

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: IRA GAMMERMAN
Justice

PART 27

City of New York

INDEX NO. 402961/03

MOTION DATE _____

- v -

Verizon New York, Inc.

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the
accompanying memo decision.

It is so ordered.

FILED

Enter:

OCT 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

IRA GAMMERMAN

Dated: 9/27/2010

[Signature]
J.G.C. J.H.W.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

THIS DOCUMENT IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

FILED

OCT 29 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
THE CITY OF NEW YORK,

Plaintiff,

-against-

Index No. 402961/03

Part Calendar No. 19032

VERIZON NEW YORK, INC.,

Defendant.

-----X
IRA GAMMERMANN, J.H.O.:

Defendant Verizon New York, Inc. ("Verizon") moves to renew its motion for summary judgment to dismiss the remainder of the complaint based upon new evidence regarding certain issue left unresolved in my decision, dated July 7, 2008, *City of New York v Verizon New York, Inc.*, NYLJ July 22, 2008, at p 26 col 1. Verizon seeks a declaration that the City of New York (the "City") may not require Verizon to obtain a franchise for any of its facilities below ground throughout the City, extending my prior ruling to the boroughs of Queens and Staten Island and that portion of the Bronx not covered in my earlier decision. In the alternative, if I should find that the City may require a franchise, Verizon seeks a declaration that, under the State Franchise Tax Law, the City is not entitled to obtain additional compensation for that franchise. Additionally, Verizon once again raises its objections to the franchise process pursuant to the federal Telecommunications Act of 1996, 47 USC § 253, and the contracts and takings clauses of the U.S. Constitution and the takings clause of the New York State Constitution.

The City cross-moves, pursuant to CPLR 2221, for leave to reargue and renew so much of the prior decision and order that declared that Verizon need not obtain a franchise for its

underground occupancy of the streets in Brooklyn, and for its aboveground placement of telephone lines throughout the City. The City seeks summary judgment declaring that Verizon has an obligation to obtain a City franchise in accordance with the City Charter to install lines underground in Queens, Staten Island, a portion of the Bronx east of the Bronx River and in Brooklyn; and that the obligation to obtain a City franchise should extend to the installation of lines aboveground throughout the City as well.¹

Background

Procedural History:

The City filed suit in this court on September 12, 2003, and served its complaint on Verizon on September 16, 2003. Verizon timely removed the action to federal court on October 14, 2003. The district court later remanded the action, finding that subject matter jurisdiction was lacking, *City of New York v Verizon New York Inc.*, 331 FSupp2d 222. Following remand, the City filed its amended complaint in this court on November 15, 2004.

This is a declaratory judgment action, in which the City is seeking a declaration that Verizon's use and occupancy of the City's streets is contrary to law, because Verizon has not obtained a franchise from the City that complies with the City Charter authorizing such use and occupancy, and that it must obtain such a franchise. In the alternative, if Verizon is found to have a currently-valid authority to use and occupy the City's streets, the City seeks a declaration that such authority is limited in scope and that Verizon must apply for and obtain a city franchise that complies with the City Charter with respect to: (1) its occupancy and use of the City's

¹ The City is reserving for appeal its challenge to the my prior declaration with regard to the 1881 Resolution that granted Verizon's predecessor the right to place lines underground in Manhattan and the western Bronx.

streets with fiberoptic telecommunications equipment; and (2) all geographical and physical locations within the City where it maintains and operates telecommunications facilities in such streets. The City further seeks a declaration that the Transportation Corporations Law (“TCL”) § 27, the 1881 Resolution, or such other source of Verizon’s authority under State and/or local law to use and occupy the City’s streets, is preempted by 47 USC § 253.

Verizon previously moved, pursuant to CPLR 3211, to dismiss the complaint on the ground that the declaratory judgment action fails as a matter of law, because the claims of the City are precluded by state and federal statutory authority and by constitutional law. The City opposed the motion, claiming that the action is not so barred, and that the City is entitled to a declaration that Verizon presently does not have authority to use the City’s streets or rights-of-way for its telecommunications enterprise, and that Verizon is required to observe the City franchise provisions. The motion was converted on notice to one for summary judgment and the parties were granted an opportunity to submit additional papers, which they did.

By decision dated July 7, 2008, I granted the motion for summary judgment to the extent that Verizon was entitled to an adverse declaration that it has a state franchise in perpetuity derived from its predecessor, Metropolitan Telephone and Telegraph Company (“Metro”), which grants it authority to access the City streets of Manhattan and portions of the Bronx, under the 1881 Resolution; that Verizon has a state franchise in perpetuity derived from another predecessor, New York and New Jersey Telephone Company (“NYNJT”), as a result of the Subway Laws, which grants Verizon authority to access the City streets of Brooklyn; that no further City franchise is required for the exercise of that authority; that said authority extends to the installation and use of fiberoptic technology; and that said authority is not in violation of, or

preempted by, 42 USC § 253. The motion was denied without prejudice to renewal upon the presentation of additional evidence as to Queens, Staten Island and the parts of the Bronx not covered by the 1881 Resolution.² The decision called for the parties to settle an order. Verizon submitted a proposed order, and the City submitted a counter-order. The Verizon version of the order was signed on January 15, 2009 and entered on January 27, 2009.

One area that my earlier decision indicated needed to be addressed concerned the size of the population of the various boroughs prior to the adoption of the Greater New York Charter in 1897. If the population was greater than 500,000, then the Subway Laws could apply to create permission for the underground placement of Verizon's equipment, as was the case in Brooklyn. The parties entered into a stipulation, dated August 20, 2008, that indicated that in 1890, the populations of Queens, Staten Island and the eastern portion of the Bronx did not reach the 500,000 level so as to trigger the Subway Laws' applicability to create authority for placement of equipment underground in those areas.

Verizon submitted with its proposed order an affidavit, containing exhibits that provided information regarding the annexation of the east Bronx and the history of telephone service in that area and in Queens, along with the minutes of meetings of the New York City Board of Estimate and Apportionment, dated June 15, 1906 and March 30, 1911. Verizon contends that these submissions demonstrate that it had authority, throughout the City, to place lines above and below ground in the City rights-of-way. The City opposed this new submission as improper, asserting that the stipulation on population levels settled the issue of the extension of the Subway

² For a discussion of the factual history of telephone service in the City of New York, see my prior decision, dated July 7, 2008.

Laws to the east Bronx, Queens and Staten Island.

In my prior decision, I indicated that the population level in these areas was not the only factor to be considered in determining whether there was authority for undergrounding of telephone lines, and, so, Verizon was directed to file a formal motion renewing its motion for summary judgment. The instant motion ensued. The City cross-moved, presenting additional material in support of its position, and in opposition to Verizon's application, including the minutes of legislative bodies of the City of Brooklyn and various villages and towns in the other outer boroughs which provided for the installation of telephone poles and aerial wiring by Verizon's predecessors.

Verizon's Procedural Objections to the City's Cross Motion:

Verizon argues that the cross motion for reargument is untimely, in that Verizon e-mailed the signed order to the City and receipt was acknowledged on February 5, 2009, and the cross motion was served on April 9, 2009, which is beyond the 30 days permitted by CPLR 2221. The City counters that e-mailing the order does not constitute proper service and is a nullity, and that consequently, the time period within which to bring a motion for reargument, under CPLR 2221, had not yet begun to run. Alternatively, the City urges that even if e-mailing constituted good service, Verizon does not allege that the service contained notice of entry.

The service made by Verizon is a nullity and the motion to reargue is timely. There is no basis for service by e-mail under the CPLR. As for the Court Rules, allowing e-filing and service for Commercial Division cases, this can only be done on consent of the parties, and that consent in this matter is lacking. Moreover, even if consent were present, the procedures employed by Verizon did not comply with Rule 202.5-b (1) (2), because service by electronic means must be

done through the court's e-filing website and not by e-mail between the parties. Lastly, Verizon's papers do not indicate that the order was served with notice of entry.

Verizon also contends that the request for renewal should not be permitted, because it is based on new documentation that was available in the earlier motion, and that the City has not provided any excuse for not including it in its prior application. The City points out that Verizon's own motion for renewal of the summary judgment motion contains additional documentation, which was available for the prior motion and not presented, and that no reason for the failure to provide such material on the earlier application has been posited by Verizon.

If however, in the earlier decision, I indicated that the record lacked critical information, and that it was contemplated that the parties would be providing additional documentation on the unresolved issues in a motion or motions to renew. Under such circumstances, both sides were expected to provide additional documentation and neither party had to provide an excuse for their prior failure to include such documents.

The City's Motion to Reargue the Determination of the Authority for Verizon to Place Lines Underground in Brooklyn:

As noted above, I previously determined that the Subway Laws³ mandated that NYNJ had to place its lines in Brooklyn, underground, by state mandate, and that no further permission from the City of Brooklyn was necessary "to do that which the law commanded," citing *Holmes*

³ The Subway Laws were a series of enactments in the 1880's that directed telephone companies in cities with a population in excess of 500,000, namely New York and Brooklyn, to convert to underground lines, because the overhead lines were deemed to present a nuisance. These acts of the State Legislature set up boards to manage the transition and beyond. Where the initial enactment was an absolute mandate to underground wires, the statute was modified the following year to provide for underground placement of wires wherever the municipality deemed it practicable for lines to be placed below ground.

Elec. Protective Co. v Williams, 228 NY 407 (1920). The City contends that reliance on *Holmes* was misplaced because that case only involved the Subway Laws' effect on telephone lines in Manhattan, and not in Brooklyn. The City further argues that the amendment of the Subway Laws to allow some aboveground wires changed the mandatory character of the statute by granting the municipalities affected discretion to require underground lines, where practicable, as opposed to the prior absolute mandate. The City suggests that I should follow the 1910 Opinion of the Corporation Counsel, which concluded that a further consent beyond the Subway Laws was necessary in the nature of a City franchise. The City suggests that, in any event, even if the rights derived from the Subway Laws apply to Brooklyn, then they only apply to the City of Brooklyn as its boundaries were at the time of the enactment of those statutes, and not to the current, larger borough of Brooklyn.

Verizon contends that the City misreads *Holmes* to limit its holding to Manhattan. Verizon points out that the actual facts involved the placement of lines underground in both Manhattan and Brooklyn, and that the Court of Appeals' decision clearly stated that where a telephone company, like NYNJ, which was incorporated prior to the Subway Laws, is required to place "certain of its wires" underground at the "the direction of the municipal authorities," no municipal consent is required. Verizon also disputes any reliance upon the Opinion of the Corporation Counsel and argues that the City is once again misreading that text. Verizon maintains that the boundaries of Brooklyn are irrelevant, because the City of Brooklyn expanded from 1884 to 1896 to reach the current boundaries of the borough of Brooklyn, and that this territorial expansion in Brooklyn pre-dates the consolidation of the City, so that the grant would expand to cover these new territories, because there was no statute preventing it prior to the 1897

Charter, and that under Section 1617 of said Charter, any pre-existing grants in the City of Brooklyn would be grand-fathered.

Reargument of this issue is denied. Having reexamined all of the parties' arguments, I conclude that I have not overlooked or misapprehended any matters of fact or questions of law in my earlier decision, *Foley v Roche* 68 AD2d 558 (1st Dept 1979).

The City's Motion to Renew the Prior Determination Regarding Verizon's Authority to Place Poles Above Ground:

The City's New Evidence:

The City asserts that new evidence it presents indicates that Verizon's predecessors were always required to obtain permission from local authorities for the placement of telephone poles above ground, even prior to the enactment of the 1897 Charter for the Greater City of New York. This evidence is in the form of the minutes of the various legislative bodies in Queens, Staten Island and Brooklyn, wherein the predecessors of Verizon petitioned, or were directed as to where to place poles for aerial telephone lines.

Specifically, the City presents minutes of meetings of the trustees of the three villages in Queens (Whitestone, College Point and Flushing) granting permission to NYNJT to place telephone lines on poles. The minutes, dated March 6, 1893, grant permission for the erection of telephone poles along 22nd Street to the Forge Works in Whitestone. The minutes, dated March 10, 1885, grant NYNJT permission to erect a structure to carry telephone communications throughout the village of College Point. The minutes of March 7, 1893 direct NYNJT to remove its wires from trees in Flushing and to place them on poles on the easterly side of Bowne Street from Broadway to Sanford Avenue. The City also provides minutes of the May 28, 1885

meeting of the Town Board of Newtown, also in Queens, which granted NYNJT the privilege of erecting poles along Metropolitan Avenue and Fresh Ponds Road, as well as on intersecting and adjoining roads. Further, with respect to the provision of telephone services to Queens, the City presents a report of the Chief Engineer of the Board of Estimate and Apportionment, dated August 16, 1910, which reviews by ward the grants in Queens to the various predecessors of what is now Verizon. The report outlines the companies and locations where poles or undergrounding were permitted in each ward.

As for Staten Island, the City submits the minutes of the September 20, 1889 meeting of the trustees of the village of Port Richmond, reflecting approval of NYNJT's request to straighten and add poles to its existing operation to improve service. In addition, the City attaches two resolutions of the Common Council of Brooklyn, dated March 6, 1882 and April 17, 1882, respectively. In the first resolution, Long Island Telephone ("LIT"), the predecessor to NYNJT, was granted permission to erect telegraph poles on Broadway between Boerum and Ellery Streets and DeKalb and Kossuth Place. The April 17, 1882 minutes grant permission to LIT to erect and maintain telegraph poles on DeKalb Avenue from Cumberland to Vanderbilt, and direct the removal of other poles from Willoughby Avenue.

The City argues that these documents establish that Verizon's predecessors always needed permission from local authorities to place poles, and that my prior decision, holding that Verizon had the right to place aerial lines on poles throughout the City under TCL § 27, was too expansive, and that the ruling should be reconsidered in light of this new evidence.

Verizon maintains that my prior decision's interpretation of TCL § 27 was correctly premised upon Court of Appeals precedent, *New York Tel. Co. v Town of N. Hempstead*, 41

NY2d 691 (1977). Verizon further maintains that the circumstantial documentary evidence submitted by the City fails to address the precedents cited in my earlier decision and, instead, invites speculation on the understanding and motivation of the various parties regarding actions taken over a century ago.

Under TCL § 27, Verizon and its predecessors had the right to place lines above ground for the purpose of providing a telecommunications system. The statute did not require municipal consent to provide these telephone services. However, as New York Telephone (“NYT”), the predecessor to Verizon, conceded in *New York Tel. Co. v Town of N. Hempstead*, 41 NY2d 691, *supra*, the placement of aerial lines was always subject to municipal police powers, and, as such, a municipality, like the City or its prior constituent villages and towns, could direct the specific location of utility poles and the height above the street at which wires must be strung, *American Rapid Tel. Co v Hess*, 125 NY 641 (1891); *Barhite v Home Tel. Co.* 50 App Div 25 (4th Dept 1900). The minutes proffered by the City seem to do exactly that – they direct where the lines are to be placed or removed, and direct the height of the poles from the ground. They appear to reflect the exercise of the police powers and not some additional franchise requirement, as proposed by the City, the statutory justification for which the City has not seen fit to provide on this motion.

After the enactment of the Subway Laws, the right granted to telecommunications providers by TCL § 27 to place lines above ground in cities with populations in excess of 500,000 was circumscribed by the constraints imposed under Subway Laws. Initially, the Subway Laws required that all lines in such cities be placed underground. This was subsequently modified to grant a municipality the discretion, where practicable, to determine whether or not to

require underground placement. Consequently, before Verizon can place new lines above ground, there must be a finding on the part of the municipality that underground placement is not practicable, 1885 Laws of NY, 109th Session. Ch. 499.⁴ With the adoption of the 1897 Charter for the Greater City of New York, these considerations were enacted in §§ 581-584, which distinguished the boroughs of Manhattan and the Bronx from the rest of the City. Under § 581, in the boroughs of Manhattan and the Bronx, there had to be a finding that underground

⁴ Section 4 of the statute provides in part as follows:

Wherever, in the suburbs or along the streets, avenues or other highways in sparsely inhabited or unoccupied portions of any such city, the public interests do not require the electrical conductors to be placed underground; and wherever, in any other locality of such city, it is deemed by said board for any cause to be impracticable to construct and successfully operate underground the electrical conductors required by any such company; then, and in either of those cases, it shall be the duty of said board of commissioners to examine and grant the application of any such company for permission to deviate therefrom an underground system; but the board shall not grant any such permission unless the board shall be satisfied upon investigation, that such a permit should, and for one or another of the reasons herinbefore stated, be in such case granted and that it will not interfere with the successful working of underground conductors elsewhere in such city. Any such permit shall be held and construed to authorize the construction and maintenance of the lines of conductors therein provided for, as and where prescribed by the board. It is hereby made the duty of said board of commissioners, in granting any such permit for other than underground electrical connections, to bear in mind the policy and purposes of this act, which is to convert the overhead system of electrical wires cables now in use in said cities to underground systems as soon as possible without impairing the efficiency of their service to require that, as far as practicable, all electrical conductors in any street, avenue or other highway of any such city shall be removed from the surface and placed and operated underground, as soon as may be consistent with the convenient use thereof by the public; and that it is intended hereby to authorize other than underground electrical conductors, to be used in the streets, avenues or other highways of any such city only when and where the public interests do not require the electrical conductors to be placed underground, or when and where it shall be deemed by the board itself to be impracticable to place and operate conductors advantageously underground as aforesaid; and that it is hereby intended to make all aerial or other electrical connections incidental only to such underground methods, and to require that they be authorized only when and where needed for the convenient use of the public or where the underground conductors can be made thereby more useful.

placement was impracticable, whereas in Brooklyn, Queens and Richmond, the City also had to find that it was not desirable, § 582.

While my prior determination and declaration was correct as far as it went, it was not a complete recitation of the scope and nature of the rights provided by TCL § 27. In short, Verizon, through the privileges acquired by its predecessors under TCL § 27, has the right to the placement of aerial lines throughout the current City of New York, subject to the City's exercise of its right under the Subway Laws, now done through the rulings of the Commissioner of Transportation under City Charter § 2903 (b) (5), to determine whether lines must go underground, and the Commissioner's exercise of police powers through the issuance of permits to control the location and placement of poles and lines.⁵

Accordingly, the City's motion to renew is granted to the extent of clarifying the prior declaration in accordance with the foregoing analysis.

Verizon's Motion to Renew:

Verizon's New Evidence:

The 1881 Resolution of the Board of Aldermen granted Metro permission to place its facilities underground in Manhattan and in the western portion of the Bronx. On the prior motion, no information was provided by either party concerning when the rest of the Bronx became incorporated into the City, and what telephone service was authorized to be provided and

⁵ It is to be noted that this is precisely the procedures followed by Verizon over the years. The City Commissioner of Transportation directs whether the lines go above or below ground, and Verizon obtains permits for the placement as so directed. Prior to the current Charter, similar authority was vested in the Commissioner of Public Buildings, Lighting and Supplies as endorsed by the Commissioner of Highways, see 1897 Charter of the Greater City of New York § 584.

by whom.

On this application, Verizon seeks to answer these questions. To start, Verizon submits 1895 NY Laws 118th Session, ch. 934, at 1948, the legislation that affected the City's annexation of the East Bronx. This statute establishes that the Bronx east of the Bronx River was incorporated into the City prior to the enactment of the Charter for the Greater City of New York in 1897. Under Section 1 of the annexation statute, the newly annexed area

shall hereafter constitute a part of the city and county of New York . . . subject to the same laws, ordinances, regulations, obligations and liabilities, and entitled to the same rights, privileges, franchises and immunities, in every respect, and to the same extent as if such territory had been included within said city and county of New York at the time of the grant and adoption of the first charter and organization thereof, and had so remained up to the Passage of this act[.]

1895 NY Laws, Ch 934 at 1949, § 1.

This is in contrast to the 1897 Charter of Greater New York, annexing Brooklyn, Queens and Staten Island, which in § 1538 explicitly declined to extend these existing rights, privileges and franchises to the newly incorporated territories. From this, Verizon argues that the privileges granted pursuant to its state franchise under the 1881 Resolution extend to the new territory of the east Bronx, and that this area must be treated the same as the territory of the City at the time of the subject resolution, so that Verizon, as successor to Metro, has authority to place its equipment underground in the entire Bronx. The City contests this view, arguing that the annexation statute was not as expansive as Verizon projects, as it does not specifically provide for the extension of resolutions to the newly acquired territory.

While the City is correct that the Bronx annexation legislation does not explicitly provide for "resolutions" as such, the 1881 Resolution is still encompassed therein because when the

Resolution was enacted by the City Board of Aldermen granting Metro permission to place lines underground as part of TCL § 27 state franchise right, it had the force of law, *Matter of Cerro v Town of Kingsbury*, 250 AD2d 978 (3d Dept 1998), and it gave rise to obligations on the part of the City to allow Verizon's predecessor access to the rights-of-way of its streets.

Moreover, unlike the 1897 Charter for the Greater City of New York, which affirmatively barred extension of rights and obligations to new territories, the 1895 annexation legislation appears to have had the opposite intent. The newly annexed east Bronx was to have all the rights and obligations of the then existing City of New York and was not to be treated differently from any other part of the City as it existed before the enactment of the annexation statute, *see Opinion of Corporation Counsel*, December 11, 1911, at 478, Verizon Ex. C to the Wu Affirmation. This is further confirmed by the 1897 Charter for the Greater City of New York, which treats Manhattan and the Bronx in its entirety as the existing City of New York prior to the consolidation with Brooklyn, Queens and Staten Island, *see* § 582.

Thus, the rights granted to Metro by the 1881 Resolution extend to encompass the territory of the east Bronx annexed in 1895.

Further, Verizon posits another basis for its authority to place its lines underground in the eastern portion of the Bronx. Verizon alleges that another of its predecessors, Westchester Telephone Company ("WTC"),⁶ founded prior to the enactment of the Subway Laws, was the holder of the state franchise under TCL § 27 to provide telephone service to that portion of the Bronx east of the Bronx River. Following my prior analysis of the Subway Laws application to

⁶ New York Telephone ("NYT"), which by name change became Verizon, acquired Westchester in 1896.

Brooklyn, Verizon argues that upon the eastern Bronx's incorporation into the City of New York, it became part of a city of over 500,000 in population, and subject to the Subway Laws requirement that telephone wires must be placed underground, and that, thus, no further permission or authorization from the City was necessary, pursuant to *Holmes Elec. Co. v Williams*, 228 NY 407, *supra*.

The City, again, argues that the Subway Laws were amended and that the amendment to allow for lines to stay above ground at the discretion of the City changed the mandatory aspect of the legislation so that my prior interpretation of the Subway Laws, and its reliance on *Holmes* was incorrect; and that, consequently, the Subway Laws as amended applied only to Manhattan, where such discretion did not exist, and not to the rest of the City.

The City's argument is without merit. *Holmes* was decided after the amendment of the Subway Laws, a fact noted in the opinion, so that the impact of said amendment must have been considered by the Court of Appeals in reaching its determination. As the amendment, cited *supra* at 11, indicates, the change applied to both the cities of New York and Brooklyn. It clearly expressed the continuing preference for underground placement, but recognized that there might be times in the public interest where aerial wiring could still be maintained. The compulsion to require underground placement still remained with the City ordering it. Regardless of which borough is involved, if the City determines that lines are to be placed underground, the mandate of the Subway Laws exists, the carrier must comply, and no further permission in the form of a City franchise is necessary to do what the law commands, *id*.

As for Queens, Verizon submits minutes of the village councils of Jamaica and Richmond Hill, dated January 9, 1896 and April 13, 1896, respectively. Both sets of minutes

indicate that the respective village councils gave permission to Verizon's predecessor, NYNJT, to place its wires underground in their villages. The City does not dispute these grants, but accurately points out that similar documentation for the rest of Queens and Staten Island is lacking. Clearly, within these two villages there was authority pre-existing the 1897 Charter for the Greater City of New York and such authority, like Metro's, survives to the present, and supports Verizon's right to place lines underground in these two areas without resort to a city franchise.

Verizon submits the minutes of the New York City Board of Estimate and Apportionment, dated June 15, 1906 and March 30, 1911, for the proposition that the City had acknowledged even back then that NYT and NYNJT had "privileges" throughout the City to place wires on poles and underground. The City argues that these minutes speak of privileges enjoyed by NYT and NYNJT without specifying what they are, and that the minutes further require NYT and NYNJT to submit a proposal for a franchise, so that their rights were not as yet defined.⁷

A review of the minutes indicates that Verizon's predecessors had existing "privileges" to operate a telephone communications system throughout the City in 1906. The minutes are ambiguous because they do not specify what privileges they are referring to exactly; whether they

⁷ The minutes indicate that the situation arose from the application of another company which sought to provide telephone service in the City that needed a city franchise, since it was a new entry into the field after the enactment of the Greater New York City Charter; and that the existing carriers sought an exclusive arrangement with the City that would bar the new entrant. The carriers offered to consider a City franchise, if the City made them the exclusive providers of telephone service. These negotiations never came to fruition and the City did not pursue the franchise until the instant action some almost 100 years later.

included the requisite permission, as mandated by TCL § 27, to place wires underground throughout the City is unclear.

However, Verizon asserts that any lack of specificity as to the privileges its predecessors enjoyed is clarified by the City's course of conduct. Verizon alleges that over the past one hundred-plus years there were countless orders by the City directing the placement of lines underground and permits issued to Verizon and its predecessors to do such work in the City's rights-of-way; and that under New York City Charter § 2903 (b) (5), such permits may only be issued to a duly authorized entity carrying on the business of transmitting, conducting and using electricity, which includes telecommunications providers; and that the issuance of these innumerable permits confirms or recognizes that Verizon and its predecessors were duly authorized to provide telephone service throughout the City by means of aerial and underground lines.

The City counters that the course of conduct argument is really the same as the waiver and estoppel argument raised by Verizon on the prior motion, which was correctly rejected in my earlier decision. The City also claims that Verizon is misreading the New York City Charter § 2903 (b) (5), in that the Charter provision merely states a requirement that a party obtaining a permit be duly authorized to make such application. The City argues that this means that Verizon must have previously been granted permission to place its equipment underground from another source, namely the City Council or its predecessors.

On the prior motion, Verizon argued that the same course of conduct gave rise to an estoppel, in that it relied on the statements of the Corporation Counsel's 1910 opinion and the permits issued over the years to Verizon and its predecessors. My prior decision recognized that

waiver or estoppel are not generally available defenses against a municipality, and that, as such, Verizon's argument was unpersuasive.

Verizon's current argument differs from its earlier position. It relies on its interpretation of New York City Charter § 2903 (b) (5) as confirmation of the privileges referred to in the Board of Estimate and Apportionment minutes. In essence, Verizon claims that, as a duly authorized telecommunications corporation with a state franchise, under TCL § 27, Verizon, and its predecessors, carried on the business of transmitting telephonic communication through the use of electric wires and more recently fiberoptic cable,⁸ and that for such a business, the granting of permits by the Commissioner of the Department of Transportation, under New York City Charter § 2903 (b) (5), can be deemed to constitute permission to place equipment underground throughout the City without resort to any additional permission in the form of a city franchise or otherwise.

The City disputes Verizon's interpretation of the Charter provision. It reads the Charter to preclude permission in the absence of a prior grant of authority in accord with TCL § 27 by the City Common Council (the City Council or its predecessors) for the placement of Verizon's telecommunications equipment underground.

The Commissioner of the City Department of Transportation has "charge and control . . .

⁸ My prior decision in this matter concluded that fiberoptic cable came within the prior grants of permission, because "general incorporation acts have usually been given a sufficiently broad interpretation to meet progressive inventions in the enterprises mentioned," *Holmes Electric Protective Co. v Williams*, 228 NY 407. The Telegraph Act of 1848, the predecessor to TCL § 27, was held to apply to the new invention of the telephone, *see Hudson Riv. Tel. Co. v Watervliet Turnpike & RR Co.*, 135 NY 393, so that in the communication industry, the invention of fiberoptic technology would be encompassed within the prior grant.

“relating to the construction, maintenance and repair of public roads, streets, highways, parkways, bridges and tunnels,” under New York City Charter § 2903 (b). Subdivision 5 provides that the Commissioner is charged with responsibility for:

regulation of the use and transmission of gas, electricity, pneumatic power for all purposes in, upon, across, over and under all streets, roads, avenues, parks, public places and public buildings; regulation of the construction of electric trains, conduits, conductors and subways in any streets, roads, avenues, parks and public places and the issuance of permits to builders and others to use or open a street; and to open the same for the purpose of carrying on the business of transmitting, conducting, using and selling gas, electricity or steam or for the service of pneumatic tubes, provided, however, that this subdivision shall not be construed to grant permission to open or use the streets except by persons or corporations otherwise duly authorized to carry on business of the character above specified.

The City’s reading of the statute is too narrow in light of the broad language of “carrying on the business of transmitting, conducting using . . . electricity” employed in the New York City Charter. If the intent of the provision was as indicated by the City, the language employed in the Charter should have been more precise, and the authorization directed to the particular part of the business, such as underground placement, rather than the general carrying on of business in the fields recited.

Clearly, Verizon and its predecessors were corporations duly authorized to carry on a business of a character specified in the Charter provision, so that the issuance of a permit would constitute permission to open or use the streets of the City. Verizon’s interpretation of the New York City Charter provision is more consistent with the language of the Charter and confirms the scope of the privileges alluded to in the resolutions in the minutes of the New York City Board of Estimate and Apportionment cited above. Thus, Verizon has authority to place its

telecommunications facilities and equipment underground throughout the city without the need for some underlying additional authority from the City Council or its predecessors in the form of a city franchise, ordinance or resolution.

The Commissioner of the Department of Transportation is charged under New York City Charter § 2903 with the responsibility to determine whether there is need to place telecommunications equipment underground. Where the Commissioner so directs and issues a permit, *Holmes, supra*, 228 NY 407, states the permit “indicate[s] that . . . the rights of the [telephone company] in the streets derived from [the Telegraph Act] have been assumed, recognized and acted upon.” To do otherwise, would be to impede Verizon’s state franchise rights, under TCL § 27, to place lines aerially, which constitutes a property right that Verizon may enforce in court. What is particularly troublesome in the City’s position is that the City is admitting to over a century of allegedly improper and unauthorized issuance of permits to Verizon and its predecessors, which were never contested before, without any explanation for its lack of diligence and ultra vires conduct.

Consequently, Verizon is entitled to a declaration that it has authority to place its equipment and facilities underground throughout the City of New York, provided it observes the permitting process set forth in New York City Charter § 2903 (b) (5). In light of the foregoing, it is unnecessary to consider Verizon’s arguments with regard to the City’s lack of entitlement to additional compensation under the State Franchise Tax law, violation of the federal Telecommunications Act of 1996 and the takings clauses of the Federal and State Constitutions and the contracts clause of the Federal Constitution.

Accordingly, it is found that the City’s cross motion to reargue the prior finding of

authority for Verizon to place lines underground in the County of Brooklyn is denied; and the City's cross motion for renewal of the finding and adverse declaration with respect to Verizon's city-wide authority, under TCL § 27, to place lines aurally is granted, and on renewal, the finding is clarified only to the extent of modifying the right to be subject to the City's exercise of its police powers and to determinations mandating the placement of lines underground, under the Subway Laws and subsequent legislation as indicated above, and is otherwise denied.

Verizon's motion to renew is granted, and upon renewal, the motion for summary judgment is granted, and Verizon is entitled to an adverse declaration that: (1) it has authority to place its telephone communications equipment underground in the eastern Bronx, under the 1895 annexation legislation which extended the City's 1881 Resolution giving Metro, Verizon's predecessor, the right to underground installation, and under the Subway Laws, through Verizon's predecessor Westchester; (2) that Verizon has authority to place telephone communications equipment underground in Queens in the former villages of Richmond Hill and Jamaica based on the permission granted Verizon's predecessor NYNJT by the resolutions contained in the minutes of the village councils cited above; and (3) that Verizon and its predecessors, as duly authorized corporations carrying on the business of transmitting, conducting and using electricity and fiberoptic technology for telecommunications, have permission under the minutes of the Board of Estimate and Apportionment cited above, as confirmed by New York City Charter § 2903 (b) (5), to place telecommunications equipment underground throughout the entire City in accordance with permits issued by the Commissioner

of Transportation under said Charter provision. The parties are directed to settle order and judgment in accordance with this decision.

Dated: 10/27/10

FILED

OCT 29 2010
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J.H.O.

IRA GAMMERMANN