STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

FRONTIER TELEPHONE OF ROCHESTER,
A/K/A CITIZENS COMMUNICATIONS CO.,

Petitioner,

v.

DECISION AND ORDER

INDEX No. 2006/06008
2005/05573
2004/07127

CITY OF ROCHESTER ASSESSOR, CITY OF ROCHESTER BOARD OF ASSESSMENT REVIEW AND THE CITY OF ROCHESTER, MONROE COUNTY, NEW YORK,

Respondent.

When the City implemented a re-valuation, it included on its 2004 Final Assessment Rolls a value assigned to all of Frontier's real property (excluding plant). As part of the re-valuation, the city assessed "Intra Building Network Cable," which includes telecommunication wiring located solely within a customer's premises or building. Contending that this intra building cable is properly recorded and accounted for as being within a customer's premises pursuant to FCC Uniform Standards of Accounting for telecommunication companies, 47 CFR §32.2426, and contending further that §32.2426 merely is a former version of 47 CFR §31.232 - station connections, petitioner maintains that the city should not have included the value of such cable in its assessment because, under the relevant regulations and statutes,

such cable constitutes "station connections" pursuant to Real Property Tax Law §102(12)(d), and (i). Real property is subject to real property taxation unless specifically exempted by statute, RPTL §300, and statutes exempting real property from taxation are strictly construed against the parties seeking an exemption. City of Lackawanna v. State Board of Equalization and Assessment, 16 N.Y.2d 222 (1965). On the other hand, unless by reason of the statue a property is defined as real property, it is deemed personal property and therefore not taxable, Herkimer County Light & Power Co. v. Johnson, 37 App. Div. 257 (4th Dept. 1899), and "to the extent that there is any ambiguity in the statutory definition of . . . ["taxable real property"], it must be construed most strongly in favor of the taxpayer and against the taxing authority." Matter of Astoria Gas Turbine Power, LLC v. Tax Commission of City of New York, 14 A.D.3d 553, 558 (2d Dept. 2005)(bracketed material quoted from Matter of Orange and Rockland Utilities v. City of Middletown Assessor, 269 A.D.2d 451, 452 (2d Dept. 2000)). See Matter of Manhattan Cable TV Servs. Div. Of Sterling Information Servs. V. Freyberg, 49 N.Y.2d 868, 869 (1980). In connection with telecommunications property, real property is defined by RPTL §102(12)(d) & (i):

> (d) When owned by a telephone company all telephone and telegraph lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground. For purposes of this paragraph ***the term "real property" shall not include station***

> ***connections*** and the term "telephone company" shall mean a company subject to regulation by the public service commission which provides, to the general public within its local exchange area, non-cellular switched local exchange telephone service at the points of origination and termination of the signal.
>
> (i) When owned by other than a telephone company as such term is defined in paragraph (d) hereof, all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain, ***except that such property shall not include:***
>
> ***A. station connections;***
>
> B. fire and surveillance alarm system property;
>
> C. such property used in the transmission of news wire services; and
>
> D. such property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefor.

(emphasis supplied).

Petitioner wholly fails to establish as a matter of law that the Intra Building Network Cable in question is exempt from real property taxation as a "station connection." Prior to deregulation in the mid 1980's telecommunication wire from the telecommunication company's (AT&T) plant to the customer's telephone in the customer's premises was owned by the telecommunications company and appropriately subject to real property tax. After deregulation, the ownership question with

respect to such wire was broken down into several categories, but certainly not the 3 broad categories urged upon the court in this case. Petitioner outlines the following categories: (1) outside plant; (2) intra-building plant; and (3) customer premises and owned wiring. The intra-building network cable drawn into question in this case is conceded to be that portion from the so-called cross over point for the customer's building interior, extending throughout the internal portions of the building, in either fiber optic or wiring mode, to the point called "the am phenol or 66 block." Affidavit of Mark Todd, at ¶3. Frontier urges that it owns this intra-building cable, that it is not a part of the customer's building or structure, that it is constructed in such a manner as to be easily removable from the building without doing damage to the structure, and that it routinely adds or replaces additional intra-building cable without effecting the structural integrity of the building. The key point, however, is that intrabuilding network cable or wire is on the company's side of the demarcation point. 47 CFR §68.3, formerly §68.3(p) as it existed in 1986.

Prior to deregulation, RPTL §102(12)(d) and its predecessor statutes defined telecommunication real property as lines, wires, poles, and "appurtenances." The term appurtenance was defined to include the wire beginning at the termination of the outside plant through and including the customer's actual telephone,

"even though, under common law, the equipment was a removable fixture which would be classified as personalty [citation omitted], and even though it was located on the customer's premises [citation omitted]." AT&T Information Systems, Inc. v. City of New York, 137 A.D.2d 7, 9 (1st Dept. 1988), affirmed without opinion, 73 N.Y.2d 842 (1988). See also, Crystal v. City of Syracuse, Dept. Of Assessment, 38 N.Y.2d 883 (1976), aff'ing on op. below, 47 A.D.2d 29, 31 (4th Dept. 1975)("company-owned telephone property is taxable to the company whether situated on company property or private property").

After deregulation, RPTL §102(12)(d) was amended to exclude from the definition of telecommunications real property "station apparatus," "station connections," and "private branch exchanges." L.1985 chapters 71, 72, and 463; L.1987 ch. 416. The legislative history provides that these terms, in particular "station connections," encompass the same type of property which were subject to real property taxation prior to [the AT & T] divestiture in accordance with the public service commission's system of accounts, regulations and rulings, and applicable judicial decisions." L.1985 ch. 71 §1. Although the 1985 amendments expired in 1986, the exclusions were continued in L.1987 ch. 416 virtually in haec verba, with the effect that enactment thereof "continues the non-taxable status provided in the 1985 legislation [L.1985 chapters 71, 72, and 463] for

station connections, such as drop and block and customers' premises wiring." L.1987 ch. 416 (bill summary). Petitioner agrees, however, that the only question presented is whether intrabuilding network wire or cable is "station connections" within the meaning of §102(12)(d).

Contrary to the affidavit provided by respondents, the New York State Office of Real Property Services issued a counsel's opinion in 1984 which held that the term "station connections" was derived from the FCC Uniform System of Accounts, then 47 CFR §31.232 (since repealed and replaced by 47 CFR §32.2321), which permitted covered entities to amortize the "original cost of installing items of station apparatus and the original cost of inside wiring and cabling." The relevant provisions of the FCC Uniform System of Accounts were incorporated into the New York State Public Service Commission Uniform System of Accounts (16 N.Y.C.R.R §§221-234), as recognized in 5 Op. Counsel SBEA No. 10 (May 12, 1975). Accordingly, SBEA determined that the statutory term "station connections" was a term of art in the telecommunications field such that there is no ambiguity in RPTL §102(12)(d) and (i) as it is applied to drop and block wires, and that therefore such property is exempt from real property taxation. 8 Op. Counsel SBEA No. 43 (October 4, 1985)(last modified on SBEA ORPS' website 11/27/2002). Presumably, SBEA's counsel would similarly conclude that the statute is unambiguous

insofar as it is applied to "customers' premises wiring." L.1987 ch. 416 (bill summary). The question presented in this case, however, is whether the statute is unambiguous as applied to the intra-building network wiring or cable that is the subject of the assessment, and these Article 7 petitions.

Petitioner places great emphasis on the regulatory history of divestiture, particularly that portion relevant to inside wiring as that term has been used by the FCC. This complicated history, in which a portion of 47 CFR §31.232 ("Station Connections") was deregulated, was rather nicely summarized as follows:

> First, the FCC directed that future inside wiring costs should be expensed and that embedded investment in unamortized inside wiring should be amortized over a ten-year period. First Report and Order, 85 F.C.C.2d 818 (1981). Subsequently, the FCC detariffed new intrasystem wiring and concluded that embedded intrasystem wiring would be addressed separately. Final Rule, 48 Fed.Reg. 50,543 (1983). In that same rule, it concluded that intrasystem wiring should be recorded in account 232. Thereafter, the FCC determined that intrasystem wiring should not be removed from regulated service because it could have an adverse effect on competition and on users. Report and Order, 95 F.C.C.2d 1276 (1983). The FCC later issued an order distinguishing between simple and complex inside wiring. Second Report and Order, 59 Rad. Reg.2d (P & F) 1143 (F.C.C.1986). In the Second Report and Order, the FCC redefined complex inside wiring and detariffed the maintenance of such wiring effective January 1, 1987. It also ordered the relinquishment of ownership with respect to inside wiring recorded in account 232 concurrent with reaching the point of full amortization or zero net investment. Finally, in 1986, the FCC revisited the relinquishment requirements and ordered that the telephone companies could not require customers to purchase inside wire that had been fully

> amortized nor could they charge customers for the use of such wiring but that the companies could collect maintenance fees on an untariffed basis provided the companies used the accounts provided for unregulated activities. Memorandum Op. and Order, 1 F.C.C.R. 1190 (1986).

Harris Corp. v. Johnson, 711 So.2d 526, 528 n.1 (Fla. Sup. Ct. 1998). A fuller history of the deregulation of inside wiring is provided in National Association of Regulatory Utility Commissioners v. F.C.C., 880 F.2d 422, 425-27 (D.C. Cir. 1989)(overturning only that aspect of the FCC deregulation orders pre-empting state regulation of inside wiring).

Petitioner states repeatedly throughout its motion papers that intrabuilding wire or cable is included in the FCC's concept of station connections, but there is no support for this proposition, and indeed the available evidence clearly indicates otherwise. As early as 1981, the FCC distinguished between the concepts of inside wiring, intrasystem wiring, and intrabuilding or house wiring. In the Matter of Amendment of Part 31, Uniform System of Accounts for class A and Class B Telephone Companies (First Report and Order), 85 F.C.C.2d 818, 1981 WL 158623 [FR] (FCC Docket No. 79-105, March 1981). As a full reading of the No. 79-105 docket of FCC decisions makes clear (the citations of which are to numerous to set forth here, but are available on WESTLAW online), the deregulation of "station connections" refers to "costs that are currently capitalized in account 232, and consists of the original cost of inside wiring and cabling, and

the cost of installing or connecting items of station apparatus[,] [g]enerally, . . . includ[ing] the drop and block wires." First Report and Order, supra, at ¶20. According to the FCC's use of these terms in 1982: "Inside cablings are restricted to small cables used in station installations instead of wires, such as those running from wall outlets of floor terminals to the station apparatus, and to cables used in installing small private branch exchanges." Id. at ¶20 n.4.[1] By contrast, "[t]he cost of other inside cables, including riser and distributing cables in buildings, which by their physical character, method of installation, and permanence constitute house cables, is chargeable to account 242.1, 'Aerial cable.'" Id. Thus, in 1982, the FCC proposed to amend 47 CFR §31.232 to revise Note A, incorporating this quoted language. Separately, §31.242:1 was proposed to be amended by revising Note A to that section, as

[1] As it ultimately came to be understood, "inside wiring refers to 'the customer premises' portion of the telephone plant which connects station components to each other and to the telephone network. . . . [which] [i]n combination with customer premises equipment (CPE), it constitutes all telephone plant located on the customer's side of the demarcation point marking the end of the telephone network." In the Matter of Detariffing the Installation and Maintenance of Inside wiring, 61 Rad. Reg.2d (P & F) 908, 1 F.C.C.R. 1190, 1190 n.1 (1986 WL 291282 [F.C.C.]) (Docket No. 79-105, November 13, 1986)(citing then 47 CFR §68.3(p)). See National Association of Regulatory Utility Commissioners v. F.C.C., 880 F.2d at 425 ("'inside wiring' generally refers to the telephone wires within a customer's home or place of business that are on the customer's side of the point of intersection between the telephone company's communication facilities and the customer's facilities").

follows: "House cables are considered to be extensions of aerial cable plant[,] . . . [and] do not include the inside wires extending from terminal boxes of house cables to subscribers' stations which are included in account 232." First Report and Order, supra. These revisions, however carried forward language contained in the 1956 revision of the Uniform Standards of Accounts, except that the relevant note for section 31.242:2 was at that time Note D. See 21 Fed. Reg. 7446, 7450 (Sept. 28, 1956).

By the time the FCC published its Notice of Proposed Rulemaking on the subject, 47 Fed. Reg. 44770 (October 12, 1982) (also found at 1982 WL 179521 [FR]), the term house cables was replaced with the concept of "intrabuilding network cable," and was distinguished from the term "intrasystem wiring," the latter of which referred to "cable or wire used to connect station system components on a customer's premises to one another." The house or intrabuilding network cable was not proposed to be deregulated or detarriffed. As explained at 47 Fed. Reg. 44770, 44773, ¶23 n.11, "if a portion of the intrasystem wiring requires the use of the *regulated* network house cable (intrabuilding network cable), it could only be offered by a regulated carrier on a tariffed basis." (Emphasis supplied). Moreover, "[i]ntrabuilding cable is the cable installed within the same building, excluding the network terminating wire, on the

telephone company's side of the demarcation point." Id. 47 Fed. Reg. at 44774 ¶25 n.13. The FCC's final rule on the subject, Detariffing of Customer Premises Equipment and Customer Provided Cable/Wiring, 48 Fed. Reg. 50534 (November 2, 1983) (1983 WL 108097 [F.R.]), carried this distinction forward, and made clear that "[n]othing in our proposal would change the tariff status of house cable on the company's side of the demarcation point." Id. 48 Fed. Reg. at 50541. Later, in Matter of Western Union Corporation, 68 Rad. Reg. (P & F) 143, 5 F.C.C.R. 4853, 1990 WL 603680 (F.C.C.) (July 24, 1990), the FCC confirmed this view:

> Such telephone company-installed intrabuilding circuits are commonly referred to as "house cable" or "riser cable." See 47 C.F.R. § 32.2426. It is cable in subscriber buildings that runs through, e.g., various floors, and is located on the telephone company's side of the demarcation point. *This particular type of facility was not detariffed by the Commission's Order in Detariffing of Customer Premises Equipment and Customer Provided Cable/Wiring, 48 Fed.Reg. 50534 (1983).* That portion of the facilities that run from the house cable to the demarcation point should be recorded as "Other Terminal Equipment Expense". See 47 C.F.R. § 32.6362. The Detariffing Order affected the wire on the *customers'* side of the demarcation point.

Id. at n.2 (emphasis supplied). Accordingly, in 1985 when RPTL §102(12)(d) was amended to exempt station connections from the definition of taxable real property, the FCC did not consider intrabuilding network cable or wire to be within the definition of station connections targeted for deregulation, but instead maintained the tariff on it.

Similarly, the PSC followed suit. In 1982, Title 16 N.Y.C.R.R. §232 was amended to require the station connections

account to be separated into two accounts entitled "Station Connections - Inside Wiring," and "Station Connections - Other," which followed the directive in the FCC First Report and Order cited above. See 16 N.Y.C.R.R. §232(B)(eff. no later than July 1, 1982). Note A to §232 also distinguished "riser and distributing cables in buildings, which by their physical character, method of installation, and permanence constitute house cables," and directed that costs associated therewith be "chargeable to account 242.1, Aerial Cable." Furthermore, 16 N.Y.C.R.R. §242.1, Note A (at p.1200 PS 1-31-82) provided:

> House Cables are considered to be extensions of aerial cable plant. They do not include the inside wires extending from terminal boxes of house cables to subscribers' stations which are included in account 232 or account 605 (effective July 1, 1982), or the cables for subscribers' private branch exchange switchboards which are included in account 232 or account 605 (effective July 1, 1982), or account 234, as appropriate."

Accordingly, the PSC was as early as 1982 and certainly in 1985 observing the FCC's distinction between inside wire on the customer's side of the demarcation point and intrabuilding network or house wire on the company's side. A fortiori, intrabuilding or house wire was not then considered station connections by the PSC, was not deregulated, and could not have been within the contemplation of the Legislature when RPTL §102(12)(d) was amended in 1985, and subsequently re-enacted effective 1987, to exempt station connections from the definition of real property subject to taxation.

A court may search the record and grant summary judgment to a non-moving party "with respect to a cause of action or issue that is the subject of the motions before the court." Dunham v. Hilco Constr. Co., 89 N.Y.2d 425, 430 (1996). The court searches the record and grants summary judgment dismissing the petitions, but only insofar as they are premised on the erroneous view that intrabuilding network cable or wiring is "station connections" within the meaning of RPTL §102(12)(d).

The parties are directed to contact my chambers within 15 days for the purpose of scheduling further proceedings in the cases.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 16, 2007
Rochester, New York