commission's Level Playing Field rule and submits that any such analysis must be read consistent with the Commission's observations in its Declaratory Ruling and state and federal policy favoring competition in the cable market.[37] Moreover, the comparison of the two competing agreements should not be term for term, *i.e.*, viewed in isolation, but, rather, consideration should be given as to whether the burdens imposed by the respective franchises, when taken as a whole, are disproportionate in a material way.[38] After evaluating Cablevision's assertions, Verizon submits that its proposed franchise agreement does not violate the Commission's Level Playing Field rule.

First, Verizon submits that its franchise agreement with the Village does not insulate its FTTP system from local oversight. Verizon argues that because its system is already subjected to a comprehensive state and federal regime under Title II and TCL § 27, the proposed agreement, when considered together with these other regulatory

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[35] Verizon franchise at §§ 1.33, 2.7.3, 7.2, 8.1 and 10.

[36] Cablevision franchise at §§ 7.6, 8.1-8.7, 18.2 and 24.1-24.2.

[37] Verizon reply at p. 18.

[38] Id.

protections is more onerous than Cablevision's agreement. Accordingly, while the myriad requirements that govern Verizon's operation may vary from those imposed under the Cablevision franchise, differences, if any, are not material and, therefore, do not constitute a violation of the Commission's Level Playing Field rule.

Second, Verizon asserts that Cablevision's effort to find a violation of the Level Playing Field rule, based on the companies' respective indemnification obligations, is misleading. Verizon claims that because its network consists of mixed-use facilities, it is reasonable to tie its indemnity obligations to the federal definition of a "cable system." Moreover, while Cablevision's claim that Verizon's indemnity obligation is narrower because it is limited to "negligent" conduct and does not encompass liability for "personal injury," Verizon submits that it takes on a comparatively greater liability risk as a facilities provider and pole owner and, therefore, the limitations in Verizon's proposed franchise are reasonable.

Third, Verizon asserts that Cablevision's universal service disparity claim is frivolous. Verizon claims that it meets all universal service obligations required by law. Moreover, it has committed to offering service to 97% of the Village's population and, as to the remaining 3%, which consists of two private facilities, Verizon is in the process of resolving access issues with those facility owners.

Fourth, Verizon claims that Cablevision's PEG access and local programming arguments do not withstand scrutiny. Verizon argues that Cablevision's reliance on studio operating cost is misleading because this is not a requirement under the Cablevision franchise. Moreover, Cablevision's attack on Verizon's interconnection provisions is also misleading because according to Verizon, maintaining a studio for the provision of PEG access is similarly not a Cablevision franchise obligation.[39] According to Verizon, its commitment to provide PEG in its proposed franchise is sufficient to satisfy the Commission's rules on PEG programming vis-a-vis its commitment to set aside channels for this programming and its commitment to pursue interconnection with the incumbent.

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[39] Verizon reply at p. 32.

Fifth, Verizon states that Cablevision's claim of different customer service obligations in the respective franchises is immaterial. Verizon claims that any differences in the customer service obligations of the respective franchise agreements are subsumed by the Commission's cable service regulations, which are binding on both franchises. Therefore, any claim of material difference which would create a level playing field violation is false.

Sixth, Verizon states that Cablevision's assertions of an escape clause and other miscellaneous provisions in the Verizon franchise agreement, which purportedly create level playing field issues, are misleading. Verizon argues that the practical effect of these varying provisions creates only minor differences in the respective franchises that do not amount to any material competitive disadvantage. These differences, according to Verizon, merely reflect a reality of the labor/management structure under which it operates.

Village SEQRA Review

Cablevision argues that the proposed franchise agreement was approved in contravention of SEQRA requirements. Cablevision submits that the Village, as lead agency, never conducted a SEQRA analysis, and since the Village acted on Verizon's proposed franchise without first determining whether the franchise would be Type I, Unlisted or Type II, it has violated SEQRA. Further, the fact that the Commission may deem its approval as Type II is not relevant to the independent duty the Village must undertake under SEQRA before it acts.

In reply, Verizon claims that Cablevision's SEQRA claims are without merit, and, in any event, are not properly before this Commission for review. Verizon alleges that Cablevision fails to meet the stringent standing requirements to bring a SEQRA claim. Moreover, Verizon claims that the SEQRA requirements do not apply to the municipality's approval or the Commission's confirmation of the proposed franchise because neither event constitutes an "action" triggering SEQRA review.

DISCUSSION

This application seeks our approval of a Certificate of Confirmation of a cable television franchise granted by the Village of Massapequa Park by Resolution of the Village Board dated September 26, 2005 following duly noticed public hearings held on September 12 and 26, 2005. The term of the proposed franchise agreement is 10 years, measured from the date of this Order.

As an initial matter, the proposed franchise agreement misinterprets and misapplies the Commission's Declaratory Ruling. The subject franchise agreement states in numerous sections that the LFA's regulatory authority over Verizon's FTTP network is limited in that the franchise and Article 11 of the PSL do not apply to its FTTP network to the extent the network is used for the provision of telephone service.[40] Verizon's attempt to apply our Declaratory Ruling in this manner is incorrect. In our ruling, we specifically stated that Verizon need not obtain a cable franchise in order to construct and deploy mixed-use facilities for the purpose of upgrading its telecommunication and information services network, and that the Article 11 cable franchising requirements, and all its attendant rules and regulations, would attach to that system when Verizon: (1) deploys equipment that could be used exclusively for cable service; or (2) offers for hire video programming.[41] Nothing in our ruling or the Public Service Law insulates Verizon's mixed-use facilities from cable regulation once that system is used for the purpose of providing cable service.

Under Article 11, a cable system is one that "operates ... the service of receiving and amplifying programs..." (PSL § 212(2)). Article 11 applies to "every cable television system and every cable television company including a cable television company which constructs, operates and maintains a cable television system in whole or in part through the facilities of a person franchised to offer a common or contract carrier service." (emphasis added)(PSL § 213(1)). Because Verizon will now use its system in

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[40] See *e.g.*, Verizon franchise at §§ 1.6, 1.29, 1.31, 1.32, 2.2, 4, 13.1.1, 13.11 and 13.19.

[41] Declaratory Ruling at p. 18.

Massapequa Park to offer broadcast programs, it is operating a cable television system subject to Article 11 and our cable rules.

This interpretation is in the public interest. In our Declaratory Ruling, we recognized Verizon's right to construct its FTTP system (capable of deploying telephone, information and cable services) without first obtaining a cable franchise because the source of that authority resided in its statewide telephone rights. Moreover, we determined that a municipality had the requisite authority to police its rights-of-way via its permitting procedures and municipal laws and codes. However, using Verizon's holistic analysis and allowing the FTTP network to continue to be subject only to Title II and TCL § 27 requirements, even after Verizon begins to offer cable service, would nullify significant aspects of the Public Service Law. Article 11 and our cable franchising rules provide a municipality and the Commission with explicit minimum authority to regulate certain aspects of Verizon's FTTP system, including adherence to National Electric Safety Code provisions. Verizon has not demonstrated that following our minimum cable requirements would be burdensome. Indeed, Verizon indicates that the differences between telephone based right-of-way management requirements and practices vary only in "trivial" particulars from cable requirements.[42] Verizon has failed to demonstrate that adherence to our minimum franchise standards operate as a barrier to entry.

Contrary to Verizon's position, moreover, our interpretation is not inconsistent with federal law. Nowhere in the Federal Cable Act does it state that a mixed-use facility is exempt from cable regulations once that system is used to provide cable service.[43]

Therefore, Verizon's attempt to insulate certain portions of its FTTP network from Article 11 cable regulation is inconsistent with our Declaratory Ruling and the Public Service Law. As a condition of this Order, any reference in the proposed

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[42] Verizon comments at p. 27.

[43] See 47 U.S.C. § 522(7)(c).

franchise agreement to facilities that are mixed-use and, therefore, purportedly subject to Title II and TCL § 27 regulation exclusively, are deemed to be stricken from the proposed agreement. Thus, the franchise will be construed such that to the extent any part of Verizon's network is being used to provide cable service within the Village, notwithstanding its mixed-use characteristics, that plant is subject to the Commission's cable laws and rules.

We further find that, in view of the above determination, the proposed franchise agreement substantially complies with Part 895[44] of our rules, except for certain provisions of the proposed franchise agreement that require conditional approval pursuant to our cable franchising regulations.[45]

First, § 13.15 of the agreement, which pertains to rates, is inconsistent with Section 895.1(e) of our rules, which requires that any rates and charges be subject to regulation in accordance with federal law. Although the Village and Verizon agree that the franchisee is subject to effective competition and, therefore, not subject to Commission rate regulation, Verizon must seek such a ruling from the Federal Communications Commission (FCC).[46] Until it has received an exemption from rate regulation from the FCC, rates are subject to federal regulation. It will be a condition of this Order that Section 895.1(e) be deemed a part of the proposed agreement as if specifically set forth therein.[47]

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[44] On or about April 15, 2005 the Commission's cable television rules in 16 NYCRR §890 et seq. became effective. Accordingly, the proposed franchise agreement is governed by the new rules.

[45] Our authority to condition our approval of the proposed franchise agreement on certain modifications is derived from PSL § 213(1).

[46] 47 U.S.C. § 543(a)(2).

[47] Cablevision further asserts that cost allocation measures and cross-subsidy safeguards should be imposed on Verizon. In view of existing protections and the broader review of emerging competition in our Competition III proceeding, we will not adopt further measures here.

Second, this Order will be granted upon the condition that the franchisee comply with the minimum consumer protection and customer service standards set forth in Parts 890 and 896 of the Commission's rules.

Third, this Order will be granted upon condition that the franchisee comply with the minimum standards for PEG access contained in Sections 895.1(f) and 895.4 of our rules. Pursuant to our rules, Verizon is required to provide PEG access capability at the same time it offers cable television service to the Village. Verizon's reliance on a voluntary interconnection or, in the alternative, Commission approval of a petition for interconnection with the incumbent, does not satisfy the requirement that the "designation of PEG access facilities shall include the provision by the cable television franchisee of the technical ability to play back prerecorded programming and to transmit programming information consistent with the designated uses of PEG access channels."[48] Accordingly, Verizon must comply with the foregoing, consistent with our rules.

Fourth, this Order will be granted upon the condition that the franchisee comply with the minimum line extension standards contained in Section 895.5 of the Commission's rules. Furthermore, the proposed franchise agreement includes certain exceptions that are inconsistent with the Commission's line extension rules. Therefore, our approval will be furthered conditioned on striking the exceptions relating to "technical difficulties" and inability to access "under reasonable terms and conditions" from the proposed agreement.[49]

Fifth, the agreement does not fully comply with Section 895.1(i)(1) of our rules which requires the franchisee to indemnify the municipality and hold it harmless from all liability, damage, cost or expense as a result of conduct undertaken pursuant to the franchise. The exception to indemnity in § 9.2.1 or the proposed agreement stating

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[48] 16 NYCRR § 895.4(c)(7).

[49] In the past, we have rejected similar exclusions regarding access and technical difficulties. See, *e.g.*, Case 03-V-0887, Application of MTC Cable for Approval of the Renewal of its Cable Television Franchise for the Village of Fleischmanns (Delaware County) at pp 4-5 (October 16, 2003).

that the franchisee shall not indemnify the LFA for any damage, liability or claims resulting from the "distribution of any Cable Service over the Cable System" is inconsistent with our regulations. Our rule states that the franchisee shall indemnify the municipality for all liability, damage, cost or expense arising from any conduct undertaken pursuant to the franchise (emphasis added). In this regard, our approval will be granted upon the express condition that the quoted language in § 9.2.4 be stricken from the proposed franchise agreement.

Sixth, § 13.17 of the agreement regarding the Administrator of the franchise has been left blank. The designation of the franchise Administrator is required by Section 895.1(n) of our rules. Accordingly, the name of the Administrator of the franchise shall be the Mayor as per the incumbent's agreement.

Seventh, Section 895.1(t) of our rules requires a provision stating that any valid reporting requirement in the franchise may be satisfied with system-wide statistics, except those related to franchise fees and customer complaints. It will be a condition of this Order that Section 895.1(t) be deemed a part of the proposed agreement, as if specifically set forth therein.

Eighth, §§ 2.7.3, 13.2 and 13.7 purport to effect an automatic amendment to the agreement under certain circumstances. We clarify that any modification of the agreement pursuant to these sections would constitute an amendment of the franchise subject to Section 222 of the PSL and Subpart 892-1 of our rules.

Ninth, Section 895.1(b) of our rules require a provision in all franchise agreements regarding a description of the system and the location of trunk and feeder plant and a provision requiring that the franchisee shall construct and maintain its cable system using materials of good and durable quality and that all work involved in the construction, installation, maintenance, and repair of the cable system shall be performed in a safe and reliable manner. It will be a condition of our approval that Section 895.1(b) be deemed part of the proposed agreement, as if specifically set forth therein.

The proposed franchise agreement contains additional provisions not required by Part 895 of our rules. We approve these provisions to the extent that they are

consistent with Article 11 and its regulations. In the event of an ambiguity in any such provision, the provision will be construed in the manner most favorable to the franchisor.

Based on the foregoing, we find that the proposed franchise agreement, as modified by the conditions outlined above, is in substantial compliance with our cable regulations. We also find that the proposed franchise agreement does not violate the Commission's Level Playing Field rule. Part 895.3 states that no municipality may award or renew a franchise for cable television service which contains economic or regulatory burdens which when taken as a whole are greater or lesser than those burdens placed upon an incumbent's franchise in the same franchise area. We agree with Verizon that this analysis does not compel us to undertake a term for term comparison of the respective franchise agreements. Nor will we review the franchise agreements in isolation. Our rule does not preclude the existence of different franchise terms for different companies as they roll out their cable service in various municipalities, should events and circumstances so warrant.[50] We will, however, ensure that both agreements in a particular franchise area substantially comply with our franchising standards in Part 895, and that no cable operator enjoys a material competitive advantage in that particular community. Based upon our review, we find that the remaining discrepancies outlined by Cablevision and CTANY in their comments do not, when taken as a whole, substantiate a level playing field violation. The differences are immaterial, speculative, ill-defined in terms of economic impact and counterbalanced by other obligations (e.g., one time grant payment and other telephone related oversight obligations) and the fact that Verizon is a new entrant in the cable market. Based on the conditions outlined above, the proposed franchise agreement does not create a level playing field concern which requires further Commission action.

The Commission orders:

1. Pursuant to Section 221 of the Public Service Law and the rules and regulations of this Commission, the application of Verizon New York Inc. for approval of

[50] Case 01-V-0381, Memorandum and Resolution Adopting 16 NYCRR Parts 890-899 (issued Apr. 4, 2005).

a Certificate of Confirmation of the franchise to provide cable television service for the Village of Massapequa Park (Nassau County) is hereby approved, subject to the conditions set forth in the body of this Certificate and Order. Said certificate shall expire 10 years from the date of this Order.

2. This Certificate and Order does not in any way confer rights or privileges other than those granted in the underlying franchise and the certificate holder remains subject to the obligations imposed by Article 11 of the Public Service Law, the underlying franchise and all applicable rules, regulations and orders of this Commission.

3. This proceeding is closed.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 05-V-1263 - Petition of Verizon New York Inc. for a Certificate of Confirmation for its Franchise with the Village of Massapequa Park, Nassau County.

NOTICE OF DETERMINATION
OF SIGNIFICANCE
NEGATIVE DECLARATION

NOTICE is hereby given that an Environmental Impact Statement will not be prepared in connection with the approval by the Public Service Commission of the Petition of Verizon New York Inc., for a Certificate of Confirmation for its cable television franchise with the Village of Massapequa Park, Nassau County, based upon our determination in accordance with Article 8 of the Environmental Conservation Law, that such action will not have a significant adverse effect on the environment. The approval of this action is an Unlisted Action as defined under 6 NYCRR Section 617.7(c).

Based upon our review of the record, the confirmation of the exercise of the franchise granted to Verizon New York Inc by the Village of Massapequa Park to provide cable service under Section 221 of the Public Service Law will not result in significant adverse environmental impacts because the incremental construction that would be induced is insignificant in that it would involve only individual service lines and equipment within existing Verizon central offices.

The address of the Public Service Commission, the lead agency for the purposes of the Environmental Quality Review of this project is Three Empire State Plaza, Albany, New York 12223-1350. Questions may be directed to Richard H. Powell at (518) 486-2885 or to the address above.

JACLYN A. BRILLING
Secretary