

**COMMENTS ON RULES PROPOSED BY THE  
DEPARTMENT OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,  
AUTHORIZING AND REGULATING THE USE OF "MICROTRENCHING"**

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**Submitted by:**

**VERIZON NEW YORK INC.**

**Michael Morano  
Assistant General Counsel  
One Verizon Way  
Basking Ridge, NJ 07920  
(908) 559-3332**

**Joseph A. Post  
Deputy General Counsel — NY  
140 West Street, 27<sup>th</sup> Floor  
New York, NY 10007  
(212) 321-8126**

**INTRODUCTION**

Verizon New York Inc. ("Verizon"), a provider of voice, data, and video services in New York City and elsewhere in New York State, respectfully submits these comments on regulations proposed by the New York City Department of Information Technology and Telecommunications ("DoITT") concerning the use of microtrenching — a new technology that reduces the cost and disruption associated with the extension of underground fiber-optic facilities into buildings. The technology holds great promise for facilitating the delivery of communication, information, and entertainment services to the City's residents and businesses. Verizon commends DoITT for its efforts to encourage the development and use of this technology. However, the proposed regulations require modifications to ensure that microtrenching will flourish as a new technology. Specifically:

- The requirement that owners of conduit installed by microtrenching must also install spare capacity and make it available without charge to other providers of telecommunications services should be eliminated from the regulations. Such a requirement is contrary to law, inconsistent with sound public policy, and beyond DoITT's regulatory jurisdiction. If owners do build excess capacity, it should be made available only at rates and on terms negotiated by the parties. Moreover, the owner should have a right to expand into its own spare capacity that is at least on par with the rights of other providers.

- The regulations should specifically recognize the right of owners to enter into negotiated occupancy agreements with providers utilizing the owners' excess capacity, in order to address such matters as liability, indemnification, and operational coordination.
- The provisions for an excess capacity database managed by the City must be modified to ensure due protection for confidential information of owners, and procedural safeguards should be developed for the distribution of confidential information.
- Response times to a request for excess capacity and response times for making excess capacity available should be extended.
- Entities requesting excess capacity should be required to place their facilities within a specific timeframe after being provided access to that excess capacity.
- Owners should not be restricted with respect to the length of microtrenched conduit segments.

#### **A. REQUIREMENTS RELATED TO EXCESS CAPACITY**

##### **1. Conduit Owners Should Not Be Required to Make Excess Capacity Available to Other Service Providers for Free**

Section 1-03 of the proposed rules requires the owner of conduit installed by microtrenching to include between four and six ducts of excess capacity in each installation.<sup>1</sup> Under § 1-05(b), the owner must make that excess capacity (beyond one duct to be made available to the City) available "without charge or fee to any telecommunications franchisee for installation of fiber-optic cable to serve the telecommunications franchisee's business or customers." A failure to comply with this requirement can lead to the imposition of penalties under § 1-07(c)(vii) of the rules.

By requiring owners to make excess capacity available to other providers without charge, the proposed regulations will impose a competitive disadvantage on "first movers" who incur the costs required to install such conduit, and will give other providers, including the conduit-owners' competitors, a free ride. Predictably, the free-occupancy regime that DoITT seeks to create will not only deter the use of microtrenching by firms such as Verizon — thus creating disincentives to infrastructure investment and hindering the deployment of advanced fiber-based services to the City's residents — but will also distort competition by requiring

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<sup>1</sup> An "owner" is "the holder of a current telecommunications franchise pursuant to § 1072(c) of the New York City Charter, that proposes to install or has installed conduit." § 1-01(g). "Conduit," for purposes of the proposed rules, is "equipment installed by means of microtrenching to house fiber-optic cabling in multiple enclosed pathways or pipes." § 1-01(a). "Excess capacity" means "ducts within a conduit that may not be used by the owner or for the owner's business." § 1-01(d).

conduit owners to subsidize their competitors. The requirement will thus undermine clearly articulated State and federal policies designed to encourage network investment by, and fair competition among, companies providing communications and information services. The City should not seek to turn an owner's construction of excess capacity into a free lunch for its competitors.<sup>2</sup> Moreover, the City lacks jurisdiction to set rates and terms for conduit, and a zero-rate regime would in any event violate constitutional prohibitions on takings without just compensation.<sup>3</sup> To the extent that providers have excess capacity that they are willing to lease to other providers, such leases should be governed by voluntary, commercial arrangements.

**a. A Free-Occupancy Requirement Would Take Property without Just Compensation, Contrary to the State and Federal Constitutions**

Both the Fifth Amendment to the United States Constitution and Article I, § 7 of the New York State Constitution prohibit the taking of private property without just compensation. DoITT's free-occupancy rule would amount to just such a taking.

In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>4</sup> the United States Supreme Court reviewed a New York statute that gave cable television companies the right to install facilities used in providing cable service on buildings without the building owners' consent. The Court found that even a "minor but permanent physical occupation of an owner's property authorized by government" constituted a taking for which just compensation is due under the Fifth and Fourteenth Amendments.<sup>5</sup> The Supreme Court specifically rejected the argument that the statute was immune from Fifth Amendment scrutiny because it served a valid public purpose, stating that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."<sup>6</sup>

Here, the "permanent physical occupation" that the proposed rules would authorize would be far more substantial than any permitted by the cable television statute that was at issue in *Loretto*. DoITT's proposed rules would authorize a permanent physical occupation by competitors of a substantial portion (as opposed to the "minor" occupation at issue in *Loretto*) of a facility that a service provider installed and maintained at a not-insignificant cost. An

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<sup>2</sup> Verizon does not object to the requirement of proposed § 1-05(a) that one duct of excess capacity in each installation be made available without charge to the City.

<sup>3</sup> Verizon voluntarily agreed to make excess capacity available for free for the duration of DoITT's pilot program. However, the company made it clear to the City that it did not regard this as an acceptable requirement for permanent microtrenching rules.

<sup>4</sup> 458 U.S. 419 (1982).

<sup>5</sup> The statute in question has since been re-enacted as Publ. Serv. L. § 228, and a process has been established by which owners can claim just compensation.

<sup>6</sup> 458 U.S. at 426. The Court also found that it was irrelevant that the actual occupation was by a private party, in view of the fact that it was government-authorized. *Id.* at 432 n.9.

analogous requirement in the cable television context would be one that gave the cable company a permanent exclusive right not only to attach a cable to the side of a building, but also to use an apartment in the building, rent-free, as a break room and equipment storage area for its installation technicians.

It is clear that DoITT's free-occupancy rule gives telecommunications franchisees, even those competing directly with the owner, the permanent right to physically occupy a substantial portion of the owner's property — its conduit bank — without any compensation at all. Under *Loretto*, the City's imposition of such a requirement unconstitutionally effects a taking without just compensation.

**b. A Free-Occupancy Requirement Would Be Contrary to Federal and State Policies**

There is an obvious connection between the economic rewards available from network investments and the incentive to make such investments. Measures like DoITT's free-occupancy rule, that diminish such rewards by requiring firms to share the fruits of their investments with competitors without compensation, deter investment and disserve the public interest.

Federal and state policies strongly support investment in telecommunications networks. These policies apply with particular force to investments in fiber-optic networks that can be used to support advanced broadband services. For example, § 706 of the Telecommunications Act of 1996<sup>7</sup> tells federal and state regulators to exercise their existing regulatory authority in a manner that encourages the deployment of "advanced telecommunications capability to all Americans," including by "remov[ing] barriers to infrastructure investment." Regulatory authorities and the courts have recognized that facilities-sharing requirements can undermine that policy by diminishing investment incentives.<sup>8</sup>

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<sup>7</sup> 104 Pub. L. 104, 110 Stat. 56.

<sup>8</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, "Report and Order and Order on Remand and Further Notice of Proposed Rulemaking" (rel. August 21, 2003), ¶¶ 3, 278, 288 (FCC declines to require sharing of certain facilities used to provide broadband facilities in order to avoid "blunt[ing]" incentives for the deployment of advanced telecommunications infrastructure, in opposition to the goals of § 706). In affirming the FCC's removal of certain unbundling requirements related to all-fiber networks, the United States Court of Appeals for the District of Columbia Circuit noted that "[a]n unbundling requirement . . . seems likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [fiber to the premises] and ILECs fearful that CLEC access would undermine the investments' potential return." *United States Telecom. Ass'n v. FCC*, 359 F.3d 554, 584 (D.C. Cir. 2004); see also *id.* at 580 (affirming same in context of hybrid fiber-copper loops and noting that "[b]ecause unbundling orders reduce return on investment, such orders would inhibit ILECs from making risky investments").

Even in the limited cases where sharing of an owner's network facilities is required, federal and state laws specify the standards that govern the compensation of the owner.<sup>9</sup> There are specific rate standards for conduit access,<sup>10</sup> and DoITT's free-occupancy regime would *directly* violate those standards. Moreover, it would undermine the general policy evidenced in *all* of these pricing rules — a policy that calls for compensation to the facility owner in order to encourage facilities-based investments and that therefore rejects the concept that facilities should be made available to competitors for free.

DoITT's rules will create a first-mover *disadvantage*, and will thus deter companies such as Verizon from investing in facilities installed through the use of microtrenching technology. It will also deter investment in such technology by other firms, who will find it more profitable to wait for Verizon to build the necessary facilities and then to climb on-board for their free ride. Nor can such a measure be defended on the grounds that it will advance competition by helping an owner's competitors — in fact, such a compelled subsidy from one provider to another *distorts* competition by freeing some providers of costs that their competitors are required to incur.

Regulations that undermine federal policies are subject to pre-emption by the FCC.<sup>11</sup> *A fortiori*, a requirement of local law that undermines both state and federal policies — as the free-occupancy rule clearly does — cannot be allowed to stand.

## 2. DoITT Lacks Jurisdiction to Set Conduit Rental Rates

Even if there were some merit to DoITT's free-occupancy model — and there is not — DoITT would have no authority to implement it. Indeed, DoITT has no authority to impose *any* rate structure for the use of the conduit at issue here, and thus should not attempt to do so through its rules. Under applicable federal and state law, it is the State Public Service Commission ("PSC") that has jurisdiction to set conduit rental rates, as it has done in the past for other types of conduit.<sup>12</sup> The City's oversight over the conduit rental rates charged by Empire City Subway ("ECS") is a narrowly-drawn exception to that general rule, and does not apply to the conduit at issue here. DoITT's proposed regulations impermissibly seek to preempt

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<sup>9</sup> See, e.g., 47 U.S.C. § 252(d)(1) (providing that rates for interconnection and use of network elements must be based on cost and may include a reasonable profit); *id.* § 252(d)(2) (rates for transport and termination of traffic to be cost-based).

<sup>10</sup> See Publ. Serv. L. § 119-a, 47 U.S.C. § 224(d).

<sup>11</sup> See, e.g., *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, Memorandum Decision and Order, 7 FCC Rcd 1619 (rel. February 14, 1992), ¶¶ 8-12.

<sup>12</sup> In view of the fact that DoITT has no jurisdiction over the rates at issue here, it is unnecessary to address the rate-setting standards that should be applied by the PSC. We note, however, that the PSC's authority includes the authority to conclude that just and reasonable rates can be set by negotiation between the parties to a co-occupancy agreement, rather than by regulatory fiat.

the overriding federal and state law that gives the PSC exclusive regulatory jurisdiction over conduit rates.<sup>13</sup>

Under the Communications Act, the FCC is given jurisdiction to “regulate the rates, terms, and conditions” for “pole attachments,” a term that is defined to include access to conduits. *See* 47 U.S.C. §§ 224(a)(4), (b). However, that regulatory authority is subject to a statutory exception under which states can choose to assert their own jurisdiction over the rates for conduit access and other “pole attachments.” In such cases, state regulation applies. *Id.* § 224(c). In accordance with § 224(c), New York State has asserted the PSC’s authority over charges for conduit access, both through legislation (§ 119-a of the State’s Public Service Law) and through regulatory action.<sup>14</sup> Thus, under both federal and state law the PSC, and not DoITT, is the agency with jurisdiction over conduit access rates within New York. Indeed, the PSC has actively exercised that authority, most recently in 2002, when it set Verizon’s conduit rental rates in Case 98-C-1357.<sup>15</sup>

Verizon is mindful of the fact that the City, and not the PSC, has jurisdiction over the conduit rental rates charged by Verizon’s subsidiary ECS within its franchise area in Manhattan and the Bronx. However, that jurisdiction constitutes a narrow exception to the general rule, an exception that is based on: (a) the fact that ECS, unlike Verizon, is neither a “telephone corporation” subject to PSC regulation nor a “utility” subject to Publ. Serv. L. § 119-a; and (b) the fact that the City was specifically given jurisdiction over ECS’s rates by the terms of an 1891 franchise agreement that was approved by the State Legislature. (The state courts have ruled that Publ. Serv. L. § 119-a did not “repeal by implication” the Legislature’s approval of the franchise agreement.<sup>16</sup>)

The rationale for the City’s regulatory jurisdiction over ECS does not extend to Verizon, which is a separate entity. Unlike ECS, Verizon is both a “telephone corporation” and a “utility” under the Public Service Law, and is not subject to rate regulation by the City under the 1891 franchise agreement. And it is Verizon, and not ECS, that will be the owner of conduit installed

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<sup>13</sup> For example, § 1-08(c) of the proposed rules allows “applicable federal or state law” to apply to the use of excess capacity, but only when those laws require owners to make such capacity available to a person or entity on terms that are *more* favorable to the person or entity than DoITT’s rules. Extraordinarily, DoITT seeks to preempt any applicable state and federal laws that set terms *less* favorable to conduit co-occupants than DoITT’s own rules.

<sup>14</sup> Public Service Law § 119-a states that the PSC “shall prescribe just and reasonable rates . . . for . . . the use of utility ducts, trenches and conduit.” *See also* Case 98-C-1357, “Supplemental Recommended Decision on Pricing of Ducts and Conduits” (issued June 18, 2001), at 3-5, and authorities cited therein.

<sup>15</sup> Case 98-C-1357, “Order on Unbundled Network Element Rates” (issued and effective January 28, 2002), at 146-60. The charges set pursuant to that order have been tariffed by Verizon pursuant to the Public Service Law. *See* Verizon Tariff PSC No. 1, § 30.14(E)(3.2).

<sup>16</sup> *See New York State Cable Television Ass’n v. Public Service Commission*, 87 A.D.2d 288, 452 N.Y.S.2d 714 (3d Dep’t 1982).

pursuant to the proposed rules. Microtrenching will be utilized only for installing “subsidiary” (manhole-to-building) conduit, and not “mainline” (manhole-to-manhole) conduit. Even within its franchise area, ECS owns only mainline conduit.<sup>17</sup>

Accordingly, it is the general rule of PSC jurisdiction over Verizon, and not the narrow exception of City/DoITT jurisdiction over ECS, that applies here. In purporting to override the PSC’s jurisdiction, the proposed rules are inconsistent with federal and state law.

### **3. Owners Should Have a Right to Utilize Their Own Excess Capacity That Is at Least on Par with the Rights of Other Providers**

Proposed § 1-05(g) states that the owner must make excess capacity available to telecommunications franchisees on a first-come, first-served basis. To the extent that DoITT adopts any rules in this area — which it lacks the authority to do and in any event should not do — DoITT should make it clear that the excess capacity can be used by the owner itself (since owners are also “telecommunications franchisees”; see Proposed Rules § 1-01(g)), and by its affiliates.

An owner may need to expand into some of the excess capacity it has built, for example if it acquires new customers or begins providing new services within the range of a particular conduit installation. If such needs arise, there is no reason why the owner’s right to utilize the excess capacity should be subordinate to the rights of other providers to do so. Although we submit that the owner, having built the excess capacity, should have an unrestricted right to expand into it as needed, at a minimum it should be permitted to participate on non-discriminatory terms with other providers who might claim a need for the capacity.

### **4. Relations between Owners and Users of Excess Capacity Should Be Governed by Negotiated Occupancy Agreements**

Conduit-sharing arrangements should be governed by voluntarily negotiated agreements between the owner and the co-occupant. Agreements facilitate coordination between the parties, and avoid unnecessary disputes, by clearly spelling out the parties’ rights and obligations with respect to such matters as insurance requirements, indemnification, technical requirements, access to engineering data, dispute resolution procedures, and so forth. The proposed rules should clarify the owner’s right to require a co-occupant to enter into such an agreement. Beyond such clarification, the rules should not impose any substantive requirements or approval process relating to such agreements. Aside from the fact that the City has no jurisdiction to dictate owners’ dealings with third parties, the owner and the co-occupant themselves are in the best position to negotiate mutually agreeable terms. Because prospective co-occupants always have the option of building their own conduit at a particular location, the owner will not have any ability to impose unfair terms through negotiation.

<sup>17</sup> See [http://www.empirecitysubway.com/faqs\\_tc.html](http://www.empirecitysubway.com/faqs_tc.html) (“What is a Subsidiary Conduit?”); [http://www.empirecitysubway.com/dbwes\\_subcndt.html](http://www.empirecitysubway.com/dbwes_subcndt.html) (“Tenants are responsible for the construction and maintenance of their own subsidiary conduits.”).

**B. THE PROVISIONS FOR AN EXCESS CAPACITY DATABASE MANAGED BY THE CITY MUST BE MODIFIED TO ENSURE DUE PROTECTION FOR CONFIDENTIAL INFORMATION OF OWNERS, AND PROCEDURAL SAFEGUARDS SHOULD BE DEVELOPED FOR DISTRIBUTION OF CONFIDENTIAL INFORMATION**

The proposed rules require owners to submit several types of information which should be treated as proprietary and confidential. Specifically, § 1-02(e)(b) requires that owners submit a map showing the street locations of conduits, including information such as side street locations, beginning and end points of the conduit, and the number of ducts of excess capacity in the conduit. That same section further provides that these maps may be made public, by themselves or in aggregation with other maps, at the discretion of the Department. Sections 1-05(j)(a) and (b) also contain quarterly reporting requirements for owners which include updating the telecommunications franchisees that either took occupancy or vacated excess capacity in the previous quarter. And while that provision is silent on the confidentiality treatment of those reports, the Statement of Basis and Purpose of Proposed Rules states that it is the City's intention to maintain an inventory of excess capacity of microtrenched conduit which will be posted on the City's web site.

Making such network information publicly available creates serious security concerns, as it would expose specific location information about critical infrastructure to the public. In addition, competitors in the telecommunications industry do not make network build-out details available to their competition. The City's proposal that such information would now be public would significantly change that landscape and could reduce overall interest in microtrenching. Moreover, it would be inconsistent with § 89(5)(a)(1-a) of the State's Public Officers Law, which establishes a procedure by which a person submitting records to a State agency can "identify those records or portions thereof that may contain critical infrastructure information, and request that the agency that maintains such records exempt such information from disclosure under [Publ. Off. L. § 87(2).]"<sup>18</sup>

In order to provide due protection to confidential owner information and to further reduce security concerns raised by making this information widely available, the Department should disclose (i) the maps received pursuant to § 1-02(e)(b) and (ii) the information contained in reports received pursuant to § 1-05(c) only in response to bona fide inquiries about the availability and ownership of excess capacity. Moreover, to further limit the distribution of this information, only telecommunications franchisees should be eligible to submit an inquiry regarding the availability of excess capacity, and any inquiries should be required to include specific address information to avoid overly broad fishing expeditions concerning network information. These procedural safeguards will ensure this information is properly provided to qualified parties that have a bona fide interest in using excess capacity.

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<sup>18</sup> "Critical infrastructure" is defined in Publ. Off. L. § 86(5) as "systems, assets, places or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy."

**C. REQUIREMENTS RELATED TO OPERATIONAL ISSUES****1. Response Times for a Request for Excess Capacity and Making Excess Capacity Available Should Be Extended**

Under § 1-05(f) of the proposed rules, each owner is required to respond to a request to use excess capacity within five business days of the owner's receipt of such request. Given the facts that the likely participants in this market are large corporations (and that requests may need to be reviewed or processed by multiple individuals), that it is likely that many requests will not be properly sent to the appropriate department, and that the number of requests will only continue to grow in the future, five business days is not an adequate timeframe for responding to a request. Instead, Verizon proposes that responses be required within 15 business days.

Similarly, under § 1-05(h) the owner must make excess capacity available to a telecommunications franchisee no later than 30 calendar days after the owner's receipt of such request. This is a particularly aggressive timeframe considering the various factors that could affect availability, including the availability of permits, the volume of requests, weather, access issues, and coordination/notification with other excess capacity tenants and nearby property owners. Given the many potential obstacles which could slow down access, Verizon proposes that owners be required to make excess capacity available within 60 calendar days of the requester's receipt of an affirmative response to a request, unless otherwise agreed to by the parties.

**2. Entities Requesting Excess Capacity Should Be Required to Place Their Facilities Within a Specific Timeframe After Being Provided Access to that Excess Capacity**

The proposed regulations do not require that the entity requesting to use excess capacity place its facilities within a specified period of being given access, effectively requiring owners to provide such access indefinitely. Verizon proposes that requesting entities be provided 30 days to place their facilities, unless otherwise agreed to by the parties. And if the facilities are not placed within that timeframe, owners should not be required to provide access unless they receive a subsequent request to do so. Alternatively, this process could be addressed in the Department of Transportation's permitting process. Either way, time constraints for access should be established to ensure timely and efficient placement of facilities.

**3. Owners Should Not Be Restricted With Respect to the Length of Microtrenched Conduit Segments**

Section 1-02(b) of the proposed rules provides that microtrenching will be permitted only in full or half block segments. This requirement is unnecessary and impractical for two reasons. First, microtrenched conduit is structured such that it can be easily extended beyond a point of termination. So, if an owner needs to microtrench only one-third of the length of a

block to get to its destination, the next owner could easily interconnect to the existing conduit and extend that conduit from the prior termination. Second, the topography of New York City's blocks is often times inconsistent and may contain physical barriers, such as trees, fire hydrants, or irregular or unique sidewalk flags that make microtrenching impractical or unfeasible. The permit for a particular block should not be denied because an owner is unable to reach the midpoint (or run the full length) of a particular block. Instead, owners should be provided the flexibility to design and construct their own segments, and the Department of Transportation can make site specific determinations regarding segments as part of the permitting process. This flexibility will increase the potential areas where microtrenching can be utilized, and would have a positive impact on the amount of microtrenching activity in the City.

**NEW YORK CITY DEPARTMENT OF INFORMATION TECHNOLOGY AND  
TELECOMMUNICATIONS**

**NOTICE OF ADOPTION OF RULES**

Pursuant to the authority vested in the Commissioner of the Department of Information Technology and Telecommunications by section 1043 of the Charter, the Department of Information Technology and Telecommunications has adopted this amendment of Title 67 of the Rules of the City of New York regarding the use of microtrenching by the City's telecommunications franchisees.

This rule was first published in the City Record on June 24, 2013. Notice amending time, date and place of hearing was published in the City Record on July 8, 2013. A public hearing was held on August 5, 2013. These rules will take effect 30 days after publication.

**STATEMENT OF BASIS AND PURPOSE OF RULES**

These rules revise the rules of the Department of Information Technology and Telecommunications (DoITT) by adding a chapter authorizing and regulating the use of microtrenching by the City's telecommunications franchisees.

Microtrenching is a technique for installing fiber-optic cable to provide telecommunications services. By contrast to conventional trenching, microtrenching involves a shallower and narrower cut that can be made either in the expansion joint between the sidewalk and the curb or within the roadway. Because microtrenching is a faster and less expensive method to install cable conduit, as demonstrated by the pilot program described below, microtrenching will support the City's goal of expanding broadband access to all of the City's neighborhoods.

Starting in November 2012, DoITT and the Department of Transportation conducted a pilot program with Verizon New York Inc. to test the viability of microtrenching as an alternative to conventional trenching. DoITT was interested in determining whether microtrenching would be faster and cost less than conventional trenching, and whether microtrenched fiber-optic cable would perform as well as fiber-optic cable installed by conventional trenching. The Department of Transportation was interested in determining whether microtrenching would be less disruptive to pedestrian and vehicular traffic and less destructive to the structural integrity of the streets.

During the pilot program, Verizon performed microtrenching in varied neighborhoods of all five boroughs. The pilot program demonstrated that microtrenching can be considerably faster and significantly less expensive than conventional trenching. The pilot program produced no indication of reduced fiber-optic cable performance. Based on the results of the pilot program, DoITT has decided to authorize microtrenching as an alternative to conventional trenching. The Department of Transportation has determined that microtrenching is less disruptive to traffic and requires less extensive restoration work, and therefore has also decided to authorize microtrenching as an alternative to conventional trenching. The Department of Transportation will issue separate rules for microtrenching permits.

These rules authorize telecommunications franchisees to perform microtrenching in compliance with Department of Transportation permits. The rules:

- specify the procedural requirements for microtrenching,
- provide for DoITT's monitoring of microtrenching after it is installed, and
- provide for penalties for violations of these rules.

In addition, the rules require the installation of "excess capacity" – extra ducts capable of housing fiber-optic cable owned by the City or by other telecommunications franchisees. The Verizon pilot program similarly required Verizon to install excess capacity and make the extra ducts available to the City and to other telecommunications franchisees. DoITT has determined that retention of the pilot program's requirement to install excess capacity will serve DoITT's interest in expanding residential and commercial access to broadband without undue cost to the telecommunications franchisee that performed the original microtrenching.

The rules permit the owner of microtrenched conduit to charge another telecommunications franchisees up to 75 cents per year per foot of duct occupied by the telecommunications franchisee. DoITT expects to revisit this rate approximately four years after these rules become effective.

The rules also provide for DoITT to maintain an inventory of excess capacity, and it is DoITT's intention that the inventory will ultimately be posted on the City's web site.

These rules are promulgated pursuant to DoITT's rulemaking authority under section 1043 of the Charter of the City of New York.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Title 67 of the rules of the City of New York is amended by adding a new chapter 1, to read as follows:

Chapter 1 – Microtrenching

Section 1-01 Definitions

The following terms are defined for purposes of this chapter:

- (a) “Conduit” means equipment installed by means of microtrenching to house fiber-optic cabling in multiple enclosed pathways or pipes.
- (b) “Department” means the Department of Information Technology and Telecommunications.
- (c) “Duct” means one enclosed pathway or pipe within a conduit.
- (d) “Excess capacity” means ducts within a conduit that may not be used by the owner or for the owner’s business. Each excess capacity duct must be no smaller than the largest duct within the conduit that is reserved for use by the owner, but in any event each excess capacity duct must have the capacity to house at least 96 strands of fiber-optic cable.
- (e) “Low density residential block” means the side of a street on a City block that consists entirely of residential buildings with no more than three residential units each.
- (f) “Microtrenching” means a technique for installing conduit to house fiber-optic cable to provide telecommunications services, utilizing a shallower and narrower cut that can be made in the expansion joint between the sidewalk and the curb as well as within the roadway.
- (g) “Owner” means the holder of a current telecommunications franchise pursuant to section 1072(c) of the New York City Charter, that proposes to install or has installed conduit. A franchise is not “current” if the term of the franchise agreement has expired and the franchise is in holdover status.
- (h) “Telecommunications franchisee” means the holder of a current franchise pursuant to section 1072(c) of the New York City Charter, or of a revocable consent from the City of New York for installation of telecommunications equipment above, below or on any of the streets within the City. A franchise is not “current” if the term of the franchise agreement has expired and the franchise is in holdover status.

Section 1-02 Microtrenching permitted; notifications to the Department

- (a) An owner may perform microtrenching to the extent allowed by a permit issued by the Department of Transportation. New microtrenching will not be permitted where sufficient excess capacity is available in existing microtrenching. Before applying to the Department of Transportation for such a permit, the owner must obtain a certification from the Department that no excess capacity is available in the location the owner proposes for microtrenching. The owner must submit that certification to the Department of Transportation as part of the owner's application for a permit.
- (b) An owner must install conduit in a way that will readily permit another owner to add length to the microtrenching by connecting its own conduit to the first owner's conduit. Where an owner connects its own conduit to another owner's previously installed conduit, the owner must install conduit that has the same number of pathways or pipes as the previous owner's conduit.
- (c) Microtrenching will be permitted only for fiber-optic service to properties within the following zoning districts as defined pursuant to the New York City Zoning Resolution: R1, R2, R2A, R2X, R3, R3-1, R3-2, R3-A, R3-X, R4, R4-1, R4A, R4B, R5, R5-A, R5-B, R5-D, C1-1, C1-2, C1-4, C1-5, C2-1, C2-2, C2-3, C2-4, C2-5, C-3, C4 (but only to premises with a commercial floor area ratio of 2.0 or less), M-1 (but only to premises with a manufacturing floor area ratio of 2.0 or less), M-2, M-3, and special purpose districts (but only to premises with a floor area ratio of 2.0 or less).
- (d) After obtaining a permit for microtrenching from the Department of Transportation, but before beginning microtrenching construction, an owner must notify the Department of the intended dates of the start and completion of microtrenching construction. Notification must be made on a form and in a format prescribed by the Department. The owner must submit the following documents with the notification:
- a. *Proof of security.* "Proof of security" means proof that the issuer of any bond, insurance, letter of credit or other security issued in connection with the owner's telecommunications franchise agreements has agreed to extend the coverage of such security to the owner's microtrenching, without change to any other terms and conditions of such security that are for the benefit of the Department or the City. The Department will have the right to draw on the security to cover any unpaid fines assessed pursuant to section 1-07(c) of this chapter, or to cover any unmet obligation to remove conduit pursuant to section 1-06 of this chapter.
  - b. *Indemnification.* The owner shall execute an indemnification agreement prepared by the Department.
- (e) Promptly after completion of microtrenching construction, and at most within 40 calendar days after the Department of Transportation issued the

permit for microtrenching, the owner must file a document with the Department, in a format to be prescribed by the Department, containing the following information:

- a. An “as-built” drawing of the conduit installed. The “as-built” drawing will be treated as proprietary and confidential, to the extent permitted by law.
- b. A map showing the street location of the conduit including the side of the street the conduit is on, the beginning and ending points of the conduit, the number of ducts in the conduit, and the number of ducts of excess capacity in the conduit. The map must accurately reflect the addresses of buildings that are passed by the conduit. The map may be made public, by itself or in aggregation with other maps, at the discretion of the Department.

#### Section 1-03 Requirement to install excess capacity

- (a) The owner must use microtrenching materials and equipment that will facilitate the use of excess capacity by telecommunications franchisees.
- (b) On a low density residential block, all conduit must have excess capacity of at least four ducts.
- (c) In any other location, all conduit must have excess capacity of at least six ducts.

#### Section 1-04 Ownership and maintenance of conduit

Except as provided in section 1-08(b) of this chapter, the owner must retain title to the conduit and must maintain the conduit in working order and good repair, and in compliance with the rules of this chapter. The owner must comply with all requirements, directives and orders of the Department of Transportation regarding microtrenching.

#### Section 1-05 Use and management of excess capacity

- (a) The owner must make one duct of the excess capacity available without charge or fee to the City for installation of fiber-optic cable for use by the City for the City’s direct benefit. The “City” includes any agency or office of New York City government, and any City-related public institution including the New York City Housing Authority, the Health and Hospitals Corporation, the New York City Department of Education, and the Metropolitan Transportation Authority.

- (b) The owner must make all other ducts of the excess capacity available to any telecommunications franchisee for installation of fiber-optic cable to serve the telecommunications franchisee's business or customers. The owner may charge the telecommunications franchisee up to but not more than 75 cents per year per foot of duct occupied.
- (c) Inquiries about the availability and ownership of excess capacity may be submitted to the Department.
- (d) A City request to use excess capacity may be submitted to the owner only by the Department.
- (e) A telecommunications franchisee's request to use excess capacity must be submitted by the telecommunications franchisee to the owner. The telecommunications franchisee must submit a copy of the request to the Department simultaneously with submission of the request to the owner.
- (f) The owner must respond to a request to use excess capacity within fifteen business days of the owner's receipt of the request. The owner's response must either approve or deny the request, and if the owner denies the request the owner must state the reasons for the denial. If the request is a City request, the owner must submit its response to the Department. If the request is by a telecommunications franchisee, the owner must submit its response to the telecommunications franchisee and simultaneously submit a copy of its response to the Department.
- (g) The owner must make excess capacity available to telecommunications franchisees on a first-come, first-served basis. However, the owner is not obligated to provide excess capacity to a telecommunications franchisee other than for the actual use for the telecommunications franchisee's business or customers. That is, a telecommunications franchisee may not reserve or use excess capacity for the possibility of future use or for hoarding. Also, the telecommunications franchisee may not sublease excess capacity.
- (h) The owner must make excess capacity available to a telecommunications franchisee no later than 45 calendar days of the owner's receipt of the telecommunications franchisee's request, unless the owner denies the request as provided by subdivision (f) or (g) of this section.
- (i) If a telecommunications franchisee does not complete the installation of fiber-optic cable within 45 calendar days after the owner makes excess capacity available to the telecommunications franchisee, the owner may deem any portion of the excess capacity that the telecommunications franchisee did not occupy by that time to be available to other telecommunications franchisees as provided by subdivision (g) of this section.

- (j) Making excess capacity available to the City and to telecommunications franchisees includes making available the opportunity to enter and connect to the conduit at the nearest manhole or similar utility access space.
- (k) No later than ten business days after the end of each calendar quarter, the owner must submit a report to the Department, in a format to be prescribed by the Department, stating:
  - a. The name of each telecommunications franchisee that took occupancy of excess capacity during the previous quarter, and, for each such telecommunications franchisee, the location of the beginning and ending points of each length of duct the telecommunications franchisee occupied; and
  - b. The name of each telecommunications franchisee that vacated excess capacity during the previous quarter, and, for each such telecommunications franchisee, the location of the beginning and ending points of each length of duct the telecommunications franchisee vacated.
- (l) No later than January 20 of each year, the owner must submit a report to the Department, in a format to be prescribed by the Department, stating the location of each conduit repair and service outage that occurred in the owner's microtrenching during the previous year.

#### Section 1-06 The owner's obligation to remove or otherwise dispose of conduit

- (a) If an owner no longer intends to maintain conduit in working order and good repair, the owner must either remove the conduit at its own expense, or, at the Department's option, transfer the conduit to another owner, or otherwise dispose of the conduit as directed by the Department.
- (b) If an owner's telecommunications franchise or microtrenching permit is terminated or revoked, or if an owner's right to own microtrenching is revoked, the owner must either remove the conduit at its own expense, transfer the conduit to another owner, or otherwise dispose of the conduit as directed by the Department.
- (c) If the Department determines that microtrenching is unsuitable or unsafe, either entirely or under specified conditions, the owner must remove the conduit and fiber-optic cable at the owner's expense, or, at the Department's option, transfer title to the conduit and fiber-optic cable to the City without fee or cost.

#### Section 1-07 Enforcement

- (a) Telecommunications franchisees may submit complaints about owners' compliance with the rules of this chapter to the Department.
- (b) The Department may audit or otherwise investigate or review an owner's use of microtrenching and compliance with the rules of this chapter. The owner and any telecommunications franchisee that uses or has applied to use the owner's excess capacity must cooperate with the Department in the conduct of such an audit, investigation or review, and must cooperate with any other governmental entity lawfully authorized to conduct such an audit, investigation or review. The owner must provide access to individuals, documents, records and information as may be reasonable and appropriate to such audit, investigation or review.
- (c) In the event of a violation of the rules of this chapter, the Department may initiate proceedings before the Office of Administrative Trials and Hearings (OATH) to seek the imposition of penalties on an owner, including fines or revocation or other limitation of the owner's right to engage in microtrenching. The rules of OATH will apply to such proceedings. Those rules are set forth in title 48, chapter 1 of the Rules of the City of New York.
  - a. Following a hearing, an administrative law judge will issue a report and recommendation to the Commissioner of the Department or his or her designee. The report and recommendation will state proposed findings of fact and conclusions of law, and a recommended disposition. The responding party will have ten business days from the date of the report and recommendation to submit comments on the report and recommendation to the Commissioner. The Commissioner will issue a final decision, subject only to judicial review.
  - b. Penalties include fines no less than \$100 and no more than \$25,000 per violation, termination of the owner's right to engage in additional microtrenching, and revocation of the owner's right to own microtrenching. Factors relevant to the determination of the penalty include the severity of the offense; whether the offense was willful or inadvertent; whether the offense furthered the owner's evasion of oversight and monitoring; the degree of the cost, disadvantage or inconvenience imposed on others by the offense; and the owner's history of offenses, if any.
  - c. Violations include the following. (Descriptions are for informational purposes only; the text of the rule itself determines the scope and meaning of the rule.)
    - i. Section 1-02(a): Performing microtrenching without or beyond the scope of a Department of Transportation-issued microtrenching permit.

- ii. Section 1-02(c): Providing fiber-optic service by microtrenching where prohibited.
- iii. Section 1-02(d): Failure to notify the Department, or to timely notify the Department, of the intended dates of microtrenching construction.
- iv. Section 1-02(e): Failure to file, or to timely file, drawings as required after conclusion of microtrenching construction.
- v. Section 1-03: Failure to install required excess capacity.
- vi. Section 1-04: Failure to maintain conduit in good repair, in compliance with these rules, or in compliance with requirements of the Department of Transportation.
- vii. Section 1-05: Failure to make excess capacity available; failure to make excess capacity available timely; attempt to overcharge for excess capacity; failure to respond or respond timely to a request for excess capacity; failure to offer excess capacity on a first-come, first-served basis.
- viii. Section 1-05(j): Failure to report to the Department as required.
- ix. Section 1-06: Failure to remove or dispose of conduit as directed.
- x. Section 1-07(b): Failure to cooperate with an audit, investigation or review.
- xi. Any other violation of the rules of this chapter.

#### Section 1-08 Miscellaneous provisions

- (a) Conduit that was installed before the effective date of this chapter, in compliance with the terms of a microtrenching pilot program, will be allowed to remain in place despite any non-compliance with sections 1-02 or 1-03 of this chapter. All of the other rules of this chapter apply to such conduit.
- (b) An owner may transfer ownership of conduit to another entity that would be an "owner" as defined by section 1-01(g) of this chapter. A transfer may not be made effective before the submission to the Department of the contract or other document effectuating the transfer.
- (c) To the extent that any applicable federal or state law or regulation requires an owner to make excess capacity available to a person or entity more expeditiously or on any other term more favorable to that person or entity than a term provided for by the rules of this chapter, then the applicable federal or state law or regulation applies with respect to such persons or entities instead of the term provided for by the rules of this chapter.

- (d) By voluntarily choosing to install conduit pursuant to this chapter, an owner agrees that the owner will not charge telecommunications franchisees any fees or costs for the use or occupancy of duct installed pursuant to this chapter greater than the fees provided in section 1-05(b) of this chapter; represents that the owner has received any regulatory permission, approval or authority that may be required to install such conduit and to charge such fees; and acknowledges that the City of New York relies on that agreement and that representation in furtherance of the City's interests in expanding fiber-optic cable deployment, especially in underserved areas.
- (e) The provisions of this chapter that require an owner to install excess capacity, to make it available to telecommunications franchisees, and to forego any fees and costs except as provided in section 1-05(b) of this chapter that might otherwise be permitted by any applicable rate regulation are integral to this chapter and essential to the City's purposes in promulgating this chapter. The City's determination to permit microtrenching is expressly based on the assumptions that an owner's conduit will include excess capacity and that the excess capacity will be available to telecommunications franchisees without payment of any fees or costs except as provided in section 1-05(b) of this chapter. Therefore, if any court or other tribunal of competent jurisdiction invalidates any of those provisions, this chapter will be invalidated in its entirety and microtrenching will not be permitted, and owners must remove or otherwise dispose of all conduit as directed by the Department.

Exhibit C

During the 14 site microtrenching trial<sup>1</sup>, a total of 4,657 linear feet of microtrenched conduit was placed. Verizon incurred an average cost of [REDACTED] per duct foot.

**REDACTED  
FOR PUBLIC DISCLOSURE**

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<sup>1</sup> This average cost is based on the fourteen trial sites completed under a trial agreement with New York City through October 2013. Three additional locations have just recently completed. The inclusion of these additional sites is not expected to appreciably change the linear foot average cost.