

Before the  
STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE  
PUBLIC SERVICE COMMISSION  
Albany, New York 12223-1359

Files / J. Grow / S. Shave / C. Hume  
G. Dalton

10/30/98

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In the Matter of  
TIME WARNER CABLE OF NEW  
YORK CITY, a division of Time Warner  
Entertainment Company, L.P.

98-V-1253  
through  
98-V-1259

Application for Approval of Franchise  
Renewal Pursuant to New York Public  
Service Law, Art. 11, § 222 and  
9 NYCRR 591.5  
-----X

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**SUPPLEMENTAL SUBMISSION IN OPPOSITION TO APPLICATION**

to the 10/20/98 Submission

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New York, New York 10022  
212-763-5000

Before the  
STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE  
PUBLIC SERVICE COMMISSION  
Albany, New York 12223-1359

ORIGINAL

-----X  
In the Matter of  
TIME WARNER CABLE OF NEW  
YORK CITY, a division of Time Warner  
Entertainment Company, L.P.

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Renewal Pursuant to New York Public  
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9 NYCRR 591.5  
-----X

TO: The Commission

**SUPPLEMENTAL SUBMISSION IN OPPOSITION TO APPLICATION**

NEW YORK CITY COUNCIL

75 Park Place, 5<sup>th</sup> Floor  
New York, New York 10007

Dated: October 30, 1998

## RECENT DEVELOPMENTS

In denying the preliminary injunction, Justice York stated that "[t]he Public Service Commission will have to determine whether its rule requiring the authorization or approval of the local legislative body means the city council." Tr. at 66. (A copy of the October 16, 1998 transcript is annexed hereto as Exhibit A.) Justice York held that a decision by the Commission was necessary before the Court would intervene. Indeed, Justice York made it clear that "[n]othing I've said should be construed in any way to indicate whether or not I believe that the city council should or should not have the approval effect. I have not ruled on the merits. That is still up in the air and that still awaits a further decision of both the Public Service Commission and whoever takes an appeal on their ruling." Tr. at 67-68.

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Although Justice York initially indicated that he was dismissing the action, such dismissal has not been granted. Tr. at 68-69. Instead, the parties are submitting briefs today to the Court on the issues of conversion of an action to a special proceeding and on venue. Thus, at this time, the action remains before Justice York.

In the meantime, the Council has formally accepted the Mayor's veto message regarding the Amended Authorizing Resolution and has sent it to the Land Use Committee for consideration of an override vote. The vote to override is expected to be held on November 12, 1998 and at that time there will be no question but that the Amended Authorizing Resolution is in effect for all purposes.

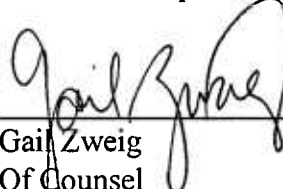
### ARGUMENT

The Council will not repeat its extensive arguments here except to say that Justice York's decision does not alter the Council's arguments. They apply with the same force as before. The meaning of "local legislative body" must be made in reference to the City Charter and the Authorizing Resolution, thus, it is more appropriate for a court to decide this issue. The Council urges the Commission to hold the Time Warner Application in abeyance and to refer the interpretation of the City Charter and Authorizing Resolution to the Court. If the Commission determines that it will interpret the City's laws, the Council urges the Commission to take into account their own past practices in accepting municipal resolutions from city councils from other cities in the State and the clear language of its own regulations, the Charter, and the Authorizing Resolution which support only one conclusion – the Council is the City's "local

## CONCLUSION

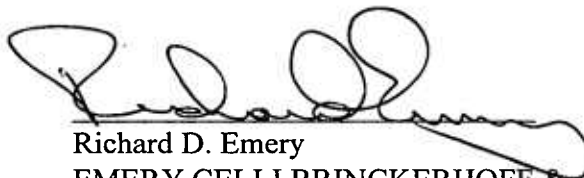
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In accordance with 9 N.Y.C.R.R. § 590.11, I, Gail Zweig, have read the foregoing and to the best of my knowledge, information, and belief, the facts asserted herein are true and correct and this pleading has not been interposed for purposes of delay.



Gail Zweig  
Of Counsel  
New York City Council  
75 Park Place, 5<sup>th</sup> Floor  
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In accordance with 9 N.Y.C.R.R. § 590.11, I, Richard D. Emery, have read the foregoing and to the best of my knowledge, information, and belief, the facts asserted herein are true and correct and this pleading has not been interposed for purposes of delay.



Richard D. Emery  
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SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY: CIVIL TERM: PART 2  
-----X

THE COUNCIL OF THE CITY OF NEW YORK,

Plaintiff,

- against -

Index No.  
403341/98

RUDOLPH W. GIULIANI, MAYOR OF THE CITY OF NEW YORK  
and CHAIR OF THE FRANCHISE AND CONCESSION REVIEW  
COMMITTEE; THE FRANCHISE AND CONCESSION REVIEW  
COMMITTEE OF THE CITY OF NEW YORK; THE DEPARTMENT  
OF INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS;  
ALLEN DOBRIN, COMMISSIONER OF THE DEPARTMENT OF  
INFORMATION TECHNOLOGY AND TELECOMMUNICATIONS,

Defendants.

-----X

80 Centre Street  
New York, New York 10007  
October 16, 1998

B E F O R E: HONORABLE LOUIS YORK, J.S.C.

A P P E A R A N C E S :

EMERY, CELLI, BRINCKERHOFF & ABADY, ESQS.  
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545 Madison Avenue  
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BY: RICHARD EMERY, ESQ., and  
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BY: LEWIS S. FINKELMAN, ESQ.,  
Deputy Chief, Commercial and  
Real Estate Litigation Division

## A p p e a r a n c e s :

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BY: ALLAN J. ARFFA, ESQ.

GRAUBARD, MOLLEN & MILLER, ESQS.  
Attorneys for Cablevision  
600 Third Avenue  
New York, New York 10016  
BY: GARY S. MAYERSON, ESQ.

MICHAEL MANISTER  
OFFICIAL COURT REPORTER

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THE COURT: Before we start, I have a couple of preliminary questions.

Have all the parties in the amended complaint been served? Are they all here or is somebody missing?

MR. EMERY: I think everybody is here.

MR. ARFFA: I'm not sure if the P.S.C. is here.

MR. MAYERSON: Your Honor, Gary Mayerson appearing on behalf of Cablevision.

I don't think there is a problem.

THE COURT: We won't hold you in default.

MR. FINKELMAN: I think the plaintiff is not seeking injunctive relief. I think their papers make that clear.

THE COURT: Is that right?

MR. EMERY: Yes.

THE COURT: Why are they a party then?

MR. EMERY: Well, we made them a

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1 party because they are the final --  
2 according to the way this thing was  
3 structured in the Appellate Division, it  
4 came out of the Appellate Division after  
5 your Honor ruled, they were -- the city  
6 made it clear that they were the final  
7 body which would approve the contract,  
8 and that no contract would be in effect  
9 without P.S.C.'s approval, and  
10 therefore, we thought it safer to name  
11 them. Although the preliminary  
12 injunction does not seek any relief  
13 against them. I was going to argue to  
14 you and I might as well just begin in  
15 that regard unless you have other  
16 questions you want to pose.

17  
18 THE COURT: Just one more that I  
19 think I'm really touching on, and that  
20 is what is the extent of Judge Wallach's  
21 order?

22 MR. EMERY: I'm going to touch on  
23 that right away in what I intend to  
24 present to you, and just interrupt me if  
25 I'm not answering that question.

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It strikes me, and maybe counsel would want to react to this even before I complete my argument overall, but it strikes me that though this is a preliminary injunction before you, as a practical matter, this is the case on the merits. And I say that --

THE COURT: That raises another question. Should I treat it that way?

MR. EMERY: Yes, I think you should treat it that way for the following reason, and maybe other people have a different point of view, but let me just give you my thoughts on that.

I think you should treat it that way because the question before you is a narrow question of law and it has to do with the issue of whether the New York City Council is the legislative body of the City of New York, or for purposes of cable franchise renewal, or whether the F.C.R.C. is. That's the question in this. The question before the P.S.C., the question before other bodies is

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1  
2 whether the public interest is served by  
3 the new amended resolution that has now  
4 been vetoed but presumably will be  
5 overridden within a month or so, and  
6 which will be the resolution applicable  
7 to future cable franchising renewals at  
8 least, and hopefully applicable here if  
9 the P.S.C. agrees with us. That's a  
10 public interest determination that has a  
11 lot to do with expertise in the cable  
12 business and cable franchising  
13 operations. That has nothing to do with  
14 the decision before you as a practical  
15 matter.

16 The decision before you is whether  
17 the administration, the executive branch  
18 of the City of New York, in granting  
19 cable franchise renewal, can read the  
20 city council out of the process  
21 entirely, which they have plainly  
22 attempted to do for the last three  
23 years. And the history of that is very  
24 clear. They sought a waiver from the  
25 P.S.C. which they withdrew when they



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1  
2 didn't get it. Last spring at the  
3 hearings they avoided all the questions  
4 and ultimately said we are not  
5 cooperating with the city council  
6 because we view them as the legislative  
7 body. And then Corporation Counsel,  
8 Mr. Hess, wouldn't answer the inquiries  
9 of Mr. Weinberg until the end of the  
10 summer. And then they went ahead with  
11 the F.C.R.C. vote. And now, in fact, we  
12 believe this is in blatant violation of  
13 Justice Wallach's T.R.O., not only  
14 yours, but Justice Wallach's T.R.O.  
15 They went and registered the contracts  
16 with the comptroller which is clearly  
17 not permitted, in my view, by the  
18 T.R.O. The only thing that was  
19 permitted was to sign them, pay and go  
20 to the P.S.C. There was no  
21 registration. Registration, if not  
22 consummation, is very close to  
23 consummation of the contracts.

24 My point is -- and that's more  
25 important to you not as a matter of

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contempt or anything like that. That's not really the issue here. But it is more important to you because it is plainly and clearly instructive of the fact, unequivocal fact, that what the city is trying to do, what the executive branch is trying to do is circumvent the legislative body.

Now, if they are right on the law, they have every right to do it. If they are right that the F.C.R.C. is the body for purposes of the franchise renewal, then they have the right to do it; if they are wrong, they don't. That's the issue before you. There is no other real issue here. It is a preliminary injunction in name, but it is ultimately the merits of this case. And when you decide that issue, it will essentially be decided finally and go up on appeal. That's what the city has been asking in this case when we were before Justice Wallach. That was their whole pitch. That's how they got it modified. They

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said we need a ruling on the merits.

And the only way we get a ruling on the

merits is if this thing goes forward.

If you restrain it, we will never get a

ruling on the merits. Justice Wallach

was convinced on that argument and

that's why he amended it.

THE COURT: I just can't understand it. It doesn't register with me.

MR. EMERY: I argued against that. It doesn't register with me either. But the reality is, that was the position the city took.

THE COURT: Why wouldn't there be a ruling on the merits if my restraints were enforced?

MR. EMERY: You can ask them that question better than I.

THE COURT: Judge Wallach is a very bright man and I respect him immensely.

MR. FINKELMAN: Your Honor, I take exception to the characterization of what transpired.

MR. EMERY: Why don't you wait

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until I finish.

MR. FINKELMAN: You invited me to interrupt.

THE COURT: One at a time, Gentlemen. Let's be civil.

MR. EMERY: My point is, I think what Lenny Kerner's position was, and he argued this with Mr. Finkelman in front of Justice Wallach, was that if the T.R.O. is not amended, then the whole process could go forward in such a way that the amended resolution, which the city council passed, could ultimately be the authorizing resolution in effect at the time these contracts came before consummation, and the old resolution would have expired and they wouldn't have the authority to go forward and there would be no more case before you, it would be moot. And that's why they were trying to rush to get you to do it earlier and that's why they were trying -- that was Kerner's point of view.

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Regardless of whether he is right or wrong, at this juncture, the fact of the matter is that their position is that they want a ruling, they wanted a ruling. That's why I don't understand the arguments before you about remedies and exhaustion, which all are complete nonsense in my view, because the reality that goes to the question of the P.S.C.'s expertise in whether cable franchises under amended resolution with public interest ramifications is desirable. I agree with that. On that issue, the P.S.C. is expert and they should be allowed --

THE COURT: Aren't you arguing that P.S.C. regulation controls any inconsistent regulations or local ordinances of the city? And doesn't the P.S.C. say that the legislative body is the one, the legislative body has to be involved in the process to the extent of approving it?

MR. EMERY: Absolutely right.

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That's the merits of this case.

THE COURT: Why don't we let -- why aren't we letting the P.S.C. decide this issue?

MR. EMERY: Very simply. The P.S.C. has said very clearly that it is the organic documents of the city's executive legislative structure, namely, the charter. They said that themselves in the letter. They said they are not competent to rule on the issue. It is an issue that is a pure matter of law. Has nothing to do with exhaustion of remedies. It is a pure matter of law for the courts of New York to decide.

THE COURT: They have referred it to the courts of New York? Let's look at the letter. That's one of the things I haven't done.

MR. EMERY: Look at the letter of September 16.

THE COURT: This is in --

MR. EMERY: From Malone to Hess. It is Exhibit I.

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THE COURT: In your amended  
complaint?

MR. EMERY: Exhibit I to the Teresa  
Scott affirmation.

THE COURT: Whose side is she on?

MR. EMERY: She is sitting right  
here with me.

THE COURT: Where is Teresa Scott?  
You seem to be very close.

MR. EMERY: I haven't known her as  
a saboteur yet.

THE COURT: Let me see if I can  
find it.

MR. EMERY: You want me to hand it  
to you, your Honor?

THE COURT: Yes. That will make it  
easier.

MR. EMERY: It is in the first  
paragraph towards the end.

THE COURT: "Confirmation of  
franchises, Section 222, relative to  
renewals, assigns the Commissioner  
responsibility to specify the branch of  
the municipal government and power to

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grant cable television franchises".

So what are they going to do about it?

MR. EMERY: And the sentence before that, your Honor.

THE COURT: "To grant franchises." You are not arguing that the council, city council is granting a franchise. Your argument is that they are approving it.

MR. EMERY: We are arguing that they have a role in approval of the franchise that is being circumvented.

THE COURT: Number one, the general counsel to the department of public service, while what he says has considerable weight, is not a final decision of the Public Service Commission.

MR. EMERY: Your Honor, Mr. Finkelman on behalf of the city has conceded in his reply affidavit, in two places, that it is the organic documents of the city, namely, the charter, which



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is the legislative body that controls. It is on Page 7 of his affidavit. His reply affirmation -- excuse me -- paragraph 12. "It is hardly possible that framers of the rule intended no specific body in any particular locality, but under organic documents of the locality was vested with the approval of functions. Thus, there is no sound reason to excuse plaintiffs from proceeding." Then he argues administrative process.

The point here is, it's not -- it is a pure matter of law for a Court to decide. You see ultimately, the city's gambit here --

THE COURT: Wait a minute, wait a minute. You say it is a pure matter of law. It is a regulation of the Public Service Commission, so why are they not at least in the first instance allowed to state, and if it is brought before them, if you intervene in the proceedings, you can get them to do

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that, how they will determine who is,  
which is or what is the legislative body  
of the city?

MR. EMERY: They said they will do  
it through the organic documents of the  
city.

The point here is that they are  
trying to go to Albany to have this  
reviewed, because an Article 78 of the  
P.S.C. is reviewable in Albany Supreme  
Court, which, of course, is a totally  
absurd position when this Court has been  
handling this case from the wheel at the  
outset when it was assigned. And the  
idea here that this is anything other  
than a pure matter of law under the  
charter of the City of New York, the  
issue of whether the P.S.C. is going to  
waive the rule or do something else is a  
different issue. That can take place  
after you decide whether or not the city  
council is the local legislative body.  
If you decide that it is, then they  
might be petitioned to waive the rule or

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something. That's a different issue.

THE COURT: What you are saying now, I should issue a declaratory judgment and hold off on the injunction?

MR. EMERY: No. You should rule on the merits of this case, it will go up on appeal and be decided.

THE COURT: That would be a declaration of the party's rights. Should I order the P.S.C. not to consider what the city is advancing in its organic documents?

MR. EMERY: I don't think you have to order the P.S.C. I think your ruling as a matter of law is binding. It is a judgment and it goes up on appeal, either be affirmed or reversed, and then the P.S.C. can act accordingly. But the point is you have an irreparable harm here. That's why we sought preliminary injunction, because the city council of the City of New York is being read out of a process which we contend and it

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1  
2 contends, and as you ruled, is likely to  
3 succeed on the merits in the T.R.O.  
4 context, that it was read out of a  
5 process which is under the charter  
6 entitled To Participate In. That is  
7 irreparable harm in itself.

8 THE COURT: I don't mean to imply  
9 that I disagree with anything I have  
10 said on my temporary restraining order.  
11 But I do have certain reservations as a  
12 procedural matter of telling a  
13 regulatory commission what to do before  
14 they do it. I'm not certain, even with  
15 your very persuasive argument, that they  
16 are going to do it exactly as you say  
17 they are going to do it. Because I  
18 don't think the general counsel is the  
19 final word here. Now, it may be. Maybe  
20 they will follow him to the letter of  
21 the law, but it seems to me we don't  
22 know that right now.

23 MR. EMERY: Let me put it slightly  
24 differently. The one thing the law and  
25 the cases that we have cited to you

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stand for is that an administrative agency, without a specific expertise in an area that it is being asked to opine on, does not have authority to do so in place of a Court that can look at the same question. The P.S.C. has no specific or specialized authority in the issue of what is a legislative body of a locality. You do. That's what courts are for.

THE COURT: But they have -- they are supposed to have the authority to implement the rules that they have promulgated, whether you say they have the expertise or not, at least in the first instance. And it seems to me that unless their interpretation of their own rules, arbitrary or capricious, or can show in some way is an excess of their jurisdiction, that we at least in the first instance have to give some weight to their opinion because it is their rule.

MR. EMERY: Well, the rule is that

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the legislative body should participate in the renewal process in X, Y and Z ways. The rule is not definition of --

THE COURT: Don't I have to see what they are going to say before I tell them what to do?

MR. EMERY: They have no expertise in the area. What they have to say is of no moment because it is a question of law on the issue of what is a legislative body. It is inappropriate for them, just as their general counsel says, to opine on that issue. The questions of how the executive branch and legislature relate to one another are peculiarly appropriate for you, for a court. It is exactly what this Court is meant to do in a quasi constitutional separation of powers at the city level. This is done repeatedly. The Mayor has had repeated cases with the council, with the public advocate, with everyone else who has gone to court. Courts are opining on these issues right and left.

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That is their particular expertise. The Public Service Commission knows about electric rates. They don't know what a legislative body of the City of New York is. They don't know what the F.C.R.C. is.

THE COURT: Let me ask a different but related question. Before we decide who may prevail on the merits or whether I decide the merits or I issue an injunction or I do anything of that sort, the first question is, is there an adequate remedy of law, right? You look at me as if I'm from Mars, but I think that's a legitimate question.

MR. EMERY: I don't think damages are appropriate here or what the remedy at law would be.

THE COURT: Isn't an Article 78 proceeding a remedy that the law gives?

MR. EMERY: I think not in this context.

THE COURT: Why would you be injured if I were not to rule on this

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1  
2 issue until the Public Service  
3 Commission ruled and then you could  
4 bring an Article 78 challenging their  
5 decision?

6 MR. EMERY: First of all, the  
7 Article 78 would have to be brought in  
8 Albany.

9 THE COURT: It would?

10 MR. EMERY: That's the venue  
11 provision. I'm sure they will argue  
12 that. They will come back and avail  
13 themselves of every technicality.

14 THE COURT: I would love to  
15 determine the Article 78, to tell you  
16 the truth. I have no desire to  
17 relinquish because I'm so far into this  
18 case, I really have no desire to  
19 relinquish my jurisdiction over it.

20 MR. EMERY: They can agree to it.

21 THE COURT: But what legal right do  
22 I have to say that I'm not going to --  
23 I'm going to rule on this issue, because  
24 if I don't, it is going to go to those  
25 judges in Albany?



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MR. EMERY: Right. The point is, the essence of the harm done here, which an Article 78 has no remedy at law to redress, is that the city council processes have been denied and deprived already as we sit here today. That's the harm. It's not more or less. It's simple. And that no remedy at law is available to redress, not anything that comes out of the P.S.C., not by the P.S.C., nothing else. It is only a court now that can correct this as quickly as possible to give the city council -- I mean we're talking about the legislative body of the City of New York for every other purpose, at least. They have to concede that. The question is, is it for this purpose. And if it is for this purpose, the people of the City of New York and the body itself has been grievously harmed by this kind of circumvention of its power. It is essential -- if this were Congress and the presidency or something of that

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1  
2 nature, maybe the courts would decline,  
3 maybe it wouldn't. But the fact of the  
4 matter is, it would be a peculiarly  
5 appropriate question for the courts if  
6 judicial intervention were allowed. And  
7 there are different considerations and  
8 constitutional issues between the  
9 branches, but not in the state law.

10 THE COURT: Here's my next  
11 question. Suppose you are right and  
12 suppose the city council's procedures,  
13 the city council's powers, the city  
14 council's jurisdiction has been violated  
15 and the Public Service Commission goes  
16 ahead, nevertheless, and approves these  
17 contracts, then you bring an Article  
18 78. And suppose I decide that you are  
19 right, that the city council's  
20 procedures have been violated, that they  
21 do have a right to participate in this  
22 proceeding, and I've said that the  
23 Public Service Commission is in  
24 violation of its own regulations, that  
25 its own regulations say that the

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legislative body of the local jurisdiction has to have a say in this, and I therefore -- either I send it back to the Public Service Commission to make a decision in light of that or I just say the whole proceeding is a violation of law and you have to start -- well, you don't have to start all over again, but before you have this proceeding before the Public Service Commission, it's got to go before the city council for its approval and for the city council to exercise whatever other things it can do, such as modifying it or whatever.

Now, hasn't the processes that have been violated have the jurisdictional avoidance, that the city council has been deprived of, hasn't that been remedied if it follows that line?

MR. EMERY: It has been remedied a year and a half later than it should be remedied now.

THE COURT: I have already read all

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the briefs.

MR. EMERY: My point is this, your Honor. The fact that it can be remedied then in that process as you describe does not take away from the city council's right to get a remedy now because the harm is complete at this moment. It has nothing to do with the fact that the Public Service Commission can possibly fix it or that you can fix it down the road after they do. The harm has occurred now on a very narrow legal question which you have particular expertise to resolve. And that's all that's necessary. We don't need any of the rest of it to give us the right to come to you as a legislative body of the city. It is not just some litigant out there. This is a legislative body of the city, and seek denial under the processes under the charter guaranteed to it and guaranteed to the people who elected the body. And that's the problem here. This is tampering with

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2 separation of powers. This is not just  
3 a case that contemplates the expertise  
4 of some administrative agency to grant  
5 redress. This is a case about sharing  
6 of power in city government. And courts  
7 decide those as quickly and efficiently  
8 as possible so that the processes of  
9 government can go forward. They don't  
10 send them over to administrative bodies  
11 to have the city council be dealt with  
12 about an administrative body when the  
13 court itself has complete jurisdiction  
14 over the wrong that already is  
15 complete. That's the essence of the  
16 point here. I mean I wish I could put  
17 it more clearly, but I can't think of a  
18 way.

19 THE COURT: I feel somewhat like  
20 Judge Braun when he sent back the Yankee  
21 Stadium case to the Bronx court a couple  
22 of weeks ago when he felt that he wanted  
23 to get into those issues, but some  
24 procedural aspects of the case which I'm  
25 not going to go into prevented him from

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doing so, and I find that I may be in the same boat.

Let me hear from the city.

MR. EMERY: Thank you, your Honor.

MR. FINKELMAN: Yes, your Honor.

You made a lot of points I was prepared to make. But I think before your Honor even gets to the notion that a judge reviewing what the P.S.C. does, what can't be lost sight of here, they are not harmed until the P.S.C. rules, makes its determination. And that determination, we hope it is not, could very well be that they agree with the council. And the P.S.C. will not approve these renewals and send it back to the city and say until such time as you get city council approval, we are not going to approve them.

THE COURT: That's one thing they can do. But as it was just pointed out, it is probably not going to happen in view of the general counsel's letter.

MR. FINKELMAN: I don't think the

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general counsel speaks on behalf of the members of the P.S.C.

THE COURT: We all know they are going to confide in them and we all know he is going to have a large part in writing the decision.

MR. FINKELMAN: That may be, your Honor.

I might also add that they have in fact filed their objections with the P.S.C., I think on October 14. So they have now availed themselves of that administrative process.

In terms of this whole notion about it being an issue of law that may be beyond the purview of the P.S.C., you've got the Public Service Law, explicitly states that the P.S.C. must look at whether the renewals are in violation of the law and the public interest. They have every right to look at the issue of whether or not the city has, as they allege, run roughshod over the city council's approval rights. And to

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suggest that they don't have the  
authority to look at these legal  
issues --

THE COURT: Let me ask you one  
question about Judge Wallach's  
decision. Judge Wallach's decision,  
after he modified the T.R.O., said that  
in all other respects, the T.R.O. is in  
place. What are the other respects?

MR. FINKELMAN: That's a good  
question, your Honor. And it is not for  
me to ask Judge Wallach at this point,  
but I don't think there are any --

THE COURT: Let me ask Mr. Emery  
that. I meant to ask him that.

MR. FINKELMAN: I think he has made  
clear that his position is city  
comptroller registration is something  
that we were still enjoined from doing  
at the present time until you modify the  
T.R.O.

THE COURT: Is that it?

MR. EMERY: That is certainly one  
of the things. I mean consummation,



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1  
2 finishing the contracts is what he was  
3 saying can't occur. And moreover, he is  
4 also, I would argue, saying that the  
5 P.S.C. can't approve the contract, it  
6 can issue an opinion, but it can't  
7 formally approve the contract until the  
8 T.R.O. is lifted.

9 MR. FINKELMAN: The P.S.C. was not  
10 even a party when we went before Judge  
11 Wallach. He didn't enjoin the P.S.C.  
12 from doing anything. It was the city  
13 defendants that were being enjoined.

14 THE COURT: I'm going to let you  
15 reply, because I don't want to have  
16 cross-conversations.

17 MR. FINKELMAN: And with respect to  
18 registration, Judge Wallach permitted  
19 execution and delivery of the contracts  
20 so they can be filed with the P.S.C.  
21 The comptroller's registration, it is  
22 not a consummation of the contracts, it  
23 is not a finalization of the contracts.  
24 The contracts are not effective until  
25 the P.S.C. approves them. And that's

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not going to happen. So the  
comptroller's registration --

THE COURT: Why is it not going to  
happen?

MR. FINKELMAN: It hasn't happened  
yet. But at the time Judge Wallach  
issued the order, that's not something  
that was even with the P.S.C. at the  
time. The registration is part and  
parcel of execution of the delivery. It  
is also not finalization and/or  
consummation, so we haven't even run  
afoul of the T.R.O., whatever remains of  
it.

THE COURT: Well, consummation at  
this point is when the Public Service  
Commission approves the contracts.

MR. FINKELMAN: That's correct,  
your Honor.

THE COURT: Is there a hearing?

MR. FINKELMAN: They haven't  
scheduled any hearing. I think they  
just got counsel's objections on the  
14th. I don't know what the next plan

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is.

THE COURT: Is there procedure that they ordinarily would schedule a hearing, do you know?

MR. FINKELMAN: It is at their discretion. They have the option to hold a hearing. It is probably likely, given the objections, that they will do so. I can't speak on their behalf, your Honor, but nothing has been scheduled yet. They just got the objections. I assume they want the city's response to it. I think that's going to proceed unless something happens.

But I just think that the notion here, and as I said, I reiterate, that state law specifically gives the P.S.C. this right to look at whether or not these renewals violate the law. And with respect to the notion that we are admitting that you have to go to the organic documents to resolve this, you don't get there until you go to the P.S.C. regulation. That is the

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1  
2 provision that provides the local  
3 legislative body. It is their  
4 regulation. If there's ever a case  
5 where an administrative body should be  
6 called upon to interpret its own  
7 regulation, this is it. It is their  
8 regulation that has created this  
9 dispute.

10 I would also add, and I think we  
11 cited several cases, I think your Honor  
12 picked up in the argument, they had  
13 adequate remedy of law here. The fact  
14 of the matter is, if everything goes and  
15 the P.S.C. approves the agreements,  
16 they've got their remedy, they've got an  
17 Article 78, your Honor, or a judge in  
18 the Third Department certainly has the  
19 authority to nullify contracts if they  
20 are in violation of the law, send them  
21 back to the P.S.C., whatever remedy a  
22 judge would fashion, so they have a  
23 remedy of law.

24 And I might also add this whole  
25 notion about the city council has sort

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1  
2 of been left out of this entire  
3 process. We didn't start the process  
4 until the city council issues this  
5 authorizing resolution. If your Honor  
6 has read the authorizing resolution, it  
7 goes for six or seven pages. It has 30  
8 comprehensive terms and conditions that  
9 have to be in these contracts.

10 THE COURT: This is what they are  
11 trying to avoid, right?

12 MR. FINKELMAN: Excuse me, your  
13 Honor?

14 THE COURT: This is what you are  
15 trying to avoid.

16 MR. FINKELMAN: No, we are trying  
17 to avoid modifications they made on the  
18 last day before the F.C.R.C. was going  
19 to vote. But before that time, in 1993,  
20 they offered an authorization, and they  
21 specified 30 terms and conditions. We  
22 followed that to a T. And then on the  
23 last day before the F.C.R.C. is  
24 scheduled to vote, 15 members of the  
25 committee decide we are not going to

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change the ground rules, which, of course, is not effective at the time because it has to go to full council, has to survive the Mayor's objections. It is not even effective today. And they tried to stop the process so they can try and change the ground rules.

THE COURT: What about Mr. Emery's argument what we are involved in here is a pure question of law? We have the Public Service Commission's regulation which has the force of law in New York City, I think we will all agree. And we have a charter. Both of them indicate that the city council is the legislative -- not the Public Service Commission ruling, but certainly the city charter says that the Public Service Commission is the -- I'm sorry, that the city council is the legislative body.

And as a matter of fact, if I went to the average guy in the street who has some knowledge, just some minimum

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1 knowledge of what goes on in this city  
2 and I asked him what is the local  
3 legislative body for the city, I'm sure  
4 nine out of 10 times the answer would be  
5 the city council.  
6

7 Now, if that's the case, if that is  
8 what is in the charter, if that is what  
9 the Public Service Commission is bound  
10 to adhere to, and that is the general  
11 knowledge of the populous, then why  
12 can't the Court know what the man in the  
13 street knows? In other words, why can't  
14 I take judicial notice of the fact that  
15 it should be the city council? Because  
16 there's no argument against it, and this  
17 shouldn't be an issue before the Public  
18 Service Commission because it is so  
19 apparent, and anything other than that  
20 would be an abuse of discretion.

21 MR. FINKELMAN: Well, in response,  
22 the average citizen probably is not  
23 familiar with Section 21 of the city  
24 charter which says that the council --

25 THE COURT: No, he is familiar with

1 - Proceedings -  
2 the city council.

3 MR. FINKELMAN: That's true, your  
4 Honor.

5 THE COURT: And he knows the city  
6 council passes the statutes of general  
7 application.

8 MR. FINKELMAN: Well, this is not a  
9 statute; these are contracts. Let's not  
10 lose sight of that, which is typically  
11 an administration function.

12 THE COURT: What is the authorizing  
13 resolution?

14 MR. FINKELMAN: Under the charter  
15 is something that the council gives the  
16 right to a particular city agency to  
17 pursue issuing franchise renewals. But  
18 the charter Section 21 states the  
19 council is the legislative body.

20 THE COURT: We are getting away  
21 from the man in the street.

22 MR. FINKELMAN: That's what I was  
23 going to say. The man in the street  
24 doesn't know that the charter says the  
25 city council is the legislative body



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unless the charter specifies otherwise.  
And in this case, we have a specific  
charter section that the council shall  
have no role whatsoever in the selection  
of franchisees.

But putting that aside -- well,  
selection --

THE COURT: Well, who is selecting  
here?

MR. FINKELMAN: Who is selecting?

THE COURT: Who is selecting the  
franchisee? Who is picking Time-Warner,  
who is responsible for bringing  
Time-Warner in this whole situation?

MR. FINKELMAN: That's a loaded  
question. But under the Federal Cable  
Act --

THE COURT: Don't say that to a  
judge.

MR. FINKELMAN: Sorry, Judge.

Under the Federal Cable Act,  
Time-Warner and Cablevision, as existing  
franchisees, have a statutory right to  
renewal as long as they meet certain

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terms and conditions under the cable act.

But I don't want to stray. The issue here is, what you have here is unlike most other cases involving this pure issue of law, you've got a statute that indicates the P.S.C. is statutorily authorized, it has to review whether or not the agreements comply with the law. That is their statutory directive. And under the P.S.C. regulation, they are the ones who issued this regulation that has started this whole conflict. So this is also a case where the agency should be called upon to look at their own regulation before any judge does.

You've got a Court of Appeals, the Joy case, which stands for the proposition that when a particular agency's regulation has been called into question, that that agency should have the first crack at interpreting it before any Court gets embroiled in that dispute. There's no reason in terms of

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harm or anything why there should be any exception. They are a litigant. I understand the city council is typically the city's legislative body. But they are a litigant. And they have to play by the same rules. And right applies and exhaustion applies. And there you have it.

THE COURT: Before Mr. Emery replies, is there anyone else, any other attorney at the table who wishes to speak?

MR. ARFFA: Judge, may I be heard? I'm here for the Time-Warner franchisees.

We support essentially the position that the city is taking here, the city in the form of the Mayor and Corporation Counsel are taking in this matter and in opposition to the city council position.

I just want to briefly state, we are clearly caught in the middle of a dispute between these two bodies. But

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1  
2 what seems absolutely clear to us, there  
3 is a statutory scheme that has been put  
4 in place by the state legislature for  
5 the review and approval of cable  
6 franchises. There is also federal  
7 statute involved as well. But under the  
8 state scheme, it is clear you go through  
9 a local process and then agreements are  
10 reached which are then submitted to the  
11 P.S.C. That's what's happened here.  
12 The only issue being raised as I hear  
13 Mr. Emery, although he is very eloquent  
14 and he puts it in terms of separation of  
15 powers and role of the council, at the  
16 end of the day, the only issue he is  
17 raising, the issue he is asking to  
18 decide is, what is the meaning of the  
19 state Public Service Commission  
20 regulation, and has it been satisfied in  
21 this case. That is a question that is  
22 within, uniquely within the province of  
23 the P.S.C.

24 Moreover, there is one other factor  
25 he did not mention, that Mr. Finkelman

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mentioned in a reply affidavit that I think is important to be aware of.

The P.S.C., like many administrative bodies, expressly has the power to waive their own regulations. Tomorrow, the P.S.C. could say you know, what that whole rule we had, I'm going to waive it in this case because you know there's been enough involvement by public authorities, by the public, there have been enough public hearings. In our view, the purposes of the regulation have been fully carried out here, and therefore, we are going to waive it. I'm not saying that they will.

THE COURT: Where does that authority to waive the regulations come from?

MR. ARFFA: They have another regulation which Mr. Finkelman cited in his own reply affidavit. I think it is --

MR. FINKELMAN: Your Honor, if I may, it is NYCRR Section 590.22. And

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1  
2 also Section 591.1, gives the P.S.C. the  
3 explicit authority to waive any rule or  
4 to approve renewals notwithstanding the  
5 fact that there's noncompliance with all  
6 the provisions of the NYCRR.

7 THE COURT: Does anyone know if any  
8 courts have issued any decisions on that  
9 rule? Because it seems to me it  
10 involves a very serious question about  
11 substantive due process, procedural due  
12 process. Or it seems to me it could be  
13 construed in the context of a particular  
14 situation it is fundamentally unfair.

15 MR. ARFFA: Let me say first why I  
16 don't think it is, and then I will  
17 answer your question.

18 I don't think it would be  
19 fundamentally unfair, because it is  
20 obviously an issue for the P.S.C. to  
21 decide what was the purpose of the  
22 rule. I expect the purpose was to  
23 assure certain degree of public  
24 involvement, public hearings and the  
25 like. And second, it certainly would be

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a rational decision to say that was satisfied in this case.

THE COURT: It just seems to me that you pull the rug right out from under everybody if you wait to the end when everybody is arguing on certain rules and they appeal to the rules upon which a case will be decided and then you say, well, we are not going to enforce this rule, so you lose.

MR. ARFFA: Judge, I think the --

THE COURT: Anyway, that's not an issue here.

MR. ARFFA: The reason I say --

THE COURT: This is all a dicta type of conversation.

MR. ARFFA: It is. But to make the point, the P.S.C., like regulatoryies, has a great deal of discretion on how to act. They may say it is in the public interest to do X even if it is not required by law. They can go far beyond it.

Now to just answer your first

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1 question, Judge, the leading authority  
2 on the powers of the P.S.C. is actually  
3 a case that does involve the city. It  
4 involved a case where some of our  
5 franchises were modified and they were  
6 challenged by the city, sued the P.S.C.,  
7 that is New York City didn't like what  
8 the P.S.C. has done. And there is a  
9 Court of Appeals decision, City of New  
10 York versus Commission on Cable  
11 Television -- that was the predecessors  
12 of the P.S.C. -- 47 NY2d 89. The Court  
13 of Appeals said that the C.C.T., now the  
14 P.S.C., "Is invested with broad  
15 authority" and "has been granted  
16 extensive power to supervise the  
17 franchising of cable television  
18 systems".

19  
20 So let me add it is a very broad  
21 authority that has been recognized by  
22 the courts, and they can take the  
23 position that they are fully satisfied  
24 with what's happened here.

25 So let me just continue with the



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1  
2 P.S.C. by saying I think there is broad  
3 authority on the part of the P.S.C. I  
4 don't see a reason for the Court to get  
5 involved at this stage where a P.S.C.,  
6 where the matter is before the P.S.C.,  
7 hasn't acted and does have the  
8 jurisdiction to decide what did that  
9 rule mean, what did they mean when they  
10 said local legislative body.

11 I spent last night looking at  
12 something because I just wasn't sure  
13 whether or not it would apply, but  
14 Mr. Emery gets up and makes it sound  
15 clear-cut and your Honor referred to the  
16 people on the street and say well, this  
17 is a nonissue. Of course, the  
18 legislative branch is the city council.

19 I looked last night at Mr. Emery's  
20 papers when he managed to get the Board  
21 of Estimate declared unconstitutional.  
22 One of his arguments over and over again  
23 was that the Board of Estimate, in doing  
24 the things it did, which is what the  
25 F.C.R.C. does, was exercising

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legislative power over and over again. In his papers he argued that they were legislative. So to me, to come in and say --

THE COURT: That's one of the reasons why they did away with it.

MR. ARFFA: Exactly. And it was its powers, those same powers that he referred to as legislative are now being held by this F.C.R.C. So to say this is a clear issue of law, I don't think I would agree with. I think there is a lot of logic to what the Corporation Counsel is arguing, which is to say no, the authorities here can be viewed here as legislative.

One final point. And this was something Mr. Finkelman said, and I'm not sure if it fully sunk in. The point is here.

There was an authorizing resolution. Even if you said, Judge, said I don't like what they did and they weren't nice enough to the city council

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1 and all of this, and even if you think  
2 the P.S.C. rule says the legislative  
3 body is the city council, which it  
4 doesn't say, but even if your Honor felt  
5 that way, the city council acted here.  
6 They passed an authorizing resolution.  
7 That authorizing resolution they concede  
8 in their own papers, the city council  
9 empowered, they used that word over and  
10 over again, empowered to do it, that's a  
11 city agency, with the F.C.R.C. approval  
12 to grant franchises. So they granted  
13 this authority. As I argue in our  
14 papers, in effect, they delegated this  
15 authority that was given to them and  
16 there's no reason they can't delegate  
17 that authority. That's a well-settled  
18 doctrine that if the city council had  
19 that authority, they enacted an  
20 authorizing resolution and clearly  
21 empowered it. If we were sitting here  
22 because there was not a new authorizing  
23 resolution because they weren't trying  
24 to amend it and we just had the old one,  
25

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1  
2 F.C.R.C. voted, they approved it, this  
3 thing went into effect and a citizen  
4 came up and said hold it, I don't think  
5 there has been compliance with city and  
6 state law here because the legislative  
7 branch wasn't involved, I think they  
8 would have been laughed out of court.  
9 They would say hold it, there is an  
10 authorizing resolution and empowered  
11 these groups to act.

12 The only issue the city council is  
13 raising --

14 THE COURT: I don't know if the  
15 city council can waive the requirements  
16 of the city charter just by issuing an  
17 authorizing resolution.

18 MR. ARFFA: That is consistent with  
19 the city charter. The city council  
20 enacted an authorizing resolution that  
21 empowered these groups to act.  
22 Therefore, I think it is a very strong  
23 argument to say that whatever power they  
24 had under the P.S.C. rule was in turn  
25 delegated to these other bodies.

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1  
2 THE COURT: Well, number one, there  
3 are other considerations; who is the  
4 authority, who is the ultimate authority  
5 for the resolution. This is similar to  
6 what I have said about the Public  
7 Service Commission, who is the ultimate  
8 authority for interpreting or stating  
9 what the intention of the resolution  
10 was. I would say that it is the body or  
11 at least the sponsors of the resolution  
12 itself.

13 Number two, the other issue is that  
14 the Public Service Commission has issued  
15 a regulation that says that the  
16 legislative body is the one to approve  
17 this transaction. And I don't know that  
18 the city council would have the right to  
19 abdicate its responsibility under state  
20 law that has been enacted by a public  
21 agency that has the effect of state law  
22 in a local jurisdiction. So there are  
23 some other considerations besides what  
24 you say about they have delegated.

25 MR. ARFFA: Judge, there may be. I

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1 think my point is just that you don't  
2 need to reach these issues of who is the  
3 local legislative body, nor should a  
4 Court, I think, under long-settled  
5 precedence where there is an  
6 administrative agency whose regulation  
7 is at issue, and the interpretation of  
8 that regulation forms the heart of the  
9 dispute, it seems to me is clearly a  
10 matter of judicial deference indeed  
11 under the precedence we cite, we think  
12 almost require the courts defer to the  
13 judgment of the administrative body.  
14 And as I say, who knows what they will  
15 do, who knows how they will interpret it  
16 or what rules they will give, and that  
17 will be reviewed. And therefore, there  
18 will be review at the end of the day of  
19 that action. So in my view, whatever  
20 the merits may be, I think that it is a  
21 matter for the P.S.C. to decide in the  
22 first instance.

23  
24 MR. MAYERSON: Your Honor, if I  
25 may, we were first named in any pleading

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on Friday. We just got Mr. Emery's papers just now. We are still not named in these papers, but we do --

THE COURT: You are named in the complaint.

MR. MAYERSON: We are named in the verified amended complaint from Friday, but we do intend to make our own separation motion to dismiss, although I would say for the purposes of today, we join --

THE COURT: Do you have anything to add to what has been said to the motion you are contemplating?

MR. MAYERSON: I think your Honor hit the nail on the head.

THE COURT: What is that? I want to know what you are going to add in the motion you are going to file.

MR. MAYERSON: We want to review. We have their papers and want to be able to review them. If there are any additional authorities, we would add those. They are essentially the same

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grounds.

But I think your Honor hit the nail on the head. You said the question of the P.S.C., don't they really have the right in the first instance to interpret their own regulations. And if the city council is unhappy with that, whatever it may be, they can take an Article 78. I think you really just hit it on the head. Thank you.

MR. EMERY: Just briefly, your Honor.

The point ultimately is that Justice Wallach, in the second T.R.O. which involved the Cablevision franchise, said at the end, "provided, however, that nothing herein contained shall limit the power of the motion or to proceed expeditiously with its hearing with respect to a preliminary injunction." That is one of the things that the T.R.O. preserved.

THE COURT: I'd like to note before you continue -- excuse me. You



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1 suggested or I suggested based on  
2 something I deduced from what you said  
3 that this could be treated as a motion  
4 for summary judgment. Does anyone have  
5 any problem with that?  
6

7 MR. EMERY: They moved to dismiss.

8 MR. FINKELMAN: Yes, your Honor.  
9 P.S.C. is named and hasn't even appeared  
10 yet.

11 THE COURT: That's their problem if  
12 they have been served.

13 MR. FINKELMAN: They were with a  
14 complaint and have 20 days to move.

15 THE COURT: Don't they have an  
16 obligation to appear at this motion?

17 MR. FINKELMAN: No. The motion for  
18 injunctive relief does not target them.

19 THE COURT: Since there's an  
20 objection, we can't treat this as a --

21 MR. EMERY: It can be converted  
22 later in any event after there is an  
23 opportunity for all parties to  
24 participate on the issue of summary  
25 judgment. I don't think that is an

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1  
2 impediment to your ruling. Obviously,  
3 you are not going to rule as a final  
4 matter on the merits if they are  
5 objecting. I put it out there to see if  
6 it were possible to agree on that. If  
7 it isn't, it isn't.

8 But my point is, Justice Wallach  
9 sent it back to this Court. And in  
10 fact, the city argued it should be sent  
11 back to this Court for a ruling because  
12 they wanted a ruling. Now they come  
13 back here, of course, and take a  
14 different tack. We heard it. I don't  
15 have to repeat it.

16 MR. FINKELMAN: I would object to  
17 that again, your Honor.

18 MR. EMERY: It is exactly what  
19 Mr. Kerner said to Justice Wallach.

20 THE COURT: I understand you are  
21 moving to dismiss.

22 MR. FINKELMAN: We argued to Judge  
23 Wallach it wasn't right. He agreed you  
24 have to go to the P.S.C. I don't know  
25 where it comes from.

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1  
2 MR. EMERY: It comes from Lenny  
3 Kerner's mouth.

4 MR. FINKELMAN: I was there.

5 MR. EMERY: In any event, the issue  
6 that was made to sound like some kind of  
7 inequitable activity on the part of the  
8 city council is really another world,  
9 that they came in the last minute and  
10 added conditions. The fact of the  
11 matter is, this is the legislative body  
12 of the City of New York, despite what  
13 Allan says about it. And what the Board  
14 of Estimate used to be or whatever, this  
15 is the legislative body. The  
16 legislative body has a right on the last  
17 day, the last minute or the last second  
18 to change the rules of the game. That's  
19 what a legislative body is. It has that  
20 power as long as it is not violating the  
21 constitution. They just may not like  
22 it. And obviously they don't because  
23 they are doing everything in the world  
24 to invoke every technicality to  
25 circumvent it and they have for the last

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1  
2 three years. But the fact of the matter  
3 is, that's the right of the people of  
4 the City of New York when they elect the  
5 city council to have a body that has  
6 power to counteract the Mayor when the  
7 Mayor is doing something against what  
8 the city council perceives as the public  
9 interest. And they can do it at the  
10 last second, even with the fact that  
11 there are no equitable issues that apply  
12 to a city council body in the same way  
13 that someone else may be held  
14 accountable in that regard in your  
15 courtroom or elsewhere. There is the  
16 city council of the City of New York,  
17 and they took these actions because they  
18 believed it was in the interests of the  
19 people of the City of New York and  
20 that's what they are elected to do.  
21 They are playing fast and loose with  
22 that whole concept, just as they are  
23 playing fast and loose with an injury  
24 that has occurred here, which is to  
25 avoid them, to circumvent them if we are

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1  
2 right about the P.S.C. rule which says  
3 legislative body.

4 Now, let's look at that because  
5 that's what everybody is arguing about,  
6 what does local legislative body mean.  
7 The fact of the matter is, we start with  
8 the proposition, and I agree with you,  
9 it is just the general counsel of the  
10 P.S.C. saying it, because he is saying  
11 that's not what they do, that's not what  
12 they said. They decide whether it is  
13 in the public interest, they decide  
14 whether it is cable expertise, but they  
15 don't decide what is the legislative  
16 body. They just say that the  
17 legislative body has to participate in  
18 the ways as described in the renewal  
19 process. Who decides what a legislative  
20 body is, is a court as a matter of law.  
21 And that's the essence of what's here.  
22 That's what you have to decide.

23 Now, if the F.C.R.C. is the  
24 legislative body and they are wrong and  
25 they win, then the P.S.C. can go and see

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1  
2 if it is in the public interest to see  
3 if they are approved. But if you decide  
4 the city council is, then they can go  
5 and decide whether they want to waive  
6 the rule or whether they want to take  
7 some other action. But it is still for  
8 a court to decide what is a legislative  
9 body. That's why the Supreme Court did  
10 it in the case that Allan was saying  
11 that I litigated some years ago. I mean  
12 it is for a court to do it. It is not  
13 for the P.S.C. to decide what the local  
14 legislative body is of the City of New  
15 York. It just isn't the case.

16 Now, I also say as a third  
17 proposition that if you read the city's  
18 papers in this, notwithstanding their  
19 technical arguments about exhaustion and  
20 ripeness and the like, which are all  
21 based on the notion that there is no  
22 harm until the contracts are signed,  
23 which we say is absolutely nonsense,  
24 that the harm took place last summer  
25 when we were denied the right to

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1 undertake the processes appropriate as  
2 that local legislative body to  
3 participate in the renewal process.  
4 That's the harm. It is not the  
5 consummation of the contract. That's a  
6 way of dealing with a remedy, but that's  
7 not the harm here. The harm is in the  
8 process. And what we still say is, if  
9 you look at their papers,  
10 notwithstanding all their technical  
11 arguments, they themselves say it is a  
12 matter of law, that it is the organic  
13 documents that charter the arguments  
14 they are making themselves about whether  
15 the charter delegates charter or whether  
16 it doesn't, arguments all joined in the  
17 papers as a matter of law which  
18 determines whether this is a legislative  
19 body for purposes of the P.S.C.  
20 regulations. And that's what you have  
21 to decide. It is not up to the P.S.C.

22 THE COURT: Have you concluded,  
23 Gentlemen, and Ladies?

24 MR. ARFFA: Judge, just one last  
25

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thing.

On the letter from the P.S.C. counsel, I don't think it should be read, and anyone could read this, even though it is just an opinion from the general counsel as stating that the city council, or one or the other of these is the body under its rule. I think what they were trying to argue is the question of whether you are required to get body approvals, whether you need F.C.R.C. approval and the city council approval. So I think the letter which I suspect --

THE COURT: I don't follow what you are saying.

MR. ARFFA: The way the letter is written, he actually starts by saying -- what he's responding to is a question. whether or not the city council -- you take the position that the regulation should not be required to read the approval of city council in addition to the F.C.R.C., and he goes from there. I



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1 don't think this is being read as taking  
2 a definitive interpretation of whether  
3 or not. I think what Mr. Emery was  
4 trying to construe the letter as, was  
5 saying he's already decided the issue of  
6 law, he has already decided the meaning  
7 of the P.S.C. regulations, and he has  
8 already said it is up to a court. I  
9 just can't -- you can't get this out of  
10 that letter. There is no way this  
11 letter says that is for the Court to  
12 decide. I think it is an initial  
13 preliminary letter in any event, and it  
14 is certainly not saying definitively  
15 that they are going to allow the courts,  
16 or I think he refers to them as organic  
17 documents, to decide that issue. I  
18 think the P.S.C. is still reserving for  
19 itself the ability to decide the meaning  
20 of its own regulation.  
21

22 That's all the I want to say.

23 THE COURT: I'm going to issue a  
24 decision today, but in order to make  
25 sure that I don't make any glaring

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1 errors in my oral rendition of my  
2 decision, I'm going to do it after  
3 lunch, after I have had a chance to talk  
4 to my staff, such as it is, and see if  
5 they agree with what I say, if they have  
6 any serious disagreements, so that I can  
7 check what my take is on what the ruling  
8 is or what the decision should be from  
9 the advice that I get from my staff. So  
10 why don't we reconvene at about 2:30 and  
11 I'll issue an order from the bench at  
12 that time.

13  
14 MR. FINKELMAN: Your Honor, just a  
15 housekeeping chore. Can I please hand  
16 up the originals of the papers that were  
17 served?

18 THE COURT: You don't have to do  
19 that. You can file them with the county  
20 clerk.

21 MR. FINKELMAN: File it with the  
22 clerk?

23 THE COURT: I have so much here,  
24 I'm afraid that it will take two  
25 court officers to carry it over to the

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1  
2 county clerk. So why don't you file it  
3 there. I think that would be easier.  
4 Nobody is going to challenge you on the  
5 basis that I have decided it on copies.

6 MR. ARFFA: Judge, we also have the  
7 cross-motions to dismiss.

8 THE COURT: I'm going to rule on  
9 that.

10 (Whereupon, a luncheon recess was  
11 taken.)

12 THE COURT: The question I have to  
13 consider right now is what the Public  
14 Service Commission is going to do when  
15 they decide the issues which have been  
16 brought before them.

17 Although their rule says that the  
18 legislative authority has to approve the  
19 contract between the city and the cable  
20 owners, it appears that there is an  
21 issue over whether or not the approval  
22 of the legislative authority of the city  
23 is the city council.

24 Plaintiff claims that the city  
25 council has to participate and has to

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1  
2 approve these contracts. The defendant  
3 cable owners and the city says that's  
4 not the case, and that the approval of  
5 the city agency -- what's the name of  
6 that agency?

7 MR. FINKELMAN: Franchise  
8 Concession Review Board.

9 THE COURT: The Franchise  
10 Concession Review Board is sufficient.

11 So I have reviewed the letter from  
12 the general counsel for the Public  
13 Service Commission, and my impression is  
14 that he believes that the approval of  
15 the city council is not necessary.  
16 However, the general counsel is not the  
17 commission. While his voice may have  
18 weight, he is not the one who makes the  
19 ultimate decision. The decision by the  
20 Public Service Commission will be --  
21 strike that. The Public Service  
22 Commission will have to determine  
23 whether its rule requiring the  
24 authorization or approval of the local  
25 legislative body means the city

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council. And that issue has not yet been determined. It seems to me that the issue arises because of the Public Service Commission's rule.

Now, before the Court should intervene, the Court should determine what the Public Service Commission's decision will be on the submission of these contracts for approval without the approval of the city council. The city council, I know, has issued its objections to the procedure and the decision awaits the Public Service Commission.

The Court feels that until the Public Service Commission rules, the Court is not in a position to dictate who is the legislative body at this time. Administrative procedures have to be exhausted and a final decision of the administrative agency in this case has to be rendered before, I believe, the Court should intervene.

Nothing I've said should be

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1  
2 construed in any way to indicate whether  
3 or not I believe that the city council  
4 should or should not have the approval  
5 effect. I have not ruled on the  
6 merits. That is still up in the air and  
7 that still awaits a further decision of  
8 both the Public Service Commission and  
9 whoever takes an appeal on their ruling.

10 It is hereby ordered that the  
11 motion for a preliminary injunction is  
12 denied, and that the cross-motion to  
13 dismiss is granted without prejudice to  
14 any subsequent ruling by any  
15 administrative agency or any court on  
16 the merits of the issue of whether or  
17 not the city council authorization is  
18 necessary before these transactions  
19 between the city and the cable companies  
20 can be consummated.

21 I'll sign that order as soon as it  
22 is typed up.

23 MR. EMERY: Your Honor, I would  
24 just make one suggestion as to an  
25 amendment with respect to the last part

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1  
2 of the order. And that is given what  
3 Justice Wallach said and sending it back  
4 to you, albeit in the context of the  
5 preliminary injunction, I just would  
6 make the suggestion that rather than  
7 granting the motion to dismiss at this  
8 time, you hold that in abeyance and  
9 await the decision of the Public Service  
10 Commission so the case can come back to  
11 you.

12 THE COURT: Well, I've thought  
13 about that. And the question is whether  
14 I can turn a proceeding, a declaratory  
15 judgment or preliminary injunction into  
16 an Article 78 proceeding. I don't know  
17 if whether I should await further  
18 submissions from the parties.

19 MR. EMERY: If you can give us a  
20 chance to brief that, I'm told we have  
21 case law that supports you doing that.

22 THE COURT: Okay. I'll withdraw  
23 that part of my decision -- well, then,  
24 what am I deciding? I'm deciding that  
25 the preliminary injunction is denied.

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MR. EMERY: But you don't have to deny the motion to dismiss.

THE COURT: Does anyone want to speak to this before I make my decision?

MR. FINKELMAN: Yes, your Honor. I think it would be patently premature to convert this to an Article 78.

THE COURT: I'm not converting it yet, I'm considering it.

MR. FINKELMAN: You are contemplating it because there's no P.S.C. determination. You don't start a lawsuit challenging a determination before it is rendered.

MS. HURSTEIN: (Law Assistant)

I also wanted to ask about the venue issue with respect to the Article 78. Is it mandatory that an appeal would go to --

MR. EMERY: No.

MR. FINKELMAN: My understanding from what I know of the P.S.C., is that it is mandatory, that the Article 78



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would have to be taken at the Third Department, your Honor.

THE COURT: Look, I am denying the preliminary injunction. I'm not ruling on the request to turn this into an Article 78 proceeding at this time, but I'm willing to consider the suggestion. All it means is that you have to give me further briefs. I don't think it is premature because I'm not doing anything but giving you more work.

Two weeks. I'm going to be gone next week anyway. Two weeks from today. Limit it to 20 pages.

MR. EMERY: Briefs haven't been long in this case anyway.

THE COURT: No, they haven't. There are times that I don't do that and I get 50-page briefs.

MR. EMERY: That's no problem.

THE COURT: I don't think we need another appearance. I just think I need your submissions.

MR. FINKELMAN: Simultaneously.

- Proceedings -

MR. EMERY: Simultaneous.

THE COURT: Simultaneous. Serving  
and filing with the part clerk within  
two weeks.


I am not going to sign the order I  
issued. I will just issue a gray sheet  
denying the motion for preliminary  
injunction at this time.

(Whereupon, the proceedings were  
concluded.)

\* \* \*

C E R T I F I C A T I O N

CERTIFIED TO BE A TRUE AND ACCURATE  
TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC  
MINUTES TAKEN OF THIS PROCEEDING.

  
\_\_\_\_\_  
MICHAEL MANISTER  
OFFICIAL COURT REPORTER

Michael Manister  
Official Court Reporter

98-V-1253  
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**Franchise Agreement Between  
The City of New York  
and  
Time Warner Cable of New York City,  
a division of Time Warner Entertainment Company, L.P.  
(Western Brooklyn Franchise)**

**New Appendix A  
Including a Complete "Engineering Analysis and System Architecture"**

**APPENDIX A**

**SYSTEM CHARACTERISTICS AND  
TECHNICAL PERFORMANCE/TESTING REQUIREMENTS**

## APPENDIX A

### SYSTEM CHARACTERISTICS AND TECHNICAL PERFORMANCE/TESTING REQUIREMENTS

#### I. SYSTEM CHARACTERISTICS

##### A. Technical Features

1. Headend/Hub Design and Intrasystem Interconnection. The System may contain one or more headends/hubs/satellite earth stations/office/ maintenance complex(es). Each headend and hub(s) will have Downstream and Upstream capability and all equipment necessary to provide Two-way services and intrasystem and intersystem interconnection.
2. System Bandwidth and Access Connectivity. The basic plant for the System will consist of a Subscriber Network with one or more coaxial or fiber optic cables. The System shall be a fully activated Two-way network.
  - a. At the completion of the Upgrade (as defined in and in accordance with the terms, schedule and sequence as set forth in Appendix B of this Agreement), the Subscriber Network will have activated Upstream bandwidth of at least 35 MHz and total activated Downstream bandwidth of at least 800 MHz. The Company presently intends to achieve this capacity for the Subscriber Network through the use of a hybrid-fiber-coax (HFC) architecture system, providing for 5-40 MHz Upstream and 54-862 MHz Downstream.
3. Interconnection.
  - a. Within nine (9) months after request by the Commissioner, or such longer period as the Commissioner may authorize, the Company shall:
    - (1) interconnect, with the appropriate capacity to transmit simultaneously all of the Governmental Channels via transmission paths equal in number to the number of Governmental Channels, the Governmental distribution center to the Company's head-end, and
    - (2) interconnect, via one (1) transmission path for each Governmental production/studio facility, each Governmental production/studio facility up to a maximum of three

facilities citywide to the Governmental distribution center; and

- b. Within nine (9) months after request by the Commissioner, in consultation with the Community Access Organization (CAO), or such longer period as the Commissioner may authorize, the Company shall: (1) interconnect, via transmission paths equal in number to the number of Public Channels, the CAO distribution center to the Company's head-end, (2) interconnect, via one (1) transmission path, the primary CAO production/studio facility to the CAO distribution center, and (3) interconnect, via one (1) transmission path for each remote CAO production/studio facility, each such remote CAO production/studio facility to the CAO distribution center, except that the maximum aggregate length of the interconnections that the Company shall be required to provide shall not exceed two (2) City blocks for the Borough in which the CAO operates. These dedicated paths shall be on fiber optic cables employing wide band FM or digital transmission characteristics and providing performance quality for video and stereo audio Signals which is effectively transparent except that the technological specifications herein shall not apply to transmission paths for collocated facilities that were provided on coaxial cable as of the Effective Date of this Agreement.
  - c. Interconnection If Number of Access Channels Changes. If the number of Access Channels on the Subscriber Network changes, the Company shall interconnect such additional Channel(s) from the Access Channel distribution center(s) to the Company's head-end(s) and shall provide other interconnection(s) as required by Section 4.1.03 of this Agreement.
- 4. Interactive Capability. The System will be activated for Two-way capabilities and will offer Two-way interactive services as they become Economically and Technically Feasible and Viable.
  - 5. Emergency Alert Systems (EAS). The Company shall comply with Section 4.4.02 of this Agreement, provide appropriate connectivity for the City to transmit emergency alerts using any EAS equipment required by applicable law, and, upon request of the Commissioner, meet with representatives designated by the City to establish emergency alert plans and procedures.

6. Standby Power. Where installed, all amplifiers and power supplies related to the coaxial trunk lines of the Subscriber Network will have standby power supplies capable of at least three (3) hours of standby operations. The headend(s) and hubs will have automatic switchover engine-generated standby power, capable of powering all headend/hub electronics for a minimum of twenty-four (24) hours, except where prohibited by lease or regulation, in which case the headend(s) and hubs will be equipped with such standby power capability as is permissible and reasonably practicable. The Company shall follow the standby power provisions of the Engineering Analysis and System Architecture (EASA) plan as set forth in III of this Appendix A.
7. Status Monitoring. Where previously installed, a status monitoring system will continually and automatically monitor the performance of all amplifiers and power supplies related to the trunk lines of the Subscriber Network. The Company will monitor the status of its trunk line amplifier system to the fullest extent possible given the reporting capability of status monitoring equipment. The Company shall follow the EASA upgrade plan submitted with regard to status monitoring. Trunk lines will be replaced by fiber extending to node locations and therefore status monitoring may only be needed to monitor node activity.
8. Parental Control Options. Each Subscriber will be supplied a method for exercising parental control as provided in Section I.D. of this Appendix A.
9. Service Delivery Techniques. The Subscriber Network shall be addressable. Addressable converters or other State-of-the-Art addressable technology allowing for changes in service configurations without interruption of Service or the need to enter any Subscriber's premises will be utilized in the System and provided by the Company to any Subscriber who subscribes to any Service requiring such a device.
10. Interconnection. The System will be interconnected to other Cable Communications Systems in accordance with the terms and conditions of this Agreement. As part of the Upgrade the Company shall change the technology used for interconnection to digital transmission to reduce the degradation of audio, stereo, surround sound, and video transmissions. The completion of the change to digital interconnection transmission shall be completed by December 31, 2003.

B. Service Capability

1. Services of the Subscriber Network

a. Local and Distant Off-the-Air Signals

The System will be capable of providing local off-the-air broadcast Signals.

b. Automated Services

The System will be capable of providing automated information services.

c. Public, Educational and Governmental Access Channels

The Company will provide these Channels in accordance with Section 4.1 of this Agreement.

d. Local Cultural, Local News, Local Sports, Local Children's Programming and Other Categories of Local Origination Programming

The System will have the capability to provide local origination programming.

e. Nonpay Satellite or Microwave Programming Services

The System will have the capability to provide nonpay satellite or microwave programming services.

f. Cable Programming Services

The System will have the capability to provide cable programming services.

g. Pay Services

The System will have the capability to offer pay services.



h. Leased Services

Leased Channels shall be provided in accordance with Section 3.7 of this Agreement.

i. Interactive Services

The Company will facilitate the development of interactive Services for the Subscriber Network.

j. Services for Physically Challenged Persons

The Company will comply with the obligations for Physically Challenged Persons set forth in Section 4.4.01 of this Agreement. The Company shall make available to Subscribers on Medicaid who are Physically Challenged remote control devices at a price not exceeding the Company's cost therefor.

k. Services for Senior Citizens

The Company will develop means of making its equipment easier for Senior Citizens to use. At a minimum, the Company will supply Subscribers who are Senior Citizens on Medicaid with remote control devices at a price not exceeding the Company's cost therefor.

l. Other

Nothing contained in this Appendix A or elsewhere in this Agreement shall be construed as a requirement that the Company provide any specific or broad category of programming.

2. The Institutional Network

The Institutional Network shall be established as provided in Appendix E to this Agreement.

C. Production Facilities

The Company will make available to the Community Access Organization and to the City the public, educational and governmental access facilities and equipment or capital grants specified in Appendices D and E to this Agreement.

#### D. Parental Control Devices

At the Subscriber's request, the Company shall provide to each Subscriber, either (i) within twenty-four (24) hours of a Subscriber's written or oral request, a parental control device, or the form of a converter with a parental control feature; or (ii) within a reasonable time after the request, a filter, trap or similar system by which the Subscriber can prohibit viewing of a particular Cable Service during periods selected by that Subscriber. The choice of (i) or (ii) shall rest with the Company.

## II. PERFORMANCE AND TESTING REQUIREMENTS

### A. Performance Standards

#### 1. General

The System shall be constructed, operated, maintained and upgraded, as a State-of-the-Art Cable Communications System consistent with the obligations of Section 3 of this Agreement. The Company shall strive to attain the best possible technical performance for the System, consistent with such sound engineering practices as are Economically and Technically Feasible and Viable.

At a minimum, throughout the term of the franchise, the System shall be designed and operated so as to meet all applicable technical performance standards, regulations and guidelines.

#### 2. Signals/Channels

For purposes of this Agreement, initially and until such time as the City and the Company otherwise agree, the spectrum capacity of each type of Channel utilized on the System shall be as follows:

- a. Analog Video Channel -- 6 MHz provided in analog form, which shall include both the visual and aural carriers and corresponding side bands that constitute the picture and sound of a television program;
- b. Audio Channel -- an FM audio Signal occupying 200 kHz of bandwidth, with 400 kHz spacing, the Signal strength of which shall not exceed that of the audio subcarrier of the nearest Video Channel nor be less than -16 dBmV at the receiver terminals (reference 0 dBmV equals 1,000 microvolts across

75 ohms) or an equivalent audio Signal utilizing an appropriate modulation technique so as to render the quality of the Signal no less than that of an FM audio Signal;

- c. Data Channel -- a band of frequencies to be determined by the interface devices used to translate the Data Signal; usually 3 kHz to 6 MHz depending upon speed of data transmission. (In some cases, the bandwidth may exceed 6 MHz.)

All Signals distributed over the System, shall conform to the performance standards set forth in II.A.3. of this Appendix A.

### 3. Performance Standards

The performance standards, including design and operating standards, for the System are those that have been established by the FCC and the standards contained in the Company's EASA plan as set forth in III of this Appendix A, which are contained in Exhibit 1 to this Appendix A. Prior to the provision of digital service, the technical specifications for such service shall be approved by the Commissioner, such approval not to be unreasonably withheld or delayed.

## B. Testing

### 1. Testing Procedures

The Commissioner shall, after consultation with the Company, establish reasonable procedures for testing the technical performance of the System in accordance with all applicable technical performance standards, regulations and guidelines. Such procedures shall include both the initial proof-of-performance tests for any upgrade of the System and periodic tests of the System and shall be consistent with the testing considerations set forth in II.B.2. of this Appendix A.

## 2. Testing Considerations

### a. General

The tests to be conducted of the technical performance of the System shall be designed to ensure compliance by the Company with all applicable performance standards. With respect to the performance standards that are set forth in Exhibit 1 to this Appendix A, the design standards shall apply to the design of the System and compliance with these standards will be evaluated in connection with the Company's EASA plan as set forth in III of this Appendix A.

The design/operating standards will be used in connection with the periodic operating tests of the System throughout the term of this Agreement, which at a minimum will occur: (i) following construction of the Upgrade (or any subsequent upgrade) of the System; (ii) semiannually, during the extremes of climate conditions (summer and winter), and (iii) at periodic intervals as established in the testing procedures based upon factors such as number or location of Subscriber complaints regarding reception problems.

The Company shall give the Commissioner prior notice of any such test to be conducted by the Company pursuant to this Section II.B.2.a of this Appendix A so that the City may arrange to have an engineer present. The failure of City personnel to attend any test shall not relieve the Company of its obligation to conduct any test. The Company shall also make available to the engineer(s) designated by the Commissioner the mobile testing facilities required by Section 6.11.04 of this Agreement to enable the City to conduct tests of the technical performance of the System. The mobile testing vehicle and equipment will be made available from time to time upon the request of the engineer(s) designated by the Commissioner; such vehicle and equipment necessary to perform all tests occasioned by Subscriber complaints shall be made available upon twenty four (24) hours' notice when such tests are required in response to Subscriber complaints;

and such vehicle together with all equipment specified by such engineer(s) from among the equipment listed in Exhibit 2 to this Appendix A shall be made available on the next business day after request by such engineer(s) for all other tests deemed necessary or appropriate by the Commissioner. All such tests at the City's request will be conducted by the Company's personnel with the City's engineer(s) present.

b. Compliance with Design Standards

In the event of the Company's failure to meet the design standards, either in connection with the Engineering Analysis and System Architecture plan as described in III of this Appendix A, or any initial proof-of-performance test (or equivalent test, as described above) in any area, the Company shall take immediate corrective action either: (i) prior to construction, in the case of a design failure; or (ii) as a condition to continued operation of the System in any area, in the case of a failure of any initial proof-of-performance test (or equivalent test, as described above).

c. Failure to Comply with Operating Standards

The Company's failure to meet the operating standards on any one occasion in connection with any test of the System will not subject the Company to any breach under this Agreement, but will obligate the Company to undertake immediate corrective action, as described below. Substantial failure to pass operating tests or repeated refusal to take corrective action in the event of such failures shall constitute a material breach of this Agreement, as provided in Section 14.4.02(ii) of this Agreement.

If the System meets the operating standards on all Channels at the time of any test, no further action by the Company will be required. If the System fails to meet one or more of the operating standards at the time of any test, the Company will immediately investigate the cause of such failure and, to the extent such cause is within the Company's control, the Company shall correct such cause within thirty (30)

days, provided that such thirty (30) day correction period shall be extended on a day-to-day basis during the period in which the Company is diligently and continuously correcting such cause to the satisfaction of the Commissioner. At the conclusion of said period, an additional test will be conducted to determine whether the corrective actions have brought the System into compliance with the operating standards.

In the event of a failure to meet the operating standards on any Channel at the time of any test, the Company will be permitted to show that such failure was due to circumstances beyond its control; for example, due to the quality of received Signals or tapes prepared by Persons other than the Company or the quality of any converter or other terminal device attached to a Subscriber's television which was not supplied by the Company or any Affiliated Person. A reasonable determination will be made by the Commissioner, in consultation with the Company, as to whether the failure to meet the operating standards on any Channel was due to circumstances beyond the Company's control, provided that, if a City engineer is present at the time of the test and such engineer determines that such failure is solely due to circumstances beyond the Company's control, no further action by the Company will be required. If the failure was due to circumstances beyond the Company's control, the Company will not be required to take further steps with respect to the failure, but may take such corrective action it deems appropriate to overcome the problem. If the failure was due to circumstances within the Company's control, the Company will correct the failure, after which an additional test will be conducted.

### 3. Mobile Testing Capability

In order to enable the Company to test the performance of the System to perform in accordance with Exhibit 1 to this Appendix A, the Company shall secure and continuously maintain: (i) all necessary testing and monitoring equipment specified in Exhibit 2 to this Appendix A to this Agreement, or its equivalent; (ii) any other equipment necessary to monitor the performance of the System as may be specified

by the Commissioner; and (iii) a mobile testing vehicle capable of containing and having all such equipment installed therein promptly, and which shall be used for the purpose of such tests.

C. Modifications

If requested by the City or the Company, representatives of the City and the Company will meet to consider revisions to the performance standards and testing procedures.

III. ENGINEERING ANALYSIS AND SYSTEM ARCHITECTURE (EASA)

A. Purpose

The Engineering Analysis and System Architecture (EASA) shall ensure that, as constructed and operated pursuant to the Upgrade, the System shall be able to provide the capacity and Services required by this Agreement in a manner consistent with the applicable performance standards.

B. EASA Plan

The Upgrade shall conform to the Engineering Analysis and System Architecture plan (EASA plan) pursuant to this Section III.B. of this Appendix A. The EASA plan is on file with the City as of the Effective Date of this Agreement and is attached hereto as Exhibit 3. Thereafter, subsequent additions or modifications to the EASA plan shall be submitted by the Company in such form and within such time period as the Commissioner shall specify.

The version of the EASA plan and all subsequent additions or modifications to such version, as accepted by the Commissioner, shall be set forth as Exhibit 3 to this Appendix A and shall be incorporated herein and made a part of this Agreement. All material modifications thereto shall be subject to the approval of the Commissioner. Prior to any material deviation by the Company in design or characteristics of the System from those set forth in the EASA plan, the Company shall submit to the Commissioner a description of the proposed deviation and the justification thereof, together with any additional information as may be reasonably specified by the Commissioner.

C. Contents

The version of the EASA plan shall contain, at a minimum:

1. A description of the design philosophy and principal assumptions for the System;
2. A listing of all operating margins for the upgraded System over the full temperature range to meet the applicable performance standards.
3. A description of all steps to be taken by the Company to ensure System reliability and to protect against failures to meet the performance standards (in lieu of a full reliability analysis);
4. A description of all channeling plans and switching systems to be utilized, together with the proposed assignment, (both Dial Location and spectrum allocation), of all Channels on the Subscriber Network;
5. All information necessary to comply with applicable local laws, rules, or regulations, including, without limitation, all environmental review requirements; and
6. The System Architecture, which shall include, at a minimum:
  - a. a block diagram of all principal sections of the System (e.g., headends, hubs, distribution plant, and optical electronics) showing the function and interconnection of all principal equipment to be utilized;<sup>1</sup>

---

<sup>1</sup> To the extent that specific equipment has been selected, the Engineering Analysis and System Architecture should list the manufacturer and model of said equipment. Otherwise, such information should be supplied when the actual equipment is selected. To the extent that the Company has provided a list of the specific equipment to be utilized, the Company may thereafter change said equipment upon written notice to the Commissioner demonstrating that the performance quality of the new equipment will not be less than that of the equipment for which it is being substituted.



- b. design maps for all principal sections of the System, including:
  - the headend(s)
  - hubs
  - nodes
  - trunk cables
  - feeder cables
  - proposed studios and other production facilities, and
  - antennas, microwave towers, and satellite earth stations and uplink; and
- c. the detailed plan for the sequence of construction of the System, as required in Section 6.1 of this Agreement.

Throughout construction of the System pursuant to the Upgrade and any other upgrade of the System, as requested by the Commissioner, the Company must submit actual "as built" maps as the Upgrade proceeds.

**PERFORMANCE STANDARDS**

PERFORMANCE STANDARDS

<u>PARAMETER</u>	<u>FCC STD.</u>	<u>UPGRADE DESIGN STD.</u>	<u>COMMENTS</u>
Carrier-to-noise ratio	43dB	46dB	
Composite Triple beat (CTB)	-51dB	-53dB	
	-51dB	-53dB	
Composite second order (CSO)	-51dB	-53dB	
Hum	+/-3%		
Differential gain	20%		
Differential phase	10 degrees		
Chrominance-			
Luminance	170 nanoseconds		
delay inequality			
In band frequency response	+/-2dB		.75 MHz-5.0MHz
Visual signal	+3dBmV		after 100' drop

EQUIPMENT FOR MOBILE TESTING CAPABILITY

**EQUIPMENT FOR  
MOBILE TESTING CAPABILITY**

<b><u>EQUIPMENT-MODEL</u><sup>1</sup></b>	<b><u>USAGE</u></b>
Tektronix/HP Spectrum Analyzer	Distortion measurements
Computer/Printer	Documentation and printing of data
Rohde & Schwartz Demodulator	Demodulate rf to test video
TV Monitor/Receiver	Analyze video
Leakage detector	To measure signal leakage (FCC CLI)
Signal level meter	To measure signal level
Tektronix VM 700/A video and audio measurement test set (including VITS generator and audio generator).	To test video and audio parameters
Band Pass Filters	To filter channels being tested
Switchable Attenuators	To adjust level of signal being tested
Tools, cables, misc.	
Mobile Vehicle	

---

<sup>1</sup> The Company shall be entitled to substitute a piece of equipment, if any is available, which is equivalent to the foregoing equipment to the extent that such alternative equipment possesses features which, to the satisfaction of the Commissioner, are sufficient to measure fully each of the applicable parameters set forth in Exhibit 1 to this Appendix A.



**T I M E W A R N E R**  
**C A B L E** OF NEW YORK CITY

**ENGINEERING ANALYSIS & SYSTEM ARCHITECTURE**

**Submission to the City of New York**

**August 1998**

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## **1.0 OVERVIEW**

As we move into an era of information-rich, interactive home communications, in which traditional distinctions between television, computers and telephony blur, Time Warner is positioned at the very heart of this exciting, competitive new world.

Time Warner Cable of New York City will use HFC (Hybrid Fiber Coax) architecture that will provide improved reliability, picture quality and increased bandwidth. Each individual optical receiver (node) will serve a maximum of 2,000 homes. The cable system will be bi-directional with a minimum downstream bandwidth of 50 MHz to 862 MHz and an upstream bandwidth of 5 MHz to 40 MHz.

In order to minimize disruption to our customers, we will utilize existing distribution cable and building wiring, wherever feasible and technically sound. Finally, we will continue to work with the DOITT to address the limited number of buildings which are still wired in a loop-through manner.

To achieve these goals, our plans focus on the need to minimize service interruptions while proceeding expeditiously to upgrade the system. We are committed to exceed customer expectations, and, to that end, we will embark on a major communication program that will continue to keep our customers informed on the status of the upgrade as it relates to them.



## **2.0 DESIGN PHILOSOPHY**

The upgrade system will consist of a bi-directional 862 MHz subscriber network with minimum downstream bandwidth of 50 MHz to 862 MHz and upstream bandwidth of 5 MHz to 40 MHz.

The system will be divided into multiple hub sites each serving areas of approximately 140,000 homes. These hubs will be interconnected using redundant fiber rings with diverse routes.

Fiber optic cable will be used to distribute signal to each node location within each hub. Each node will provide service to a maximum of 2,000 homes. The RF output of these nodes will interface with the existing coaxial plant for final signal delivery to the customer. in Manhattan, due to the extreme density, many blocks will have their own dedicated node.

By reducing the node size to such a small number of homes, the potential for a major interruption affecting thousands of subscribers is virtually eliminated. Our adoption of this advanced design once again demonstrates our strong commitment to quality customer service.

### **3.0 SYSTEM CAPACITY**

The upgraded plant will be at an least 862 MHz bi-directional network built in the HFC (Hybrid Fiber Coax) configuration.

Downstream Bandwidth: 50 MHz to 862 MHz

Upstream Bandwidth: 5 MHz to 40 MHz

The downstream bandwidth will be used to deliver traditional cable television entertainment services. We plan to begin offering other more advanced services whenever they become technically and financially feasible. These services may include video-on-demand, cable modems, telephony, etc.

The upstream bandwidth may be used for control carriers for interactive services such as impulse pay-per-view, system telemetry and telephony. Based on Time Warner extensive experience with the upstream bandwidth, we do not intend to transport video signals in this part of the spectrum.

#### 4.0 PLANT RELIABILITY

As previously described, the segmentation of the distribution plant and elimination of long trunk cascades will result in dramatic improvement in reliability and quality. Our experience indicates that the most serious system interruptions are caused by trunk problems. These trunk cascades, which are prevalent in the classic tree and branch architecture, generally provide cable signals to thousands of subscribers.

In Manhattan, Con Edison employs a "network power grid" which means that each transformer location has a primary and back-up secondary feed for redundancy. The "network" feature provided by Con Edison improves reliability significantly. We will install battery back-up power in those areas of Brooklyn and Queens that experience commercial power difficulties. It is appropriate to note that the performance of CATV stand-by power supplies has been somewhat unreliable and they most often generate outages instead of preventing them. We intend to be very cautious in choosing and deploying stand-by power supplies.

As for the facilities, such as headends, we will install generators and UPS systems that will provide constant and stable power to all equipment.

## 5.0 TECHNICAL OPERATING MARGINS

### TIME WARNER CABLE OF NEW YORK CITY System Distortion Analysis

MANUFACTURER: Generic		Fwd Noise: 4.000 MHz (BW)		Noise =	-59.2		
Unswitched Architecture		Rev Noise: 4.000 MHz (BW)		Noise =	-59.2		
MANUFACTURER'S SPECIFICATIONS			TYPE 1 TRUNK	TYPE 2 BRIDGER	TYPE 3 LE		
RATED OUTPUT LEVEL			36	43	43		
RATED OUTPUT TILT			9	9	9		
RATED CHAN. CAPACITY			110	110	110		
RATED NOISE FIGURE			10	13	12		
RATED CTB (-dBc)			-84	-66	-68		
RATED XM (-dBc)			-81	-66	-67		
RATED CSO (-dBc)			-74	-62	-63		
RATED HUM (-dBc)			-70	-70	-70		
SYSTEM OPERATIONAL PARAMETERS			TYPE 1 TRUNK	TYPE 2 BRIDGER	TYPE 3 LE		
AMPLIFIER INPUT			8	12	15		
GAIN OR BR DC LOSS			28	31	28		
DESIRED TILT			9	9	9		
AMPLIFIER OUTPUT			36	43	43		
CHANNEL LOADING			95	95	95		
CASCADE LENGTH			2	1	2		
CALCULATED SECTIONAL PERFORMANCE		SUPER AMFIBER	REGULAR AMFIBER Dist.Port	TYPE 1 TRUNK	TYPE 2 BRIDGER	TYPE 3 LE	
LOG.. 10.0	C/N.....	-55	-50	-54	-58	-59	
	CTB.....	-70	-63	-80	-67	-64	
	XM.....	-70	-61	-77	-68	-63	
	CSO.....	-70	-60	-73	-64	-62	
	HUM.....	-70	-70	-64	-70	-64	
CALCULATED SYSTEM PERFORMANCE		FIBER SYSTEM SUPER & REGULAR	FORWARD SYSTEM FIBER & TRUNK	FORWARD SYSTEM (+BDGR)	FORWARD SYSTEM (+LEs)		
	C/N.....	-49.0	-47.9	-47.5	-47.2		...C/N
	CTB.....	-59.6	-58.8	-56.0	-53.0		...CTB
	XM.....	-58.7	-57.6	-55.3	-52.2		...XMO
	CSO.....	-59.1	-58.9	-57.8	-56.3		...2ND
	HUM.....	-64.0	-58.0	-56.0	-53.1		...HUM

## 6.0 EQUIPMENT DESCRIPTION

We will continue to use our existing technical facilities to receive, process and transmit the core services to our subscribers. New equipment will be added to these facilities as new services are introduced. It is impossible to precisely specify such equipment at this time, as it is being developed based on trials in various cable systems throughout the U.S.

However, the expansion of the system's bandwidth and heavy implementation of fiber optics will necessitate the introduction of new equipment. The following is a brief description of this new equipment.

Optical Transmitters - Distributed feedback lasers will be used to transmit the entire downstream bandwidth of a single fiber. The laser modules will have an internal isolator and a predistorter to improve distortion characteristics. These lasers will be capable of transmitting broadband and narrowband services.

Receivers (Optoelectronic Node) - The fiber node will be equipped with one forward path optical receiver and one return path optical transmitter. The RF portion of the node will have the necessary amplification to provide for up to four (4) RF outputs. These outputs will be used for system distribution and will replace the current 550 MHz trunk and bridger stations. The node will be equipped with surge protection and it will be powered by a 60 VAC CATV power supply connected directly to the commercial power network (Con Edison).

## 6.0 EQUIPMENT DESCRIPTION (cont'd)

RF Amplifiers - We will deploy high-gain, power-doubled amplifiers. There will be a mixture of two and three-stage amplifiers which will be determined by specific system design. These amplifiers will be bi-directional and will be equipped with diplex filters, return amplifier and surge protection circuitry.

System Passives - All taps and other passives will have a minimum bandwidth of 750 MHz. The taps will be equipped with the brass SCTE approved ports that offer increased strength and protection against corrosion. The passives will be modular which provides for interchangeability of assembly without removing the housing from the cable. All passives will support telephony with some assembly without the need to replace the housing.

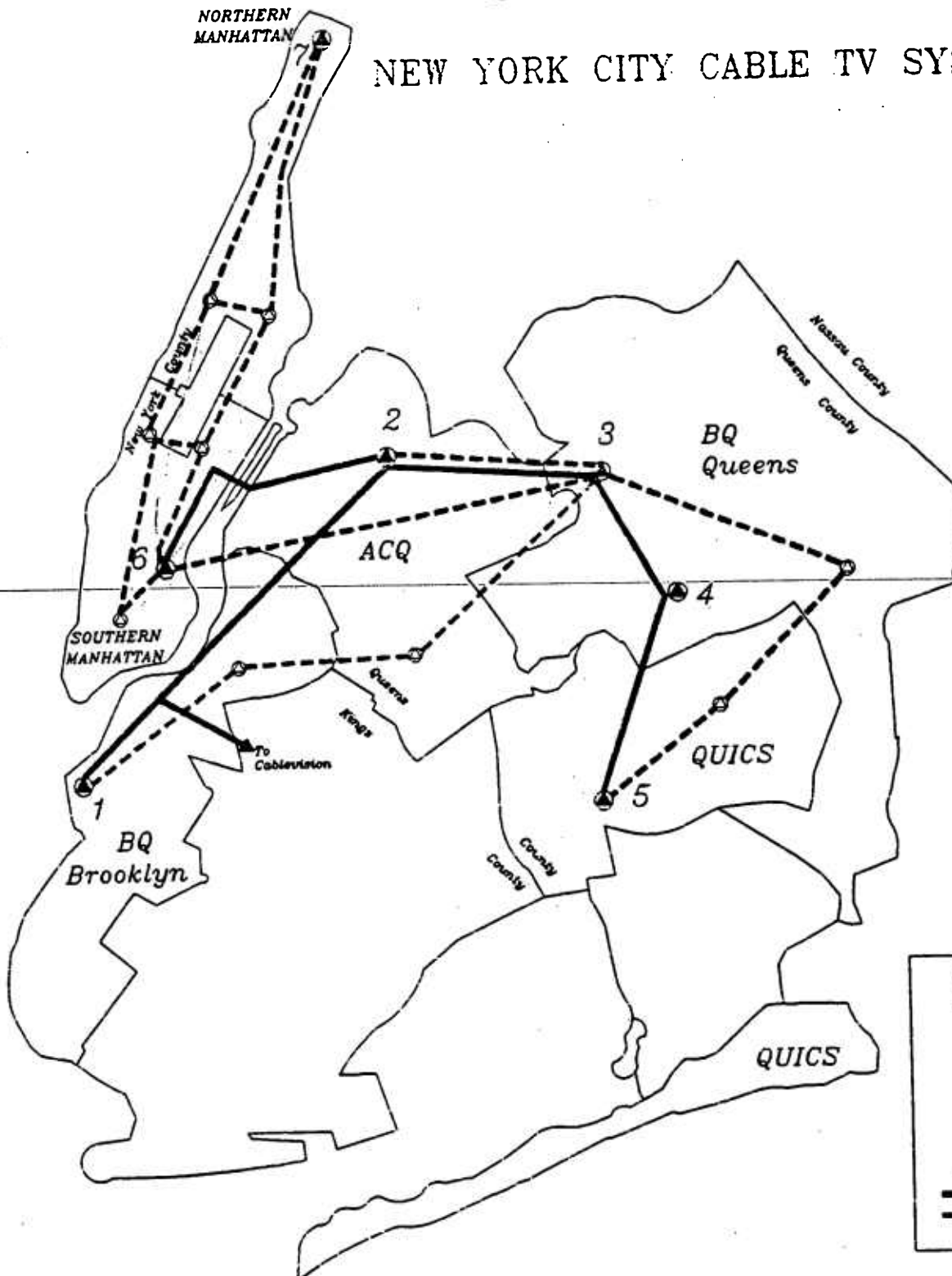
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## 7.0 FACILITIES BLOCK DIAGRAM



**TIME WARNER  
CABLE OF NEW YORK CITY**

### NEW YORK CITY CABLE TV SYSTEMS



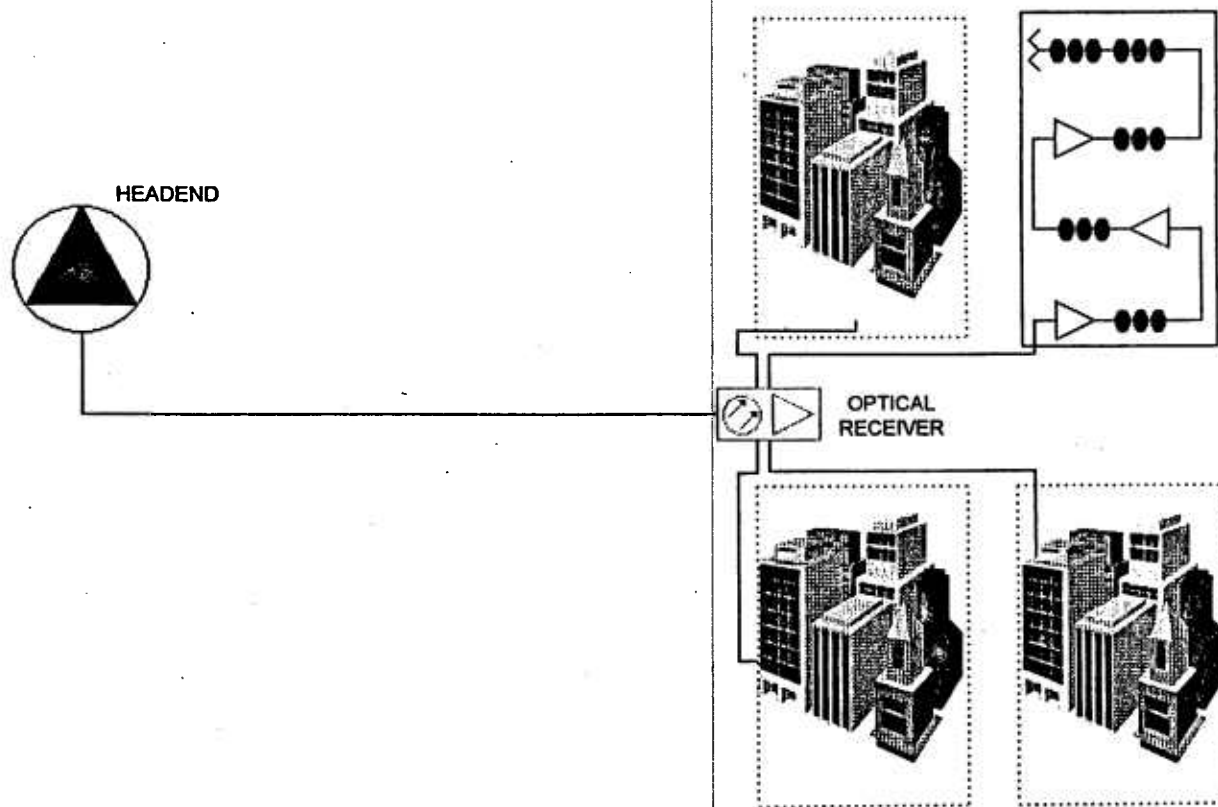
#### LEGEND

- HEAD-END FACILITY
- PROPOSED HUB
- 1 BQ BROOKLYN H/E
- 2 ACQ H/E
- 3 BQ QUEENS H/E
- 4 BQ QUEENS H/E
- 5 QUICS H/E
- 6 SOUTHERN MANHATTAN
- 7 NORTHERN MANHATTAN
- FIBER OPTIC CABLE
- - - PROPOSED FIBER

//Plan/Maps/From/From.dwg

# TYPICAL MANHATTAN NODE DEPLOYMENT

8.0 TYPICAL HFC ARCHITECTURE

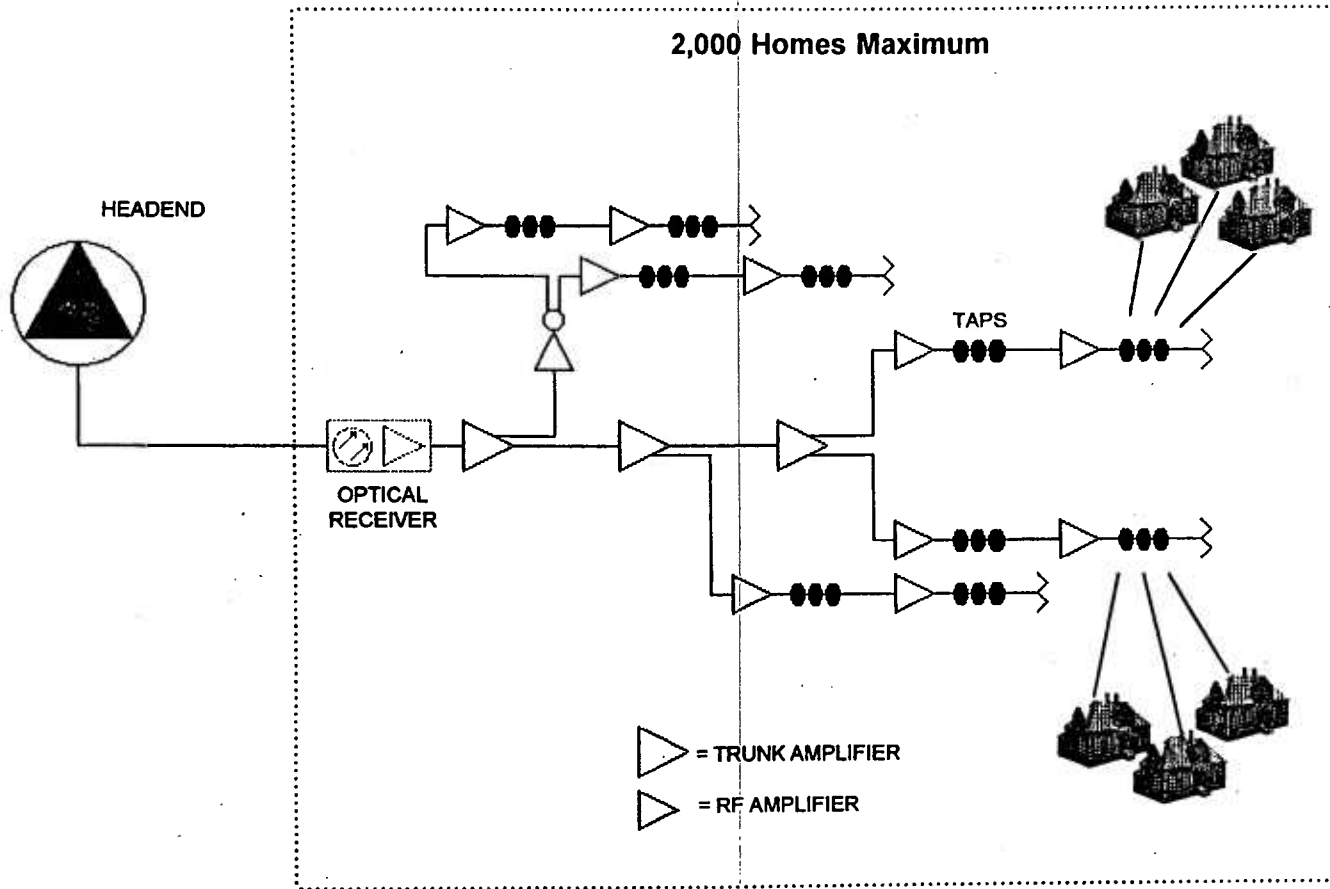


TIME WARNER CABLE OF NEW YORK CITY



# TYPICAL HFC ARCHITECTURE

8.0 TYPICAL HFC ARCHITECTURE



TIME WARNER CABLE OF NEW YORK CITY

## 9.0

MANUFACTURERS TYPICAL SPECIFICATIONS**Optical Transmitter assembly****RF Characteristics:**

Operational Bandwidth	50 - 860 MHz
RF Input Impedance	75 Ohms
RF Input Return Loss	14 dB min.
RF Connector Type	G-type

**Optical Characteristics:**

Optical Wavelength	1310 nm +/- 20 nm
Distortion Performance	(see link performance specs.)
Optical Connector Type	SC/APC
Laser Shutdown	Enable/Disable via. Control Module using LIFEnet™ Software
Eye Protection	Optical Safety Shutter

**Power Requirements:**

DC Currents Minimum/Maximum	
+5 Vdc	90 mA/1.7 A
+12 Vdc	350 mA/450 mA
+24 Vdc	400 mA/550 mA
Power Consumption	25 watts

**User Interface:**

Front Panel	Tri-state Module Status LED
Operational Mode	Push-button Selectable, LED display indication
Optical Power Test Point	5 mW/1 V, Scaled DC Voltage of Optical Output Power
RF Test Point	+17 dBmV/channel with 77 NTSC channel loading
Data/Control Interface	Serial Peripheral Interface (SPI) using LIFEnet™ Software

**Environmental:**

Operating Temperature Range	-20° to 65°C (-4°F to 149°F)
Storage Temperature Range	-40° to 80°C (-40° to 176°F)
Over Temperature Laser Protection	Software and Hardware active

**Physical Properties:**

Dimensions	1.5" W x 6.5" H x 14.25" D (3.81 cm x 16.51 cm x 36.20 cm)
Weight	4.0 lbs (1.8 kgs)
Mounting	AM-OMNI-HSG* equipment shelf, any of slots 3 - 10

## 9.0 MANUFACTURERS TYPICAL SPECIFICATIONS

## Broadband Telecommunications Line Extender

### Specifications

PARAMETER	UNITS	NOTE	FORWARD		RETURN RA-KIT-40L
Passband	MHz	1	52-860		5-40
Flatness	dB	2	±0.75		±0.75
Minimum Full Gain	dB	3	30		N/A
Operational Gain	dB	4	26		19
Manual Bode Slope Control Range	dB	5	±4.5		N/A
Interstage Equalizer Slope	dB	6	8±1		N/A
Noise Figure 40/52/860 MHz	dB	7	NA/13/10		6.5/NA/NA
Reference Frequency	MHz	8	860/750/50	860/550/50	N/A
Output Level	dBmV		39/47/37	39/44/37	N/A
Channel Loading			110 NTSC with 110 MHz	77 NTSC with 310 MHz	N/A
			Compressed Data	Compressed Data	
Distortion CTB	dBc	9	57	69	N/A
XM	dBc	10	59	66	N/A
CSO	dBc	9,11	59	68	N/A
CIN	dBc	12	N/A	N/A	N/A
STB	dBc	9	N/A	N/A	N/A
SSO	dBc	9	N/A	N/A	N/A
Test Point (all)	dB	13	20 ± 1.0		
Return Loss (Minimum)	dB	14	16		15
Hum Modulation	dBc	15	70		70
DC Voltage	Vdc	16	+ 24.0 ± 0.25		
Current DC	mA	17	700		825
DC Ripple	mV		15 P-P		
Power Consumption	W.		22.6		26.6
AC Input Voltage Range	Vac		38-90		
AC Current Draw @ 90 Vac	A	18	0.45		0.52
@ 75 Vac	A		0.49		0.57
@ 60 Vac	A		0.56		0.64
@ 53 Vac	A		0.59		0.71
@ 45 Vac	A		0.66		0.75
@ 38 Vac	A		0.73		0.84
AC Bypass Current	A	16	15		
Group Delay, Typical		19			
Channel 2 (HRC)	nSec		20(28)		N/A
Channel 3	nSec		9		N/A
Channel 4	nSec		5		N/A
Channel 5 or >	nSec		2 or <		N/A
Channel T11	nSec		N/A		20
Housing Dimensions			10.5"W x 8.0"D x 4.0"H (26.57 cm x 20.24 cm x 10.12 cm)		
Weight			7.2 lbs. (3.26 kgs)		
Ambient Operating Temperature			-40° to +60°C		

## 9.0 MANUFACTURERS TYPICAL SPECIFICATIONS

### Dual Hybrid Mini-Bridger

#### Specifications

PARAMETER	UNITS	NOTE	FORWARD	
Passband	MHz	1	50 - 862	
Flatness	dB	2	±0.75	
Minimum Full Gain	dB	3	41	
Operation Gain	dB	4	36	
Manual Control Range				
Gain	dB	5	0-8	
Slope	dB	6	±1	
Noise Figure		7		
50 MHz	dB		13.0	
750 MHz	dB		11.5	
Ref. Frequency	MHz		862/50	862/650/50
Output Level	dBmV		47/37	37/44/37
Channel Loading			110 NTSC	94 NTSC with 200 MHz compressed data
See slope chart			S1	S2
Distortion				
CTB	dB	8	-57	-69
XM	dB	9	-59	-68
CSO	dB	8	-59	-68
CIN	dB	10	N/A	-71
Test Point				
Input	dB	11	20 ± 1.5	
Output	dB		20 ± 0.5	
Return Loss	dB	12	14	
Hum Modulation	dB	13	-70	
B+	VDC		+24.0 ± 0.25	
Current DC	mA	14	1310	
DC Ripple	mV		15 P-P	
Power Consumption	W		39.3	
AC Input Voltage	V		38-60 VAC	
AC Current			w/o ACB	
@ 60 VAC	A		0.69	
@ 53 VAC	A		0.80	
@ 45 VAC	A		0.92	
@ 38 VAC	A		1.09	
AC Bypass Current	A	15	10	
Housing = MB-HSG			L = 15.37"	W = 5.51" H = 9.59"
			Weight = 15 lbs.	
Operating Temp.	deg.		-40° to +60° C	

Specifications subject to change without notice.

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October 21, 1998

\*NOT ADMITTED TO NEW YORK BAR.  
\*\*ADMITTED IN FRANCE ONLY.

Mr. John Grow  
Special Counsel -- Cable  
State of New York Department of Public Service  
Three Empire State Plaza  
Albany, New York 12223-1350

Re: Applications by Time Warner Cable of New York City  
on behalf of seven franchisees

Commission Docket Nos. ✓ 98-V-1253 (Western Brooklyn)  
98-V-1254 (Eastern Queens)  
98-V-1255 (Staten Island)  
98-V-1256 (Western Queens)  
98-V-1257 (Southern Manhattan)  
98-V-1258 (Northern Manhattan)  
98-V-1259 (Queens -- QUICS)

Dear Mr. Grow:

This letter is to confirm that the time for filing comments on the above-referenced applications has been extended to October 30, 1998. Accordingly, the

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Mr. John Grow

2

time for the applicants to reply to comments will be extended to November 9, 1998.

If there is any other change in the schedule, please let us know.

Sincerely,



Hilary Jewett\*

cc: Barry Rosenblum, President, Time Warner Cable of New York City  
Robert Jacobs, Vice President and General Counsel, Time Warner Cable of  
New York City  
Elaine Reiss, New York City Department of Information Technology and  
Telecommunications  
Bruce Regal, Office of the Corporation Counsel of the City of New York  
Christopher Collins, New York City Council, Land Use Division  
Allan J. Arffa  
Karen S. Kennedy

\*Not yet admitted in New York