

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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

COMMISSIONERS PRESENT:

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

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

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

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

(Issued and Effective June 15, 2005)

BY THE COMMISSION:

INTRODUCTION

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

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

Specifically, the Petitioners request that we:

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

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

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

¹ Joint Petition at p. 31.

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

Verizon filed its Brief in Opposition (Opposition Brief) to the various petitions on March 24, 2005. In addition, Petitioners filed a Reply Brief on April 4, 2005 and Verizon filed a Supplemental Brief in Opposition (Supplemental Brief) on April 11, 2005.⁴ A summary of these pleadings is provided below.

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

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

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

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

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

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

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

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

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

BACKGROUND

Verizon's Upgrade

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

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

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

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

Rights-of-way Management

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

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

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

⁸ 47 U.S.C. § 253.

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

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

PLEADINGS AND COMMENTS

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

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

⁹ Joint Petition at pp. 10-14.

¹⁰ Id. at pp. 16-17.

¹¹ Id. at pp. 18-19.

¹² Id.

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

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

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

¹³ Id.

¹⁴ Id. at p. 20.

¹⁵ Id. at pp. 5, 12.

¹⁶ Id. at pp. 21-22, 28.

¹⁷ Id.

¹⁸ Opposition Brief at p. 2.

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

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

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

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

²¹ Id. at pp. 2-4.

²² Id. at pp. 5, 7-11.

²³ Id.

²⁴ Id. at pp. 10-14.

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

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

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

²⁵ Id. at pp. 15-16.

²⁶ Id. at pp. 16-17.

²⁷ Id. at pp. 20-23.

²⁸ Id. at pp. 20-21.

²⁹ Id.

³⁰ Id. at pp. 20-23.

³¹ Id.

³² Id. at pp. 23-24.

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

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

³³ Reply Brief at pp. 6-10.

³⁴ Id. at pp 10-11.

³⁵ Id. at p. 11.

³⁶ Id. at p. 13.

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

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

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

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

³⁷ Supplemental Brief at pp. 2-5.

³⁸ Id.

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

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

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

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

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

Verizon's argument that federal law is preemptive of state and local franchising rights. The City asserts that pursuant to the City of Dallas⁴¹ case (overturning the FCC's attempt to preempt local franchise authority for Open Video Systems (OVSs)), franchise requirements arise from state and local authority and the federal Cable Act is merely an overlay that establishes an additional franchise requirement.

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

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

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

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

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

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

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

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

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

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

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

Finally, under the veil of the SAPA notice, on May 9, 2005, the Petitioners⁴³ seek to supplement the underlying record with a factual allegation regarding Verizon's deployment plan and request an evidentiary hearing to explore Verizon's

⁴² NYCRR § 894.7(e).

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

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

DISCUSSION

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

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

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

⁴⁴ Joint Petition at pp. 5, 12.

⁴⁵ Opposition Brief at pp. 2, 4, 13.

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

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

Public Service Law

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

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

⁴⁶ Id. at p. 18.

⁴⁷ Joint Petition at p. 18.

⁴⁸ Id.

acknowledges that it may be used to provide video.⁴⁹ However, Verizon maintains that its network will only be used to deliver voice and broadband services at this time.⁵⁰ When, and if, Verizon seeks to use the network to provide video programming, it is committed to obtaining the necessary municipal and state approvals under Article 11.⁵¹ Thus, because it is not currently "using" its network to "transmi[t] video programming directly to subscribers" (and it will not do so until it obtains the requisite municipal and state approvals), its current activities do not constitute the operation of a cable television system.⁵²

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

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

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

⁵⁰ Id.

⁵¹ Opposition Brief at pp. 2, 24.

⁵² Id. at pp. 2, 16.

the definition of a cable television system.⁵³ Further, it is not using its system for the delivery of cable. Petitioners claim that these arguments are "clever wordsmithing" and Verizon should be required to obtain cable franchises consistent with Article 11.⁵⁴

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

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

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

⁵⁴ Joint Petition at p. 5.

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

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

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

Federal Law

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

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

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

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

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

⁵⁷ Joint Petition at pp. 18-19.

⁵⁸ Reply Brief at pp. 2-4.

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

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

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

⁵⁹ Opposition Brief at pp. 7-9.

⁶⁰ Id.

proceeding⁶¹ makes clear that mere ownership of a video capable network is not sufficient to trigger the cable franchising requirements unless the network is also being used by the network owner to provide video programming directly to subscribers.⁶² Finally, Verizon maintains that the relief sought by Petitioners is preempted by federal law which specifically exempts common carriers from cable franchising requirements unless and until they begin offering video programming directly to subscribers.⁶³

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

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

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

⁶² Opposition Brief at p. 14.

⁶³ Id. at pp. 5-6.

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

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

Discrimination and Rights-of-way Management

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

⁶⁴ Joint Petition at p. 25.

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

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

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

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

⁶⁵ Id. at pp. 25-27.

⁶⁶ Opposition Brief at pp. 18-19.

⁶⁷ Id. at p. 20.

⁶⁸ Id. at p. 22.

⁶⁹ Id. at p. 20.

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

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

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

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

⁷⁰ See *infra* fn. 6.

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

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

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

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

⁷² See *infra*, p. 16.

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

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

CONCLUSION

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

The Commission Finds and Declares:

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

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

3. These proceedings are closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary