

Exhibit 13

ROSS FERRARO

MAYOR



Village of Carol Stream

OFFICE OF THE MAYOR

500 N. GARY AVENUE • CAROL STREAM, ILLINOIS 60188-1899

(630) 871-6251 • FAX (630) 665-1064

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EMAIL: rferraro@caroistream.org



March 30, 2006

Mr. Timothy Peterson
Senior Account Manager
AT&T Illinois
225 W. Randolph - Floor 7b
Chicago, IL 60606

Dear Mr. Peterson:

The Village of Carol Stream has recently become aware of Project Lightspeed your initiative to provide cable television or multi-channel communications. It is the firm belief of the Village of Carol Stream that any video service utilizing the right-of-way for placement of system facilities requires a local franchise. Accordingly the Village of Carol Stream will not issue permits for use of the right-of-way for Project Lightspeed without a franchise in place.

Please recognize that the Village is in favor of enhanced competition in the market for video services. The results are predicted to be pro-consumer and are in the best interests of our residents. Accordingly, we would like to see AT&T negotiate a franchise with the Village to accelerate the presentation of the new service. However, we cannot forfeit or abrogate our duty to be the custodian of the public rights-of-way.

Questions concerning this matter may be directed to Village Manager, Joseph Breinig.

Sincerely,


Ross Ferraro
Mayor

cc: Board of Trustees

Exhibit 14



Village of Addison

STATE OF ILLINOIS)

COUNTY OF Du PAGE)

I, Maria Conrad, Deputy Village Clerk of the Village of Addison, Illinois, DO HEREBY CERTIFY that as such Deputy Village Clerk and keeper of the records, that the foregoing is a true and correct copy of Ordinance No. O-06-35, passed and approved by the Mayor and Board of Trustees of the Village of Addison at the May 15, 2006 Village Board meeting.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this 16th day of May, 2006.

A handwritten signature in cursive script that reads "Maria Conrad".

Maria Conrad
Deputy Village Clerk
Village of Addison
DuPage County, Illinois

ORDINANCE NO. *0-06-35*

**ORDINANCE AMENDING CERTAIN PROVISIONS OF
CHAPTER 17 OF THE VILLAGE OF ADDISON CODE**

WHEREAS, pursuant to 65 ILCS 5/11-42-11, the corporate authorities of each Illinois municipality may license, franchise and tax the business of operating a community antenna television system; and

WHEREAS, the Mayor and Board of Trustees find and hereby declare that it is appropriate and in the best interests of the Village that certain provisions of Chapter 17, Article 6 of the Village Code be amended as hereinafter provided and that all such systems be required to obtain a franchise from the Village;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND BOARD OF TRUSTEES OF THE VILLAGE OF ADDISON, DU PAGE COUNTY, ILLINOIS, PURSUANT TO ITS STATUTORY AND HOME RULE POWERS, AS FOLLOWS:

SECTION ONE: The foregoing recitals are hereby incorporated in this Section One as if said recitals were fully set forth herein.

SECTION TWO: Subsection (D) of Chapter 17, Article VI (Construction of Utility Facilities in the Public Rights-of-Way), Section 17-601 of the Village Code of the Village of Addison shall be and is hereby amended in its entirety so that said Subsection 17-601(D) shall hereafter be and read as follows:

(D) Effect of Franchises, Licenses, or Similar Agreements.

- (1) Utilities Other Than Telecommunications Providers. In the event that a utility other than a telecommunications provider has a franchise, license or similar agreement with the Village, such franchise, license or similar agreement shall govern and control during the term of such agreement and any lawful renewal or extension thereof.

- (2) Telecommunications Providers. In the event of any conflict with, or inconsistency between, the provisions of this Article and the provisions of any franchise, license or similar agreement between the Village and any telecommunications provider, the provisions of such franchise, license or similar agreement shall govern and control during the during the term of such agreement and any lawful renewal or extension thereof.
- (3) Notwithstanding anything to the contrary set forth in this Section, any person, corporation, partnership or other legal entity that operates a "community antenna television system," as defined in 65 ILCS 5/11-42-11, as now existing or hereafter amended, shall be required to obtain a franchise from the Village in the manner provided by law before providing any community antenna television services within the Village.

SECTION THREE: Those portions of Section 17-601 of the Village Code that have not been expressly amended herein shall be and are hereby ratified and affirmed and shall remain in full force and effect.

SECTION FOUR: Subparagraph 616(B)(6) of Chapter 17 of the Village Code shall be and is hereby amended in its entirety so that said Subparagraph 17-616(B)(6) shall hereafter be and read as follows:

- (6) Ground Mounted Appurtenances. Ground mounted appurtenances to overhead or underground facilities, when permitted within a right-of-way by variance, shall be provided with a vegetation-free area extending one foot (305 mm) in width beyond the appurtenance in all directions. The vegetation-free area may be provided by an extension of the mounting pad, or by heavy duty plastic or similar material approved by the Director of Public Works. With the approval of the Director of Public Works, shrubbery surrounding the appurtenance may be used in place of vegetation-free area. The housing for ground-mounted appurtenances shall be painted a neutral color to blend with the surroundings.

SECTION FIVE: All policies, ordinances or resolutions, or parts thereof that conflict with the provisions of this Ordinance are hereby expressly repealed to the extent of such conflict.

SECTION SIX: This ordinance shall be in full force and effect from and after its passage, approval and publication in the manner provided by law.

PASSED THIS 15th day of May, 2006.

AYES: Justices Shurdley, Kaye, Lynch, McDermott, Theodore & Venstra

NAYS: None

ABSENT: None

APPROVED THIS 15th day of May, 2006.

ATTEST:

Maria Conrad
Deputy Village Clerk

George Hartung
Mayor

PUBLISHED: May 16, 2006

LKLM103340REV5/9/06

Exhibit 15



Village of Addison

STATE OF ILLINOIS)

COUNTY OF Du PAGE)

I, Maria Conrad, Deputy Village Clerk of the Village of Addison, Illinois, DO HEREBY CERTIFY that as such Deputy Village Clerk and keeper of the records, that the foregoing is a true and correct copy of Ordinance No. O-06-36, passed and approved by the Mayor and Board of Trustees of the Village of Addison at the May 15, 2006 Village Board meeting.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this 16th day of May, 2006.

A handwritten signature in cursive script that reads "Maria Conrad".

Maria Conrad
Deputy Village Clerk
Village of Addison
DuPage County, Illinois

ORDINANCE NO. 0-06-36

**ORDINANCE TERMINATING ILLINOIS BELL TELEPHONE
COMPANY (AT&T) FRANCHISE AGREEMENT**

WHEREAS, the Village has previously entered into a franchise agreement with Illinois Bell Telephone Company, now AT&T, for the use of streets and other public places in the Village; and

WHEREAS, the ten-year term of the franchise agreement has expired, but the franchise agreement remains in effect until sixty days after notice of termination is sent by either party; and

WHEREAS, the Mayor and Board of Trustees believe and hereby declare that it is in the best interests of the Village to terminate said franchise;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND BOARD OF TRUSTEES OF THE VILLAGE OF ADDISON, DU PAGE COUNTY, ILLINOIS, AS FOLLOWS:

SECTION ONE: The foregoing recitals shall be and are hereby incorporated within this Section One as if said recitals were fully set forth herein.

SECTION TWO: The Agreement for Use of the Public Way, between the Village and Illinois Bell Telephone Company (now AT&T), dated July 6, 1992, shall be and is hereby terminated, on the sixtieth day after the effective date of this ordinance.

SECTION THREE: The Village Clerk shall be and is hereby authorized and directed to cause a copy of this ordinance to be sent to AT&T and its local representative.

SECTION FOUR: Any policy, resolution or ordinance that conflicts with the provisions of this ordinance shall be and is hereby repealed to the extent of such conflict.

SECTION FIVE: This Ordinance shall be in full force and effect from and after its passage, approval and publication in the manner provided by law.

PASSED THIS 15th day of May, 2006.

AYES: Trustees Hendley, Rayne, Lynch, Madern et al., Headlee + Keenstra

NAYS: none

ABSENT: none

APPROVED THIS 15th day of May, 2006.

ATTEST:

Maria Conrad
Deputy Village Clerk

George Hartung
Mayor

Exhibit 16

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ROSA JUNQUEIRO, CLERK

BY ~~SOAIA FARRELL~~
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14 Attorneys for Petitioner and Plaintiff
15 PACIFIC BELL TELEPHONE COMPANY,
doing business as AT&T CALIFORNIA

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF SAN JOAQUIN

19 UNLIMITED JURISDICTION

No. CV028523

20 _____)
21 PACIFIC BELL TELEPHONE COMPANY,)
a California corporation doing business as)
22 AT&T CALIFORNIA,)
23 Petitioner and Plaintiff,)
24 vs.)
25 THE CITY OF LODI, THE LODI CITY)
COUNCIL,)
26 Respondents and Defendants.)
27 _____)

VERIFIED PETITION FOR WRIT OF
MANDAMUS; AND COMPLAINT
FOR DECLARATORY JUDGMENT

BY FAX

THIS CASE HAS BEEN ASSIGNED TO
JUDGE K. PETER SAHRS IN DEPARTMENT 13
FOR ALL PURPOSES, INCLUDING TRIAL

1 Telegraph or telephone corporations may construct lines of telegraph or
2 telephone lines along and upon any public road or highway, along or across any
3 of the waters or lands within this State, and may erect poles, posts, piers, or
4 abutments for supporting the insulators, wires, and other necessary fixtures of
5 their lines, in such manner and at such points as not to incommode the public
6 use of the road or highway or interrupt the navigation of the waters.

7 13. Section 7901 preempts and removes local municipal authority to deny AT&T
8 the right to access the public rights-of-way for the construction, maintenance and repair of its
9 telephone lines. AT&T's franchise rights under Section 7901 are well-established and remain
10 vested and fully in force so long as AT&T continues to construct, maintain and operate
11 telephone lines within the State.

12 14. Under California law, a Section 7901 franchisee, such as AT&T, is entitled to
13 use its lines interchangeably for transmitting any communication service by means of the
14 transmission of electrical impulses and no additional franchise is required to add additional
15 services.

16 15. The franchise granted by Section 7901 reserves to local entities the limited
17 authority to regulate the "time, place and manner of installations" in a reasonable manner.
18 This principle is codified in Public Utilities Code section 7901.1, which provides:

19 "(a) . . . municipalities shall have the right to exercise reasonable control
20 as to the time, place and manner in which roads, highways, and waterways are
21 accessed;

22 "(b) The control, to be reasonable, shall, at a minimum, be applied to
23 all entities in an equivalent manner."

24 Under well-established precedent, this limited right to regulate the placement of telephone
25 corporation facilities does not include the right to require a franchise agreement for access to
26 or use of the public rights-of-way. Nor does it confer to municipalities the authority to restrain
27 or regulate the nature of services to be provided over telephone lines and related facilities.

28

1 **AT&T's Use of State Franchise Rights To Provide Communications Services**

2 16. AT&T owns, controls, manages and operates telephone lines for compensation
3 in California, and is a "telephone corporation" within the meaning of Section 7901. Relying
4 on its established right to access the public rights of-way, AT&T has, directly and through its
5 predecessor entities, provided communications services to business and residential customers
6 in Lodi for over 75 years. AT&T now serves over 45,000 residential and business customers
7 in Lodi.

8 17. AT&T's services, and the technologies and network design and engineering by
9 which those services are delivered, have evolved over time. Section 7901 has been
10 consistently interpreted to encompass the evolution and development of expanded services by
11 telephone corporations like AT&T.

12 18. AT&T's services initially consisted of traditional local exchange telephone
13 services, transmitted over twisted-pair copper wires placed on overhead poles or in
14 underground conduit. In some locations AT&T's twisted-pair copper telephone lines have
15 gradually been augmented, replaced and upgraded with fiber optic lines, which are able to
16 carry larger amounts of communications traffic at higher speeds. As telephone lines have
17 evolved to take advantage of new technology and materials, AT&T has offered a variety of
18 new and improved services in connection with telephone communications provided over its
19 telephone lines. These developments will now provide AT&T the capability to provide IP
20 Video Services over its telephone lines in connection with telephone and other services.

21 19. With the advent of "broadband" Internet access, in which customers access the
22 Internet through high-speed connections such as DSL service, AT&T further expanded its
23 deployment of fiber optic cable under "Project Pronto." As part of that work, next-generation
24 remote terminals were placed closer to customer homes within the CITY, and fed by advanced
25 fiber optic cable as a way to provide broadband capability to a greater number of CITY
26 customers. With these improved facilities, AT&T has expanded its services to include a mix
27 of voice telephony, including three-way calling, caller ID, voicemail, and video telephoning,
28 as well as Internet backbone and DSL services. AT&T has been able to provide this array of

1 services to Lodi residents by installing its facilities within public roads and highway rights-of-
2 way pursuant to long-standing franchise rights granted under Section 7901.

3 **Project Lightspeed**

4 20. "Project Lightspeed" is a project by which AT&T is improving its existing
5 telephone lines and network facilities to increase bandwidth and throughput speeds. To
6 complete Project Lightspeed, AT&T and its affiliated companies will invest approximately
7 \$4 billion over a period of two to three years to deploy fiber optic cable facilities more deeply
8 into its network (i.e., closer to the point of connection to residential customers) in California
9 and other states. Project Lightspeed will extend fiber optic cable to a network point within a
10 neighborhood (called a "node") from which point existing twisted-pair copper lines or fiber
11 will then carry service to each residence as they do now. Project Lightspeed also involves
12 removing some facilities from the existing twisted-pair copper lines in order to increase their
13 ability to carry advanced communications services with much higher bandwidth. Project
14 Lightspeed will also involve placement of facilities to provide IP Video Services in connection
15 with telephone communications over twisted-pair copper and fiber optic telephone lines.

16 21. Completion of the Project Lightspeed construction, maintenance and repair
17 work on AT&T's telephone lines will provide significant benefits to residents in the CITY.
18 Subscribers will enjoy an expanded range of integrated, next-generation communications
19 services, at higher speeds and with functionality not presently available. New Internet
20 Protocol ("IP")-based services and capabilities will be provided, including very high-speed
21 Internet access, Voice over Internet Protocol ("VOIP") and IP Video Services, in addition to
22 traditional telephone services, over the same "last mile" twisted-pair copper wire connection
23 and fiber.

24 22. AT&T is in the process of deploying its Project Lightspeed services in
25 California. As part of that effort, AT&T seeks to upgrade existing communications facilities
26 and install additional cable and equipment in its existing CITY rights-of-way. Construction
27 and engineering projects directed to completion of Project Lightspeed in the City of Lodi are
28 in progress, and AT&T is prepared to undertake the necessary work immediately.

1 agreement) and to avoid potential court challenges by cable television companies. The Report
2 noted that the CITY derives cable franchise fees of \$233,000, fearing that “the provision of
3 video services has the potential to impact services currently provided by Cable Access
4 Television (CATV)” since “[t]he video capabilities of this program *may conflict* with existing
5 and future cable franchises with the City.” See Ex. A at 4 (emphasis added). As the Report
6 stated, “[t]he intent of this proposed limitation is to stop the erosion of revenues from franchise
7 fees and avoid possible litigation from our current CATV franchise holder.” *Id.*

8 27. On December 21, 2005, the City Council met to consider the Resolution No.
9 2005-264 (“Resolution 264”). The City Council’s consideration of the matter was brief, led by
10 City Manager Blair King. See Ex. A at 5-18. Mr. King did not mention AT&T’s rights under
11 Section 7901. Nor did he report or contend that AT&T would be providing cable television
12 service. Nor did the Council hear testimony from experts or other witnesses demonstrating
13 that AT&T would offer cable television. Instead, Mr. Blair explained that the purpose of
14 Resolution 264 was to bar AT&T from providing “*cable-like services*” without obtaining a
15 franchise. *Id.* at 8:4-9 (emphasis added). While conceding “whether this will be enforceable
16 in the future will be a test of litigation” (*id.* at 8:10-11), he described the Resolution’s
17 “intention [is] that we aren’t going to just allow *cable-like services* to be delivered out of the
18 franchise agreement.” *Id.* at 8:9-14. Mr. King urged the City Council to adopt Resolution 264
19 “without getting head into the question of is this going to be cable or not” *Id.* at 14:8-10
20 (emphasis added). Indeed, he cited AT&T’s position that the infrastructure improvements
21 would “allow for them to deliver what they are calling interactive TV services.” *Id.* at 14:5-6.
22 After Mr. King noted that “no contact was made with either SBC or Comcast on this particular
23 issue before you” (*id.* at 16:23-25), the Council proceeded to vote on Resolution 264, adopting
24 it by a vote of four to one. *Id.* at 19.

25 28. When AT&T learned of Resolution 264 the following day, AT&T officials
26 promptly contacted the City Manager to object, expressing concern that the CITY would take
27 such action directed at AT&T without contacting the company or analyzing AT&T’s video
28

1 service, technology or network design. AT&T is informed and believes the CITY nonetheless
2 refused to rescind Resolution 264.

3 29. As a result of the CITY's Resolution 264, AT&T has ceased work and been
4 forced to halt its Project Lightspeed build-out in the CITY because it cannot accept the
5 Franchise Condition, which is illegal, unauthorized and preempted by state law. As a result,
6 AT&T has not completed preparations and applications for encroachment permits in
7 connection with Project Lightspeed in Lodi, and will not do so until the question of the CITY's
8 authority to impose conditions that are different from and not authorized by Section 7901 is
9 resolved. But for the CITY's Resolution 264, AT&T is otherwise ready, able and willing to
10 proceed with the construction, maintenance and repair of its communications facilities in the
11 public rights-of-way in the CITY. As a result of Resolution 264, AT&T is effectively
12 precluded from completing Project Lightspeed, and thereby is unable to provide new and
13 improved services to subscribers of its telephone services and those other services provided in
14 connection with telephone service for compensation in the CITY.

15 **FIRST CAUSE OF ACTION**

16 **(Writ of Mandamus)**

17 **(Code of Civil Proc. § 1085)**

18 30. AT&T incorporates the allegations of paragraphs 1 through 29 above as though
19 fully set forth herein.

20 31. AT&T brings this cause of action pursuant to Code of Civil Procedure section
21 1085 to set aside Resolution 264 as contrary to the CITY's duties under the law, in excess of
22 the CITY's jurisdiction, lacking in a rational basis, and arbitrary and capricious.

23 32. Under Section 7901, the CITY has no authority or discretion to condition an
24 encroachment permit on factors unrelated to AT&T's physical use of the public rights-of-way.
25 Accordingly, the CITY has a ministerial, non-discretionary duty to grant permits to AT&T to
26 access the public rights-of-way to construct, maintain and repair its telephone lines including
27 facilities AT&T operates in connection with provision of telephone service for provision of IP
28 Video Services, subject only to the CITY's reasonable regulations affecting the time, place and

1 manner of such access. The Franchise Condition, which imposes an unrelated "cable
2 franchise" obligation upon AT&T for future IP Video Services, is in violation of this duty.

3 33. Acting as a telephone corporation, AT&T seeks through Project Lightspeed to
4 construct, maintain and repair its telephone lines within the public rights-of-way in the CITY
5 pursuant to rights conferred to it by state law under Section 7901. Notwithstanding AT&T's
6 franchise and long-standing practice of using the rights-of-way to install and upgrade its
7 telephone lines, and though those lines offer new and improved services as they may be
8 developed and become feasible, Resolution 264 limits and diminishes the authority granted to
9 AT&T by state law and has the effect of interposing the unilateral determination of the CITY
10 that the state statutory franchise is not sufficient to allow AT&T to install, operate and
11 maintain its telecommunications facilities along or upon public rights-of-way within the CITY,
12 and provide Project Lightspeed services that may include IP Video Services without first
13 consenting to a local cable franchise agreement. The CITY's refusal to recognize and
14 acknowledge AT&T's authority to access public rights-of-way for installation and
15 maintenance of telephone lines and facilities for provision of service in connection with
16 telephone communications without precondition of execution of a "cable franchise"
17 agreement, and the CITY's requirement of the Franchise Condition on all AT&T
18 encroachment permits, exceed the limited authority conferred to the City by Section 7901.1
19 and are in violation of and preempted by Section 7901.

20 34. In adopting Resolution 264, the CITY acted in excess of its jurisdiction, in
21 disregard of its legal duties, and committed a prejudicial abuse of discretion in numerous
22 respects, including the following:

23 (a) Failing to perform the ministerial duty of issuing encroachment permits
24 for the public rights-of-way subject only to reasonable time, place and manner
25 restrictions, adopting instead a binding CITY resolution imposing the Franchise
26 Condition on all AT&T permits, in violation of Section 7901 of the Public Utilities
27 Code;

28

1 (b) Refusing to recognize and acknowledge AT&T's authority to install,
2 operate and maintain its communications network along or upon the public rights-of-
3 way within the CITY for the provision of communications services, including IP Video
4 services, free from the Franchise Condition;

5 (c) Wrongfully requiring that AT&T obtain a cable franchise or open video
6 franchise prior to providing any IP Video services in the CITY, contrary to AT&T's
7 vested rights under Section 7901, and in violation of state constitutional provisions
8 prohibiting state or local governments from impairing contractual obligations;

9 (d) Acting without a rational basis to support its adoption of Resolution
10 264; and

11 (e) Basing its decision in whole or in part on irrelevant and/or erroneous
12 conclusions of law and/or fact.

13 35. The CITY has a duty at all times to act in accordance with state law, including
14 Section 7901, and within the limits of its delegated authority under Section 7901.1, but has
15 refused to perform an act or acts which the law specially requires as a duty on its part. AT&T
16 is a party enjoying a right which the CITY has unlawfully denied. By adopting Resolution
17 264, the CITY has taken a final act that is contrary to law and which has harmed AT&T by
18 denying to AT&T rights and benefits secured to it by state law.

19 36. AT&T is a party beneficially interested in the issuance of a writ of mandamus
20 as a result of the CITY's action complained of herein. AT&T's rights and interests have been
21 and will be adversely affected, and the full use and enjoyment of its legal rights and property
22 will be denied, unless the Resolution is set aside and annulled.

23 37. AT&T has no plain, speedy or adequate remedy at law, other than the relief
24 sought herein, to prevent the CITY from unlawfully conditioning AT&T's authority to utilize
25 the public rights-of-way in the manner alleged. Unless the requested relief is granted, AT&T
26 will be irreparably harmed, for which harm it cannot be adequately compensated by money or
27 other legal remedies, because AT&T's ability to construct, maintain and repair its
28 telecommunications network will be frustrated and denied, and because AT&T will not be

1 permitted to provide new broadband services in the CITY (including IP Video Services), or
2 such services will be delayed indefinitely, resulting in financial losses to AT&T, and injury to
3 AT&T's competitive position. Damages of this nature would be difficult, if not impossible, to
4 calculate or recover.

5 38. Accordingly, the Court should issue a peremptory writ of mandamus requiring
6 the CITY to set aside Resolution 264, and enter an order permanently enjoining and restraining
7 the City from imposing the Franchise Condition, or requiring any local cable franchise, as a
8 condition of any encroachment permits or other approvals for AT&T's installation,
9 maintenance and operation of facilities in the public rights-of-way.

10 **SECOND CAUSE OF ACTION**

11 **(Declaratory Judgment That Section 7901 Precludes Local Franchising of AT&T's IP**
12 **Video Services)**

13 **(Cal. Pub. Util. Code § 7901; Code Civ. Proc. § 1060)**

14 39. AT&T incorporates the allegations of paragraphs 1 through 38 above as though
15 fully set forth herein.

16 40. As heretofore alleged, under Section 7901, the State of California has granted
17 AT&T a franchise that authorizes AT&T to access the public rights-of-way located in the
18 CITY for the purpose of installing and operating its telephone lines. Long-standing California
19 precedent establishes that, as long as AT&T continues to facilitate communication by phone
20 via its telephone lines, it is entitled to use such lines to provide any form of electronic
21 communication. Among other things, AT&T's franchise under Section 7901 authorizes
22 AT&T to provide IP Video Services over its telephone lines without obtaining a separate cable
23 franchise or open video franchise from the CITY.

24 41. AT&T provides telephone services to residents in the City of Lodi using a
25 combination of fiber and twisted-pair copper facilities. Upon completion of Project
26 Lightspeed, AT&T will continue to deliver all its communications services, including
27 traditional telephone services, to CITY residents through a combination of fiber and twisted-
28 pair copper wire. AT&T's planned upgrades will not create a new network, but will merely

1 increase the speed and efficiency of the communications network that AT&T has been
2 operating within the CITY. The intended Lightspeed upgrades will make the network more
3 capable for broadband and IP-based applications, including IP video services, but will not
4 change the architecture of the network with the CITY. AT&T's network in the CITY will
5 remain, after Lightspeed improvements, a two-way, switched network, and not a network
6 designed for the purpose of delivering one-way cable television service. The Section 7901
7 franchise authorizes AT&T to use its telephone lines to provide IP Video Services in
8 connection with telephone communications without obligation to enter into a separate "cable"
9 franchise when video content is carried over its telephone lines.

10 42. The CITY has attempted to impose a cable television franchise requirement on
11 AT&T's use of the public rights-of-way to provide communications services, including IP
12 Video services. However, state law does not impose any such requirements because AT&T is
13 not constructing a community antenna system and does not intend to offer cable television
14 services via a "cable television system." Moreover, even if AT&T were obligated by law to
15 obtain a cable franchise, AT&T cannot be compelled to obtain an additional franchise from the
16 CITY, because Section 7901 constitutes an existing state franchise that already authorizes
17 AT&T to install and upgrade its telephone lines in the public rights-of-way located in the
18 CITY and to use those lines interchangeably to provide any form of electronic communication
19 services, including video services.

20 43. An actual controversy has arisen and now exists between AT&T, on the one
21 hand, and the CITY, on the other hand, in that the CITY contends that it can condition
22 AT&T's continuing access to the public rights-of-way to construct, maintain and repair its
23 existing telephone lines on a requirement that AT&T agree that any IP Video Services it
24 provides will be subject to a local cable franchise from the CITY; whereas AT&T contends
25 that the CITY has no authority to require a local franchise for IP Video Services that AT&T
26 may provide via its telephone lines. To preserve its legal rights, AT&T has been compelled to
27 delay its planned network upgrades in Lodi pending a resolution of the controversy, and has
28 suffered financial and competitive injury as a result.

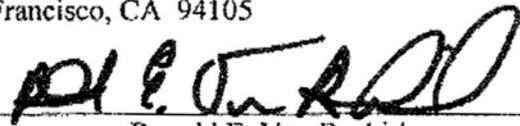
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4. For such other and further relief as the Court may deem just and proper.
Dated: February 3, 2006.

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By 
Ronald E. Van Buskirk

Attorneys for Plaintiff
PACIFIC BELL TELEPHONE
COMPANY, doing business as AT&T
CALIFORNIA

VERIFICATION

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I, John S. Crothers, am an Area Manager—Construction and Engineering/Project
Lightspeed and Project Management for petitioner and plaintiff, Pacific Bell Telephone
Company, doing business as AT&T California, formerly known as SBC California. I have
read the attached petition for writ of mandamus and complaint for declaratory and injunctive
relief, and state that the allegations contained therein are true of my own personal knowledge,
except as to allegations made on information and belief, and as to those allegations, I believe
them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that I
executed this verification on February 3, 2006 at Stockton, California.

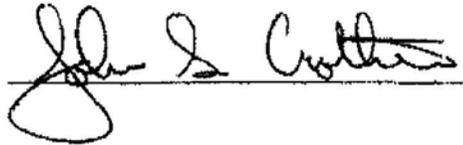


EXHIBIT A



LODI CITY COUNCIL

Carnegie Forum
305 West Pine Street, Lodi

AGENDA – REGULAR MEETING

Date: December 21, 2005
Time: Closed Session 6:30 p.m.
Regular Meeting 7:00 p.m.

For information regarding this Agenda please contact:

Susan J. Blackston
City Clerk
Telephone: (209) 333-6702

NOTE: All staff reports or other written documentation relating to each item of business referred to on the agenda are on file in the Office of the City Clerk and are available for public inspection. If requested, the agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132); and the federal rules and regulations adopted in implementation thereof. To make a request for disability-related modification or accommodation contact the City Clerk's Office as soon as possible and at least 24 hours prior to the meeting date.

C-1 Call to Order / Roll Call

C-2 Announcement of Closed Session

- a) Actual litigation: Government Code §54956.9(a); one case; People of the State of California; and the City of Lodi, California v. M & P Investments, et al.; United States District Court, Eastern District of California, Case No. CIV-S-00-2441 FCD JFM

C-3 Adjourn to Closed Session

NOTE: THE FOLLOWING ITEMS WILL COMMENCE NO SOONER THAN 7:00 P.M.

C-4 Return to Open Session / Disclosure of Action

- A. Call to Order / Roll call**
- B. Invocation ~ Pastor Dale Edwards, Century Assembly**
- C. Pledge of Allegiance**
- D. Presentations**
- D-1 Awards – None
- D-2 Proclamations – None
- D-3 Presentations – None
- E. Consent Calendar (Reading; comments by the public; Council action)**
- E-1 Receive Register of Claims in the amount of \$7,225,789.11 (FIN)
- E-2 Approve minutes (CLK)
- a) November 8, 2005 (Shirtsleeve Session)
- b) November 15, 2005 (Shirtsleeve Session)
- c) November 15, 2005 (Special Meeting)
- d) November 29, 2005 (Shirtsleeve Session)
- e) December 6, 2005 (Shirtsleeve Session)
- f) December 6, 2005 (Special Meeting)
- Res. E-3 Adopt resolution approving specifications for total station surveying equipment with global positioning satellite capability and authorizing the City Manager to approve the purchase from Haselbach Surveying Instruments as the sole supplier (not to exceed \$64,000) (PW)
- Res. E-4 Adopt resolution authorizing the City Manager to negotiate and purchase five Type 2 Medium Bus (Dial-A-Ride) transit vehicles off of the state contract, authorizing conversion of the five vehicles to compressed natural gas, and appropriating funds (\$425,000) (PW)

- Res. E-5 Adopt resolution accepting improvements at 2650 West Lodi Avenue (PW)
- Res. E-6 Adopt resolution approving the Disadvantaged Business Enterprise Program and Established Overall Annual Disadvantaged Business Enterprise goal of 6% for Federal Transit Administration-assisted projects for federal fiscal year 2005-06 (PW)
- Res. E-7 Adopt resolution authorizing three-year extension of existing telephone service contract with SBC (\$231,333 per year) (ISD)
- Res. E-8 Adopt resolution ratifying Purchasing Policies and Procedures (FIN)
- E-9 Receive notice of intent to issue annual payment to the Mokelumne Rural Fire District as negotiated in the annexation agreement approved on September 6, 2000 (\$27,917.96) (CM)
- E-10 Receive for informational purposes annual Housing Element report for submittal to the Department of Housing and Community Development (CD)

F. Comments by the public on non-agenda items

THE TIME ALLOWED PER NON-AGENDA ITEM FOR COMMENTS MADE BY THE PUBLIC IS LIMITED TO FIVE MINUTES.

The City Council cannot deliberate or take any action on a non-agenda item unless there is factual evidence presented to the City Council indicating that the subject brought up by the public does fall into one of the exceptions under Government Code Section 54954.2 in that (a) there is an emergency situation, or (b) the need to take action on the item arose subsequent to the agenda's being posted.

Unless the City Council is presented with this factual evidence, the City Council will refer the matter for review and placement on a future City Council agenda.

G. Comments by the City Council Members on non-agenda items

H. Comments by the City Manager on non-agenda items

I. Public Hearings -- None

J. Communications

- J-1 Claims filed against the City of Lodi -- None
- J-2 Appointments -- None
- J-3 Miscellaneous
 - a) Monthly Protocol Account Report (CLK)

K. Regular Calendar

- Res. K-1 Approve Downtown Lodi Business Partnership 2005-06 Annual Report, adopt Resolution of Intention to levy annual assessment, and set public hearing for January 4, 2006 (CM)
- Ord. (Introduce) K-2 Introduce ordinance adding Chapter 15.65 to the Lodi Municipal Code establishing the San Joaquin County Regional Transportation Impact Fee Program and set public hearing for January 4, 2006, to consider adoption of the fee (PW)
- Res. K-3 Adopt resolution eliminating early lock-in date for Development Impact Fees established in Resolution 2004-238 and establishing that Development Impact Fees established by Resolution 2004-238 will not be locked in until the time required by California law (CA)
- Res. K-4 Adopt resolution approving SBC Encroachment Permit Condition (Video Programming Limitation) for new facilities installations (CM)
- Res. K-5 Adopt resolution authorizing the City Manager or his designee to execute a Project Development Agreement to fund due diligence assessments associated with the Resource 500 generation project (not to exceed \$61,875) (EUD)
- K-6 Provide preliminary and non-binding policy direction regarding electric rate design/structure for future adjustment to base rates by transferring rates from Market Cost Adjustment charges to Base Rate charges, i.e. "Truing up the Electric Rates" (EUD)

- Res. K-7 Adopt resolution awarding contract to Rosendin Electric Inc., of San Jose, CA, for the reconstruction of Killelea Substation and the addition of 60kV power circuit breakers at Industrial Substation, accepting bid withdrawal of Diede Construction, and transferring funds (\$4,231,874) (EUD)
- K-8 Ratify employment agreement entered into between City Manager, Blair King, and Deputy City Manager/Internal Services Director, James Krueger, and receive for information only a report on the reorganization of the Finance Department and City Manager's Office (CM)
- Ord. K-9 Introduce ordinance amending Lodi Municipal Code relating to the establishment of wastewater (introduce) development impact fees by amending Lodi Municipal Code Title 13 – Public Services – Chapter 13.12, "Sewer Service," by repealing and reenacting Sections 13.12.020 (5) and (45), 13.12.180 (A), and 13.12.190; and further amending Title 15 – Buildings and Construction – Chapter 15.64, "Development Impact Mitigation Fees," by amending Section 15.64.10 – adding new paragraph "F" and relettering paragraphs (G) and (H) – repealing and reenacting Sections 15.64.030 (A) and 15.64.040, amending Section 15.64.060 – adding paragraph "C" – and repealing and reenacting Section 15.64.070 (B) (PW)
- K-10 Discuss and select project nominations for San Joaquin Council of Governments' One Voice trip (PW)
- K-11 Approve expenses incurred by outside counsel/consultants relative to the Environmental Abatement Program litigation and various other cases being handled by outside counsel (\$111,288.43) and approve Special Allocation covering general litigation matter expenses (\$10,066.11) (CA)
- L. Ordinances – None
- M. Adjournment to the following agency meetings:
- M-1 Meeting of the Lodi Public Improvement Corporation
 - M-2 Meeting of the Industrial Development Authority
 - M-3 Meeting of the Lodi Financing Corporation
 - M-4 Meeting of the City of Lodi Redevelopment Agency
- N. Adjournment

Pursuant to Section 54954.2(a) of the Government Code of the State of California, this agenda was posted at least 72 hours in advance of the scheduled meeting at a public place freely accessible to the public 24 hours a day.

Susan J. Blackston
City Clerk

AGENDA ITEM K-04



**CITY OF LODI
COUNCIL COMMUNICATION**

AGENDA TITLE: Adopt Resolution Approving SBC Encroachment Permit Condition (Video Programming Limitation) for New Facilities Installations

MEETING DATE: December 21, 2005

PREPARED BY: Management Analyst, City Manager's Office

RECOMMENDED ACTION: That the City Council adopt a resolution approving SBC Encroachment Permit Condition (Video Programming Limitation) for new facilities installations.

BACKGROUND INFORMATION: In November 2005, SBC announced that network lab and field trials are underway for Project Lightspeed, a program to deploy fiber optic service into residential areas. Construction of the network is planned to begin the first quarter of 2006. Local SBC representatives have provided to staff a cursory overview of the program. Lodi is expected to be included in the earliest phases of the program.

Project Lightspeed will allow SBC to provide services within the area served using internet protocol. The video capabilities of this program may conflict with existing and future cable franchises with the City.

It is recommended that the following language be included as a condition on all future SBC encroachment permits issued for facilities installation:

"By accepting this permit, SBC agrees on behalf of itself and its affiliates and assigns that it will not provide video programming (including but not limited to programming delivered using internet protocol) over its facilities located within the City's rights of way to subscribers within the City without first obtaining a cable franchise or an open video system franchise from the City."

FISCAL IMPACT: The City of Lodi estimates revenues of \$233,000 from its cable franchise fee of three percent for fiscal year 2005-06. The maximum rate allowed and most commonly negotiated is actually five percent, potentially contributing more than \$388,000 annually pending successful negotiations during the upcoming cable franchise renewal. SBC claims that it is not providing cable services and therefore not subject to paying franchise fees but the provision of video services has the potential to impact services currently provided by Cable Access Television (CATV). The intent of this proposed limitation is to stop the erosion of revenues from franchise fees and avoid possible litigation from our current CATV franchise holder.

FUNDING AVAILABLE: Not applicable.

Janet L. Hamilton
Management Analyst

APPROVED: _____
Blair King, City Manager

LODI CITY COUNCIL
REGULAR MEETING

Res K-4: Adopt Resolution Approving
SBC Encroachment Permit Condition

ORIGINAL

(CD ROM Transcription of Proceedings)

Agenda Item K-4
December 21, 2005

Transcribed by: Christine Bricknell, Job # 377288

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MAYOR HITCHCOCK: Next item on the agenda is Item K-4, which is to adopt a resolution approving SBC encroachment permit condition, video programming limitation for new facilities installation.

Mr. King, I'll turn this over to you. I want you to know, I read this over two times, and I still don't understand what it is about. So whoever makes this presentation, please bring it down to a layman's, school-teacher level.

MR. KING: Maybe I can do that. This is, I think, an emerging policy issue for the Council and for the public. And let me just set the stage that is probably, as you may know, there has been discussion for many years that there would be the possibility of some day that one strand of wire or fiber optic would have the ability to carry telephone service, Internet service, and cable service. That future vision is rapidly coming to reality.

Currently, SBC is seeking to begin to conduct work on their infrastructure system which would allow them to deliver a cable television-type of programming to customers via phone lines. Why this is of public policy interest to the City is that Federal Communications Act allows the City to impose franchise fees on cable

1 companies. We currently impose a franchise fee on
2 Comcast, our cable provider. The franchise fee provides
3 revenue for the city. We can charge a maximum of five
4 percent; we charge three. But also performs a variety of
5 other functions. It allows for us to set certain quality
6 of standards, such as responding to outages, maintaining
7 records of complaints, ensuring that redlining does not
8 take place throughout a community. It is an important
9 financial source of revenue to the City but also performs
10 a variety of other public purpose functions.

11 We are concerned that phone companies, or other
12 entities like SBC, if they were to begin to provide cable
13 services that they would operate outside of a franchise
14 agreement. SBC claims that they are not covered as a
15 franchise -- as a cable company, and should not pay a
16 franchise fee or be covered by a franchise. Currently,
17 that question is in litigation in the City of Walnut
18 Creek, it and may take a while to sort out.

19 However, we would like to get our tow in the
20 water in this debate, one of the ways to do that is to put
21 some fairly simple language into the encroachment permit
22 SBC is seeking. And that language basically says: By
23 accepting this permit, encroachment permit, SBC needs to
24 work in the city's and the public's right of ways, that
25 SBC agrees on behalf of itself and its affiliates or

1 signees that it will not provide video programming cable
2 service without obtaining a franchise permit or fee, or
3 franchise agreement from the City of Lodi.

4 It is -- basically what we're saying is if you
5 are going to use this infrastructure, which is our
6 understanding is their intention, to deliver cable-like
7 services -- in other words, you subscribe to a TV show
8 over your phone line -- that before you can do that, you
9 obtain a franchise agreement from us. Without that,
10 whether this will be enforceable in the future will be a
11 test of litigation, but without that we have indicated
12 that our clear intention that we aren't going to just
13 allow cable-like services to be delivered out of the
14 franchise agreement.

15 So hopefully that's a clear enough explanation of
16 what this issue is.

17 MAYOR HITCHCOCK: Yes. That makes it very clear
18 for me. Are other cities taking this approach? Is this a
19 standard way to go?

20 UNIDENTIFIED SPEAKER (male): I don't know that
21 this is a standard way to go, because as the City Manager
22 indicated, it is an emerging issue. There are other
23 cities that are taking this approach, principally Walnut
24 Creek, and they'll be the -- really the test case because
25 SBC is going to fight them. But it is our view, and I

1 think the League of California Cities' view that the
2 approach that Walnut Creek is taking is a good one.
3 There's an alternate approach which is to just not issue
4 the permits, and just go to -- let's go to war right now.
5 That, you know, seems to be an unproductive use of
6 resources. It is maybe the most direct and most
7 aggressive approach. I don't think any cities are doing
8 it. So I think the two approaches are either to do this
9 or to ignore it. And I think this is the middle course,
10 and the one that we would recommend, and I think it is the
11 one that League backs.

12 The League certainly believes that SBC is not
13 entitled to come in and provide these services without a
14 franchise agreement, and we do too.

15 MAYOR HITCHCOCK: So if this resulted in a
16 lawsuit, it would probably be one of those where a number
17 of cities would jump on board?

18 UNIDENTIFIED SPEAKER (male): Yes.

19 MR. KING: The current players are -- just so you
20 know. It is our understanding the City of San Jose is
21 refusing to issue the encroachment permit to SBC until
22 they negotiate a franchise agreement. The County of L.A.,
23 we're told, is attaching language very similar to this.
24 And when we say this is an emerging issue, this is an
25 emerging issue over the last several months because SBC is

1 just beginning this process of installing this
2 infrastructure. So it is happening right now. Although,
3 the literature, we talked about this day would come, we've
4 talked about this for several years, this would come to a
5 head.

6 I think -- well, I'll leave it at that.

7 MAYOR HITCHCOCK: So what you are saying is we do
8 have policy. This is a policy-making decision in terms of
9 which way we want to go, the San Jose approach, the Walnut
10 Creek approach, but you are recommending the Walnut Creek
11 approach. The question I have for you would be: In terms
12 of litigation expense, which one will minimize our cost?

13 UNIDENTIFIED SPEAKER (male): I think the one
14 we're recommending is less likely to result in immediately
15 all-out war while preserving our ability to not lose that
16 control over cable television access in our community and
17 standards, like we have here, you know, community access
18 channel. All those things that you get out of your cable
19 franchise that SBC, you know, presumably wants to come in
20 and provide cable service without those benefits.

21 MR. KING: The hidden glaringness is the cable
22 companies, they have somewhat of a self-serving position,
23 but they certainly believe if someone should provide
24 cable, that it would be a level playing field for
25 everybody providing cable. Meaning if it were to go the

1 other way, they would then say why are we paying franchise
2 fees or operating under a franchise agreement.

3 UNIDENTIFIED SPEAKER (male): Why are we
4 providing community access, they do not have that. All
5 the benefits that you get are at risk.

6 MAYOR HITCHCOCK: Councilmember Hansen.

7 COUNCILMEMBER HANSEN: Thank you, Madam Mayor.

8 I see this as a good thing. I see it as the
9 right step in the right direction for the City. Quite
10 frankly, I think competition for the cable company is a
11 good thing, based on complaints that I have been hearing.

12 My two questions are: Number 1, another emerging
13 trend is wireless providers. Does -- I mean, this is hard
14 line fiber optics. Should we explore whether there should
15 be a -- or whether we could have a franchise fee for
16 wireless providers?

17 And my second question is: Does this in any way
18 inhibit the City's ability to look at being possibly a
19 provider for fiber optics in the future?

20 MR. KING: One, I don't believe it inhibits our
21 ability to provide cable services if we wanted to. I
22 don't believe it does. Two, the issue of wireless in
23 terms of cable services, I think that would look awful
24 like -- or that would look like regular, standard TV
25 service, which is not covered by the FCC in terms of our

1 franchising ability. So the issue here is basically
2 television programming that's delivered to subscribers
3 over a hard line, into a house, in technical terms CATV,
4 community access television. If it looks like it, we are
5 saying it is. SBC is drawing the distinction that it
6 really isn't because people are subscribing to choose a
7 channel, not a whole range of channels, and that's what
8 they are saying why they are not a cable provider.

9 COUNCILMEMBER HANSEN: I'm sure if they got their
10 foot in the door, they would not add a whole range of
11 channels. Yeah.

12 UNIDENTIFIED SPEAKER: (Inaudible) either.

13 COUNCILMEMBER HANSEN: Yeah. All right. Thank
14 you.

15 MAYOR HITCHCOCK: Vice Mayor Johnson.

16 VICE MAYOR JOHNSON: I'm a little bit leery about
17 this, and I think Mr. Hansen and I are on the same page to
18 a great degree. Our, our Comcast contract is up in 2008,
19 I believe. So we're on the verge, if we haven't already,
20 started renegotiating that. This is a foot in the door of
21 a whole new player that -- I mean, you know, they are
22 going to start small, and they are going to expand as fast
23 and as far as they can. I'm absolutely convinced of it;
24 that's the nature of the beast. And the staff report says
25 we've been provided a cursory overview of the program. So

1 we're being asked to provide, just open the door a little
2 bit and limit them so we don't get in trouble with Comcast
3 by providing a competing product. I have said before and
4 I'm not too sure we're even getting a fair shake from
5 Comcast, because they have expanded their product line.
6 Are we getting our fair share of revenue that's grown as
7 they've, you know, gone bigger and better and provided
8 more product.

9 What would be the -- would we have any, any
10 negotiating power or any strength if we said to SBC,
11 "We're not going to give you an encroachment permit.
12 We're going to wait until we see how this thing evolves in
13 other communities, we're getting ready to negotiate a
14 contract with our other cable carrier. And by that time,
15 you may be up and moving in direct competition and we're
16 going to put you head to head."

17 MR. KING: Just so you know, our cable franchise
18 is non-exclusive. Any company can come in and provide
19 cable services as long as they have a franchise agreement.

20 UNIDENTIFIED SPEAKER (male): That's just by
21 municipal code, but by federal law we are not allowed to
22 grant an exclusive franchise. So you can't prevent
23 anybody who wants to come into the market from coming in.

24 UNIDENTIFIED COUNCILMEMBER: We have to give them
25 the encroachment permit, right? We have to allow them in.

1 MR. KING: In this particular case, they are
2 coming forward, as I understand at this time, contacting
3 engineering Public Works Department seeking to have the
4 encroachment permit at this time to install the
5 infrastructure that, in theory, will allow for them to
6 deliver what they are calling interactive TV services.
7 The interactive -- which is a, which is moving down the
8 road as technology changes. What we're saying now is the
9 appropriate time, without getting head into the question
10 of is this going to be cable or not cable, to say, "If you
11 are going to be providing cable services over these lines
12 you are installing via this encroachment permit before
13 that you flip the switch, you are going to come back to us
14 and get a franchise agreement." Without that, they are
15 going down the road and saying, "You didn't stop us when
16 you got the chance to."

17 MAYOR HITCHCOCK: Councilmember Hansen.

18 COUNCILMEMBER HANSEN: Thank you, Madam Mayor.

19 As a point of clarification, maybe this is a
20 question for Mr. Prima. Do they already have,
21 don't they already have fiber optic lines in Lodi?

22 MR. PRIMA: They have some fiber optic backbone.
23 You have probably seen some of these large boxes that have
24 been placed on North Sac and one on Lodi Avenue and other
25 places around that are a different system. This new work

1 would involve additional boxes above ground and a lot of
2 underground fiber.

3 COUNCILMEMBER HANSEN: So they would need to
4 install a whole new --

5 MR. PRIMA: New stuff.

6 COUNCILMEMBER HANSEN: -- infrastructure.

7 MR. PRIMA: They came in to let us know hey
8 probably, I think, March they said, I believe, they will
9 be submitting permit applications to install those
10 facilities.

11 COUNCILMEMBER HANSEN: Okay.

12 MAYOR HITCHCOCK: You know, Mr. Prima, I just --
13 one of the things I think is really ugly in Lodi are these
14 great big green boxes that seem like they pop up in about
15 every third house's yard. And if we are going to see
16 those, point the finger again, you know, in now everyone's
17 yard, I think we should think about what other
18 alternatives we might have for that. I think that
19 wouldn't pass the ugly ordinance smell test.

20 MR. PRIMA: There's a whole host of large boxes
21 out there above ground. I think most of the ones you are
22 referring to do belong to us. They are what we call
23 the --

24 UNIDENTIFIED SPEAKER: Paint them a different
25 color.

1 UNIDENTIFIED SPEAKER (male): I'm very attached
2 it to.

3 MR. KING: There are a number of cities that are
4 looking at forcing utilities to underground those boxes,
5 and there is some debate about, you know, what can be
6 required and of course the utilities all come in and talk
7 about the cost. That is one of the things that Walnut
8 Creek is actually working on. And a number of cities have
9 found, that if you push hard enough you can get them
10 underground for the privately owned utilities.

11 MR. PRIMA: It is a liability problem, though.
12 It isn't just cost. It is a liability. When a lot of
13 that hardware winds up underground, it doesn't hold up the
14 way you would like it to.

15 MAYOR HITCHCOCK: Well, it is certainly something
16 we should consider. They are looking like pieces of
17 furniture in everyone's yard.

18 Any other questions of staff on this item?

19 Anyone from the public who would like to speak on
20 the franchise fee or SBC's encroachment permit?

21 Seeing none, bring it back to the Council for
22 action. Go ahead.

23 MR. KING: Just for interest of fair play. As
24 far as I know, no contact was made with either SBC or
25 Comcast on this particular issue before you.

CERTIFICATE OF REPORTER

I, CHRISTINE M. BRICKNELL, a Certified Shorthand Reporter, hereby certify that the foregoing proceedings were taken in shorthand by me, at the time and place therein stated, and that said proceedings were thereafter reduced to typewriting, by computer, under my direction and supervision;

I further certify that I am not of counsel or attorney for either or any of the parties nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED:

January 30, 2006



Christine M. Bricknell, CSR 9683

RESOLUTION NO. 2005-264

A RESOLUTION OF THE LODI CITY COUNCIL
APPROVING SBC ENCROACHMENT PERMIT
CONDITION (VIDEO PROGRAMMING LIMITATION) FOR
NEW FACILITIES INSTALLATIONS

WHEREAS, in November 2005, SBC announced that network lab and field trials are underway for "Project Lightspeed," a program to deploy fiber optic service to residential areas; and

WHEREAS, construction of the network is planned to begin the first quarter of 2006, with the City of Lodi expected to be in the earliest phases of the program; and

WHEREAS, Project Lightspeed will allow SBC to provide video services within the area served using internet protocol. The video capabilities of this program may conflict with existing and future cable franchises within the City of Lodi; and

WHEREAS, staff recommends that the City Council approve the inclusion of the following condition on all future SBC Encroachment Permits issued for facilities installation:

"By accepting this permit, SBC agrees on behalf of itself and its affiliates and assigns that it will not provide video programming (including but not limited to programming delivered using internet protocol) over its facilities located within the City's rights of way to subscribers within the City without first obtaining a cable franchise or an open video system franchise from the City."

NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council hereby approves the SBC Encroachment Permit Condition (Video Programming Limitation) for new facilities installations and its inclusion on all future SBC Encroachment Permits issued for facilities installation, as shown in the preceding paragraph.

Dated: December 21, 2005

I hereby certify that Resolution No. 2005-264 was passed and adopted by the Lodi City Council in a regular meeting held December 21, 2005, by the following vote:

AYES: COUNCIL MEMBERS - Beckman, Hansen, Mounce,
and Mayor Hitchcock

NOES: COUNCIL MEMBERS - Johnson

ABSENT: COUNCIL MEMBERS - None

ABSTAIN: COUNCIL MEMBERS - None


SUSAN J. BLACKSTON
City Clerk

2005-264

Exhibit 17

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14 Telephone: (415) 778-1213
15 Facsimile: (415) 882-4458
16 Email: bl2153@sbc.com

14 Attorneys for Plaintiff and Petitioner
15 PACIFIC BELL TELEPHONE COMPANY,
16 doing business as SBC CALIFORNIA

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

19 PACIFIC BELL TELEPHONE COMPANY,
20 a California corporation doing business as
21 SBC CALIFORNIA,

21 Plaintiff and Petitioner,

22 vs.

23 THE CITY OF WALNUT CREEK and THE
24 CITY COUNCIL OF THE CITY OF
25 WALNUT CREEK,

25 Defendants and Respondents.

28
e-filing
ORIGINAL FILED
JAN 17 PM 3:10
RICHARD W. WIEKING
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
MMC
No. 05 4723

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION;
PETITION FOR WRIT OF
MANDAMUS

[Federal Telecommunications Act of
1996, Federal Preemption,
Unconstitutional Deprivation of
Substantive Due Process, Violation of 42
U.S.C. § 1983, Violation of First
Amendment and Contracts Clause of
U.S. Constitution; Supplemental State
Law Claims]

1 Plaintiff and petitioner, PACIFIC BELL TELEPHONE COMPANY, doing business
2 as SBC California (“SBC”), alleges against defendants and respondents, the City of Walnut
3 Creek and the City Council of the City of Walnut Creek (collectively, the “City”), as follows:

4 **NATURE OF THE ACTION**

5 1. The City has deprived SBC of its right to upgrade its telecommunications
6 network currently installed in the public rights-of-way (“PROW”) located within the City of
7 Walnut Creek unless SBC agrees that the Internet Protocol (“IP”)-based video services it
8 intends to provide are subject to the City’s cable franchise ordinance, and that it will not
9 provide video programming without first obtaining a video franchise or an open video system
10 franchise from the City (the “Franchise Condition”). SBC’s IP video services are not cable
11 services or open video services subject to the City’s authority to require a cable franchise.
12 The City’s actions were taken in derogation of SBC’s right to use the public rights-of-way to
13 install and operate telecommunications facilities as protected under the Telecommunications
14 Act of 1996, 47 U.S.C. §§ 151 et seq. (the “TCA”). SBC contends that the Franchise
15 Condition is improper, unlawful and unenforceable in that it conflicts with controlling federal
16 and state laws which preclude local governments like the City from imposing conditions on
17 SBC’s access to, or use of, its telephone lines in the PROW. In particular:

18 a. Under 47 U.S.C. § 253 (“Section 253”) the City has no authority to
19 refuse to grant SBC access to PROWs for the purpose of upgrading its
20 telecommunications facilities based on the types of services that SBC plans to provide
21 in the future. The City may only regulate SBC’s physical use of the PROWs through
22 reasonable time, place and manner restrictions. The Franchise Condition exceeds this
23 limited authority and effectively prohibits the provision of telecommunication
24 services in violation of Section 253;

25 b. The Franchise Condition interferes with SBC’s existing franchise
26 under section 7901 of the California Public Utilities Code (“Section 7901”). The
27 State of California has granted SBC a franchise under Section 7901 to construct its
28 telephone lines in the PROWs and to use its lines to provide any form of

1 communication, including video. By constructing lines and providing service, SBC
2 has entered into a binding contract with the State that is protected by both the United
3 States Constitution and the California Constitution from impairment by subsequent
4 state or local regulation. Contrary to this authority, the Franchise Condition deprives
5 SBC of the beneficial use of its Section 7901 franchise by conditioning SBC's right to
6 access the PROWs—as necessary to maintain and enhance its network—on SBC's
7 first providing a commitment to negotiate a franchise with the City for video services.
8 The City, however, has a ministerial duty to issue permits to access the PROWs to
9 SBC without imposition of the Franchise Condition;

10 c. The Franchise Condition violates California's Constitution and
11 statutes. Matters of telecommunications regulation are of general statewide concern.
12 The City, by attempting to regulate SBC's use of telephone lines because its network
13 will include the additional capability to deliver video, illegally intrudes on matters
14 which are exclusively the domain of state authority;

15 d. Federal cable law, as set forth in Title VI of the Communications Act
16 of 1934 (the "Cable Act"), imposes a cable franchise requirement only where a "cable
17 operator" provides "cable services" through a "cable system." 47 U.S.C. § 541(b)(1).
18 SBC's telephone network is not such a "cable system" because it will provide
19 "interactive on-demand services" (*id.* § 522(7)), and Project Lightspeed video will not
20 be a "cable service" because it is not "one-way transmission" of video programming
21 (*id.* § 522(6)), but is a two-way switched network that is designed to transmit voice,
22 interactive video and data indifferently in a call-based or session-based format
23 controlled by the user. SBC's network has been designed, and will be operated, as a
24 two-way switched network. Irrespective of the nature of the video services that SBC
25 will provide in the City over that network, SBC's network does not constitute a
26 community antenna television system or cable television system and its services are
27 not community antenna television or cable services. Accordingly, the City's
28 assumption that SBC will be providing cable services over a cable system is contrary

1 to SBC's actual network architecture, not supported by substantial evidence and is
2 subject to a writ of mandate under Cal. Code Civ. Proc. ("CCP") § 1085 and/or CCP
3 § 1094.5;

4 e. The Cable Act, at 47 U.S.C. § 556(c), provides that "any law of any
5 State, political subdivision, or agency thereof, or franchising authority, or any
6 provision of any franchise granted by such authority, which is inconsistent with this
7 Act shall be deemed to be preempted and superseded." The Franchise Condition
8 improperly requires SBC to submit to cable franchise requirements contrary to the
9 requirements set forth in the Cable Act. For example, a common carrier such as SBC
10 is entitled to provide, among other services, open video services or interactive on-
11 demand video programming without becoming subject to cable franchise
12 requirements. By contrast, the Franchise Condition illegally purports to require SBC
13 to obtain a franchise prior to providing *any* video services and thus deprives SBC of
14 rights expressly granted under the Cable Act;

15 f. The City's attempt to franchise SBC's future video services is also
16 improper because Section 7901 authorizes SBC to use its telephone lines to provide
17 any form of electronic communications without the need for a separate local
18 franchise. That SBC will improve its existing network and use its existing telephone
19 lines to provide video programming does not require SBC to obtain a local franchise
20 for "cable services" because Section 7901 constitutes a sufficient authorization, or
21 "franchise," for SBC to access the public rights-of-way; and,

22 g. The Franchise Condition is also contrary to California cable law, as set
23 forth at Cal. Gov. Code §§ 53066 *et seq.* The City's authority is limited by Section
24 53066(e) of the California Government Code to persons who "commence *the*
25 *construction* of a cable television system without a franchise or license granted by the
26 city, county, or city and county in which the cable television system will operate"
27 (emphasis added). Section 53066 can be applied only to a system that is a cable
28 television system and does not support the City's attempt to franchise video services

1 which will be delivered over a pre-existing telephone network and not via a cable
2 system whose construction was franchised by the City.

3 **THE PARTIES**

4 2. SBC is a California corporation with its principal place of business in San
5 Francisco, California. SBC is, and at all times mentioned herein was, qualified to do
6 business in California. SBC is a "telephone corporation" which provides service over
7 "telephone lines" as those terms are defined in the Public Utilities Code. SBC is also a
8 "telecommunications carrier" that provides "telecommunications services" as those terms are
9 defined in the TCA, and the rules, regulations and orders promulgated by the Federal
10 Communications Commission ("FCC") pursuant to the TCA.

11 3. Defendant and respondent, the City of Walnut Creek, is a municipal
12 corporation duly organized and constituted under the Constitution and laws of the State of
13 California. Among other things, the City has a duty to act in accordance with law, including
14 the TCA, the Cable Act, the California Public Utilities Code, and the California Government
15 Code. Defendant and respondent, the City Council of Walnut Creek, is the duly elected
16 governing body of the City, empowered by law to take certain actions on behalf of the City.
17 In taking the actions complained of herein, the City acted through its City Council and
18 certain staff, employees and agents responsible to the City. Defendants and respondents are
19 "persons" within the meaning of Title 42 U.S.C. § 1983, and each of the actions complained
20 of herein was taken under color of state law.

21 **JURISDICTION AND VENUE**

22 4. This action arises under the Constitution and laws of the United States,
23 including the Supremacy Clause, U.S. Const., Art. VI, par. 2; the Federal Communications
24 Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended by the TCA; the Due Process Clause, U.S.
25 Const. Amend. XIV, § 1; the First Amendment, U.S. Const. Amend. I; and the Civil Rights
26 Act, 42 U.S.C. § 1983. The Court has jurisdiction of this action pursuant to the TCA and
27 Title 28 U.S.C. §§ 1331 and 1337(a). Additionally, the Court has jurisdiction of this action
28 pursuant to Title 28 U.S.C. § 1367(a) in that the state law claims are so related to the claims

1 over which the Court has original jurisdiction that they form part of the same case or
2 controversy under Article III of the United States Constitution. The Court's authority to
3 grant declaratory relief and other appropriate relief is founded upon Title 28 U.S.C. §§ 2201
4 and 2202.

5 5. Venue is proper in this Court under the TCA and 28 U.S.C. § 1391(b) in that
6 the claims stated herein arose in this Judicial District and defendants reside and transact
7 business within this District.

8 **INTRADISTRICT ASSIGNMENT**

9 6. Pursuant to Local Rule 3-2, this action arises in Contra Costa County and
10 therefore should be assigned to the San Francisco Division or the Oakland Division.

11 **GENERAL ALLEGATIONS**

12 **The Federal Statutory Framework**

13 7. Since Congress enacted the Communications Act in 1934, it has been "the
14 policy of the United States to encourage the provision of new technologies and services to
15 the public." 47 U.S.C. § 157(a). In 1996, in the face of rapidly developing technology and
16 the need to ensure its timely deployment, Congress amended the Communications Act by
17 enacting the TCA, which was intended to increase and improve competition in the industry.
18 In particular, several provisions of the TCA are designed to ensure that emerging, advanced,
19 Internet-based networks and services would flourish and spread. In section 230 of the TCA,
20 Congress declared: "It is the policy of the United States . . . to preserve the vibrant and
21 competitive free market that presently exists for the Internet and other interactive computer
22 services, unfettered by Federal or State regulation." *Id.* § 230(b)(2). Congress also made
23 clear in section 706 of the TCA that national policy requires both the FCC and state
24 governments to adopt deregulatory policies designed to promote the deployment of
25 "advanced telecommunications capability." *Id.* § 157, note. Those advanced
26 telecommunications capabilities include high-speed, fiber-based facilities and new Internet-
27 based voice, data and video services. *Ibid.* Congress directed both the FCC and state
28 commissions to "encourage deployment" of such services "on a reasonable and timely basis"

1 by using tools “that promote competition in the local telecommunications market, or other
2 regulating methods that remove barriers to infrastructure investment.” *Ibid.*

3 8. In enacting the TCA, Congress took steps to promote competition and reduce
4 the regulation of telecommunications providers. Congress enacted Section 253 to preempt
5 state and local governments from imposing legal requirements that could have the effect of
6 prohibiting the provision of interstate or intrastate telecommunications service. 47 U.S.C.
7 § 253(a). Section 253 limits local authorities’ power to “manage” carriers’ use of PROWs
8 except for competitively neutral and non-discriminatory time, place and manner restrictions.

9 9. In addition, Congress amended the Cable Act to make clear that telephone
10 companies could provide cable services. In those amendments, Congress specifically
11 provided that telephone companies that used their telephone networks to provide only
12 interactive on-demand video programming would not be subject to the franchising provisions
13 of the Cable Act because they would not be categorized as cable operators. 47 U.S.C.
14 § 522(7). The 1996 amendments also provided other non-exclusive means by which
15 telephone companies could enter the video market without a cable franchise.

16 The State Statutory Framework

17 10. In California, telephone companies have long had the right to use the PROWs
18 to install and operate their facilities. That right is based on a statute that has been in force for
19 over 100 years, now codified as Section 7901 of the Public Utilities Code, which provides as
20 follows:

21 “Telegraph or telephone corporations may construct lines of telegraph or
22 telephone lines along and upon any public road or highway, along or across
23 any of the waters or lands within this State, and may erect poles, posts, piers,
24 or abutments for supporting the insulators, wires, and other necessary fixtures
25 of their lines, in such manner and at such points as not to incommode the
26 public use of the road or highway or interrupt the navigation of the waters.”

27 11. Section 7901 removes municipal authority to deny SBC the right to access the
28 PROWs for the construction, installation and maintenance of telephone lines. SBC’s

1 franchise rights under Section 7901 are well-established and remain vested and fully in force
2 so long as SBC continues to construct, maintain and operate telephone lines within the state.

3 12. Under California law, a Section 7901 franchisee, such as SBC, is entitled to
4 use its lines interchangeably for transmitting any communication service by means of the
5 transmission of electrical impulses and no additional franchise is required to add additional
6 services.

7 13. Section 7901 has been judicially construed by many decisions. "It has been
8 uniformly held that the statute is a continuing offer extended to telephone and telegraph
9 companies to use the highways, which offer when accepted by the construction and
10 maintenance of lines constitutes a binding contract based on adequate consideration, and that
11 *the vested right established thereby cannot be impaired by subsequent acts of the*
12 *Legislature."* *County of Los Angeles v. Southern California Tel. Co.*, 32 Cal.2d 378 (1948)
13 (emphasis added). See U.S. Const., Art. I, § 10 ("No State shall . . . pass any . . . Law
14 impairing the Obligation of Contracts"); Cal. Const. Art. 1, § 9 ("[A] law impairing the
15 obligation of contracts may not be passed").

16 14. The franchise granted by Section 7901 reserves to local entities only a limited
17 right to reasonably regulate the "time, place and manner of installations." This principle is
18 codified in Public Utilities Code section 7901.1, which provides:

19 "(a) . . . municipalities shall have the right to exercise reasonable
20 control as to the time, place and manner in which roads, highways, and
21 waterways are accessed;

22 "(b) The control, to be reasonable, shall, at a minimum, be applied to
23 all entities in an equivalent manner."

24 **SBC's Use of State Franchise Rights To Provide Communications Services in California**

25 15. Relying on its established right to access the PROWs, SBC has, directly and
26 through its predecessor entities, provided communications services to business and
27 residential customers in California for over a century. Because SBC owns, controls, manages
28 and operates telephone lines for compensation in California, it is a "telephone corporation"

1 within the meaning of Section 7901 as defined by Section 234 of the Public Utilities Code.
2 SBC's services, and the technologies and network design and engineering by which those
3 services are delivered, have constantly evolved over time. Section 7901 has been consistently
4 interpreted to encompass the evolution and development by telephone corporations like SBC.

5 16. Initially, SBC's services consisted of local exchange voice services, which
6 SBC transmitted over twisted-pair copper wires placed on overhead poles or in underground
7 conduit. Connections were made by manual switching, handled from switchboards located in
8 central offices by telephone operators. Switchboard operators interconnected lines by
9 inserting plug-equipped cords into switchboard jacks. After 1891, manual operator switching
10 began being augmented or replaced by electromechanical switches known as Stowger
11 systems or "step-by-step," in which the motion of the switches was controlled by electrical
12 pulses created by a rotary dial. The Stowger switching system had no intelligence and
13 limited capability to vary call destination. Manual operator switching and Stowger systems
14 were incapable of rerouting call paths in the event of a blockage in the switching system.
15 These limitations were addressed by common-controlled switching systems known as
16 "panel" systems first introduced in the 1920's and "crossbar" systems introduced in the
17 1940's. Common-controlled switching operated based on a circuit that registers digits
18 transmitted by the subscriber by dial or tone pulses. Common-controlled switching was
19 faster than "Stowger system" switching, and the "alternate routing" capability introduced
20 with common-controlled switching is characteristic of modern switching systems. Growth in
21 computer and switching technology produced an electronic equivalent of the
22 electromechanical common-control switching system, electronic switching systems ("ESS")
23 utilizing "logic gates" which operated the equivalent of electromechanical relays
24 electronically. Early ESS were not programmable. In 1965 stored program control ("SPC")
25 central offices utilized the first ESS driven by computer software, making these switching
26 systems programmable. The "No. 1 ESS" manufactured by Western Electric, provided
27 analog switching controlled by digital computers. SPC central offices provided enhanced
28 features unavailable in electromechanical central offices, and were more capable of

1 collecting data and diagnosing system irregularities. Following the innovation and perfection
2 of large-scale integrated circuits in the 1970's, it was technically feasible to replace analog
3 electronic switching in SPC central offices with fully digital switching. By 2000 the state of
4 the art developed digital switching controlled by programmable central processors capable of
5 supporting large tandem switches handling thousands of trunks. Digital switches reduce
6 analog-to-digital conversions, which improves connection quality. Advances in digital
7 switching network technology provide for modern maintenance and administrative features,
8 central office equipment features, and service and signaling features never imaginable in the
9 days of manual operator switched service. Today, the communications network provided by
10 SBC continues to evolve to take advantage of Internet Protocol packet switched technologies
11 in order to expand the services available and enhance the quality of service provided over its
12 network.

13 17. As switching has evolved, SBC's twisted-pair copper telephone lines have
14 been augmented, replaced and upgraded with fiber optic lines. As telephone lines have
15 evolved to take advantage of new technology and materials, new and improved services have
16 been offered by SBC. These new services have included, for example, vertical services such
17 as call forwarding and three-way calling, caller ID, voicemail service, video telephoning, and
18 Internet access. At each phase of SBC's evolution in its telephone network and services,
19 customer equipment has also evolved to best utilize the capabilities offered—from hand-
20 cranked telephones supplying their own electrical power to telephones using power supplied
21 as an integral part of the telephone line; from the dial to the touchtone telephone; from
22 telephones integrating voice and caller ID functions to video phones and personal computers,
23 transmitting video and other communications capabilities using telephone lines as the means
24 to provide connectivity and transport.

25 18. Beginning in the late 1980s, SBC has been upgrading its network in
26 California, including in Walnut Creek, by installing new fiber optic cable, which is able to
27 carry larger amounts of communications traffic at higher speeds.

28

1 19. In the late 1990s, SBC began deploying “broadband” Internet access
2 capabilities in its network to allow customer access to the Internet through high-speed
3 connections, such as Digital Subscriber Line (“DSL”) service. Initially, that capability was
4 delivered by equipment placed in SBC’s central switching offices. SBC later expanded its
5 broadband capabilities through deployment of fiber optic cable farther out into its network
6 under “Project Pronto.” As part of that work, which was initiated over five years ago, next-
7 generation remote terminals were placed closer to customer homes within the City, and then
8 fed by fiber optic cable as a way to provide broadband capability to a far greater number of
9 City residents. Connections to most residential and business subscribers, from the remote
10 terminal, were achieved with the same twisted-pair copper wire facilities over which legacy
11 public switched telephony has been and still is delivered. The Project Pronto network
12 improvements enabled SBC to offer more end users a broadband service using DSL
13 technology that permits ordinary voice calls to be carried over the same twisted-pair copper
14 wires at the same time as higher speed data and Internet access service. Current generation
15 DSL services are limited in certain respects, however. Essentially, the speed or “bandwidth”
16 of information transfer is dependent on the distance the information must travel over the
17 twisted-pair copper facilities. The maximum bandwidth of present generation DSL, while
18 much improved over “dial-up” access to information or Internet services, is not as fast as the
19 emerging technologies that SBC intends to employ through Project Lightspeed.

20 **SBC’s Continuing Effort to Upgrade Its Facilities**

21 20. In October 2004, SBC announced plans to implement a further upgrade of its
22 network under “Project Lightspeed.” In Project Lightspeed, SBC and its affiliated companies
23 will invest approximately \$5 billion over the next two to three years to deploy fiber optic
24 cable facilities more deeply into its network throughout the SBC regions, including
25 California. While Project Pronto extended fiber optic cables to remote terminals, Project
26 Lightspeed will go farther, extending fiber from where Project Pronto left off to a network
27 point within a neighborhood (called a “node”) from where existing twisted-pair copper lines
28 or fiber will then carry service to each residence or office as they do now. Project Lightspeed

1 also involves removing some facilities from the existing twisted-pair copper lines in order to
2 increase their ability to carry advanced communications services with much higher
3 bandwidth.

4 21. The capabilities contemplated by the Project Lightspeed improvements will
5 provide remarkable benefits to residents and businesses in the City. Subscribers will enjoy a
6 vastly expanded range of integrated, next-generation services, at speeds and with
7 functionality not presently available. All of these new IP-enabled services and capabilities
8 will be offered in addition to traditional voice services over the same “last mile” twisted-pair
9 copper-wire connection and fiber. SBC also will provide its customers advanced “Voice
10 over Internet Protocol” (VoIP) service. Because IP-enabled services can be selected and
11 managed individually by the subscriber, Project Lightspeed, once deployed, will empower
12 customers in Walnut Creek to have an unprecedented ability to use information over various
13 IP-based devices.

14 **SBC’s Application for a Permit to Upgrade Facilities in Walnut Creek**

15 22. SBC is in the process of implementing its Project Lightspeed network
16 improvements in California, including within the City. In addition to extending fiber optic
17 cable further into the neighborhoods, SBC will perform work to “condition” its existing
18 twisted-pair copper wires, which typically extend the last few thousand feet from the fiber-
19 fed node to the customer premises. Because the new IP-based services will be sent partially
20 over twisted-pair copper wire and long distances cause packet loss or degradation, the
21 existing copper lines need to be conditioned to minimize packet loss. This requires the
22 removal, in some locations, of equipment known as “bridge taps” and “load coils” that had
23 been placed on the copper wires in earlier years to extend phone service, but which are no
24 longer necessary and can have the effect of degrading performance. Removing this
25 equipment also will facilitate the transmission of SBC’s existing DSL broadband and voice
26 services. In accordance with its long-standing rights under Section 7901 and the TCA, SBC
27 has the authority to install, operate and maintain its communications network along or upon
28 PROWs in the City.

1 23. As part of this conditioning work, SBC sought to remove certain bridge taps
2 on existing aerial twisted-pair copper lines along a one-block stretch of Walnut Avenue,
3 between Schneider Lane and Wiget Lane, in the City. Because SBC did not intend to
4 undertake any excavation, the conditioning work did not require an encroachment permit
5 under the City's Public Works ordinance. *See* Walnut Creek Municipal Code Section 7-
6 1.210 ("No permit shall be required for the continuing use or maintenance of encroachments
7 installed by public utilities or when such changes or additions require no excavation of the
8 right-of-way"). In an abundance of caution, however, a permit was sought under Municipal
9 Code Section 7.1-303 (requiring an encroachment permit for any temporary street closure)
10 for the temporary closure of a bike lane to perform the line conditioning work.

11 24. On June 7, 2005, an SBC representative submitted an encroachment permit
12 application to the City to perform the line conditioning work on Walnut Avenue. The permit
13 described the work as "[a]erial work only," and indicated that the work would be performed
14 sometime between June 7 and July 8, 2005. In submitting the permit, the SBC representative
15 was asked by the City Construction Coordinator to indicate whether the permit was related to
16 Project Lightspeed and this was indicated on the application form. No information was
17 provided that a special Franchise Condition would be attached to the permit.

18 25. On June 8, 2005, an SBC representative contacted the City Inspector's office
19 to inquire about the status of the permit application. A City representative indicated that
20 SBC could proceed with the work. No notice was given that a special condition or limitation
21 would be attached to the permit. In accordance with the City's approval, SBC's construction
22 crews proceeded with and completed the line conditioning work in the period of June 8-10,
23 2005.

24 26. On June 21, 2005, the City forwarded a copy of Permit No. EP05-0434 (the
25 "Permit") via facsimile to SBC's offices. Attached to the permit was a non-standard one-
26 page rider entitled, "Additional Permit Conditions for Project Light Speed [sic]," containing
27 the Franchise Condition:

28

1 By accepting this permit, SBC agrees on behalf of itself and its affiliates that
2 it will not provide video programming (including but not limited to
3 programming delivered using internet protocol) over facilities located with
[sic] the City's rights-of-way to subscribers within the City without first
obtaining a cable franchise or an open video system franchise from the City.

4 27. The Franchise Condition was not attached to the permit application that SBC
5 filled out and submitted on June 7, 2005. The Permit application stated only that SBC agreed
6 to comply with the standard rules and regulations printed on the reverse side of the form and
7 to comply with "the City of Walnut Creek's Standard Specifications, City ordinances and
8 Traffic Division requirements and conditions."

9 28. By imposing the Franchise Condition, the City acted in excess of its
10 jurisdiction and in violation of its duties under Section 253, the TCA and Cal. Pub. Util.
11 Code Sections 7901 and 7901.1.

12 29. While the City disputes that SBC lacked advance notice of the Franchise
13 Condition, the dispute is immaterial because the Franchise Condition is contrary to state and
14 federal law. Even if SBC had agreed with the condition, which SBC disputes, the agreement
15 would be void *ab initio* under California Civ. Code § 1598 and other provisions of California
16 law.

17 30. On June 28, 2005, following receipt of the Permit containing the Franchise
18 Condition, SBC promptly objected to the Franchise Condition, stating that SBC did not
19 accept the Condition and advising the City that SBC was reserving all rights to challenge the
20 applicability, enforceability and/or the legality of the Condition.

21 31. On July 1, 2005, SBC timely filed an administrative appeal of the Franchise
22 Condition to the City Council, pursuant to Walnut Creek Municipal Code § 7-1.107.

23 32. On July 27, 2005, the City forwarded to SBC a 58-page proposed "Cable
24 Franchise Agreement." Under the proposed agreement, SBC would be required to submit to
25 an architectural design review process, agree to construction deadlines, comply with various
26 tests and inspections, adopt system requirements, comply with interconnection requirements,
27 pay a 5% franchise fee, agree to rate regulation, comply with reporting and review
28 requirements, acknowledge the City's right to require the franchise and other conditions.

1 effect of prohibiting the ability of any entity to provide any interstate or intrastate
2 telecommunications service.”

3 38. Courts have held that under Section 253(a) cities are not permitted to deny
4 permits to telecommunications providers for access to PROW based on discretionary factors
5 unrelated to the management or use of the rights-of-way.

6 39. In this case, the City’s attempt to impose the Franchise Condition prohibits, or
7 has the effect of prohibiting, the provision of the telecommunications services that SBC
8 intends to provide along with the full complement of advanced, IP-based services, such as the
9 provision of some legacy voice services. This is in violation of Section 253(a) because the
10 City is exercising discretion as to whether to allow SBC to access the PROWs to install and
11 upgrade communications infrastructure that is used, and will continue to be used, to deliver
12 both traditional voice telecommunications services as well as a variety of more advanced
13 broadband services, and because of the Franchise Condition imposed by the City.

14 40. An actual controversy has arisen and now exists between SBC, on the one
15 hand, and the City, on the other hand, in that:

16 (a) The City has conditioned SBC’s continued access to its existing
17 communications network on SBC’s willingness to agree that any video programming
18 SBC provides will be subject to cable franchising obligations;

19 (b) By imposing a condition on SBC’s ability to upgrade its
20 communications network based on SBC’s future services rather than SBC’s physical
21 use of the PROW, the City improperly imposes barriers to SBC’s provision of
22 telecommunications services in violation of Section 253(a); and

23 (c) The City continues to maintain its position that SBC may not upgrade
24 its network unless and until it submits to the Franchise Condition which SBC believes
25 to be illegal.

26 41. As a result of the City’s unlawful actions, SBC has been and is damaged in
27 that it has been and will continue to be unable to timely modify and upgrade its facilities,
28 which is necessary to improve the reliability and performance of existing

1 telecommunications services as well as create capabilities for new services demanded by
2 customers, resulting in lost utilization of its existing services, as well as lost revenues for
3 existing and new services.

4 42. SBC has no adequate and speedy remedy at law to resolve this dispute except
5 for the instant action. A determination is necessary and appropriate at this time so that SBC
6 may ascertain its rights.

7 43. SBC seeks a declaration of its rights to install, operate and maintain its
8 improved facilities in PROWs within the City for the provision of services, including a
9 declaration that the Franchise Condition is preempted under Section 253 and the Supremacy
10 Clause of the United States Constitution. In addition, SBC seeks an order compelling the
11 City to set aside and annul the Franchise Condition forthwith and to grant all other permits or
12 approvals needed for installation, operation and maintenance of SBC's facilities within
13 PROWs in the City for the provision of Project Lightspeed services without the Franchise
14 Condition or any other restrictions or conditions unrelated to SBC's physical use of the
15 PROWs located in the City.

16 **SECOND CLAIM FOR RELIEF**

17 **(Declaratory Judgment, Injunction and Preemption Based On The Cable Act)**

18 **(47 U.S.C. §§ 522, 541, 556; 28 U.S.C. §§ 2201, 2202)**

19 44. SBC incorporates the allegations of paragraphs 1 through 43 above as though
20 fully set forth herein.

21 45. The Franchise Condition requires SBC to agree that it will not provide any
22 video programming in the City unless it first obtains a cable franchise from the City.
23 However, as alleged above, the Cable Act provides that "any law of any State, political
24 subdivision, or agency thereof, or franchising authority, or any provision of any franchise
25 granted by such authority, which is inconsistent with this Act shall be deemed to be
26 preempted and superseded." 47 U.S.C. § 556(c).

27 46. The Franchise Condition improperly requires SBC to submit to cable
28 franchise requirements contrary to the requirements set forth in the Cable Act. Under the

1 Cable Act, the cable franchise provisions apply only to “cable operators” that provide “cable
2 services” over “cable systems.” These requirements do not apply to Project Lightspeed.

3 47. SBC is not a “cable operator” because it does not operate a “cable system,”
4 i.e., a system “designed to provide cable service.” 47 U.S.C. § 522(7). SBC’s network is not
5 such a system because it is not designed to provide cable service. Rather, SBC’s network is a
6 two-way switched network that is designed to transmit packetized data, including voice and
7 video indifferently, in a call-based or session-based format controlled by the user.

8 48. In addition, SBC’s services will not constitute “cable services” under the
9 federal Cable Act. A “cable service” is defined as:

10 (A) the one-way transmission to subscribers of (i) video programming, or
11 (ii) other programming service, and

12 (B) subscriber interaction, if any, which is required for the selection or use
13 of such video programming or other programming. 47 U.S.C. § 522(6).

14 49. In contrast to incumbent cable service, SBC’s video service does not involve
15 “one-way transmission.” Instead, the video service is a two-way interactive service. No
16 connection exists between a customer and the network server from which content is provided
17 until the customer’s act of selection, by command to their personal computing device or
18 television set top box (with the same function), causes a customized network channel to be
19 created for such duration as is necessary to transmit the content that the customer selected.

20 50. Thus, the switched, two-way interactive nature of SBC’s IP video services
21 makes it clear that SBC will not be providing a cable service under state or federal law.
22 Moreover, the City failed to consider the nature of video programming and features being
23 developed, all of which further substantiate the fact that SBC’s IP video service is not a cable
24 service. The City’s conclusion that SBC’s IP video services will constitute “cable services”
25 is, therefore, unsupported by substantial evidence.

26 51. An actual controversy has arisen and now exists between SBC, on the one
27 hand, and the City, on the other hand, in that:

28

1 57. Under Section 7901, the State of California has granted SBC a franchise
2 authorizing SBC to access the PROWs located in the City for the purpose of installing and
3 operating its telephone lines. A “telephone line” is defined broadly to include “all conduits,
4 ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and
5 personal property owned, controlled, operated, or managed in connection with or to facilitate
6 communication by telephone, whether such communication is had with or without use of
7 transmission wire.” Cal. Pub. Util. Code § 233. Section 7901 places no restrictions upon
8 what may be transmitted by means of electrical impulses over its telephone lines. Indeed,
9 longstanding California precedent establishes that, as long as SBC continues to facilitate
10 communication by phone via its telephone lines, it is entitled to use such lines to provide any
11 form of electronic communication, including video, without obtaining any additional
12 franchise from local governments.

13 58. SBC is not a “cable operator” and does not intend to offer “cable services”
14 over a “cable system.” Regardless of the regulatory classification of SBC’s future video,
15 however, SBC’s existing state franchise under Section 7901 authorizes SBC to transport
16 video over its telephone lines without obtaining a separate franchise from the City. SBC is
17 not building a new or separate network in the City but is merely upgrading or modifying its
18 network as it has continuously done in the past (most significantly and recently through
19 Project Pronto) and will use its existing network, including twisted-pair copper wires over
20 which it routinely transports phone calls, as the medium for delivery of video services. The
21 Section 7901 franchise authorizes SBC to use this network without obligation to enter into a
22 separate local franchise when video content happens to be carried over a common network.

23 59. Even if the Cable Act were applicable to SBC’s services (which it is not),
24 nothing in the Cable Act requires that a cable franchise must be granted from a local
25 government as opposed to the state. Section 541 requires merely that a cable company obtain
26 a franchise from the “franchising authority.” 47 U.S.C. § 541(a)(1). The term “franchising
27 authority” includes “any governmental entity empowered by Federal, State, or local law to
28 grant a franchise.” 47 U.S.C. § 522(10). Furthermore, the Cable Act expressly reserves to

1 the states the right to “exercis[e] jurisdiction with regard to cable services consistent with this
2 title.” 47 U.S.C. § 566. In California, Section 7901 is the state law that empowers the State,
3 not any individual locality, to issue a franchise for a telephone corporation such as SBC.

4 60. The franchise required by Section 541 of the Cable Act is a franchise that
5 “authorize[s] the construction of a cable system over public rights-of-way.” *See id.*,
6 subd.(a)(2). In this case, as alleged above, Section 7901 has authorized SBC to construct its
7 telephone lines in the PROWs and to use its lines to provide any form of electronic
8 communication. SBC’s lines are “telephone lines” under state law because they are used,
9 and will continue to be used, to facilitate communication by phone. Even if SBC’s telephone
10 lines could also be classified to constitute a “cable system,” the video services which SBC
11 offers to its customers over those lines could be classified to constitute “cable services,” and
12 SBC could be classified as a “cable provider” (all of which SBC disputes), the State already
13 has given SBC all of the authority SBC requires to construct and operate its network and
14 provide video programming to its telephone customers pursuant to Section 7901.

15 61. An actual controversy has arisen and now exists between SBC, on the one
16 hand, and the City, on the other hand, in that:

17 (a) The City has conditioned SBC’s continuing access to its existing
18 communications network on SBC’s willingness to agree that any video programming
19 SBC provides will be subject to a franchise from the City;

20 (b) Under California and federal law, the City has no authority to
21 franchise any video services that SBC may provide via its telephone lines regardless
22 of the regulatory classification of those services; and

23 (c) The City continues to maintain its position that SBC may not upgrade
24 its communications network unless and until it agrees that the City may franchise
25 SBC’s video services, contrary to SBC’s understanding of its rights.

26 62. Accordingly, SBC seeks a declaratory judgment that (i) SBC’s state franchise
27 under Section 7901 authorizes SBC to provide any form of electronic communication,
28 including video programming even if classified as “cable services,” without obtaining any

1 franchise from the City and (ii) that SBC's Section 7901 franchise satisfies the cable
2 franchising requirement under Section 541 of the Cable Act to the extent Section 541 is or
3 may become applicable to SBC.

4 63. SBC has no adequate and speedy remedy at law to resolve this dispute except
5 for the instant action. A determination is necessary and appropriate at this time and in the
6 circumstances alleged above so that SBC may ascertain its rights.

7 **FOURTH CLAIM FOR RELIEF**

8 **(Denial of Substantive Due Process)**

9 **(Fifth and Fourteenth Amendments to U.S. Constitution)**

10 64. SBC incorporates the allegations of paragraphs 1 through 63 above as though
11 fully set forth herein.

12 65. The franchise granted to SBC under Section 7901 constitutes a vested and
13 cognizable property interest created by state law and protected by the Due Process Clause of
14 the Fourteenth Amendment to the United States Constitution.

15 66. The City's actions complained of herein have deprived SBC of rights,
16 privileges and immunities secured by the Due Process Clause, in that the City's denial of
17 SBC's permit appeal was unfair, arbitrary and capricious, and lacking in a rational basis.
18 Prior to its actions, the City was aware of the enactment of the TCA, and the restrictions
19 contained therein, as well as SBC's rights under Section 7901 granting SBC a franchise to
20 construct, upgrade and maintain its communications facilities in the PROW free from
21 unreasonable and discriminatory conduct. Despite this knowledge, the City denied SBC's
22 appeal and upheld the Franchise Condition without proceeding in the manner required by
23 law, by taking action unsupported by substantial evidence, in knowing and direct
24 contravention of the TCA and state law.

25 67. Accordingly, the City's actions should be declared to be in violation of, and
26 preempted by, constitutional guarantees of due process, and should be set aside and enjoined
27 by the Court on that basis.

28

1 **FIFTH CLAIM FOR RELIEF**

2 **(Declaratory Relief Based on Violation of First Amendment Rights)**

3 68. SBC incorporates the allegations of paragraphs 1 through 67 above as though
4 fully set forth herein.

5 69. An actual and justiciable controversy has arisen between SBC and the City
6 with respect to SBC's First Amendment rights.

7 70. SBC is a First Amendment speaker, entitled to protection under the First
8 Amendment to the United States Constitution. As a provider of IP video and other
9 communications services, SBC distributes and will distribute a variety of content involving
10 speech, including news, information, shopping, weather, governmental, public and
11 educational content. The content that SBC seeks to distribute is protected speech under the
12 First Amendment to the United States Constitution.

13 71. The City's decision to prohibit SBC from installing its network improvements
14 unless SBC first agrees to the cable franchise condition is an unlawful abridgement of SBC's
15 freedoms as guaranteed by the First Amendment to the United States Constitution. The
16 Franchise Condition is at best content-neutral regulation of video services, which is subject to
17 intermediate constitutional scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62
18 (1994) ("*Turner I*"); *Horton v. City of Houston*, 179 F.3d 188, 194 (5th Cir. 1999); *see also*
19 *United States v. O'Brien*, 391 U.S. 367 (1968). Under intermediate scrutiny, "the
20 government may impose reasonable restrictions on the time, place, or manner of protected
21 speech, provided the restrictions are justified without reference to the content of the regulated
22 speech, that they are narrowly tailored to serve a significant governmental interest, and that
23 they leave open ample alternative channels for communication of the information." *Ward v.*
24 *Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted). The
25 City's actions do not serve a significant governmental interest and cannot withstand the test
26 of intermediate scrutiny.

27 72. Accordingly, the City's imposition of franchise conditions on SBC's network
28 upgrades is unconstitutional under the First Amendment to the Constitution, and thus void

1 and of no effect. SBC has already been, and will continue to be, damaged and irreparably
2 harmed by the City's actions. Accordingly, the City should be enjoined from enforcing such
3 a condition.

4 **SIXTH CLAIM FOR RELIEF**

5 **(Violation of Civil Rights Act)**

6 **(42 U.S.C. § 1983)**

7 73. SBC incorporates the allegations of paragraphs 1 through 72 above as though
8 fully set forth herein.

9 74. Title 42 U.S.C. § 1983 provides in relevant part that:

10 Every person who, under color of any statute, ordinance, regulation, custom,
11 or usage, of any State or Territory or the District of Columbia, subjects or
12 causes to be subjected, any citizen of the United States or other person within
13 the jurisdiction thereof to the deprivation of any rights, privileges, or
14 immunities secured by the Constitution and laws, shall be liable to the party
15 injured in an action at law, suit in equity, or other proper proceeding for
16 redress.

17 75. At all times relevant hereto, the City acted "under color of law" within the
18 meaning of section 1983.

19 76. As heretofore alleged, the City's actions violate SBC's rights, privileges and
20 immunities under the Due Process Clause and the Contracts Clause of the United States
21 Constitution, the TCA (47 U.S.C. § 253), the Cable Act and FCC rules, regulations and
22 orders promulgated pursuant thereto, all as secured by section 1983.

23 77. Accordingly, the City's actions should be declared to be in violation of, and
24 preempted by, section 1983, and should be set aside and enjoined by the Court on that basis.
25 In addition, SBC is entitled to damages and to recover its attorneys' fees and costs incurred
26 in bringing this action pursuant to 42 U.S.C. § 1988 and as otherwise provided by law.

27

28

1 84. SBC currently provides telecommunications services to City residents using a
2 combination of fiber and twisted-pair copper facilities. Upon completion of Project
3 Lightspeed, SBC will continue to deliver telecommunications services to City residents
4 through a combination of fiber and twisted-pair copper wire. SBC's planned upgrades will
5 not create a new cable network, as the City appears to assume, but will merely increase the
6 speed and efficiency of the network that SBC has been operating in the City. While the
7 intended Lightspeed upgrades will make the network more suitable for broadband
8 applications, including video, the network has been used to deliver video for decades. The
9 planned upgrades will not change the architecture of the network which will remain a two-
10 way, switched network, and not a network designed for the purpose of delivering one-way
11 cable service.

12 85. SBC accordingly seeks a declaration that Cal. Gov. Code § 53066 does not
13 apply to SBC's telephone lines and does not require SBC to obtain a franchise in order to
14 provide video services via its telephone lines.

15 86. In addition, the U.S. Constitution provides, at Article I, § 10, that "No State
16 shall . . . pass any . . . Law impairing the Obligation of Contracts." Similarly, the
17 California Constitution provides, at Article 1, § 9, that "[A] law impairing the obligation of
18 contracts may not be passed." The Section 7901 franchise has been construed by state and
19 federal courts to constitute a binding contract based on adequate consideration that
20 establishes a vested right that cannot be impaired by subsequent acts of the Legislature. Nor
21 can the vested right conferred by the Section 7901 franchise be impaired by a subsequent
22 delegation of power from the state to a city. Once a telephone corporation such as SBC
23 accepts the Section 7901 franchise, as SBC has, its contractual access to the public rights-of-
24 way are secured against impairment by either subsequent state acts, or by discretionary or
25 incidental acts of local governments. Accordingly, City regulations which purport to impose
26 new requirements inconsistent with a state utility franchise violate both the federal and state
27 constitutional prohibitions on impairment of contracts.

28

1 87. An actual and justiciable controversy has arisen between SBC and the City
2 with respect to SBC's vested rights in the Section 7901 franchise that are protected by Article
3 I, § 10 of the United States Constitution and Article 1, § 9 of the California Constitution.

4 88. SBC is a telephone corporation that has constructed, and will continue to
5 construct, telephone lines in the public rights-of-way of California. SBC has performed its
6 obligations under the Section 7901 franchise in Walnut Creek and has continuously
7 employed that Franchise as the source of its legal authority to seek from the City
8 encroachment permits for access to PROWs within the City in order to install, maintain and
9 enhance its communications network. The Section 7901 authority has been employed during
10 the period that SBC's services expanded beyond basic voice to provision of initial broadband
11 services as provided by DSL modem. SBC seeks to employ the Section 7901 franchise to
12 improve and enhance its communications network within the City in order to offer traditional
13 voice telecommunications and a variety of more advanced broadband services over that same
14 network. Its ability to exercise that franchise to employ new technology for the benefit of
15 City residents and businesses is being directly denied and frustrated by the City's unjustified
16 and illegal actions demanding that SBC agree to the Franchise Condition and enter into a
17 Franchise Agreement.

18 89. Neither Cal. Gov. Code § 53066, any provision of the Municipal Code of
19 City, nor any subsequent action of City, including the Franchise Condition, or City's
20 resolution of the appeal that has given rise to this suit, can supersede rights that are
21 guaranteed to SBC by the United States Constitution or, in the present case, the California
22 Constitution.

23 90. The City's position and action in the present case constitutes a substantial
24 impairment of SBC's protected interests and does not further any substantial governmental
25 interest.

26 91. SBC's rights under the Section 7901 franchise are impaired because it is and
27 has been precluded from upgrading and improving the communications facilities within the
28 City to enable such facilities to carry traditional telecommunications services more reliably,

1 to improve the features and performance of other existing services and to provide new higher
2 bandwidth broadband services that will accompany the network improvements and also
3 permit SBC to deliver more and better video services over the same network. The City does
4 not advance any substantial public purpose where it acts against the benefits that its residents
5 and businesses will receive from deployment of this advanced network (irrespective of
6 whether video ever is offered or ever is selected by any particular customer) and by denying
7 to its constituency the manifest benefits of competitive choice in powerful broadband
8 services and video services.

9 92. Accordingly, the City's prohibition of SBC upgrading its system except on
10 acquiescence to the Franchise Condition is unconstitutional under Article I, § 10 of the
11 United States Constitution and Article 1, § 9 of the California Constitution and thus void and
12 of no effect. SBC has already been, and will continue to be, damaged and irreparably
13 harmed because the effect of the City's action has been to prohibit SBC from upgrading its
14 network. Accordingly, the City should be enjoined, preliminarily and thereafter
15 permanently, from enforcing such a prohibition.

16 **NINTH CLAIM FOR RELIEF**

17 **(Writ of Mandamus)**

18 **(CCP §§ 1085 and/or 1094.5)**

19 93. SBC incorporates the allegations of paragraphs 1 through 92 above as though
20 fully set forth herein.

21 94. Under Section 253, as well as Sections 7901 and 7901.1 of the California
22 Public Utilities Code, the City has no authority or discretion to condition an encroachment
23 permit based on factors unrelated to SBC's physical use of the PROWs. Accordingly, the
24 City has a ministerial, non-discretionary duty to grant SBC a permit to access the PROWs to
25 upgrade its communications network subject only to the City's reasonable regulations
26 affecting the time, place and manner of such access. Conditions that impose an unrelated
27 cable franchise obligation and that apply to the prospective provision of video programming
28 are in violation of this duty.

1 95. SBC brings this claim pursuant to CCP § 1085 to set aside the City's actions
2 and determinations as being contrary to its duties under the law, and in excess of its
3 jurisdiction, lacking in substantial evidence or a rational basis, and arbitrary and capricious.

4 96. In the alternative, SBC also seeks a writ of mandamus under CCP § 1094.5 on
5 the ground that to the extent a hearing was required by law and the City had any discretion in
6 imposing conditions on SBC's exercise of its right to access the PROWs located in the City,
7 the City's actions and determinations were contrary to law, in excess of its jurisdiction and
8 lacking in substantial evidence or a rational basis, arbitrary and capricious, and a prejudicial
9 abuse of discretion.

10 97. As heretofore alleged, Section 7901 grants telephone corporations the right to
11 install lines and associated equipment along and upon PROWs throughout the State of
12 California. Because SBC owns, controls, operates and manages its own instruments and
13 appliances used to facilitate communications by telephone for compensation within
14 California, it is a "telephone corporation" within the meaning of Section 7901 and may
15 install telephone lines along and upon PROWs pursuant to Section 7901.

16 98. As set forth in section 234(a) of the Public Utilities Code, a telephone
17 corporation "includes every corporation or person owning, controlling, operating, or
18 managing any telephone line for compensation within the state." A telephone line is defined
19 broadly to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and
20 all other real estate, fixtures, and personal property owned, controlled, operated, or managed
21 in connection with or to facilitate communication by telephone, whether such communication
22 is had with or without use of transmission wire." Pub. Util. Code § 233.

23 99. Acting as a telephone corporation, SBC sought to upgrade certain telephone
24 lines within the PROWs in the City pursuant to its rights under Section 7901.
25 Notwithstanding SBC's franchise and long-standing practice of using PROWs to install its
26 telephone lines, the City contends that the authority granted by the CPUC is not sufficient to
27 allow SBC to install, operate and maintain its telecommunications facilities along or upon
28 PROWs within the City and provide Project Lightspeed services without consenting to a

1 cable franchise agreement. The City's refusal to recognize and acknowledge SBC's
2 authority to access PROWs for the installation, operation and maintenance of its
3 communications facilities for the provision of communications services free from improper
4 local interference, and the City's imposition of the Franchise Condition, and without
5 execution of the Franchise Agreement, are in violation of Section 7901 and deny SBC its
6 rights under Section 7901.

7 100. In taking its actions, the City acted in excess of its jurisdiction, in disregard of
8 its legal duties and committed a prejudicial abuse of discretion in numerous respects,
9 including the following:

10 (a) Failing to perform the ministerial duty of issuing an encroachment
11 permit to SBC subject only to reasonable time, place and manner restrictions and
12 imposing the Franchise Condition in violation of Section 253, federal and state cable
13 laws, and Sections 7901 and 7901.1 of the Public Utilities Code;

14 (b) Unreasonably delaying and impeding SBC's provision of improved
15 telecommunications services;

16 (c) Refusing to recognize, acknowledge and issue a determination
17 regarding SBC's authority to install, operate and maintain its communications
18 network along or upon the PROWs within the City;

19 (d) Attempting to require SBC to agree to franchise obligations that
20 conflict with federal and state cable law as set forth in the Cable Act and Cal. Gov.
21 Code §§ 53066 *et seq.*;

22 (e) Wrongfully demanding that SBC obtain a cable franchise prior to
23 providing any video programming in the City contrary to SBC's vested rights under
24 Section 7901 and in violation of state and federal constitutional provisions prohibiting
25 state or local governments from impairing contractual obligations;

26 (f) Acting without substantial evidence or a rational basis to support its
27 decision; and
28

1 (g) Basing its decision in whole or in part on irrelevant and/or erroneous
2 conclusions of law and/or fact.

3 101. The City is a municipal corporation that has a duty to act in accordance with
4 law, including the provisions of the TCA, federal and state cable laws, and Public Utilities
5 Code Sections 7901 and 7901.1, but has refused to perform an act or acts which the law
6 specially requires as a duty on its part. SBC is a party enjoying a right which the City has
7 unlawfully denied.

8 102. SBC is beneficially interested in the issuance of a writ of mandamus. As the
9 applicant for the approval at issue, SBC's rights and interests have been and will be adversely
10 affected, and the full use and enjoyment of its property will be denied, unless the decision
11 and actions of the City in imposing the Franchise Condition are set aside.

12 103. SBC has no plain, speedy or adequate remedy at law if the City is allowed to
13 unlawfully condition SBC's authority to utilize the PROWs and require a franchise
14 agreement. Unless the requested mandatory and injunctive relief is granted, SBC will be
15 irreparably harmed, for which harm money or other legal remedies cannot adequately
16 compensate it.

17 104. Accordingly, the Court should issue a writ of mandamus requiring the City to
18 set aside its actions and decision, and enter an order commanding the City to grant the
19 encroachment permit without the unlawful Franchise Condition, and to grant all other
20 permits or approvals needed for installation, operation and maintenance of SBC's facilities
21 within PROWs in the City for the provision of Project Lightspeed services without any
22 requirement for a cable franchise agreement or similar agreement.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, SBC prays for the following relief:

25 1. On the first claim for relief, for a declaration and judgment that the City's
26 imposition of the Franchise Condition was preempted by, and in violation of, Section 253 of
27 the TCA and the Supremacy Clause, and is therefore void and invalid, and for an order
28

1 compelling the issuance forthwith of all necessary permits and approvals without the
2 Franchise Condition or any other restrictions or conditions on the services SBC may provide;

3 2. On the second claim for relief, for a declaration that the City's actions are
4 preempted by, and contrary to, the Federal Cable Act, and are therefore void and invalid, and
5 for an order compelling the issuance forthwith of all necessary permits and approvals;

6 3. On the third claim for relief, for a declaration and judgment that SBC's
7 existing franchise under Section 7901 authorizes SBC to provide video services over its
8 communications network without the need for any separate local franchise and satisfies the
9 cable franchising requirement under Section 541 of the Cable Act to the extent Section 541 is
10 or may become applicable to SBC;

11 4. On the fourth claim for relief, for a declaration and judgment that the City's
12 actions deprived SBC of its rights without due process of law in violation of the Fifth and
13 Fourteenth Amendments to the U.S. Constitution, and are therefore void and invalid, and for
14 an order compelling the issuance forthwith of all necessary permits and approvals;

15 5. On the fifth claim for relief, for a declaration and judgment that the City's
16 demand for a cable franchise as a condition to allowing SBC to upgrade its network violates
17 the First Amendment to the United States Constitution, and that the Franchise Condition is
18 thus void and of no force and effect;

19 6. On the sixth claim for relief, for a declaration and judgment that the City's
20 actions violate 42 U.S.C. § 1983, and are void and invalid, and for an order compelling the
21 issuance forthwith of all necessary permits and approvals, and an award of monetary
22 damages including attorneys' fees and costs according to proof;

23 7. On the seventh claim for relief, for a declaration of the respective rights and
24 obligations of the parties as to the City's action based on the constitutional and statutory
25 rights and duties at issue herein;

26 8. On the eighth claim for relief, for a declaration and judgment that Cal. Gov.
27 Code § 53066 *et seq.* does not require SBC to obtain a franchise in order to provide video
28 programming over its telephone lines or, in the alternative, that Cal. Gov. Code § 53066 *et*

1 *seq.* is unenforceable as applied to SBC because it would substantially interfere with SBC's
2 vested rights under Section 7901 of the California Public Utilities Code, which rights are
3 protected by both the federal and state constitutions, and for an order compelling the issuance
4 forthwith of all necessary permits and approvals without the Franchise Condition or any
5 other restrictions or conditions on the services SBC may provide.

6 9. On the ninth claim for relief, for issuance of a peremptory writ of mandamus
7 commanding the City to set aside the Franchise Condition and compelling the City to issue
8 permits and approvals for installation, operation and maintenance of SBC's facilities in the
9 PROWs in the City for the provision of Project Lightspeed services without the Franchise
10 Condition or any requirement for a cable franchise agreement; and

11 10. For such other and further relief as the Court may deem just and proper.

12 Dated: November 17, 2005.

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VERIFICATION OF PETITION FOR WRIT OF MANDAMUS

I, RONALD E. VAN BUSKIRK, am one of the attorneys for plaintiff and petitioner herein, and make this verification pursuant to Code of Civil Procedure section 446 on the basis that plaintiff and petitioner is absent from the county in which my office is located. I have read the attached complaint and petition for writ of mandamus, and state that the allegations contained therein are true of my own personal knowledge, except as to allegations made on information and belief, and as to those allegations, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that I executed this verification on November 17, 2005 at San Francisco, California.



Ronald E. Van Buskirk

Exhibit 18

LEXSEE 2005 NY PUC LEXIS 253

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.;

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

CASE 05-M-0250; CASE 05-M-0247

New York Public Service Commission

2005 N.Y. PUC LEXIS 253

June 15, 2005, Issued and Effective

PANEL: [*1] COMMISSIONERS PRESENT: William M. Flynn, Chairman; Thomas J. Dunleavy; Leonard A. Weiss; Neal N. Galvin

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

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

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 [*2] 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. n1

n1 Joint Petition at p. 31.

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 [*3] 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 on and approve the design of Verizon's network, and redlining. n2 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. n3

n2 Redlining is the practice of providing service to high income areas while avoiding low income areas.

n3 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.

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 [*4] (Supplemental Brief) on April 11, 2005. n4 A summary of these pleadings is provided below.

n4 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.

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.

Based on our review of the record and the numerous comments and letters [*5] 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. n5

n5 There is no state or federal requirement to obtain a separate franchise to deploy broadband over a telecommunications system.

[*6]

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 legitimate municipal concerns. n6 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. n7

n6 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]

n7 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.

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 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 [*8] 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. n8 Section 253(c) states that "nothing 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 [*9] review for purposes of telecommunications.

n8 47 U.S.C. § 253.

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 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 [*10] to provide cable service and that it is obtaining cable franchises in other jurisdictions where it is deploying this network. n9 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. n10

n9 Joint Petition at pp. 10-14.

n10 Id. at pp. 16-17.

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. n11 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 of the federal Cable Act) and Article 11 of the PSL Verizon is required to obtain cable franchises before it commences construction. n12 Petitioners claim that the legislative intent of Title VI makes clear that a system designed to provide cable [*11] satisfies the definition of a cable television system. n13 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. n14 Accordingly, the Petitioners urge the Commission to apply an intended use or economic but for test to determine whether Article 11 is invoked. n15

n11 Id. at pp. 18-19.

n12 Id.

n13 Id.

n14 Id. at p. 20.

n15 Id. at pp. 5, 12.

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. n16 Consequently, [*12] Petitioners assert that certain cable regulations are rendered meaningless, and Verizon gains an unfair competitive advantage over existing cable providers. n17

n16 Id. at pp. 21-22, 28.

n17 Id.

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. n18 Rather, Verizon asserts that it is conducting a network upgrade to its existing telecommunications system for voice and broadband services. Verizon argues that it has the requisite authority to conduct this upgrade under its existing state telephone rights. n19 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. n20 Therefore, Verizon urges this Commission to apply an actual [*13] use test in determining whether Article 11 applies. n21

n18 Opposition Brief at p. 2.

n19 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.

n20 Opposition Brief at pp. 1-2, 17-18.

n21 Id. at pp. 2-4.

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. n22 According to Verizon, since state and local governments cannot impose franchise related requirements that are inconsistent with Title VI, any such requirements are preempted. n23 Moreover, Verizon contends this interpretation of Title VI is supported by the Federal Communications Commission's (FCC) interpretation of Title VI. n24 However, even if this preemption argument is not controlling, Verizon argues that because its [*14] system is not being used to deliver video programming, it is not a cable television system as defined under state law. n25 Therefore, Article 11 does not apply. n26

n22 Id. at pp. 5, 7-11.

n23 Id.

n24 Id. at pp. 10-14.

n25 Id. at pp. 15-16.

n26 Id. at pp. 16-17.

Moreover, Verizon submits that the Petitioners' discrimination claims are unfounded. n27 First, Verizon asserts that the cable franchising requirements as they relate to this construction are beyond the limits set by federal and state laws. n28 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. n29

n27 Id. at pp. 20-23.

n28 Id. at pp. 20-21.

n29 Id.

[*15]

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. n30 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. n31 Similarly, Verizon suggests that this is not the appropriate proceeding to address allegations concerning terms and conditions of future cable franchises. n32

n30 Id. at pp. 20-23.

n31 Id.

n32 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 [*16] 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. n33 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. n34 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. n35 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. n36

n33 Reply Brief at pp. 6-10.

n34 Id. at pp 10-11.

n35 Id. at p. 11.

n36 Id. at p. 13.

[*17]

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 video programming under 47 U.S.C. § 522(7). n37 Further, Verizon asserts that Petitioners' analysis is inconsistent with the FCC's interpretation of the federal Cable Act. n38

n37 Supplemental Brief at pp. 2-5.

n38 Id.

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 [*18] of this issue and advocating support, in whole or in part, for the Yonkers Petition and the Joint Petition. n39 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.

n39 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.

[*19]

By letter dated March 23, 2005, Time Warner Cable, Inc. (Time Warner) supports the Petitioners' request that we 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 concern 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 [*20] 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. n40 Rather, it raises four related concerns. First, the City objects to Verizon's argument that federal law is preemptive of state and local franchising rights. The City asserts that pursuant to the City of Dallas n41 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.

n40 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.

[*21]

n41 *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

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 [*22] 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 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 [*23] 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 [*24] 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. n42 This argument does not directly bear upon the interpretive question presented.

n42 NYCRR § 894.7(e).

Lastly, the Board argues that because state law does not specifically preclude localities from requiring franchises prior to construction, the Commission should declare [*25] 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 n43 seek to supplement the underlying record with a factual allegation regarding Verizon's deployment plan and request an evidentiary hearing to explore Verizon's 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.

n43 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.

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 [*26] 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. n44 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.

n44 Joint Petition at pp. 5, 12.

Conversely, Verizon urges the Commission to apply an actual use test. n45 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, [*27] state and federal laws and regulations in its capacity as a telecommunications provider and, therefore, it makes no sense to add an additional layer of franchising as a precondition to its build-out of its FTTP network. n46

n45 Opposition Brief at pp. 2, 4, 13.

n46 Id. at p. 18.

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 [*28] 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. n47 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. n48 Therefore, Petitioners submit that Verizon is required to obtain the necessary cable franchises prior to commencing construction of this network.

n47 Joint Petition at p. 18.

n48 Id.

Verizon explains that its FTTP network will be capable of providing telecommunications and broadband services and acknowledges that it may be used to provide video. n49 However, Verizon maintains that its network will only be used to deliver voice and broadband services at this time. n50 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 [*29] 11. n51 Thus, because it is not currently "using" its network to "transmit 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. n52

n49 Opposition Brief at pp. 2, 16; Supplemental Brief at p. 1.

n50 Id.

n51 Opposition Brief at pp. 2, 24.

n52 Id. at pp. 2, 16.

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 [*30] 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 the definition of a cable television system. n53 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. n54

n53 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.

n54 Joint Petition at p. 5.

[*31]

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. n55 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.

n55 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).

[*32]

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 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 [*33] 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. n56

n56 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.

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 definition of a cable system under 47 U.S.C. § 522(7). n57 The Petitioners argue that notwithstanding the fact that Verizon's network can be used to deploy data and telephone, because it is [*34] 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. n58

n57 Joint Petition at pp. 18–19.

n58 Reply Brief at pp. 2–4.

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 [*35] 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 "to the extent that a common carrier is providing transmission of video programming on a 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, [*36] 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. n59 Until that time, the cable franchising requirements of Title VI do not attach. n60 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.

n59 Opposition Brief at pp. 7–9.

n60 Id.

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 proceeding n61 makes clear that mere ownership of a video capable network is not sufficient [*37] to trigger the cable franchising requirements unless the network is also being used by the network owner to provide video programming directly to subscribers. n62 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. n63

n61 *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).*

n62 Opposition Brief at p. 14.

n63 *Id.* at pp. 5-6.

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 [*38] 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.

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 [*39] 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. n64 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 [*40] Verizon an unfair advantage over incumbent cable providers by not holding Verizon to the same set of regulations and standards. n65

n64 Joint Petition at p. 25.

n65 *Id.* at pp. 25-27.

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. n66 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." n67

n66 Opposition Brief at pp. 18-19.

n67 Id. at p. 20.

[*41]

Verizon further suggests that the issues raised by the Joint Petition regarding safety violations are not properly the subject of this declaratory review. n68 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. n69

n68 Id. at p. 22.

n69 Id. at p. 20.

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 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 [*42] 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. n70

n70 See *infra* fn. 6.

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 [*43] 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 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. n71

n71 Time Warner supplemented its earlier letter comments and essentially echoed the City's position regarding Verizon's preemption argument.

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 [*44] 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. n72 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. n73 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 network Verizon is deploying. The issues

raised by the Petitioners at this late stage are more appropriately dealt with once [*45] 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.

n72 See *infra*, p. 16.

n73 See *Power Authority of the State of New York v. NYDEC*, 58 NY2d 427 (1983).

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 [*46] 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