Matter of Centurylink Communications, LLC v Schmidt
2020 NY Slip Op 34658(U)
May 13, 2020
Supeme Court, Albany County
Docket Number: Index No. 906348-19
Judge: Margaret T. Walsh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

CENTURYLINK COMMUNICATIONS, LLC,
BROADWING COMMUNICATIONS, LLC,
GLOBAL CROSSING NORTH AMERICA, INC.,
GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
LEVEL 3 COMMUNICATIONS, LLC,
LEVEL 3 COMMUNICATIONS, LLC, as successor-in-interest to the assets of GENUITY SOLUTIONS, INC.,
LEVEL 3 TELECOM OF NEW YORK, LP, and
TELCOVE OPERATIONS, LLC,

Petitioners,

-against-

MICHAEL R. SCHMIDT, in his official capacity as
THE COMMISSIONER OF THE NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE;
THE NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE;
CITY OF ALBANY; CITY OF BATAVIA;
CITY OF BINGHAMTON; CITY OF BUFFALO;
CITY OF CANANDAIGUA; CITY OF COHOES;
CITY OF DUNKIRK; CITY OF ELMIRA;
CITY OF GENEVA; CITY OF ITHACA;
CITY OF LACKAWANNA; CITY OF MECHANCIVILLE;
CITY OF NEW YORK; CITY OF PLATTSBURGH;
CITY OF RENSSELAER; CITY OF ROCHESTER;
CITY OF ROME; CITY OF SARATOGA SPRINGS;
CITY OF SCHENECTADY; CITY OF SYRACUSE;
CITY OF TROY; CITY OF UTICA;
CITY OF WATERVLIET; CITY OF WHITE PLAINS;
TOWN OF AMHERST; TOWN OF AUSABLE;
TOWN OF BALLSTON; TOWN OF BEEKMANTOWN;
TOWN OF BETHLEHEM; TOWN OF BERGEN;
TOWN OF BRIGHTON; TOWN OF CANAAN;
TOWN OFCHAMPLAIN; TOWN OF CHATHAM;
TOWN OF CHAZY; TOWN OF CHEEKTOWAGA;
TOWN OF CHESTERFIELD; TOWN OF CLIFTON PARK;
TOWN OF COLLINS; TOWN OF COLONIE;
TOWN OF CONKLIN; TOWN OF CROWN POINT;
TOWN OF DEWITT; TOWN OF DRESDEN;
TOWN OF DUNKIRK; TOWN OF EAST GREENBUSH;
TOWN OF EDEN;TOWN OF ESSEX;
TOWN OF FORT ANN; TOWN OF FORT EDWARD;

TOWN OF GHENT; TOWN OF GLENVILLE;
TOWN OF GREECE; TOWN OF GREENFIELD;
TOWN OF HALFMOON; TOWN OF HAMBURG;
TOWN OF HANOVER; TOWN OF HARTFORD;
TOWN OF HENRIETTA; TOWN OF IRONDEQUOIT;
TOWN OF KINDERHOOK; TOWN OF KINGSBURY;
TOWN OF KIRKWOOD; TOWN OF LLOYD;
TOWN OF MACEDON; TOWN OF MALTA;
TOWN OF MILTON; TOWN OF MOREAU;
TOWN OF MORIAH; TOWN OF MOUNT PLEASANT;
TOWN OF NEW PALTZ; TOWN OF NORTH COLLINS;
TOWN OF NORTHUMBERLAND; TOWN OF ORANGETOWN;
TOWN OF ORANGE PARK; TOWN OF OWEGO;
TOWN OF PENFIELD; TOWN OF PERU;
TOWN OF PITTSFORD; TOWN OF PLATTSBURGH;
TOWN OF POMFRET; TOWN OF PORTLAND;
TOWN OF PUTNAM; TOWN OF RIPLEY;
TOWN OF ROTTERDAM; TOWN OF SCHODACK;
TOWN OF SENECA; TOWN OF STAFFORD;
TOWN OF TICONDEROGA; TOWN OF UNION;
TOWN OF VESTAL; TOWN OF WATERFORD;
TOWN OF WEBSTER; TOWN OF WEST SENECA;
TOWN OF WESTFIELD; TOWN OF WESTPORT;
TOWN OF WHITEHALL; TOWN OF WILLSBORO;
TOWN OF WILTON; VILLAGE OF BALLSTON SPA;
VILLAGE OF BLASDELL; VILLAGE OF BROCKPORT;
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VILLAGE OF COLONIE; VILLAGE OF DEPEW;
VILLAGE OF EAST ROCHESTER; VILLAGE OF EAST SYRACUSE;
VILLAGE OF ENDICOTT;VILLAGE OF FAIRPORT;
VILLAGE OF FORT ANN; VILLAGE OF FORT EDWARD;
VILLAGE OF GARDEN CITY; VILLAGE OF GREEN ISLAND;
VILLAGE OF GOWANDA; VILLAGE OF HAMBURG;
VILLAGE OF JOHNSON CITY; VILLAGE OF LIVERPOOL;
VILLAGE OF MENANDS; VILLAGE OF NEWARK;
VILLAGE OF NORTH COLLINS; VILLAGE OF NORTH SYRACUSE;
VILLAGE OF OWEGO; VILLAGE OF PITTSFORD;
VILLAGE OF ROUSES POINT; VILLAGE OF SCOTIA;
VILLAGE OF VICTOR; VILLAGE OF WATERFORD;
VILLAGE OF WEBSTER; VILLAGE OF WESTFIELD;
VILLAGE OF WHITEHALL; VILLAGE OF WILLIAMSVILLE;
VILLAGE OF WOODBURY,

Respondents.

For a judgment pursuant to Article 7 and 499-pppp of the
Real Property Tax Law

(Albany County Supreme Court, Special Term)

(Hon. Margaret Walsh, Presiding Justice)

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DECISION and ORDER ON MOTIONS

WALSH, J.:

Introduction

The Petitioners are affiliated telecommunications entities that own properties consisting of, *inter alia*, fiber optic cables and conduits enclosing these fiber optic cables. The Respondents, denominated as "Taxing Jurisdictions" in the Verified Petition, are local assessing units; the Petitioners' properties are located within the Respondents' respective jurisdictions. For tax year

2019, the Respondent Michael R. Schmidt, in his official capacity as Commissioner of the New York State Department of Taxation and Finance ("Commissioner"), issued determinations, pursuant to Real Property Tax Law ("RPTL") §499-pppp, establishing final assessment ceilings for tax year 2019 with respect to the Petitioners' properties. As explained more fully below, Title 5, Article 4 of the RPTL is known as the "Assessment Ceilings for Local Public Utility Mass Real Property" (RPTL §499-hhhh *et seq.*)("Assessment Ceilings Statute" or "Statute"). In this proceeding, the Petitioners challenge the Respondent Commissioner's final determinations. The Petitioners also challenge as unlawful the assessments upon the Petitioners' properties made by the Respondents for tax year 2019 and seek refunds of real property taxes paid.

By *Notices of Motion* filed in November and December, 2019, forty-seven Respondent and intervenor-Respondent local assessing units move to dismiss the *Verified Petition* pursuant to CPLR 3211(a)(2), (5) and (7) and on the grounds that the proceeding is procedurally improper as well as untimely.[1] Motions to dismiss on additional grounds were filed by the Niskayuna Central School District, the Town of Niskayuna, and the Shenendehowa Central School District. The Petitioners oppose the motions and further cross-move for an extension of time to serve additional Respondents. Oral argument on the motions was held on February 28, 2020.

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[1]The moving Respondents and intervenor-Respondents are Chautauqua County, City of Dunkirk, Town of Dunkirk, Town of Hanover, Town of Pomfret, Town of Portland, Town of Ripley, Town of Westfield, Village of Brocton, Village of Westfield, Dunkirk City School District, Fredonia Central School District, Brocton Central School District, Ripley Central School District, Westfield Central School District, Forestville Central School District, Silver Creek Central School District, Chautauqua Lake Central School District, Sherman Central School District, City of Lackawanna, Hamburg Central School District, Williamsville Central School District, Springville-Griffith Institute Central School District, Gowanda Central School District, North Collins Central School District, Amherst Central School District, Clarence Central School District, Orchard Park Central School District (collectively the "western New York" or "WNY" Respondents), City of Binghamton, Frontier Central School District, Town of Hamburg, Town of Orangetown, City of Elmira, Village of Garden City, Town of Conklin, Town of Kirkwood, Town of Union, Village of Johnson City, Village of Owego, City of Rome, Town of Amherst, City of Buffalo, Town of Orchard Park, County of Erie, Lake Shore Central School District, Lancaster Central School District, and City of Utica.

A party may move to dismiss pursuant to CPLR 3211(a)(5) where a cause of action is barred by reason of collateral estoppel, res judicata, or applicable statute of limitations. CPLR 3211(a)(7) permits dismissal of a pleading, or so much of a pleading, that fails to state a cause of action. For purposes of the motions to dismiss, all allegations set forth in the petition, together with favorable inferences, are deemed true (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The question before the Court is whether "the facts as alleged fit within any cognizable legal theory" (*id.*). "'At the same time, however, allegations consisting of bare legal conclusions...are not entitled to such consideration'" (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017], quoting *Simkin v. Blank*, 19 NY3d 46, 52 [2012]), nor are "any factual claims flatly contradicted by the record are not" presumed to be true (*Everett v. Eastchester Police Dept.*, 127 AD3d 1131, 1132 [2d Dept. 2015]). "[I]f a plaintiff fails to assert facts in support of an essential element of the claim" or "if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery," dismissal of the pleading is warranted (*id.*). Employing these well-established standards, the Court turns to the causes of action alleged by the Petitioners.

According to the *Verified Petition*, the Petitioners' telecommunications services are delivered by a network of fiber optic cables and conduits enclosing those fiber optic cables that comprise the properties at issue. Fiber optics is a technology that uses light to transport data from one point to another. The fiber optic cables are enclosed in a high density polyethylene pipe or conduit. Fiber optic cables do not conduct electricity. The fiber optic cables and conduits also deliver video content "throughout the United States, including the transmission of television signals for broadcasters, cable TV channels, local stations and live TV viewing." The Petitioners contend that the fiber optic cables and conduits enclosing the fiber optic cables are not local public utility mass real property ("LPUMRP") pursuant to RPTL 102(12)(i) for purposes of RPTL 499-hhhh(3) and therefore are not

taxable real property. The Petitioners maintain that the Commissioner's final telecommunications assessment ceilings for the properties are unlawful, and further maintain that the local assessing units' assessments are unlawful. The Petitioners seek annullment of the Commissioner's final determinations, an order directing the ceilings to be set to $0, and an order directing refunds from the Respondents for taxes paid.

In March, 2019, DTF's Office of Real Property Tax Services ("ORPTS") provided the Petitioners and the Respondents copies of Notices of Tentative Telecommunications Ceiling for the properties owned by the Petitioners in each of the Respondents' respective jurisdictions. The Petitioners then filed administrative complaints with ORPTS asserting that the tentative assessment ceilings were unlawful because their properties do not constitute LPUMRP and, therefore, the ceiling estimates for each of the properties should be annulled and reduced to $0. The Commissioner's designated hearing officer rejected the Petitioners arguments and recommended that no changes be made to the tentative assessment ceilings. Adopting the hearing officer's recommendations, the Commissioner issued Certificates of Final Telecommunications Ceiling for the Petitioners' properties which were copied to the Petitioners via envelopes postmarked August 21, 2019 and August 22, 2019. The Petitioners then commenced this proceeding pursuant to RPTL§499-pppp and RPTL article 7.

The Petitioners assert seven causes of action. The first four causes of action allege that the final assessment ceilings are unlawful because the Petitioners' properties are not LPUMRP and therefore not taxable real property (*Verified Petition*, ¶¶57-83). The Petitioners assert that the final assessment ceilings should therefore be annulled and reduced to $0 (*id.*, ¶¶61, 69, 76, 83). In the fifth and sixth causes of action, the Petitioners assert claims for violation of equal protection rights, including illegal selective assessments by the Commissioner and the local assessing unit

Respondents (*id.*, ¶¶84-106). In their seventh cause of action, the Petitioners seek refunds of real property taxes paid by the Petitioners to the local assessing unit Respondents on the properties at issue, together with interest (*id.*, ¶¶55, 108-109). The Petitioners' prayer for relief additionally requests an order directing the Respondent assessing units "to reduce their 2019 assessments of Petitioners' Properties to $0" (*id.*, p. 25). The subject properties in this proceeding include approximately 520 tax parcels located in the 134 local assessing units named Respondents herein.

I. Assessment Ceilings for Local Public Utility Mass Real Property

Upon a careful and thorough review of the parties' submissions, the Court concludes that the Assessment Ceiling Statute is not the proper avenue for the relief sought by the Petitioners.

"'When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature'" (*Matter of Walsh v. New York State Comptroller*, 2019 NY Slip Op 08518, 2019 NY LEXIS 3249, at *4 [2019], quoting *Nadkos, Inc. v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 34 NY3d 1, 7 [2019]). "[T]he plain language of the statute,. . . is the clearest indicator of legislative intent" (*Matter of T-Mobile Northeast, LLC v. DeBellis*, 32 NY3d 594, 607 [2018], citing *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]; *DaimlerChrysler Corp. v. Spitzer*, 7 NY3d 653, 660 [2006]["The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning"]). Additionally, inquiry should be made into 'the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history'" (*Nostrom v. A.W.. Chesterton Co.*, 15 NY3d 502, 507 [2010], quoting *Matter of ATM One v. Landaverde*, 2 NY3d 472, 477 [2004]).

Analysis begins with the Legislature's express policy that "[a]ll real property within the state

shall be subject to real property taxation, special ad valorem levies and special assessments unless exempt ... by law" (RPTL 300). What constitutes taxable "real property" is defined in RPTL 102 (see *Matter of Niagara Mohawk Power Corp. v. Cutler*, 109 AD2d 403, 405 [3d Dept. 1985], *aff'd* 67 NY2d 812 [1986]). Exemptions from taxation of real property are set forth in Article 4 of the RPTL.

One such exemption from taxation is on the amount of an assessment made by a local assessing unit of local public utility mass real property ("LPUMRP") that exceeds the final assessment ceiling, or cap, determined by the Commissioner of the New York State Department of Taxation and Finance ("DTF") of such real property. This exemption, set forth in Title 5 of article 4 (RPTL 499-hhhh *et seq.*), applies to public utility mass real property located in or on private property within each local assessing unit.[2] Public utility mass real property, or "PUMRP," means

> real property, including conduits, cables, lines, wires, poles, supports and enclosures for electrical conductors located on, above and below real property, which is used in the transmission and distribution of telephone or telegraph service, and electromagnetic voice, video and data signals. Such term shall include all property described in [RPTL 102[12][d] and [i]. Special franchise property..., and all property described in ... subparagraphs (A), (B), (C) and (D) of [RPTL 102[12][i] ... shall not be considered [PUMRP] for purposes of this title.

(*see* RPTL 499-hhh[3]). RPTL 102(12)(i) includes real property,"[w]hen owned by other than a telephone company..., [consisting of] all lines, wires, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or witching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain" (RPTL 102[12][i]). Excepted from the definition of "real property" are station connections, fire and surveillance alarm system property, property used in the transmission of news

[2]"Local assessing jurisdictions" mean each town, village, city or county assessing unit that establishes the assessment rolls for such town, village, city or county (RPTL 499-hhhh[2]).

wire services, and property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, regardless of whether a fee is charged or not (*id.* [12][i][A]-[D]). "Local public utility mass real property" or LPUMRP refers to "public utility mass real property that is located in a particular town, village, city or county assessing unit and under the same ownership" (RPTL 499-hhhh[1]).

According to the Statute's legislative history, utility property (which has included PUMRP) located on public rights-of-way is categorized as "special franchise" property and is assessed by the Commissioner for valuation purposes (*see* NY Assembly Sponsor's Mem in Support, Bill Jacket, L 2013, ch 475; see also RPTL 102[17]; RPTL Article 6; see *Matter of RCN N.Y. Communications, LLC v. Tax Commn. of the City of N.Y.*, 95 AD3d 456, 457 [1st Dept. 2012]; *Matter of Level 3 Communications, LLC v. DeBellis*, 72 AD3d 164 [2d Dept. 2010]). When these same properties are situated on private property, they are, and have been, assessed separately by the local assessing units.[3] As a consequence, the local assessed valuations lacked uniformity, and owners of LPUMRP were required to litigate valuations in each of the various local jurisdictions. Motivation for enactment of the Statute as a pilot program included establishing more consistent valuations for LPUMRP.[4] Because the State was already valuing PUMRP on public property and had the necessary expertise, infrastructure and information to carry out valuations of LPUMRP, the Statute consolidated the valuation function of LPUMRP under the DTF. The Statute directs the Commissioner to establish caps for valuations of LPUMRP. LPUMRP is then exempt from taxation to the extent the local assessment exceeds the final ceiling, or maximum assessed value, determined by the Commissioner (see RPTL 499-kkkk[1][the Commissioner establishes assessment ceilings for

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[3]See, e.g., *Notice of Motion to Dismiss*, *Affidavit* of Jason C. Shell [NYSCEF Doc. No. 214], ¶4 (City of Buffalo has been taxing such properties, known as outside plant, for more than thirty years).

[4]NY Assembly Sponsor's Mem in Support, Bill Jacket, L 2013, ch 475.

PUMRP within each local assessing unit "[t]o determine the extent to which [PUMRP] shall be exempt under this title"]). These assessment ceilings, or caps, ensure that LPUMRP are not over-assessed by the local assessing units. The Statute further provides for judicial review of the Commissioner's final assessment ceilings, where a proceeding may be brought in supreme court in either Albany County or in the county in which the property subject of the assessment ceiling is located.

The Statute sets forth a two-step process in establishing the assessment ceilings. First, the Commissioner determines tentative assessment ceilings of LPUMRP. The ceiling is derived by multiplying the LPUMRP's value by the applicable equalization rate factor (RPTL 499-kkkk [1][a],[b]).[5] The tentative assessment ceilings of LPUMRP are then transmitted to both the local assessing unit and the owner of the LPUMRP (RPTL §499-oooo[1]). The tentative assessment ceilings may then be challenged by either the local assessing unit or the owner of LPUMRP upon the filing of a written complaint specifying objections to the tentative determination (*id.*[2][a]). The Commissioner (or his/her designee) hears the complaints "in relation to the tentative determination of the assessment ceiling" on the specified place and time (*id.*[2][b]).

The second step involves the issuance of final certified assessment ceilings for LPUMRP situated in each local assessing unit. The final certified assessment ceiling is issued whether or not an administrative hearing has been held. The Commissioner must file a certificate setting forth each final assessment ceiling with each local assessing unit at least ten days prior to the tax levy (RPTL §499-pppp[1], [3]). Simultaneously with the filing of the final certified assessment ceilings, the

[5]The LPUMRP's value is determined by the Commissioner utilizing the local reproduction cost of the LPUMRP, less depreciation and adjusting for economic or functional obsolescence (RPTL 499-llll[1]-[3]). The equalization rate factor is either the final state equalization rate for the assessment roll of the local assessing jurisdiction, the special equalization rate established pursuant to RPTL article 12, or the applicable class equalization rate (RPTL 499-nnnn).

Commissioner transmits duplicate copies of such certificates to the owners of PUMRP (RPTL 499-pppp[3]). Either the local assessing jurisdiction or the owner of LPUMRP may judicially challenge the final determination of an assessment ceiling by the Commissioner (RPTL 499-pppp[4]).

If the assessed valuation by the local assessor exceeds the final assessment ceiling, the assessor is required to reduce the assessment accordingly (RPTL §499-qqqq[1]). The local assessor otherwise is not required to make any adjustments where the local assessed valuation does not exceed the ceiling (*id.*). If the certified assessment ceiling is received after the tax rolls have been established and a tax levy is made and paid by the LPUMRP owner prior to a required reduction of the LPUMRP's assessment, the owner is entitled to a refund in accordance with RPTL 726 (*id.* [2]).

In the matters at bar, the Petitioners assert that the final assessment ceilings are unlawful because their properties do not constitute LPUMRP and are therefore "excluded" from taxation (*Verified Petition*, ¶¶57-83). The Petitioners allege that they paid or will pay real estate taxes to "some or all of the Taxing Jurisdictions based on the unlawful assessment ceilings determined by the Commissioner for their Properties and based on the unlawful assessments and imposition of real property taxes on their Properties made by the Taxing Jurisdictions" (*Verified Petition*, ¶108). The Petitioners are, in reality, challenging the legality or lawfulness of the assessments made by the local assessing units–i.e., the taxability of their properties–as opposed to the Commissioner's final assessment ceilings, or maximum valuations, of their properties. Nowhere within the four corners of the petition do the Petitioners challenge the manner by which the Commissioner calculated the final assessment ceilings for the Petitioners' properties.[6] In the Court's view, the Petitioners

[6]In their *Memorandum of Law in Opposition to WNY Respondents' Motion to Dismiss*, the Petitioners assert, however, that the petition "challenges *assessment ceilings* determined by the Commissioner, not *assessments* by local assessors" (*Memorandum of Law in Opposition to WNY Respondents' Motion to Dismiss*, NYSCEF Doc. No. 119, p. 35)(emphasis in original).

misconstrue the objective of Article 5, Title 4 of the RPTL, which concerns the extent to which an owner of LPUMRP may be entitled to an exemption from taxation by a local assessing unit, not whether a local assessing unit's assessment (and taxation) of such property is in the first instance unlawful. The Petitioners' challenges to the alleged "unlawfulness" of the assessments cannot be maintained in this proceeding.

The Court begins with RPTL 499-pppp. The scope of a judicial challenge is expressly limited to "[a]ny *final determination of an assessment ceiling* by the commissioner" (RPTL 499-pppp[4])(emphasis added). The Statute does not define the phrase "assessment ceiling"; however, "assessment" is defined as "the valuation of real property, including the valuation of exempt real property" (RPTL 102[3][1]). In the context of the Statute it is clear from this definition and plain language that the phrase "assessment ceiling" means the final maximum valuations, or caps, for LPUMRP as determined by the Commissioner (*see Matter of T-Mobile Northeast LLC v. DeBellis*, 32 NY3d at 607). It does not encompass a challenge to an "assessment" of LPUMRP, i.e., whether the property is taxable real property.

While the statute provides that "all questions of fact and law shall be determined de novo," the Court construes that such questions must necessarily pertain to the manner by which a final assessment ceiling, or maximum valuation, has been determined by the Commissioner pursuant to RPTL 499-kkkk. RPTL 499-pppp(4) lends itself to such construction as it explicitly preserves the LPUMRP owner's right to commence a separate article 7 proceeding against a local assessing unit.[7] This dual scheme reinforces the intent of the Legislature to preserve an owner's right to commence article 7 proceedings against a local assessing unit for appropriate relief, while also allowing an

[7]RPTL 499-pppp(4) states, "Nothing in this section shall preclude a challenge of the assessed value established by a local assessing jurisdiction with respect to local public utility mass real property as otherwise provided in article seven of this chapter."

owner to avail itself to relief in a separate proceeding challenging the Commissioner's final determination of an assessment ceiling. Such interpretation finds support in the additional explicit language exempting from taxation the assessed valuation of LPUMRP to the extent it exceeds the ceiling (RPTL 499-qqqq[1]). Here, "taxation" means "an ad valorem levy...for which [PUMRP] is otherwise liable pursuant to this chapter" (RPTL 499-hhhh[4]). In other words, the Statute excludes any challenge to the underlying tax liability of the subject property and contemplates only disputes concerning the ceilings. In the Court's view, the foregoing demonstrates that assessment ceiling challenges are not intended to supplant RPTL article 7 proceedings.

The Petitioners insist that their claims concerning the "unlawfulness" of the assessment ceilings are properly asserted under RPTL 499-pppp(4). RPTL 499-pppp(4) provides that a judicial proceeding challenging the Commissioner's final determination of an assessment ceiling be brought under article 7 of the RPTL. The Petitioners argue that grounds for an article 7 proceeding, in turn, include whether an assessment is "excessive, unequal or unlawful," pointing to the ORPTS Form RP-7143 utilized by the Petitioners for their administrative complaints[8] (see RPTL 706[1]). While it is true that RPTL 499-pppp(4) states that a judicial proceeding challenging the Commissioner's final determination of an assessment ceiling be brought under article 7 of the RPTL, the Court construes this requirement as pertaining to the form of the proceeding. To interpret otherwise would import certain meanings into the framework of the Statute that conflict with the Statute's plain language and purpose. For example, as relevant here, the grounds for review set forth in RPTL 706(1), relate only to an "assessment," not an "assessment ceiling." Under the Statute, the

[8] *Nicolich Affidavit In Opposition*, ¶42 [NYSCEF Doc. 120]; Exhibit L [NYSCEF Doc. 115]; *Memorandum of Law In Opposition*, pp. 34-35[NYSCEF Doc. 136].

Commissioner sets assessment ceilings, or caps, for LPUMRP, but does not assess the properties.[9] Neither the Commissioner nor the ORPTS has the power to determine the lawfulness of an assessment on a complaint before it (*see* RPTL 200-a[2][[a], 202). The Statute does not alter the fundamental responsibility of local assessors to assess LPUMRP, but instead reaffirms it, subject only to Commissioner's ceilings pursuant to RPTL 499-qqqq (RPTL 499-jjjj). As noted above, the Statute explicitly contemplates an owner's right to separately challenge a local assessing unit's assessment of LPUMRP under RPTL article 7, indicating that the Legislature did not intend to obviate this remedy.

Support for the Court's conclusion and interpretation is found by analogy with the statutes establishing procedures for the determination of assessment ceilings for railroad property (*see* RPTL article 4, Titles 2-A, 2-B). In *Matter of Delaware & H.R. Co. v. McDonald*, 126 AD2d 29 (3d Dept. 1987), the Appellate Division, Third Department reversed the trial court's dismissal of article 7 challenges brought by petitioner for review of the assessments of its properties. The trial court had determined that the petitioner's exclusive remedy was to challenge the State Board of Equalization

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[9]While the Commissioner and DTF function as an oversight agency (*see* RPTL article 2), the Legislature "has clearly demonstrated an intent not to allow that body to become an active participant in the local assessment process. Such powers have been specifically reserved to the local assessors as reflected by the provisions of article 5 of the Real Property Tax Law'" (*Matter of Shandaken v. State Bd. of Equalization & Assessment*, 97 AD2d 179, 181 [3d Dept. 1983], quoting *Matter of State Bd. of Equalization & Assessment v. Kerwick*, 72 AD2d 292, 299, aff'd 52 NY2d 557). An "assessment" means "a determination made by assessors of (1) the valuation of real property, including the valuation of exempt real property and (2) *whether or not real property is subject to taxation* or special ad valorem levies" (RPTL 102[2])(emphasis added). "Assessors" mean elected or appointed officer or body of officers charged by law with the duty of assessing real property in an assessing unit for the purposes of taxation or special ad valorem levies, for county, city, town, village, school district or special district purposes" (RPTL 102[3]). An "assessing unit" means a city, town, village as provided in RPTL 1402, or county having the power to assess real property (RPTL 102[a][a]-[c]). It is the local city and town assessors who are statutorily obligated to maintain an inventory of all real property within their respective jurisdictions (RPTL 500[1]; *see Kennedy v. Mossafa*, 100 NY2d 1, 6 [2003]; *Matter of Fifth Ave. Office Ctr. Co. v. City of Mount Vernon*, 89 NY2d 735, 741 [1997]["Under the statutory scheme, the local assessor is responsible for investigating the facts necessary to establish a proper assessment roll"]).

and Assessment (SBEA) determination of final railroad ceilings for the properties. In reversing the lower court's ruling, the appellate court found that "[the statute] does not explicitly require the SBEA to set the assessment of railroad real property nor does it oust the assessors of local taxing jurisdictions from that responsibility" (*id.* at 34). "The railroad ceiling is not an assessment, but only a cap on that of the local taxing entity, beyond which nonsubsidized railroad real property is exempt from taxation. Indeed, in directing that if the local assessment does not exceed the ceiling * * * * the assessor shall make no adjustment in such assessed valuations" (*id.*, quoting RPTL 489-mm[1]). The appellate court further noted that the statute "specifically recognizes that a local assessor may arrive at a valuation of railroad real property less than the ceiling set by SBEA, in which case the local assessment shall control for taxation purposes" (*id.*). Similarly, the Assessment Ceilings Statute establishes a cap on the assessments of LPUMRP made by the local assessing units; it does not foreclose or replace an owner's right to challenge the lawfulness of the local assessing unit's assessment of the LPUMRP.

To summarize, based on the foregoing, the Court finds that a challenge to the final assessment ceiling is limited to the manner by which the Commissioner determined the ceilings pursuant to RPTL 499-kkkk, not whether the final assessment ceiling is unlawful because property is alleged to be non-taxable. Moreover, a judicial challenge of final assessment ceilings does not include claims that assessments of properties by local assessing units are unlawful. Even assuming the truth of the factual allegations set forth in the *Verified Petition*, the first, second, third and fourth causes of action must be dismissed for failure to state claims upon which relief may be granted.

II. RPTL Article 7 Proceedings

To the extent the Petitioners contend the assessments of their properties by the local assessing

units are unlawful as non-taxable property, RPTL article 7 is the proper remedy.

"Article 7 of the [RPTL] applies to taxes collected because of erroneous assessments. It is the exclusive procedure for review of property assessments 'unless otherwise provided by law'" (*Matter of Niagara Mohawk v. City School District of Troy*, 59 NY2d 262, 268 [1983], quoting RPTL 700[1]). Grounds for the review of an assessment "shall be that the assessment ... is excessive, unequal or unlawful, or that real property is misclassified" (RPTL 706[1]; see also *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v. Town of Fallsburg*, 78 NY2d 194, 204 [1991]; *Level 3 Communications, LLC v. Jiha*, 162 AD3d 465 [1st Dept. 2018]; *Matter of Turtle Is. Trust v. County of Clinton*, 125 AD3d 1245, 1246 [3d Dept. 2015], *lv denied* 26 NY3d 912 [2015]). RPTL 701 defines an "unlawful assessment" as meaning and including "(a) an entry on the taxable portion of the assessment roll of the assessed valuation of real property which ... is wholly exempt from taxation" (RPTL 701[9][a]; see also *Matter of Foundation for Chapel of Sacred Mirrors, Ltd. v. Harkins*, 98 AD3d 1044, 1045 [2d Dept. 2012])(emphasis added). Article 7 proceedings also provide an avenue for disputing whether certain property constitutes "real property" for purposes of taxation (see *Matter of Manhattan Cable TV Services, Div. of Sterling Information Services, Inc. v. Freyberg*, 49 NY2d 868 [1980]; *Matter of Orange & Rockland Utils. v. City of Middletown Assessor,* 269 AD2d 451 [2d Dept. 2000]*; Matter of South Seas Yacht Club v. Board of Assessors & Bd. of Assessment Review*, 136 AD2d 537 [2d Dept. 1988]; *Matter of Niagara Mohawk Power Corp. v. Cutler*, 109 AD2d 403, 404-406 [3d Dept. 1985], *aff'd* 67 NY2d 812 [1986]; *Matter of Crystal v. City of Syracuse, Dept. of Assessment*, 47 AD2d 29 [4th Dept. 1975]; *Matter of Frontier Tel. of Rochester v. City of Rochester Assessor*, 16 Misc.3d 471 [Supreme Ct, Monroe Cty 2007]). If the court determines that the assessment under review "is unlawful it shall order the assessment stricken from the roll or where appropriate entered on the exempt portion of the roll" (RPTL §720[1]). Taxes

paid upon an assessment deemed unlawful must be refunded by the county, city, town, village or school district together with interest, in accordance with RPTL §726.

As explained more fully above, the local assessing units create the assessment rolls (i.e., determine what is real property to be included on the rolls) and assess the Petitioners' properties, not the Commissioner. The Petitioners' exclusive remedy is by way of separate RPTL article 7 proceedings.

In their seventh cause of action, the Petitioners assert that their properties are being unlawfully assessed by the municipal Respondents because the properties are not real property and therefore non-taxable. The Petitioners' prayer for relief requests an order directing the local assessing units to reduce their assessments to $0. To the extent such cause of action is asserted pursuant to RPTL article 7, even assuming the truth of the factual allegations, the claims fail against these Respondents as a matter of law.

Proceedings must be brought in the judicial districts in which the assessments to be reviewed were determined, and they must be commenced within thirty days after completion and filing of the final assessment roll (RPTL 702[1], [2]). This has not happened here. Additionally, the Petitioners have not alleged or shown that they filed timely grievances with the appropriate bodies or officers of each of the local assessing units herein (RPTL 706[2]), and administrative reviews of a property owner's grievance is a condition precedent to commencement of an RPTL article 7 judicial proceeding (RPTL 706[2], 524; see *Matter of Larchmont Pancake House v. Board of Assessors*, 33 NY3d 228, 235 [2019].[10] The filings of administrative complaints filed with the ORPTS disputing

[10]Grounds for administrative review of a grievance include that the assessment is "excessive, unequal or unlawful, or that real property is misclassified" (RPTL 524[2]). An "'unlawful assessment' or an assessment which is unlawful shall mean and include: (a) an entry on the taxable portion of the assessment roll of the assessed valuation of real property which, except for the provisions of [RPTL 499], is wholly exempt from taxation; or * * * * (d) an entry of assessed valuation of real property on an

the tentative assessment ceilings serve as condition precedents only to an RPTL §499-pppp judicial proceeding challenging the Commissioner's final assessment ceilings, and do not fulfill the administrative remedies required for RPTL article 7 proceedings. Bypassing the grievance procedure at the local level defeats the purpose of RPTL 524, which is to give the local board of assessment review the opportunity to review and correct assessments (see *Matter of Radisson Cmty. Ass'n v. Long*, 3 AD3d 135, 139 [4th Dept. 2003]) and "is a jurisdictional prerequisite to obtaining judicial review" (*Matter of Frei v. Town of Livingston*, 50 AD3d 1381, 1382 [3d Dept. 2008]). In the absence of grievances filed with the local assessing units, the Petitioners' seventh cause of action must be dismissed for failure to exhaust administrative remedies (see *Matter of Frei v. Town of Livingston*, 50 AD3d at 1382; *Matter of Cornwell v. Town of Esperance*, 252 AD2d 795, 796 [3d Dept. 1998]; *Matter of Willig v. Town of Ballston*, 126 AD2d 856, 856 [3d Dept. 1987]).

III. *Res Judicata* and Collateral Estoppel

In their pleading, the Petitioners assert that their properties, i.e., fiber optic cables and conduits enclosing the fiber optic cables, are not taxable real property as defined in RPTL §102(12)(i), rendering unlawful the Commissioner's final assessment ceilings for these properties. The Petitioners allege that their fiber optic cables are used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate distribution to the public such that they are not taxable real property pursuant to RPTL 102(12)(i)(D). The Petitioners contend that the inclosures of their fiber optic cables, which are not electrical

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assessment roll which has been made by a person or body without the authority to make such entry...." (RPTL 522[10][a], [d]; see also RPTL 552, 550[7][a], [c][correction of same errors upon receipt of verified statement from assessor]). The board of assessment review, upon determination of a complaint, is authorized to order an assessment determined to be unlawful to be stricken from the roll (RPTL 525[3][c]).

conductors, do not qualify as taxable real property. The Petitioners allege that their fiber optic cables and conduits that connect to customer equipment constitute "station connections" that are exempt from taxable real property in RPTL 102(12)(i)(A) The Petitioners also allege that, through their service Vyvx Solutions, they deliver video content including the transmission of TV signals for broadcasters, cable TV channels, local stations and live TV viewing such that their properties are not taxable real property pursuant to RPTL §102(12)(i)(D).

Respondents argue that the Petitioners' claims are barred by *res judicata* and collateral estoppel. The doctrine of *stare decisis*, which has an even broader application, precludes the Petitioners from litigating several causes of action here. "When a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same, and this it does for the stability and certainty of the law" (*Moore v. Albany*, 98 NY 396, 410 [1885]). "The doctrine of stare decisis...operates to prevent reexamination of issues once resolved" (*Brown v. Verizon N.Y., Inc.*, 8 AD3d 838, 839 [3d Dept. 2004]). The Court of Appeals and Appellate Division have thoroughly examined and addressed either identical or substantially similar claims raised by the Petitioners in the instant proceeding as follows:

A. *Fiber Optic Cables*

Fiber optic cables are "lines" and taxable real property pursuant to RPTL 102(12)(i) (*Matter of T-Mobile Northeast, LLC v. DeBellis*, 32 NY3d at 608). The *Verified Petition* does not set forth any factual allegations that differentiate the Petitioners' properties from those at issue in *T-Mobile.*

B. *Conduits Enclosing Fiber Optic Cables*

The Petitioners allege that the pipes or conduits enclosing and protecting their fiber optic

cables are not "inclosures for electrical conductors" under RPTL 102(12)(i) and are therefore not taxable real property. RPTL 499-hhhh(3) specifically includes "conduits" as taxable LPUMRP. Moreover, precisely the same argument was raised and rejected in *Matter of Level 3 Communications, LLC v. Erie County*, 174 AD3d 1497, 1502 (4th Dept. 2019), *reargument and lv to appeal denied*, 177 AD3d 1346 (2019), wherein the Fourth Department held that enclosures of fiber optic cables constitute taxable real property pursuant to the statute. In *Erie County*, the phrase "fiber optic installations" included fiber optic cables and the conduits enclosing those cables[11],which are the very same categories of properties alleged here. Again, the *Verified Petition* does not set forth any factual allegations that distinguishes the Petitioners' properties from those in *Erie County*. Additionally, in *Matter of Level 3 Communications, LLC v. Chautauqua County*, 174 AD3d at 1502, the Petitioner conceded that its fiber optic installations are taxable under the statute as "lines" even though they do not conduct electricity. In short, the fiber optic cables and conduits enclosing these cables have been previously determined to constitute taxable real property. Even assuming the truth of the allegations, the Petitioners' second cause of action fails to state a claim on which relief may be granted.

C. *Station Connections*

The Court of Appeals in *T-Mobile Northeast, LLC* held that the term "station connections" is a specific exemption that "relates to wiring physically connecting customer telephones to telephone poles" (*id.* at 609).[12] Because the Petitioners do not allege that their fiber optic cables

[11]See *Nicolich Affirmation in Opposition to Motions to Dismiss* [NYSCEF Doc. No. 103], Exhibit I [NYSCEF Doc. 112], ¶2)

[12]In arriving at this conclusion, the Court of Appeals examined the relevant State Board of Equalization and Assessment (SBEA) memoranda, which described the term "station connections" as "inside wires and the wire connecting items of station apparatus like desk sets, hand sets and wall sets

physically connect customer telephones to telephone poles, the third and fourth causes of action fail to state claims upon which relief could be granted.

D. *Exemption for Use in the Transmission of News, Television or Cable Television*

The Appellate Division, Fourth Department held that fiber optic installations are non-taxable only where they are primarily or exclusively used for one of the exempt purposes in RPTL 102(12)(i)(A)-(D)(*Matter of Level 3 Communications, LLC v. Erie County*, 174 AD3d at 1501; *Matter of Level 3 Communications, LLC v. Chautauqua County*, 174 AD3d 1502, 1502 [4th Dept. 2019]).[13] Because the Petitioners do not allege that their fiber optic cables and conduits (i.e., their fiber optic installations) are primarily or exclusively "used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate distribution to the public," their first cause of action fails to state a claim on which relief may be granted.

Thus, even assuming the Petitioners' claims are properly before the Court, the Petitioners' first, second, third and fourth causes of action alleging "unlawful" assessment ceilings must be dismissed for failure to state claims.

(plain old telephone), amplifying equipment, mobile telephone equipment, small private branch exchanges and teletypewriter equipment ... including drop wires from the telephone pole to the block and wires from the block to the house wire" (*id*. at 609, quoting SBEA Explanation of Terminology at 3-4, Bill Jacket, L 1987, ch 416, and Feb. 1, 1984 SBEA Mem attached to 1985 SBEA Report at 2)(internal quotations omitted).

[13]In the absence of a Third Department decision directly on point, this court is bound to follow the legal precedents set by other Departments of the Appellate Division (see *Oswald v. Oswald*, 107 AD3d 45, 47 [3d Dept. 2013]; *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, 664 [2d Dept. 1984]).

V. Equal Protection Claims

The Court turns to the fifth and sixth causes of action for discriminatory taxation and selective assessment.

"The Equal Protection Clause 'imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of State taxation'" (*Port Jefferson Health Care Facility v. Wing*, 94 NY2d 284, 290 [1999], quoting *Allied Stores v. Bowers*, 358 US 522, 526-527). "Neither the Federal nor the State Constitution 'prohibit[s] dual tax rates or requires that all taxpayers be treated the same'" (*Tax Equity Now NY LLC v. City of New York*, 2020 NY App Div LEXIS 1465, at *7 [1st Dept. 2020], quoting *Foss v. City of Rochester*, 65 NY2d 247, 256 [1985]). Accordingly, "'the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class'" (*Matter of Sullivan Farms, II, Inc. v. Assessor of the Town of Mamakating*, 179 AD3d 1176, 117 NYS3d 324, 325-326 [3d Dept. 2020], quoting *Foss v. City of Rochester*, 65 NY2d 247, 256 [1985]). Thus, in matters of taxation, the Equal Protection clause does not preclude "State Legislatures from drawing lines that treat one class of individuals or entities differently from others unless the difference in treatment is 'palpably arbitrary' or amounts to an 'invidious discrimination'" (*Matter of Trump v. Chu*, 65 NY2d 20, 25 [1985], *app dismissed*, 474 US 915 [1985], citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 US 356, 360; see also *Foss v. City of Rochester*, 65 NY2d 247, 256-257 [1985]).[14]

In their fifth cause of action, the Petitioners assert that the RPTL 102(12)(i) includes for

[14]The review of any differences in taxation is the same under both Federal and State Constitutions and "'is subject to the lowest level of judicial review, whether any rational basis supports the legislative choices'" (*Matter of DaimlerChrysler Co., LLC v. Billet*, 51 AD3d 1284, 1287 [3d Dept. 2008], quoting *Port Jefferson Health Care Facility v. Wing*, 94 NY2d at 289; *Tax Equity Now NY LLC v. City of New York*, 2020 NY App Div LEXIS 1465, at *7 [1st Dept. 2020], citing *Matter of Walsh v. Katz*, 17 NY3d 336, 343 [2011]).

purposes of taxation conduits or inclosures of coaxial cables that transmit voice, video or data signals, whereas it excludes from taxation conduits or inclosures of fiber optic cables that likewise transmit voice, video or data signals. The Petitioners maintain that this distinction resulted from the Court of Appeals decision in *Matter of T-Mobile Northeast, LLC*, *supra*, when the Court held that the phrase 'for electrical conductors' modifies only 'inclosures' in RPTL 102(12)(i)(*Matter of T-Mobile Northeast*, LLC, 32 NY2d at 608). The Petitioners allege that "[t]he inclusion of conduits for coaxial cables in taxable real property...and the exclusion of conduits for fiber optic cables from taxable real property under RPTL 102(12)(i) constitutes invidious discrimination and is palpably arbitrary" (*Verified Petition*, ¶90). The Petitioners allege that "RPTL 102(12)(i) is unconstitutional and invalid because it imposes demonstrably different tax burdens on functionally indistinguishable properties without any rational basis" (*id.*, 91).

Even assuming the truth of these allegations, the Petitioners fail to state a claim upon which relief could be granted. The Petitioners essentially contend that real property consisting of conduits or inclosures of coaxial cables is subject to taxation, while conduits or inclosures of fiber optic cables are not, even though the properties achieve the same objective in the delivery of voice, video or data signals.[15] However, fiber optic cables and conduits are taxable real property under the Statute (RPTL 499-hhhh[2]; RPTL 102[12][i]). Further, as mentioned above, fiber optic cables and the conduits enclosing the fiber optic cables have been determined to constitute taxable real property (*Matter of Level 3 Communications, LLC v. Erie County*, 174 AD3d at 1502). The petition, in any event, is devoid of any factual allegations to support the Petitioners' claims of "invidious discrimination" or that the application of the Statute is "palpably arbitrary."

[15]The Petitioners do not allege that they own coaxial cables and conduits or inclosures of such coaxial cables for which they would be liable to pay property taxes.

The Petitioners' sixth cause of action is for alleged "selective assessments" in violation of the Equal Protection clauses. The Petitioners allege that the Commissioner does not determine assessment ceilings for similar property owned by cable television companies located within the Respondent local assessing units. The Petitioners allege that the Respondent local assessing units do not assess and impose real property tax on similar properties owned by cable television companies located within their jurisdictions. The Petitioners allege that, even assuming that their own properties are taxable real property, the Commissioner's failure to determine assessment ceilings for "functionally indistinguishable properties of cable television companies" violates the Petitioners' rights to equal protection of the laws. The Petitioners similarly allege that the failure of the Respondent local assessing units to assess and impose real property tax on such properties owned by cable television companies violates the Petitioners' rights to equal protection of the laws. The Petitioners claim that the Commissioner's final assessment ceilings are unconstitutional, should be annulled and be reduced to $0. The Petitioners further ask the court to invalidate the assessments and imposition of taxes by the Respondent local assessing units upon the Petitioners' properties.

Generally, a municipality may not selectively reassess (or assess) real property without a rational basis (*see Matter of Harris Bay Yacht Club, Inc. v. Town of Queensbury*, 68 AD3d 1374, 1375 [3d Dept. 2009]; *Niagara Mohawk Power Corp. v. State of New York*, 300 AD2d 949 [3d Dept. 2002]; *Matter of Krugman v. Board of Assessors,* 141 AD2d 175 [2d Dept. 1988], *appeal dismissed* 73 NY2d 872). As discussed above, the Commissioner does not "assess" the subject properties; rather, the local assessing units assess and levy taxes upon the Petitioners' properties, subject to the Commissioner's final determination of ceilings, or caps, on valuations (*see* RPTL 499-jjjj).

The Petitioners make conclusory and generalized allegations that the local assessing units are not assessing similar properties owned by cable television companies. There are no factual

allegations asserted in support of this cause of action demonstrating that any of the Respondents are not similarly assessing properties owned by cable television companies in their respective jurisdictions. The Petitioners' sweeping conclusions, in the absence of any supporting factual allegations, are too vague to withstand the Respondents' motions.

Moreover, even assuming the truth of these generalized allegations, the Petitioners do not state a claim upon which relief could be granted. Real property owned by cable television companies located on private rights of way is assessable by local assessing units (*see* 3 Op Counsel SBEA No. 31). Cable television companies that own properties on or in public rights of way constitute "special franchises" subject to assessments by the Commissioner pursuant to RPTL article 6 (*see* RPTL article 6; RPTL 102[17]; 1 Op Counsel SBEA No. 38 and No. 71). The Petitioners' conclusory allegations fail to set forth a cognizable claim of a violation of equal protection.

An exception to assessments exists for property used in the transmission of news or entertainment radio, television or cable television signals (*see* RPTL 102[12][i][D]). The exception applies to property for which its primary purpose is the transmission of of news or entertainment radio, television or cable television signals. Applicability of the exception turns on the primary purpose or usage of the property, not the type of owner of the property. Notably, the Petitioners do not allege that their properties are primarily or exclusively used for the transmission of news or entertainment radio, television or cable television signals such that they would likewise qualify for the exception (*see Matter of Level 3 Communications, LLC v. Erie County*, 174 AD3d at 1501).

Even assuming that cable television companies are treated differently, such difference in treatment arises from relevant Federal and State law. Cable television companies are required to pay municipalities franchise fees representing a percentage of their gross revenue or earnings, which, in turn, are credited against special franchise assessments pursuant to RPTL 626 (*see* 47 USC 541, 542;

Public Service Law 219; 4 Op Counsel SBEA No. 110). The scheme requiring cable television companies to pay a percentage of their gross revenue or earnings, while in turn permitting them to receive a credit in the amount of such payments against their real property taxes and to except certain qualifying properties from taxation pursuant to RPTL 102(12)(i)(D), does not alone demonstrate treatment that is irrational. The Court discerns no further allegations demonstrating anything invidious or palpably arbitrary about the RPTL 102(12)(i)(D) exception. That the Commissioner and/or local assessing units exclude from assessment ceilings and assessments such properties primarily or exclusively used for these stated purposes–including those properties owned by cable television companies–pursuant to the exception, does not state a cognizable claim for selective assessment.

In opposing the motions, the Petitioners point to excerpts from Charter Communication's Form 10-K filed with the Securities and Exchange Commission for the year ending on December 31, 2018[16] (see *Nicolich Aff. in Opposition*, [NYSCEF Doc. No. 103], ¶¶ 53-54; Exhibit N).The Petitioners contend that Charter's Form 10-K supports their allegations that the properties owned by the cable television companies such as Charter are not primarily used in the transmission of news or entertainment radio, television or cable television signals such that they do not qualify for the RPTL 102(12)(i)(D) exception. Even assuming the truth of the contents, the form sets forth a summary of Charter's annual operations throughout the United States. The form broadly and generally sets forth, *inter alia*, Charter's business operations, services and property holdings; the excerpt does not provide relevant factual allegations sufficiently particular to the Respondents. From this filing it is quite impossible to discern, identify or correlate any of Charter's particular cable

[16]A Form 10-K is used for annual reports that must be filed with the United States Securities and Exchange Commission (see www.sec.gov/files/form10-k.pdf)

properties in any of the Respondents' respective jurisdictions allegedly not primarily used in the transmission of news or entertainment radio, television or cable television signals.[17] Here, "[m]ore is needed to state a claim...than factual allegations which are conclusory [and] vague" (*Matter of Niagara Mohawk Power Corp. v. State*, 300 AD2d at 952). The Court finds that Charter's Form 10-K does not supply the necessary factual allegations to support the Petitioners' cause of action for selective "assessment ceilings" by the Commissioner or "selective assessments" by the Respondents.

Conclusion

Those motions or arguments not specifically addressed herein were unpersuasive or found to be rendered academic in light of the determinations herein.

Based upon the foregoing, the Court finds that the *Verified Petition* must be dismissed in its entirety.

Accordingly, it is hereby

ORDERED, that the motions to dismiss are granted. The *Verified Petition* filed on September 19, 2019 is dismissed in its entirety; and it is further

ORDERED, that the notice of cross-motion filed on November 22, 2019 on behalf of Petitioners for extension of time to serve is denied as moot.

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[17]Even taking the issue of mobile services, the Court finds that the allegations are likewise insufficient and speculative to support a valid cause of action. Charter's Form 10-K discloses its recent launch of Spectrum mobile services to residential customers. According to the Form 10-K, Charter has an "MVNO" [which] is a "mobile virtual network operator. . .reseller agreement with Verizon Communications, Inc. ("Verizon")" (Exhibit N, p. 1). Charter's Form 10-K states that these mobile services are provided by it "as an MVNO which allows us [Spectrum mobile] to deliver service over Verizon's network and our network of Spectrum WiFi hotspots" (Exhibit N, p. 16). Even crediting Charter's Form 10-K for purposes of evaluating the sufficiency of the pleadings, its Spectrum mobile services are delivered using Verizon's network installations, i.e., over properties owned by Verizon.

This constitutes the *Decision and Order* of the Court. The Court has uploaded the original electronically signed *Decision and Order* to the case record in this matter maintained on the NYSCEF system whereupon it is to be entered and filed by the Office of the Albany County Clerk. Counsel for moving Respondents Michael B. Risman, Esq. [NYSCEF motion #3], is designated to serve with notice of entry in accordance with the provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts upon all other parties to the proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party. Said service with notice of entry may be done as soon after entry and filing are made by the Albany County Clerk's Office.

So Ordered.

Dated: May 13, 2020

Margaret T. Walsh
Supreme Court Justice

E N T E R:

05/15/2020

Papers considered on motions:

(1) *Notice of Motion to Dismiss* by Higgins, Roberts & Suprunowicz, P.C. dated November 1 2019, with *Affidavit in Support* of Michael E. Basile, Esq., sworn to on November 1, 2019, with Exhibits A and B annexed; *Affidavit* of Cynthia Gagnon, sworn to on October 31, 2019; *Memorandum of Law* [NYSCEF motion #2]

(2) *Notice of Motion to Dismiss* by Hodgson Russ LLP dated November 6 2019, with *Affirmation in Support* of Michael B. Risman, Esq., affirmed November 6, 2019, with Exhibits A through F annexed [NYSCEF motion #3];

(3) *Notice of Motion to Dismiss* by Gibson, McAskill & Crosby dated November 8, 2019, with Affidavit of Milton Bradshaw, sworn to on November 8, 2019; *Affirmation of Michael J. Willett, Esq.,* affirmed November 8, 2019 [NYSCEF motion #4];

(4) *Affirmation in Support of Motion to Dismiss* by Dennis D. Michaels, Esq., Deputy Town Attorney of the Town of Orangetown, sworn to on November 12, 2019;

(5) *Notice of Motion to Dismiss* by City of Elmira, by John J. Ryan, Jr., Esq., Corporation Counsel, dated November 13, 2019, with *Affidavit* of Bruce Stanko sworn to on November 13, 2019; *Affirmation* of John J. Ryan, Jr., Esq. affirmed November 13, 2019 [NYSCEF motion #5];

(6) *Affirmation in Support of Motion to Dismiss* by Andrew K. Preston, Esq., Bee Ready Fishbein Hatter & Donovan, LLP, attorneys for Village of Garden City, affirmed November 14, 2019;

(7) *Notice of Cross-Motion to Dismiss* by Cooper Erving & Savage, LLP dated November 18, 2019, with *Affidavit* of David C. Rowley, Esq., sworn to on November 18, 2019, with Exhibits A through D annexed; *Affidavit* of Kathleen Wetmore, sworn to on November 18, 2019, with Exhibit A annexed; *Memorandum of Law* [NYSCEF motion # 7];

(8) *Notice of Motion to Dismiss* by Coughlin & Gerhart, LLP dated November 18, 2019, with Affidavit of Sherrie Jacobs sworn to on November 15, 2019; Affidavit of Gayle M. Diffendorf sworn to on November 15, 2019; Affidavit of Cindy Kennerup sworn to on November 15, 2019; Affidavit of Cindy Motter sworn to on November 15, 2019; Affidavit of Leonard J. Perfetti sworn to on November 16, 2019; Affidavit of Veronica N. Ramirez, Esq., sworn to on November 18, 2019; Memorandum of Law [NYSCEF motion #8];

(9) *Affirmation of John G. Nicolich, Esq., in Opposition to Motion to Dismiss*, affirmed November 18, 2019, with Exhibits A through O annexed; *Memorandum of Law in Opposition*;

(10) *Notice of Cross-Motion* by Paul Briggs, Esq., Town Attorney, Town of Niskayuna, dated November 19, 2019, with *Affirmation* of Paul Briggs, Esq. affirmed November 19, 2019 [NYSCEF motion #9];

(11) *Notice of Motion to Dismiss* by Hodgson Russ LLP dated November 19, 2019 with *Affirmation in Support* of Michael B. Risman, Esq., affirmed November 19, 2019 [NYSCEF motion #10];

(12) *Notice of Motion to Dismiss* by Hodgson Russ LLP dated November 19, 2019 with *Affirmation in Support* of Michael B. Risman, Esq., affirmed November 19, 2019 [NYSCEF motion #11];

(13) *Affidavit in Support of Motion to Dismiss* by Charles W. Engelbrecht, Esq., attorney for City of Rome, sworn to on November 19, 2019;

(14) *Affidavit in Support of Motion to Dismiss* by Joanne A. Schultz, Esq., Senior Deputy Attorney of the Town of Amherst, affirmed November 21, 2019;

(15) *Affirmation of John G. Nicolich in Opposition to Motion to Dismiss by Respondent City of Binghamton*, affirmed November 22, 2019, with Exhibits A and B annexed;

(16) *Affirmation of John G. Nicolich in Opposition to Motion to Dismiss by Intervenor-Respondent Frontier Central School District*, affirmed November 22, 2019, with Exhibits A and B annexed;

(17) *Affirmation of John G. Nicolich in Opposition to Motion to Dismiss by Respondent City of Elmira*, affirmed November 22, 2019, with Exhibits A through D annexed; Memorandum of Law in Opposition;

(18) *Affirmation of John G. Nicolich in Opposition to Motion to Dismiss by Intervenor-Respondent Shenendehowa Central School District*, affirmed November 22, 2019, with Exhibits A through F annexed; *Affidavit* of Michael Keating sworn to on November 22, 2019 with Exhibits A and B annexed; *Memorandum of Law in Opposition*;

(19) *Notice of Cross-Motion to Extend Petitioners' Time to Serve Notice of Petition and Petition* by Ingram Yuzek Gainen Carroll & Bertolotti,, LLP dated November 22, 2019; *Affirmation* of John G. Nicolich, Esq., dated November 22, 2019, with Exhibits A through I; *Affidavit* of Michael Keating, sworn to on November 22, 2019, with Exhibits A and B; and *Memorandum of Law* [NYSCEF motion #12];

(20) *Notice of Motion to Dismiss* by Bennett, DiFilippo & Kurtzhalts LLP dated December 6, 2019, with *Affirmation* of Maura C. Seibold, Esq. affirmed December 6, 2019 with Exhibit A annexed; *Affidavit* of Jason C. Shell, sworn to on December 6, 2019 [NYSCEF motion #13];

(21) *Notice of Motion to Dismiss* by Bennett, DiFilippo & Kurtzhalts LLP dated December 6, 2019, with *Affirmation* of Maura C. Seibold, Esq. affirmed December 6, 2019 with Exhibit A annexed; *Affidavit* of Milton Bradshaw, sworn to on December 6, 2019 [NYSCEF motion #14];

(22) *Reply Affirmation* of Michael J. Willett, Esq., affirmed December 11, 2019, with Exhibits A and B annexed; *Memorandum of Law in Reply*;

(23) *Notice of Motion to Dismiss* by Lippes Mathias Wexler Friedman LLP dated December 12, 2019, with Affirmation of James P. Blenk affirmed December 12, 2019 [NYSCEF motion #15];

(24) *Notice of Cross-Motion to Dismiss* by Roach, Brown, McCarthy & Gruber, P.C. dated December 12, 2019, with *Affirmation* of Meghann N. Roehn, Esq. affirmed December 12, 2019, with Exhibits A and B annexed [NYSCEF motion #16];

(25) *Notice of Cross-Motion to Dismiss* by Roach, Brown, McCarthy & Gruber, P.C. dated December 12, 2019, with *Affirmation* of Meghann N. Roehn, Esq. affirmed December 12, 2019, with Exhibits A and B annexed [NYSCEF motion #17];

(26) *Reply Affirmation in Support of Motion to Dismiss and in Opposition to Verified Petition* by Michael B. Risman, Esq., affirmed December 13, 2019;

(27) *Affirmation in Opposition to Motion to Dismiss by Respondent City of Buffalo* by John G. Nicolich, Esq., affirmed December 18, 2019, with Exhibits A through O annexed; *Memorandum of Law in Opposition*;

(28) *Reply Affirmation in Support of Cross-Motion to Dismiss* by David C. Rowley, Esq., affirmed December 18, 2019;

(29) *Affirmation in Opposition to Motion to Dismiss by Respondent Town of Orchard Park* by John G. Nicolich, Esq., affirmed December 18, 2019, with Exhibits A through O annexed; *Memorandum of Law in Opposition*;

(30) *Affirmation in Opposition to Motion to Dismiss by Intervenor-Respondent County of Erie* by John G. Nicolich, Esq., affirmed December 18, 2019, with Exhibits A through J annexed; *Memorandum of Law in Opposition*;

(31) *Notice of Motion to Dismiss* by City of Utica, dated December 19, 2019, with *Affirmation* of Kathryn F. Hartnett, Esq., Assistant Corporation Counsel affirmed December 19, 2019 [NYSCEF motion #18];

(32) *Reply Affirmation* of Maura C. Seibold affirmed December 19, 2019;

(33) *Reply Affirmation* of Maura C. Seibold affirmed December 19, 2019;

(34) *Affirmation in Opposition to Cross-Motions by Intervenors-Respondents Lake Shore Central School District and Lancaster Central School District* by John G. Nicolich, Esq. affirmed December 19, 2019, with Exhibits A through Q annexed; *Memorandum of Law in Opposition*;

(35) *Affirmation in Opposition to Cross-Motions by Respondent City of Utica* by John G. Nicolich, Esq. affirmed December 20, 2019, with Exhibits A and B annexed; *Memorandum of Law in Opposition*;

(36) *Notice of Petition* and *Verified Petition* filed on September 17, 2019.