07-V-0495
cable

OGC
OT

RECEIVED
PUBLIC SERVICE
COMMISSION
EXEC-FILES-ALBANY

2008 MAY 31 PM 2:40

140 West Street
27th Floor
New York, NY 10007-2109
Tel (212) 321-8126
Fax (212) 962-1687
joseph.a.post@verizon.com

Joseph A. Post
Assistant General Counsel

verizon

May 31, 2007

BY HAND

Honorable Jaclyn A. Brilling
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 07-V-0495 (Verizon New York Inc.'s Petition for Confirmation of Cable Television Franchise Awarded by the Town of North Hempstead, New York)

Dear Secretary Brilling:

Attached please find the Supplemental Reply Comments of Verizon New York Inc. in further support of its petition for confirmation of a cable television franchise for the Town of North Hempstead, New York.

Respectfully submitted,

Joseph A. Post

cc: Town of North Hempstead
Ms. Leslie Gross
Hon. Jonathan S. Kaiman
Andrew M. Hyman, Esq.
Town of North Hempstead
220 Plandome Road
Manhasset, New York 11030

Cablevision
Lawrence G. Malone, Esq.

Department of Public Service
Peter McGowan, Esq.
Peter Catalano, Esq.
Maureen Farley, Esq.
Brian Ossias, Esq.
Mr. Robert Mayer
Mr. Chad G. Hume
Mr. John A. Figliozzi

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Verizon New York Inc. Pursuant to Section 221 of the Public Service Law for Confirmation of a Cable Television Franchise Awarded by the Town of North Hempstead, New York (Nassau County)	Case 07-V-0495

SUPPLEMENTAL REPLY COMMENTS OF VERIZON NEW YORK INC.

JOSEPH A. POST
140 West Street — 27th Floor
New York, NY 10007-2109
(212) 321-8126

Counsel for Verizon New York Inc.

May 31, 2007

TABLE OF CONTENTS

Page

I. BACKGROUND 2

II. THERE IS NO NEED FOR THE COMMISSION TO INTERPRET PROVISIONS OF THE FRANCHISE THAT LIKELY NEVER WILL BE TRIGGERED IN ORDER TO CONFIRM THE FRANCHISE 3

III. VERIZON IS NOT REQUIRED TO OBTAIN THE CONSENT OF THE TOWN AND THE APPROVAL OF THE COMMISSION IN ORDER TO CHANGE THE SIX-MONTH SERVICE DEPLOYMENT SCHEDULE SET FORTH IN EXHIBIT B TO THE FRANCHISE 6

IV. CONCLUSION 12

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Verizon New York Inc. Pursuant to Section 221 of the Public Service Law for Confirmation of a Cable Television Franchise Awarded by the Town of North Hempstead, New York (Nassau County)	**Case 07-V-0495**

SUPPLEMENTAL REPLY COMMENTS OF VERIZON NEW YORK INC.

The Commission should expeditiously confirm Verizon's cable television franchise agreement with the Town of North Hempstead (the "Franchise"). The Franchise is identical in all material respects to other Verizon franchises that have been confirmed by the Commission, and like those franchises it fully complies with all applicable statutes and regulations. No party suggests otherwise. The *only* issue that has been raised concerning the provisions of the Franchise is the Town's claim that certain provisions should be interpreted to require the Town's consent, and the Commission's approval, if Verizon should ever seek to change the anticipated six month service deployment schedule set forth in Exhibit B to the Franchise. However, as the Town recognizes, Verizon's build-out is close to complete, and there is no reason to believe that Verizon will ever seek to change its anticipated schedule. Thus, any dispute over the "remedies" that might be available in such a case is purely hypothetical.

In order to review and approve the Franchise, the Commission does not need to resolve the entirely speculative claims belatedly raised by the Town in this proceeding. Instead, the Commission need only test the Franchise against the standards set forth in Article 11 and the Commission's regulations. Because the Franchise fully complies with those standards, the Commission can and should confirm it expeditiously. To allow the Franchise to be held hostage

to the Town's efforts to prejudge a wholly speculative future dispute would be contrary to both the language of the Public Service Law and the pro-competitive policies that underlie it.

I. BACKGROUND

Verizon's petition for confirmation of the Franchise was on the agenda for the Commission's May 16, 2007 Public Session, but was removed after an eleventh-hour letter from the Town Supervisor requested a "postponement" of this proceeding. The sole basis for the Town's request was its self-serving assertion that in the hypothetical and unlikely event that Verizon ever made a material change to its anticipated service deployment schedule, it would be liable to the Town for liquidated damages unless the Town consented to and the Commission approved that change. The delay in the confirmation process that resulted from the Town's request has caused serious harm not only to Verizon, but also to the residents of the Town, who will now have to wait even longer — not only for the arrival of wireline video competition, and for the price and service discipline that such competition brings, but also for the other benefits that would be conferred on the Town by the Franchise, including a $1,150,000 PEG grant.[1] Indeed, the only beneficiary of this delay is the incumbent provider Cablevision, which played a significant role in provoking the Town's action and which has continued to enjoy the benefits of its wireline monopoly status well beyond the point at which Verizon could and would have begun offering competitive cable service to thousands of Town residents.

Verizon demonstrated in its May 10, 2007 reply comments that the Franchise agreement does *not* require either Town consent or Commission approval for changes in the detailed six-month service deployment schedule set forth in Exhibit B to the Franchise. The Town addressed

[1] Franchise § 5.4.

this issue further in its self-styled "Request for Clarification and Enforcement of Provisions Related to Timeliness of Service Deployment and Application of Liquidated Damages," filed on May 29, 2007 (the "Request"). As demonstrated in Section III below, the Town's arguments are totally devoid of merit. While Verizon believes that there is no need for the Commission to prejudge a controversy that does not yet — and in all likelihood never will — exist, if the Commission concludes that it must address the Franchise interpretation issue, then it should reject the Town's arguments.

II. THERE IS NO NEED FOR THE COMMISSION TO INTERPRET PROVISIONS OF THE FRANCHISE THAT LIKELY NEVER WILL BE TRIGGERED IN ORDER TO CONFIRM THE FRANCHISE

Both parties recognize that at this late stage of Verizon's build-out in the Town, there is no reason to believe that the company will ever seek to make material changes to the anticipated service deployment schedule set forth in Exhibit B. Verizon fully expects and intends to meet that schedule. While it is possible that unanticipated future circumstances could change the schedule, that possibility is a purely speculative one. If and when such an unlikely situation were ever to arise, both Verizon and the Town would have an opportunity to assert their respective positions on the obligations imposed by the Franchise, and to pursue the matter in whatever fashion they deemed advisable. Quite simply, there is no reason why the Commission should be required at this time to issue an advisory opinion on the nature and scope of obligations that are not yet triggered, and in all likelihood never will be triggered.

Certainly, nothing in Article 11 requires the Commission to prejudge an entirely speculative question prior to confirming the Franchise. Rather, Section 221(3) of the Public Service Law explicitly sets forth the limited grounds on which the Commission may disapprove a franchise. Under that section:

> The commission ***shall*** issue a certificate of confirmation of the franchise ***unless*** it finds that (a) the applicant, (b) the proposed cable television system, or (c) the proposed franchise does not conform to the standards established in the regulations promulgated by the commission pursuant to subdivision two of section two hundred fifteen, or that operation of the proposed cable television system by the applicant under the proposed cable television system by the applicant under proposed franchise would be in violation of law, any regulation or standard promulgated by the commission or the public interest. [Emphasis supplied]

There is clearly no basis for concluding that the Franchise violates any law, regulation, or standard promulgated by the Commission — regardless of how Exhibit B might be interpreted in the future. As Verizon showed in its May 10, 2007 reply comments,[2] the Commission's regulations do not require Verizon to adhere to any specific six-month milestones; rather, they simply require it to complete "significant construction" within a year and to complete the build-out (within the limits set forth in the regulations) within five years. The only requirement imposed with respect to the six-month schedule is the *notice* requirement of Commission Rule 895.1(b). The Town has not claimed in any of its pleadings — nor could it — that Verizon's plain reading of the Franchise would conflict with any of these regulations.

Nor could it be credibly claimed that the Franchise would violate the public interest test under § 221(3), however Exhibit B and the related Franchise provisions might be interpreted. Even though *none* of the franchises that Verizon has submitted for confirmation has required franchisor consent or Commission approval for a change in the six-month build-out schedule, the Commission has never withheld its approval or conditioned it on Verizon's acceptance of such a requirement. If the absence of such a requirement were contrary to the public interest, then the Commission could not have approved all of Verizon's previously-submitted franchises.

---

[2] Verizon's May 10, 2007 Reply Comments, § III.

Thus, it is clear that the Commission *may* approve the Franchise notwithstanding any speculative dispute over the consequences of future events that in all likelihood will never occur. Indeed, it *must* do so under the standards set forth in § 221(3). The mandatory nature of that section's "shall . . . unless" wording is clear: a franchise may not be rejected except on the basis of a demonstrated inconsistency with law or public policy. Moreover, § 221(5) provides that "[i]n the event the commission refuses to issue a certificate of confirmation, it shall set forth in writing the reasons for its decision." The Commission does not have the option of pocket-vetoing a franchise simply by deferring it from one session to another without a decision: it must state reasons for disapproving a franchise, and those reasons must be consistent with § 221(3).

The Commission has recognized its power to confirm franchises under § 221 without necessarily ruling on the meaning or wisdom of each individual franchise provision. The Commission's confirmation orders routinely include a sentence stating that the franchise "contains additional provisions not required by Part 895 of our rules. We approve these provisions to the extent that they are consistent with Article 11 and its regulations." Since the provisions which the Town attempts to put at issue here are clearly "consistent with Article 11," there is no basis for either disapproving the Franchise or for unnecessarily interpreting those provisions at this time.

By confirming the Franchise, the Commission will give the Town the benefits of competition and of its PEG grant; and will enable Verizon to begin its task of winning customers from its competitors through lower prices, better service, and superior technology. The purely hypothetical question of Exhibit B remedies will likely never arise, and if it does arise it can be addressed at that time without any need for prejudgment of the issue by the Commission.

III. VERIZON IS NOT REQUIRED TO OBTAIN THE CONSENT OF THE TOWN AND THE APPROVAL OF THE COMMISSION IN ORDER TO CHANGE THE SIX-MONTH SERVICE DEPLOYMENT SCHEDULE SET FORTH IN EXHIBIT B TO THE FRANCHISE

Although Verizon believes that the Commission need not and should not address the contract interpretation issue at this time, we cannot let the substantive arguments in the Town's May 29, 2007 Request stand unchallenged.

Initially, we note that the Town apparently has abandoned its reliance on statements purportedly made by Mr. John Figliozzi of the Commission's Staff concerning the manner in which the Commission would interpret the Franchise. This is not surprising in view of the fact that Mr. Figliozzi has made it clear that his statements were misinterpreted by the Town, and that the Commission has not in fact "determined a particular course of action should it receive notification of a 'material change.'"[3]

Instead of focusing on Mr. Figliozzi's purported representations, the Town's May 29 Request properly recognizes the primacy of the *words* of the Franchise in determining the parties' obligations. Unfortunately, its analysis of those words is severely deficient. The starting point of any analysis of Verizon's service deployment obligations must be Exhibit B of the

[3] It is hornbook law that, when a government official provides advice to a third party, the third party relies on such advice at its peril. *See, e.g., Upton v. Tribilcock*, 91 U.S. 45, 50 (1875); William F. Fox, Jr., UNDERSTANDING ADMINISTRATIVE LAW 206 (4th ed. 2000) ("Rely on advice given by agency personnel at your own peril."). This axiom is reinforced by the fact that New York, like virtually every jurisdiction, follows the longstanding rule that a government agency is not bound by the erroneous advice or opinions of its agents. *See, e.g., Maytum v. Nelson*, 53 A.D.2d 221, 228, 385 N.Y.S.2d 654, 659 (4th Dep't 1976) ("Erroneous opinions of law offered by officials will not prevent the municipality from enforcing its laws properly."); *People v. Widelitz*, 39 Misc. 2d 51, 239 N.Y.S.2d 707 (Special Term 1963) ("'Administrative officials frequently announce their views as to the meaning of statutes or regulations.' . . . In like manner, and for the same basic reason, that an advisory opinion does not create law, it has been held that an advisory opinion lacks binding effect (*Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 [1947].") If the Commission is not bound by the erroneous advice of an official spokesman for the commission, it certainly would not encumbered by the alleged oral statements of an employee not authorized to provide legal advice.

Franchise.[4] The language of that Exhibit is totally inconsistent with the Town's claim that the six-month schedule may not be changed without Town consent or Commission approval. *First*, the Exhibit only purports to set forth what Verizon's schedule calls for "[a]t present." *Second*, it refers to the six-month schedule as an "*anticipated* schedule." *Third*, it specifically states that the schedule "is subject to further review and modification by the Franchisee [Verizon] consistent with" the "five-year" provision of the Commission's rules. *Finally*, the Exhibit does not ignore the question of the consequence of changes in the schedule but rather specifically addresses it, but *solely* by requiring that Verizon "provide notice to the [Town] and the [Commission] of any material change in this schedule." It is hard to see how the parties could have more clearly expressed their intention to allow Verizon to change the schedule subject *only* to the five-year rule and a limited notice requirement.

Contrary to the Town's statements, the clear language of Exhibit B is not nullified by either the amendment provisions of § 12.7 of the Franchise, or by the liquidated damages provisions of §§ 11.5.2 and 11.6.

Section 12.7 sets forth the procedural requirements for "[a]mendments and/or modifications to this Franchise." However, as explained in Verizon's May 10 reply comments, changes in the six-month build-out schedule would not constitute an "amendment" of the Franchise because Exhibit B itself explicitly permits such changes. Thus, a schedule change would not alter any of the rights granted or obligations imposed by the Franchise. Indeed, since Exhibit B requires only a separate notice of a schedule change, such a change would not entail

---

[4] Additional provisions related to build-out are included in § 3 of the Franchise. However, those obligations are not at issue here. The Town's arguments are based on the *anticipated* six-month schedule, which is found only in Exhibit B.

any changes in the text of the Exhibit. To say that the six-month schedule set forth in Exhibit B must be "amended" every time the schedule is revised is no more cogent than the claim that the presence of the following sentence in Exhibit B —

> The construction of the Franchisee's FTTP Network has been completed to approximately 78% of the current households in the Franchise Area.

— means that the Exhibit must be amended, through a full proceeding under Publ. Serv. L. § 222, when the level of completion first exceeds 78%, and at every subsequent point at which the level of completion increases further. (Another absurd consequence of the Town's novel theory is that a full amendment proceeding under § 222 would be required whenever Verizon *outperforms* its anticipated schedule.)

Nor do §§ 11.5.2 or 11.6 change the meaning of Exhibit B. Both sections address the *enforcement* of the Town's rights and of Verizon's obligations — *but do not purport to define the scope or extent of those rights and obligations*. Thus, insofar as is relevant here, §§ 11.5.2 and 11.6 only recognize the fact that the Town *has* rights, and that Verizon *has* corresponding obligations, under Exhibit B. But that fact is not disputed by Verizon: Exhibit B clearly obligates the company to provide notice of "material changes" in its anticipated schedule and also to complete its service deployment — to the extent required by Rule 895.5(b)(1) — within a five-year period.[5] And the Town has the right to require and receive such notice, should a material change ever occur. If the parties had intended the two liquidated damages provisions to change the unambiguous language of Exhibit B relating to the obligations imposed by that

[5] *See* Transcript of March 27, 2007 Public Hearing at 101 (Supervisor Kaiman acknowledged that liquidated damages should be applied "if there's a failure to perform in the five years, that with each month there could be an added liquidated damage hit that we might be able to pursue.").

Exhibit — instead of merely providing a remedy for a violation of those obligations — they surely would have said so explicitly.[6]

Having failed to advance its position through an analysis of the words of the Franchise, the Town moves on to a consideration of the discussions at the third Public Hearing held on April 17, 2007. However, the Franchise includes a clear and unambiguous integration clause (§ 12.6), which explicitly "supersedes" any separate agreements that might be reflected in the oral discussions at the hearing. When the parties signed the Franchise agreement, they gave their consent to its plain meaning — including the language of the integration clause — and not to any alleged "prior or contemporaneous agreements, representations, or understandings . . . regarding the subject matter hereof." This is not to say that the hearing record necessarily is irrelevant to the interpretation issue; rather, as Verizon showed in its May 10 reply comments, the record clearly *supports* — not contradicts — the interpretation reached through a plain reading of Exhibit B.

We will not repeat the detailed quotations from the hearing record set forth in our May 10 reply comments. We will merely note that those extracts clearly demonstrate that the parties understood that the language of Exhibit B, as it existed on the date of the hearing, did *not* support the Town's interpretation — a point made repeatedly by Cablevision's attorney and agreed to by the Town Supervisor.[7] This was the common ground occupied by Verizon, the Town, and

---

[6] The Town argues that ambiguities in the Franchise agreement should be construed against the "drafter of the Agreement, the Franchisee." Whatever the merits of this argument as a general proposition, it has no application here where the language of the Franchise is totally clear and unambiguous. The *contra proferentum* rule relied on here by the Town would in any event apply only where other canons of contractual interpretation fail to yield a clear meaning.

[7] Verizon's May 10 reply comments cited a number of statements made by Cablevision's counsel, Mr. Bee, on the third hearing day, as well as the Town Supervisor's agreement that notice did not require consent: "I understand that." Transcript of April 17, 2007 Public Hearing at 32. Cablevision's counsel made similar statements earlier in

(continued ...)

Cablevision by the end of the hearing. Despite this fact, the parties ultimately executed the Franchise without any changes to the language of that Exhibit. In doing so, the Town accepted that language, regardless of any subjective desire it might have had for a different sort of agreement.[8]

In its May 29 Request, the Town cites two bits of colloquy that shed little light on the parties' understandings or intentions. Presumably through some combination of misunderstood questions and answers, verbal slips, and mistranscriptions, neither of these squibs elucidates any of the contract interpretation issues belatedly raised by the Town — a phenomenon that is neither uncommon nor surprising in transcribed oral colloquy, and which is one of the principal reasons that formal written agreements such as the Franchise typically include integration clauses — so that there will be one clear statement of what the parties agreed to, rather than numerous vague and possibly conflicting bits of quoted speech.

Perhaps unsurprisingly, the Town has been exceedingly selective in its editing of the transcript in order to find some fragmentary statement upon which to hang its hat. *Immediately after* the colloquy cited by the Town, Verizon's representative Paul Trane made a very significant statement that is ultimately elucidative regarding Exhibit B's notice requirement:

(...continued)

the hearings as well. For example, Mr. Bee's opening comments on the first day of the hearing stated that the deployment dates in Exhibit B "are references to an estimated timetable for building. It is not a contractual commitment that says if we are unsuccessful in building by this date, you can penalize us and we'll be in breach." Transcript of March 27, 2007 Public Hearing at 50.

[8] A party cannot bootstrap itself into favorable contract terms through self-serving assertions that it wanted something different. What a party agrees to is the plain meaning of the words in the contractual document that it chooses to sign. Moreover, to the extent that the Town somehow still asserts that "notice means consent," this is belied by other language in the Franchise that plainly shows that the parties understood the difference between these concepts and that, when the parties intended to include a consent requirement, they knew how to do so and

(continued ...)

> *And the PSC has opined on this twice and noted that the only obligation they would require of Verizon is to notify the PSC and the Town if there were difficulties* [in meeting the schedule]. We don't anticipate any. As I noted at one of our prior hearings, this is a good news story, we've build out the vast majority of the Town and we'll have all of it virtually build by the end of '08.[9]

The Town's letter fails to include the highlighted sentence. Instead, it quotes the question to which Mr. Trane was responding, and the first two words of his answer. Inexplicably, the sentences quoted above were represented in the Town's letter only by three dots.[10]

In short, the Franchise clearly permits Verizon to change its six-month service deployment schedule without Town consent or Commission approval, subject only to the five-

---

(...continued)

did so expressly. For example, Section 9 of the Franchise ("Transfer of Franchise") expressly requires Verizon to obtain the Town's "consent" prior to transferring the franchise to certain entities.

[9] Transcript of April 17, 2007 Public Hearing at 28 (emphasis supplied.). A copy of the complete transcript of the third hearing day was attached to Verizon's May 10 reply comments.

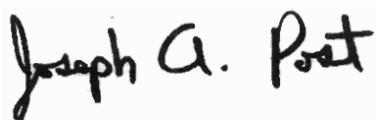
[10] It is important to understand that the contract interpretation issue would be a significant one (if a scheduling dispute ever arose) precisely because neither the Town nor the Commission has the power to *compel* Verizon to accede to a consent and approval requirement for any change in the six-month build-out schedule. Indeed, the Town does not even claim that it has such power; its argument is simply that Verizon voluntarily agreed to a consent requirement. Conferring blanket veto authority on a community to regulate the construction of a mixed-use network independent of the community's authority to impose reasonable time, place and manner restrictions on the use of the public rights of way would squarely contradict New York law. *See* Cases 05-M-0247 and 05-M-0250, "Declaratory Ruling on Verizon Communications, Inc.'s Build-Out of its Fiber to the Premises Network" (issued and effective June 15, 2005), at 25-26. Indeed, the Town's demand — unsupported by any agreement on the part of Verizon — is an attempt to exert precisely the type of "broad new authority" over telecommunications facilities under the guise of a cable franchise that the Commission has repeatedly rejected. *See, e.g.*, the Commission's orders in the Nyack (Case 05-V-1570) and South Nyack (Case 05-V-1571) confirmation proceedings (February 8, 2006). Federal law reinforces the Commission's decisions. The FCC has made abundantly clear that the kind of control over the architecture and deployment of a mixed-use network that the Town seeks to assert through the unilateral imposition of a consent requirement is unlawful. In the recent *Section 621 Order*, the FCC addressed this precise issue when it held that: "To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities. *For example, we find it unreasonable for an LFA to refuse to grant a cable franchise to an applicant for resisting an LFA's demands for regulatory control over non-cable services or facilities.*" *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007), ¶ 121 (emphasis added, footnote omitted). *See also id.* ¶ 122.

year rule and a limited notice requirement. The Town's May 29 Request totally fails to provide any meaningful support for its contrary interpretation.

IV. CONCLUSION

For the reasons set forth above, the Commission should expeditiously confirm the Franchise without prejudging speculative contract interpretation issues where no controversy currently exists. If the Commission deems it necessary to address this issue, it should interpret the Franchise in accordance with its unambiguous wording, and recognize that Verizon's right to properly provide notice of a material change in the anticipated build-out schedule is not subject to a veto by the Town.

Respectfully submitted,



JOSEPH A. POST
140 West Street — 27th Floor
New York, New York 10007-2109
(212) 321-8126

Counsel for Verizon New York Inc.

May 31, 2007