

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 13-C-0197 - Tariff filing by Verizon New York, Inc. to introduce language under which Verizon could discontinue its current wire line service offerings in a specified area and instead offer a wireless service as its sole service offering in the area.

**PLEADING BY LAW STUDENT ALEXANDER GOLDMAN
THAT THE PUBLIC SERVICE COMMISSION INVESTIGATE
VERIZON'S COMPLIANCE WITH ITS CABLE FRANCHISE IN NEW YORK CITY
AND, IF VERIZON HAS NOT COMPLIED WITH THE FRANCHISE AGREEMENT,
THAT THE PUBLIC SERVICE COMMISSION MODIFY THE FRANCHISE
AGREEMENT OR, IN THE ALTERNATIVE,
ALLOW NEW YORK CITY TO MODIFY THE FRANCHISE AGREEMENT**

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August 4, 2013

I. INTRODUCTION

In violation of a contract with New York City, Verizon will not be delivering fiber optic service to Manhattan's Lower East Side. Verizon, in its cable franchise in New York City, promised to deliver fiber optic video and broadband service to 100 percent of New York City. Verizon has impermissibly modified its cable franchise, violating an order of the New York Public Service Commission (Commission) as well as the Commission's rules. As a result, the Commission should conduct an investigation, and, if it finds that Verizon has abandoned the Lower East Side, it should hold the public hearings that are required under the Commission's rules in any franchise modification. It should then modify the franchise to eliminate Verizon's cable franchise on the Lower East Side or, in the alternative, allow the City of New York to modify the franchise agreement so as to eliminate Verizon's cable franchise on the Lower East Side.¹

II. FACTUAL BACKGROUND

Over the past five years, the Commission has been concerned about Verizon's failure to meet its promises to the Commission.² On December 17, 2010, the Commission issued an Order requiring Verizon to supply landline service³ to disadvantaged customers known as core

¹ The New York State Attorney General's Bureau of Consumer Frauds and Protection has petitioned the Public Service Commission of the State of New York for an audit of Verizon's activities and, depending on the results of the audit, the invocation of sanctions pursuant to Public Service Law § 25, which provides per-violation money damages in §25(2) as well as per-day money damages for continuing violations. N.Y. Atty Gen., Case 13-C-0197, *Reply of New York Attorney General Eric T. Schneiderman to Verizon's Response to the Attorney General's Emergency Petition* (N.Y. Public Service Comm'n, July 2, 2013), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={88B988B0-0729-4C5C-BFD2-53EFA633CC8C}>. This petition is not intended to argue for a substitute for the remedy proposed by the New York State Attorney General.

² See, e.g., N.Y. Pub. Serv. Comm'n, Case 10-C-0202, *Order Directing Verizon New York Inc. to File a Revised Service Quality Improvement Plan* at 3 (June 22, 2010), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={871A4F68-1DDA-481C-8B4A-90CCE0D1D90A}> ("SQIP Order") ("Beginning in the summer of 2008, Verizon's timeliness of repair performance fell short of the threshold levels defined in the Commission's service standards.").

³ N.Y. Pub. Serv. Comm'n, Case 10-C-0202, *Order Adopting Verizon New York Inc.'s Revised Service Quality Improvement Plan With Modifications* at 15-16 (Dec. 17, 2010), available at

customers.⁴

Verizon never planned to abide by the Order. On June 21, 2012, Verizon Chairman and CEO Lowell McAdam told Wall Street analysts that the company would deploy fiber in some areas and wireless in others, removing all the copper in the wireless areas in order to increase profits.⁵

Verizon initiated this Case, 13-C-0197, on May 3, 2013, seeking 1) emergency permission for a modification to its tariff on Fire Island and 2) permission to deploy Voice Link beyond Fire Island.⁶ On May 16, 2013, the Commission gave Verizon permission to install inferior Voice Link service in the western part of Fire Island but suspended Verizon's application to replace landline service with Voice Link in other parts of the state.⁷

The Commission noted that Voice Link has the following flaws: 1) does not support fax, credit card point of sale, medical alert, and alarm systems, 2) does not support DSL, 3) does not allow the subscriber to place calls by dialing zero, and 4) does not allow subscribers to collect

<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={432DD15F-A50A-479E-8887-0210879CC606}> (the Order refused to recognize wireless as a substitute for landline because, in addition to the reasons cited *infra*, wireless "is not yet directly and seamlessly substitutable for all wireline service" and because of the "unsatisfactory reliability of wireless signals in certain areas of the state and the infirmities of wireless 911 emergency service.").

⁴ The Commission defines core customers as "those who do not have wireline alternatives, customers subscribing to Lifeline service, or customers who are characterized as having special needs." SQIP Order at 8, *supra* note 2. Lifeline customers are those who are poor, as defined by FCC rules at 47 C.F.R § 54.409.

⁵ Thomson Reuters Edited Transcript, interview of Verizon Chairman and CEO Lowell McAdam by Guggenheim Securities analyst Andrew Decker at 8, June 21, 2012 ("Kill Copper Transcript"), available at http://www.media-alliance.org/downloads/Verizon_Kill_Copper.pdf ("we are going into the copper plant areas and every place we have FiOS, we are going to kill the copper . . . [in] areas that are more rural and more sparsely populated, we have got LTE built that will handle all of those services and so we are going to cut the copper off there. . . . So margins can improve.").

⁶ Verizon, Case 13-C-0197, *Petition to introduce language under which Verizon could discontinue its current wireline service offerings in a specified area and instead offer a wireless service as its sole service offering in the area* (N.Y. Pub. Serv. Comm'n, May 3, 2013), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={4AB392F2-7E92-44BA-B3A4-9266F3EC74AA}>.

⁷ N.Y. Pub. Serv. Comm'n, *Order Adopting Verizon New York Inc.'s Revised Service Quality Improvement Plan With Modifications* at 9-10 (Case 13-C-0197) May 16, 2013 ("Voice Link Order"), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C0F21317-B7CE-4AEE-9A38-3393D1DEB670}> ("we are suspending that portion of Verizon's tariff amendment related to the expansion of the use of Voice Link to other areas of [New York] State.").

calls.⁸ The Commission also noted that Voice Link provides only two hours of voice calls during the first thirty-six hours of a power outage (after which, Voice Link provides no service) — and that a Voice Link unit that would use replaceable batteries is not currently available.⁹ The Commission did not note (because it is obvious) that Voice Link, unlike FiOS, does not provide cable television service.

Verizon never intended to comply with this Order. Instead, it began forcing customers to switch to Voice Link throughout New York State. On June 26, 2013, the New York Attorney General (NY AG) filed an emergency petition with the Commission, informing the Commission that Verizon had failed to abide by the conditions of the Voice Link Order of May 16, 2013; and was forcing customers in the rural Catskill Mountains to replace their landline phones with Voice Link.¹⁰

On the same day, the Communications Workers of America (CWA) informed the Commission that Verizon had installed Voice Link in Monticello, NY after allowing its local copper plant to degrade.¹¹

The CWA also informed the Commission that Verizon was engaging in the same violation of the Commission's rule in Manhattan. The CWA informed the Commission that, in May:

Verizon dispatched employees to install VoiceLink as replacement service to all 81 units of a building at 308 E. 8th St. in lower Manhattan, but the elderly residents of the building insisted that VoiceLink not be installed after learning that it would not support their LifeAlert health

⁸ *Id.* at 6.

⁹ *Id.* at 4.

¹⁰ N.Y. Atty Gen., Case 13-C-0197, *Emergency Petition of New York Attorney General Eric T. Schneiderman for an Order Preventing Verizon from Illegally Installing Voice Link Service in Violation of its Tariff and the Commission's May 16, 2013 Order* at 1 (N.Y. Pub. Serv. Comm'n, June 26, 2013) ("NY AG Emergency Petition"), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={A3F0A269-8613-4437-AEB3-35ACCF6E5A47}>.

¹¹ Letter from Chris Shelton, Vice President, CWA to The Honorable Jeffrey Cohen, Acting Secretary, Public Service Commission, State of New York at 1-2 (Case 13-C-0197) June 26, 2013 ("CWA Letter"), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={550EC63B-CB92-493B-BE27-C84101E1A399}>.

monitoring equipment. To CWA's knowledge, the building remains without phone service at the present time.¹²

308 East 8th Street is on Manhattan's Lower East Side, an area that Verizon has abandoned. In February of 2013, local news reported that numerous small local businesses on the Lower East Side were switching to cable service in order to process credit cards and to obtain telephone service after Verizon refused to make repairs.¹³ Credit card point of sale devices, like fax machines, are not supported by Verizon's Voice Link service. A restaurant owner told WNYC, "If I may say that, they're making fun of people. . . . They send you a message that everything is resolved. And *nothing* is resolved."¹⁴

On July 2, 2013, the NY AG requested that the Commission audit Verizon's Voice Link practices. The NY AG further requested that if the Commission found that Verizon had violated the Voice Link Order of May 16, 2012, the Commission penalize Verizon pursuant to New York Public Service Law § 25.¹⁵

III. LEGAL BACKGROUND

The Commission has jurisdiction over telephone service, including "every telephone line which lies wholly within the state and that part within the state of New York of every telephone line which lies partly within and partly without the state and to the persons or corporations owning, leasing or operating any such telephone line."¹⁶ The Commission's jurisdiction over

¹² *Id.* at 2. It is not clear whether Verizon would be obliged to supply Voice Link subscribers with equipment for the hearing impaired (if any such equipment exists), pursuant to N.Y. Pub. Serv. Law § 92-a.

¹³ Ilya Marritz, *Customers Quit Verizon Over Extended Phone and Internet Outages*, WNYC (Feb. 13, 2013, 4:00 PM) <http://www.wnyc.org/blogs/wnyc-news-blog/2013/feb/13/customers-quit-verizon-over-extended-phone-and-internet-outages/>.

¹⁴ *Id.*

¹⁵ N.Y. Atty Gen., Case 13-C-0197, *Reply of New York Attorney General Eric T. Schneiderman to Verizon's Response to the Attorney General's Emergency Petition* at 4-5 (N.Y. Pub. Serv. Comm'n, July 2, 2013), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={88B988B0-0729-4C5C-BFD2-53EFA633CC8C}>; N.Y. Pub. Serv. Law § 25 (McKinney).

¹⁶ N.Y. Pub. Serv. Law § 5(1)(d) (McKinney).

telephone service includes radio telephone service.¹⁷ The Commission has investigative powers.¹⁸

The Commission may order repairs or improvements to telephone service that "ought reasonably to be made . . . in order to promote the convenience of the public or employees, or in order to secure adequate service or facilities for telegraphic or telephonic communications."¹⁹

The Commission also regulates franchises. It provides the Certificate of Public Convenience and Necessity without which no telephone company may "begin construction of its telegraph line or telephone line."²⁰ When the Commission grants a telephone company permission to exercise its franchise right, the Commission does not "revive or validate any lapsed or invalid franchise or . . . enlarge or add to the powers and privileges contained in the grant of any franchise or . . . waive any forfeiture."²¹

The Commission regulates cable television because cable television service "operations involve public rights-of-way, municipal franchising, and vital business and community service, and, therefore, are of state concern."²² The Commission "is the agency best suited to oversee development of the cable television industry in this state in accordance with a statewide service plan and consistent with state communications policy generally; to review the suitability of practices for franchising cable television companies to protect the public interest. . . ."²³

As the NY AG has noted,²⁴ any utility that fails to obey an Order of the Commission is subject to a penalty of \$100,000 per offense, and, in a continuing violation, of \$100,000 per

¹⁷ *Capital Tel. Co., Inc. v. Kahn*, 366 N.Y.S.2d 538, 540 (Sup. Ct. 1975), *aff'd*, 5381 N.Y.S.2d 705 (N.Y. App. Div. 1976), *app. den.* 39 N.Y.2d 710 (N.Y. 1976).

¹⁸ N.Y. Pub. Serv. Law § 96 (McKinney).

¹⁹ N.Y. Pub. Serv. Law § 98 (McKinney).

²⁰ N.Y. Pub. Serv. Law § 99(1) (McKinney).

²¹ N.Y. Pub. Serv. Law § 99(3) (McKinney).

²² N.Y. Pub. Serv. Law § 211 (McKinney).

²³ *Id.*

²⁴ *See generally*, NY AG Emergency Petition, *supra* note 10.

day.²⁵

On July 16, 2008, Verizon obtained its cable franchise in New York City in an Order and Certificate of Confirmation from the Commission.²⁶ The Commission noted, "any modification to the agreement. . . would constitute an amendment of the franchise subject to our approval pursuant to PSL §222 and our rules (16 NYCRR Subpart 892-1)."²⁷ In its petition to the Commission, Verizon said it would "provide its cable television service over an advanced, all-fiber-optic video and broadband network that will create numerous new economic development opportunities within the City."²⁸ Verizon promised that it would "provide, for the first time, a head-to-head competitive challenge to the City's cable incumbents by a wireline provider."²⁹

The Commission's penalty powers are broad. In *New York Tel. Co. v. Pub. Serv. Comm'n*, the Commission sanctioned Verizon's predecessor, the New York Telephone Company, for failing to maintain outside plant, much as Verizon has failed to maintain copper plant throughout New York State.³⁰ The court held that the Commission did "not penalize petitioner for poor service; it merely adjusted petitioner's proposed rate base on the ground that certain expenses were not reasonably incurred and should therefore not be passed on to ratepayers," which was within the Commission's powers.³¹

The Commission's decisions "will not be set aside by the courts if there is a rational basis

²⁵ N.Y. Pub. Serv. Law § 25(2) (McKinney).

²⁶ N.Y. Pub. Serv. Comm'n, Cases 08-00624 & 08-V-0624, *Order and Certificate of Confirmation* (July 16, 2008) ("Cable Certificate"), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1BF3C448-6BDD-481C-B7D5-6A0C01D68F60}>.

²⁷ *Id.* at 6. "No cable television franchise may be amended except after a public hearing on notice to the public in accordance with State and local laws applicable to public hearings generally." 16 NYCRR 892-1.3(a).

²⁸ Verizon New York, Inc., case 08-00624, *Petition for Confirmation of a Cable Franchise with the City of New York* at 2 (N.Y. Pub. Serv. Comm'n May 30, 2008) ("Cable Franchise Agreement"), available at <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={1ADEE3AD-F3BB-419A-8585-5A8678BED49B}> (part 1) and <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={D84AAA36-607D-4988-8150-1FB2B21E4FBE}> (part 2).

²⁹ *Id.*

³⁰ *New York Tel. Co. v. Pub. Serv. Comm'n*, 190 A.D.2d 217 (N.Y. App. Div. 1993).

³¹ *Id.* at 222.

for the conclusions reached."³² "[T]he purpose and function of the PSC is to increase, rather than diminish, the competitiveness and efficiency of its regulated utilities in order that they might better serve the public."³³

IV. ARGUMENT

Verizon has abandoned Manhattan's Lower East Side. In doing so, it has impermissibly modified its cable franchise agreement without following the required process. As a result of its impermissible modification of the cable franchise, Verizon is subject to sanction by the Commission. Verizon promised to build a fiber optic network throughout New York City. It has decided not to do so. Verizon promised to compete with Time Warner Cable and Cablevision throughout New York City. On the Lower East Side, it has abandoned its customers to Time Warner Cable. Verizon received waivers from the Commission on the basis of these promises.³⁴

Verizon now hopes to benefit from its failure to maintain copper plant throughout New York State by modifying its tariff in violation of the Commission's rules. Verizon plans to install inferior Voice Link service, according to the plan that it disclosed to Wall Street in 2012 (it has not disclosed this plan to the Commission). Verizon does not plan to abide by its SQIP or by the Commission's Voice Link Order. Instead, it plans to reduce its long term maintenance costs by delivering inferior service to customers.

There is no practical remedy in Verizon's franchise agreement with the city. The agreement provides for two remedies: revocation of the franchise agreement or a payment of money (a forfeiture).³⁵ The agreement provides for revocation if Verizon commits "any

³² *Radio Common Carriers of New York, Inc. v. New York State Pub. Serv. Comm'n*, 360 N.Y.S.2d 552, 555 (N.Y. Sup. Ct. 1974).

³³ *Capital Tel. Co., Inc. v. Kahn*, N.Y.S.2d 538, 541 (N.Y. Sup. Ct. 1975) aff'd, 381 N.Y.S.2d 705 (1976).

³⁴ Cable Certificate at 5-6, *supra* note 26.

³⁵ Cable Franchise Agreement at 41-42, ¶ 15.6, *supra* note 28 (defining a revocation default that would terminate the franchise agreement); *id.* at 43-44, ¶ 15.8 (describing the notice and hearing procedure for a revocation default);

abandonment of service in default of the obligations described. . . .³⁶ It would not be in the public interest to revoke Verizon's five borough franchise agreement with the city because Verizon is serving many areas of the city even though it has abandoned the Lower East Side. It would not be in the public interest to demand money from Verizon because the forfeiture would either be too low or too high. If the forfeiture were too low, the payment would in effect allow Verizon to violate its franchise agreement; if the forfeiture were too high, it might deter other companies from competing in New York's cable market. In contrast, a limited revocation of Verizon's cable franchise, not provided for in the Cable Franchise Agreement, would perfectly suit the remedy to the harm and serve the public interest by appropriately penalizing Verizon.

V. REQUEST FOR RELIEF

The Commission should investigate Verizon's Voice Link behavior in Manhattan as well as on Fire Island and in the Catskills. If, after an audit and investigation, the Commission determines that Verizon has abandoned the Lower East Side, it should hold the appropriate public hearings. If warranted, it should find that Verizon has abandoned its cable franchise on the Lower East Side. It should then eliminate Verizon's cable franchise on the Lower East Side or, in the alternative, allow the City of New York to modify the franchise agreement so as to eliminate Verizon's cable franchise on the Lower East Side.

id. at 43-44, ¶ 15.9 (defining Verizon's performance bond obligation).

³⁶ *Id.* at 42, ¶ 15.6.10. *See also id.* at 46, ¶ 15.13 ("Franchisee shall not abandon provision of any Cable Service or portion thereof in the City without the City's prior written consent as provided in the Cable Law.").