**New York's History with Telecommunications Lobby's Efforts to Replace Historic Municipal Franchising Regimes for Telecommunications with Centralized State Franchising, and Corresponding Influence of Regulatory Regime Upon Fios Buildout Outcomes**[1]

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# Introduction

This white paper analyzes, first, the telecommunications industry's targeted efforts in New York, starting around 2005, to lobby for state legislation preempting municipal authority to negotiate franchises with telecommunications companies for use of the public rights-of-way, and New York's subsequent regulatory approach to the telecommunications industry. This paper further contextualizes New York's regulatory choices from the early 2000s by evaluating the success of its FiOS buildout contract with Verizon.

## Issue

New York State has typically reserved the authority to issue rights-of-way ("ROW") franchises to telecommunications companies to municipal authorities. Beginning in 2005, telecommunications companies began lobbying for legislation to limit municipal regulatory authority, cap fees and cost recovery related to franchising and operations, and create a single statewide franchising. Proponents of the legislation argued that reducing costs and local variance associated with franchising would encourage competition, incentivize network buildout, and ultimately reduce prices for consumers.

Has New York made any legal or regulatory changes to limit municipal regulatory authority over telecommunications franchising? How have New York's regulatory choices impacted the availability and affordability of broadband connectivity in the New York markets?

## Answer

No, New York has not made legal or regulatory changes limiting municipal regulatory authority over telecommunications franchising. Although New York lawmakers—echoing sentiment espoused in federal law—have repeatedly espoused a preference for allowing competitive market forces to operate freely and without undue regulatory intervention,[2] New York policymakers have also consistently recognized the

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[2] On January 25, 2006, initiating a survey regarding the competitive and technological conditions of the broadband market at the time, the New York Public Utility Commission ("PUC") took pains to reiterate its longstanding principle of "presum[ing] that competition is the most efficient way of ensuring the provision of quality utility services at reasonable prices." Proceeding on Motion of the Commission to Examine Issues Related to the Deployment of Broadband over Power Line Technologies. NYPSC Order Initiating Proceeding, Case No. 06-M-0043, January 25, 2006.

need for antitrust and consumer protection regulation in industries—such as telecommunications—where incumbents have structural anticompetitive advantages.

Starting in 2005—following the deregulatory wake of the Telecommunications Act of 1996—the telecommunications industry began promoting legislation to further deregulate the industry and remove the regulatory powers of municipalities. In promoting its legislation, the telecommunication lobby claimed that reducing the expense and regulation associated with operations would naturally lead market forces to become more competitive, thereby reducing prices for consumer and encouraging network distribution. Rather than accept these assertions as true without evidence, New York lawmakers commissioned the Public Utilities Commission ("PUC") to investigate the potential impact of such legislation. The PUC has consistently produced white papers in favor of maintaining regulatory control for the purpose of maintaining competitive balance and customer protection. The industry has proposed similar, if watered-down, legislation in each session since 2005, but no bill of this nature has ever been adopted into law.

Although the telecom lobby initially promoted the legislation as public "rights-of-way legislation" (also "ROW legislation") geared toward creating a centralized state franchising authority to administer the rights-of-way ("ROW"), the legislation as initially proposed was much broader and its provisions were calculated to undermine the municipal franchising authority's negotiating position. Under the initial legislation, the franchisor would have had no discretion to deny franchise applications that facially complied with the franchise requirements, its decision would have been subject to multiple appeals, and the franchisor could have been held liable for attorney fees and costs for denied applications. The legislation also would have reduced or shifted costs traditionally borne by the franchisee (such as costs associated with building permitting), carved out for franchisees an exception to legal liability even for gross negligence in building and operating their facilities under state tort laws, avoided disclosure and production requirements, accelerated the franchising and construction permitting process, and required uniform terms for all franchisees. Subsequent proposals have been far less aggressive, but as of this writing New York has left its legislative framework unchanged.

In addition to its legislative proposals, telecommunications companies have sought approval of new or renewed franchise agreements containing modified contractual terms in line with the provisions it has promoted through legislation. The PUC has consistently refused to exercise its regulatory authority to approve franchise agreements that include terms inconsistent with the established legislative and regulatory structure.

This paper will, first, discuss the national regulatory structure, New York State regulatory structure, the legislation proposed by the telecommunications companies, and terms of New York City franchises negotiated and enacted by municipalities subsequent to 2005. Subsequently, this paper will consider the 2008 franchise agreement Verizon entered into with New York, and consider how effective New York's statutory and regulatory framework has been in helping New York City to achieve its objectives with respect to broadband deployment across the city.

## Discussion

This paper discusses, first, the regulatory structure that applies to telecommunications in New York City, from the national to the local. Second, this paper discusses so-called "Right-of-Way" legislation repeatedly proposed in New York starting in 2005, and will analyze the rationale set forth by the legislation's proponents, problems with the legislation, and the ultimate fate of the legislation in the state. Third, this paper considers common and oft-repeated terms of approved telecommunications franchise agreements that New York City entered into with various providers since 2005. Fourth, this paper looks specifically at the franchise agreement that New York City entered into with Verizon in 2008, which is notable insofar as it includes contractual provision for Verizon to complete FiOS buildout to one-hundred percent of New York City. Fifth, this paper analyzes how New York State's regulatory posture has impacted New York City's ability to achieve its long-term objectives with respect to telecommunications service generally, and with respect to FiOS buildout specifically.

## I. Telecommunications Regulation: Legislative Historical Background, Federal Statutes, Agency Involvement, and New York State Regulation.

All levels of government are involved with the regulation of broadband-as-internet. This overview sets forth A) the historical development of the telecommunications regulatory structure, B) federal law regarding telecommunications franchising authority, C) FCC involvement, and the D) New York State regulatory structure.

### A. Historical Development of the Telecommunications Regulatory Structure

The Federal Communications Commission ("FCC") regulates internet provided over a traditional cable connection by virtue of authority established under Communications Act of 1934 (subsequently amended by the Telecommunications Act of

1996).[3] Antitrust objectives have been part of the FCC's mandate with respect to telecommunications ever since the Clayton Antitrust Act of 1914, that extended the FCC's rulemaking powers to include antitrust considerations.[4]

The Communications Act of 1934 did not explicitly grant the FCC authority to regulate cable—neither as television, nor as internet. Instead, when cable arose as a new form of telecommunications, the FCC exercised *as implied* its authority over cable, and the FCC's decision to do so was subsequently upheld by the Supreme Court.[5]

The Cable Communications Act of 1984 amended the Communications Act of 1934 to create guidelines for national cable regulation.[6] Among other things, the 1984 amendment sought to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal,"[7] and to "promote competition in cable communications and minimize unnecessary regulation."[8]

The 1984 Cable Act arose in response to expressed concerns about franchise operators (that is, municipalities) extracting excessive concessions from the franchisees (telecommunications companies) and issuing unfair denials to franchise applicants. The 1984 Cable Act was precautionary legislation intended to avoid the growing problem of allowing a multiplicity of regulatory schemes to emerge from each municipality.

The 1984 Cable Act also included additional cable regulations—most significantly, restrictions upon competition with local telephone companies—that were removed through the subsequent passage of the Telecommunications Act of 1996 ("the 1996 Act").[9] The 1996 Act represented a deregulatory shift that removed barriers to market entry into cable television by allowing telephone companies to enter into the market for provision of cable and other telecommunications service.[10]

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[3] Codified at 47 U.S.C. et. seq.

[4] Pub.L. 63-212, 38 Stat. 730, codified at 15 U.S.C. 12-27. (FCC guidelines for enforcing various considerations regarding antitrust, encouraging competitive markets, and limiting editorial influences of franchise operators).

[5] United States v. Sw. Cable Co., 392 U.S. 157, 165 (1968).

[6] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, sec. 601, 98 Stat. 2779, 2780 (1984) (codified at 47 U.S.C. § 521 et. seq. (2002)) (internal quotation marks omitted).

[7] 47 U.S.C. § 521(5).

[8] 47 U.S.C. § 521(6).

[9] Telecommunications Act of 1996 ("96 Act"), Pub.L. 104–104, Feb. 8, 1996, 110 Stat. 56.

[10] James G. Parker, Statewide Cable Franchising: Expand Nationwide Or Cut The Cord? 64 Fed. Comm. L.J. 199, 207 (2011).

### B. Federal Regulation Regarding Telecommunications Franchising Authority

Heading into the 21st century, one of the stated objectives of federal regulation in telecommunications was to establish uniform national broadband policy. "Uniform policy" has been advocated a means of promoting uniform national development of cable systems and orderly franchising processes, as well as a means of promoting competition and avoiding excessive regulation.[11]

Franchising authorities are defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise."[12] Franchising authority has historically rested with municipal authorities due to their traditional authority over public rights-of-way.[13] Federal law leaves authority with states or municipalities—at the state's option—to negotiate individually with telecommunications companies seeking franchises to conduct operations within the municipality.[14] Under the federal statute, franchising authorities retain significant discretion to negotiate franchising terms.[15] Franchising authorities have the authority to establish customer service requirements,[16] construction-related requirements,[17] consumer protection laws,[18] and consumer protection laws.[19] They may charge a franchising fee up to five percent of a company's gross annual operations.[20] They are limited by antitrust considerations.[21] ("A franchising authority may award . . . [one] or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not

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[11] 47 U.S.C. § 521 (federal, state, and local authorities share authority). 47 U.S.C. § 556. (federal conflict preemption only).

[12] 47 U.S.C. § 522(10).

[13] Nat'l Ass'n of Telecomms. Officers & Advisors, Local Government Principles Relating to Rights-of-Way Management and Compensation & Ownership of Telecommunications Facilities 2, (Aug. 20, 1998), http://www.natoa.org/documents/Local_Government_Principles_Relating_to_Rights-of-Way.pdf.

[14] 47 U.S.C. § 541(a)(1).

[15] 47 U.S.C. § 541 (describes the authority and duties of franchising authorities) and 47 U.S.C. § 1504 (setting forth guidelines for the future deployment of broadband).

[16] 47 U.S.C. § 552(a)(1) & (b).

[17] 47 U.S.C. § 552(a)(2).

[18] 47 U.S.C. § 552(d)(1).

[19] 47 U.S.C. § 552(b) & (d)(2).

[20] 47 U.S.C. § 542(b).

[21] 47 U.S.C. § 541(a)(1).

unreasonably refuse to award an additional competitive franchise.") Franchising authorities "may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition."[22]

To the extent that franchising authorities are broadly distributed at a municipal level, rather than state or federal level, a cable operator seeking to deploy broadband on a nationwide scale conceivably may be required to adhere to differing terms and continuing requirements set forth in franchise agreements individually negotiated with each of the nearly twenty-thousand municipal governments across the United States.[23]

To minimize this regulatory burden, large telecommunications companies—most prominently Verizon and AT&T—have lobbied to consolidate authority, first with the federal government and then with the states.[24]

### C. FCC Involvement

The FCC regulates broadband communications.[25] With respect to broadband, the degree to which equal access and consumer protection are assured is partially a result of how the service is classified. The provisions of 47 U.S.C. § 522 et. seq. explicitly regulate cable operators; however, the franchise requirements within the statute do not distinguish between cable as internet and cable as television.[26] Courts have struggled to determine whether cable internet companies are subject to regulation as an information service under Title I of the Communications Act and primarily subject to regulation by the FCC, or a telecommunications service under Article II of that Act, and thus subject to mandatory regulation as a common carrier (as telephone service is regulated), and subject to open access requirements.[27] In 2005, the Supreme Court

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[22] 47 U.S.C.A. § 541(b)(3)(D).

[23] Nat'l League of Cities. Number of Municipal Governments & Population Distribution, (accessed August 8, 2020), https://www.nlc.org/number-of-municipal-governments-population-distribution.

[24] James G. Parker, Statewide Cable Franchising: Expand Nationwide Or Cut The Cord? 64 Fed. Comm. L.J. 199, 206 (2011).

[25] Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359, 361 (D.C. Cir. 1963).

[26] *See* Section 602(6) of the 1996 Telecommunications Act. *See also* Christopher Duffy, *The Statutory Classification of Cable-Delivered Internet Service*, 100 Colum. L. Rev. 1251 (2000).

[27] Telecommunications providers who fall under Title II of the Communications Act are considered common carriers, and are required to make their infrastructure available to market competitors on reasonable and regulated terms. With open-access, the hope is

upheld the FCC determination that broadband is an information service under Title I of the Communications Act, and exempt from mandatory regulation as a common carrier.[28] The FCC rule was briefly changed in 2015 to classify broadband as a telecommunication service, but then changed back in 2017.[29]

### D. New York State Regulatory Structure

New York State has not made any substantive changes to its regulation of the telecommunication companies since 2005. This section analyzes 1) New York State telecommunications statutory framework, and 2) telecommunications regulations adopted by the New York Public Utility Commission. This represents the legislative framework as it was when the telecommunications lobby began its legislative push, and how it remains as of this writing.

### New York Telecommunications Statutory Framework

New York State regulates cable broadband through the New York Public Utility Commission (formerly, and as referenced by statute, the New York Public Service Commission, and hereafter referred to as "the PUC" or "PUC"). The duties of the PUC with respect to cable television companies (as well as cable internet) include supervision of the franchising process for municipalities across the state,[30] establishing minimum standards required for all franchisee applicants,[31] establishing minimum construction standards and specifications[32]; promoting cable development through liaisons within the industry[33]; and "[i]mplement[ing] the provisions of this article in a manner which is cognizant of the differing financial and administrative capabilities of

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that costly and duplicative infrastructure deployment can be avoided while simultaneously allowing competitive market forces to hold down prices, spur innovation, and protect consumer interests. In the absence of open access requirements, the incumbent would be all but assured a continuing monopoly because the initial cost of deploying a network would be prohibitively costly. Furthermore, the cost of deploying a second (or third) network would outstrip the benefit to society redundant networks owned by competitors.

[28] Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

[29] FCC Rcd. 17-166.

[30] N.Y. PUB. SERV. LAW § 215(2)(b) (McKinney 2020).

[31] N.Y. PUB. SERV. LAW § 215(2)(c) (McKinney 2020).

[32] N.Y. PUB. SERV. LAW § 215(2)(d) & (4) (McKinney 2020).

[33] N.Y. PUB. SERV. LAW § 215(10) (McKinney 2020).

companies of different sizes."[34] In service of its mandate to consider the differing capabilities of companies of different sizes, the PUC "may promulgate, issue, amend and rescind such orders, rules and regulations as it may find necessary or appropriate . . . . Such orders, rules and regulations **may classify persons and matters within the jurisdiction of the commission and prescribe different requirements for different classes of persons or matters**."[35] (Emphasis added.)

The PUC must approve all franchises before they may become effective,[36] and public hearings may be held if within the public interest.[37] Franchise authorities may charge franchise fees,[38] but "[i]n no event shall the amount billed to or collected from any cable television company pursuant to this section exceed two percent of the gross annual receipts of such company during the twelve month period designated by the commission."[39]

Transfers of control over any franchise for any reason must first be submitted by application to the PUC for approval,[40] nor may any automatically triggered provisions constituting a change in the terms of the agreement take place without prior approval of the PUC.[41] Franchisees are not permitted to abandon their franchises without, at minimum, six months' prior written notice to the PUC and the franchisor, and the terms of a franchise may prohibit abandonment of service altogether.[42]

Franchising authority remains explicitly with the municipal authority, and municipal authorities retain the authority to negotiate more favorable terms than those required by the PUC:

> 1. Notwithstanding any other law, no cable television system, whether or not it is deemed to occupy or use a public thoroughfare, may commence operations or expand the area it serves unless it has been franchised by each municipality in which it proposes to provide or extend service.

[34] N.Y. PUB. SERV. LAW § 215(11) (McKinney 2020).
[35] N.Y. PUB. SERV. LAW § 216 (McKinney 2020).
[36] N.Y. PUB. SERV. LAW § 221(1) (McKinney 2020).
[37] N.Y. PUB. SERV. LAW § 221(2) (McKinney 2020).
[38] N.Y. PUB. SERV. LAW § 218 (McKinney 2020).
[39] N.Y. PUB. SERV. LAW § 217 (McKinney 2020).
[40] N.Y. Pub. Serv. Law § 222 (McKinney 2020).
[41] Id.
[42] N.Y. PUB. SERV. LAW § 226 (McKinney 2020).

> 2. A municipality shall have the power to require a franchise of any cable television system providing service within the municipality. . . . The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises.
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> 3. Nothing in this article shall be construed to prevent franchise requirements in excess of those prescribed by the commission, unless such requirement is inconsistent with this article, any regulation, policy or procedure of the commission, or federal law.[43] (Emphasis added).

Unlike the proposed centralized state franchising authority, the PUC's authority only preempts local authority where there is a conflict of laws. The PUC retains broad authority to order broadband deployment, including in instances where the deployment was not set forth explicitly in the franchise itself:

> 2. Whenever . . . the commission finds that, despite its economic feasibility, the construction or operation of a franchised or certificated cable television system has been unreasonably delayed or that the extension of service to any persons or areas within a cable television company's territory has been unreasonably withheld, it may order such construction, operation or extension on such terms and conditions as it deems reasonable and in the public interest. . . .
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> 4. In a city with a population of more than one million, the commission shall designate areas where significant inconsistent installations of cable television systems may be proposed. . . . The commission may order or permit construction by a cable television company of its facilities in an inconsistent manner only upon such terms and conditions as shall ensure the availability of cable television service to the largest number of potential subscribers consistent with the character of the community and economic and technical feasibility.[44]

Franchisees must, within five years of receiving all necessary authorizations, provide service to all subscribers who request it, including those "in line extension areas who are willing to contribute to the cost of construction.[45] Redlining[46] prohibitions extend beyond buildout. Franchisees are prohibited from exercising price discrimination such that "[A]ny rate or rates found by the commission . . . to be discriminatory or preferential as between subscribers similarly situated shall thereafter be void."[47]

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[43] N.Y. Pub. Serv. Law § 219 (McKinney 2020)

[44] N.Y. PUB. SERV. LAW § 224 (McKinney 2020).

[45] N.Y. COMP. CODES R. & REGS. tit. 16, § 895.5(1) & (2).

[46] Within the telecommunications context, the term "redlining" refers to discriminatory service deployment that excludes lower-income areas from the provider's service network.

[47] N.Y. PUB. SERV. LAW § 225(3)(b) (McKinney 2020).

### Regulations adopted by the Public Utility Commission

The PUC has elected to require public hearings for franchise applications, and takes franchisee performance into account during franchise renewal.[48] Municipalities have authority to incorporate additional terms and conditions in their negotiated franchises (notably, putting the franchise authority in a position to negotiate with the franchisee for the benefit of constituents).[49]

The franchisee must agree to buildout into a legislatively defined service area as a condition of obtaining the franchise. A franchisee must provide service to all subscribers within the primary service area (defined by population density), and must share buildout costs, pursuant to a preset formula, with all potential subscribers outside of the primary buildout area along the line extension area.[50] The primary service area requirement is designed to protect against redlining—the practice of developing wealthier areas, where more lucrative services are likely to be sold, to the neglect of lower income areas which then are left with no service options. The PUC has discretion to waive buildout requirements that it deems under the circumstances to be infeasible.[51]

## II. Proposed "State Rights-Of-Way" Legislation: Rationale, Problems, and Outcome

The legislation promoted by the telecommunication lobby, as first proposed in 2005 as S07263 in the senate and A08039 in the general assembly, was called the "state public rights-of-way act." If passed, the legislation would have added a new article to the General Municipal Law of New York, removing municipal authority to authorize telecom franchises to a newly created central state agency, leaving to municipalities only authority to govern municipal rights-of-way and to issue construction permits.[52] The rationale for the legislative proposal was the creation of uniform, nondiscriminatory policies to encourage entry into the market by a multiplicity of competitive telecommunications companies.[53]

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[48] N.Y. Comp. Codes R. Regs., tit. 16, § 895.1 (2020).

[49] N.Y. Comp. Codes R. Regs., tit. 6, § 895.2 (2020).

[50] N.Y. Comp. Codes R. Regs., tit. 16, § 895.5 (2020).

[51] N.Y. Comp. Codes R. Regs., tit. 16, § 895.5 (2020).

[52] A08039 § 990-d.

[53] Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services. NYPSC Order Initiating Proceeding, Case No. 05-C-0616, June 15, 2005.

However, it proposed many limitations on state subdivisions beyond merely assigning authority to issue franchises to the state. The effect of many of the provisions would have been to reduce or eliminate the ability of the municipality to negotiate with prospective franchisees for the right to access the public right of way. Municipalities would no longer have had the right to extract concessions—such as requiring broadband buildout into less profitable locations—in exchange for issuance of franchising permits. Proponents of the new legislation would argue that reducing the cost of doing business within any municipality would lead to the inevitable market consequence of reducing prices to consumers in the form of passed along savings. Proponents further proposed that reducing barriers to market entry would encourage more competition to enter the market, leading to improved market outcomes through competitive forces, negating the need for regulatory mechanisms.

New York did not, however, take these claims at face value. In a white paper the PUC analyzed current market conditions for telecommunications within the state and made recommendations at odds with those made by the telecom lobby. [54]

One of the PUC's primary stated objectives is to encourage competitive conditions and create a level playing field amongst telecom competitors. Amongst the PUC's findings in its white paper was that although "[i]n theory, a level playing field requires that the regulation of network interconnection be consistent and non-discriminatory," in fact the creation of a level playing field may require disparate treatment of incumbents and new entrants.[55] This fundamental regulatory approach would have been upset by the proposed ROW legislation, and would have led to conditions that arguably favored market incumbents under the guise of equality in regulation. The proposed ROW legislation included frequent admonitions that all telecom providers must be treated identically, without any discrimination with respect to rates and terms. The PUC rightly noted the need to regulate conditions to keep monopoly forces from rendering them anticompetitive. Particularly in the realm of telecom, where replicating

[54] The State of New York Public Service Commission initiated a generic administrative proceeding on June 15, 2005, Case 05-C-0616, Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services. Among a litany of other policy issues and questions, the investigation sought to determine 1) whether proliferation of competitive conditions could justify relaxing consumer protections, 2) whether universal service goals articulated a decade earlier remained valid, and 3) how best to pursue the objective of affordable basic telecommunications service.

[55] Id. at 95.

existing communications structures may be prohibitively costly, monopolistic bottlenecks are common and pervasive.[56]

The overall effect of the legislation would have been to deprive the municipality of any discretion with respect to the issuance of rights-of-way construction permits. The legislation would also have dramatically shifted the locus of cost sharing away from the franchisee to the point where operational costs would almost certainly be borne by the municipality, and it would have eliminated virtually all regulatory authority currently held by the municipality.

More specifically, the legislation would have prohibited any political subdivision from collecting from the franchisee anything beyond actual costs sustained from the franchisee's use of the rights-of-way,[57] abolished the right of a subdivision to charge franchise fees,[58] set the construction permit application fee at no more than fifty dollars and required the application to be fully processed within ten days,[59] and barred any conditions of the municipality that might constitute a "barrier to entry."[60] The legislation would have created a cause of action permitting franchise applicants to pursue judicial review against any governmental subdivision violating the article, and awarded attorney fees to the prevailing party,[61] created broad provisions for mutual indemnification,[62] limited recovery for franchisee failure to adhere to buildout schedules to actual losses suffered by the political subdivision,[63] permitted franchisees to abandon their franchises, permitted franchisees to transfer their franchises to new owners subject only to providing notice of the transfer to the political subdivision, and required subdivisions to treat all franchise applicants the same. The proposed legislation would have prohibited municipalities from requiring franchise applicants to

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[56] Id. at 95.

[57] A08039, § 990-e.

[58] Id. § 900-a(b).

[59] Id. § 990-f. (The legislation specifies that the fifty-dollar fee covers all costs relating to the review and issuance of the construction permit. By these murky provisions, the municipality would not be compensated in fact for actual costs associated with the review and issuance of the construction permit, but would be limited to fifty dollars recovery. The municipality would be forced to operate at a loss to process building permit applications.)

[60] Id. § 990-d(d).

[61] Id. § 990-h.

[62] Id. § 990-j.

[63] Id. § 900-1(b).

agree to any contractual arrangements beyond the terms of the article, and barred municipalities from requiring fees, rents, or compensation for use of the public rights-of-way, including "free conduit, fiber or services for [sic] any other fee of a similar nature."[64] Municipalities would be prohibited from any form of regulation of services, rates, terms, or conditions.[65]

## III. Analysis of Common Terms of Negotiated Telecommunications Franchise Agreements in New York City Since 2005

The franchise agreements in place after the telecommunication companies commenced their lobbying efforts in 2005 are indicia of the implications and that the franchising regulatory structure in New York State have had on its municipalities. New York City has made franchising agreements with Verizon, Time Warner, and Cablevision,[66] as well as smaller companies such as Lextent Metro Connect, LLC, Mobilitie Investments II, LLC, Citybridge LLC, and Zenfi Networks, LLC. The differing contract terms appear to reflect the PUC's mandate to consider the size of the company in carrying out its regulatory responsibilities. The agreements show that the franchising authorities issued the franchise agreements to each of the companies on different terms. Additionally, New York City and its internal boroughs had the flexibility to negotiate either individually or collectively, depending upon their interests. The agreements also show that companies would negotiate cash payments as an alternative to compliance with statutory requirements, and that the municipalities negotiated for franchise fees.

While there are many terms that merit attention, following is a limited analysis focusing on I) deployment requirements and II) franchising fees.

- **Deployment Requirements**

Franchises regularly require companies to build or deploy infrastructure according to negotiated terms. These deployment requirements are of special significance because they protect against the risk that companies will seek to maximize profits by building service capabilities only to geographical locations where they expect to be able to maximize profits. Municipalities within New York State have both the authority and the

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[64] Id. § 900-e(d)(i) and (ii).
[65] Id. § 900-e(d)(iii).
[66] NYC DOITT: Information Technology & Telecommunications: Cable TV Franchises. https://www1.nyc.gov/site/doitt/business/cable-tv-franchises.page.

legislative mandate to ensure that broadband is deployed to residents in a manner that does not discriminate according to wealth and income. New York has included provisions mandating that telecommunications companies deploy broadband as a condition of receiving the franchise for the last several decades.[67] However, the franchise agreements vary significantly from company to company. New York City's franchise agreements with smaller companies do not contain deployment requirements, whereas the city's franchise agreements with the three larger companies do. Verizon negotiated a franchise with New York City as a whole, whereas Time Warner and Cablevision negotiated a separate franchise agreement with each borough.

The franchise agreements show that agreements to construct and further deploy broadband according to a set schedule have been required of the larger companies, but the provision has been omitted from the franchise agreements for the smaller companies. Verizon's franchise agreement states that:

> Subject to the exceptions and checkpoint extensions set forth in this Article, the FTTP Network will pass all households served by Franchisee's wire centers within the Franchise Area in accordance with the table attached hereto as Appendix F, with final completion no later than June 30, 2014. For purposes of this Agreement including Appendix F, "pass" or "passage" of a household shall mean MDU's whether or not network created and single family units whether or not a drop is installed.[68]

Appendix F of the Cable Franchise Agreement lays out a schedule for deployment culminating in full coverage of all subscribers by the final completion date. It also sets out annual "Checkpoints" in subsequent subsections to § 5 for Verizon to verify its buildout schedules with the franchising authority, or request a twelve-month extension. By contrast, the franchise agreements with Cablevision and Time Warner (all of which are substantially similar and valid until July 18, 2020), include deployment requirements, but the requirements prioritize income nondiscrimination rather than

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[67] N.Y. PUB. SERV. LAW § 215(2)(d) & (4) (McKinney 2020).

[68] § 5.1 Cable Franchise Agreement by and between The City of New York and Verizon New York Inc., executed in 2008, expired June 30, 2020. The agreement has been presumptively amended by a settlement entered into on November 19, 2020, between the City of New York and Verizon. The amendments will be finalized at such time as the PUC approves of the settlement agreement.

The 2008 Agreement can be found at: https://www1.nyc.gov/assets/doitt/downloads/pdf/verizon_nyc_franchise_agreement_approved_by_fcrc.pdf.

The 2020 proposed settlement agreement can be found at: https://cdn.arstechnica.net/wp-content/uploads/2020/11/NYC-Verizon-Settlement-Agreement-with-Proposed-Franchise-Amendments.pdf.

scheduled deployment to all prospective subscribers, and provide more flexibility with respect to cost sharing with customers.

> 5.2 Franchisee shall make Cable Service available . . . to all residential dwelling units in the Initial Service Area, at Franchisee's expense, except that Franchisee may charge a standard installation fee. . . .
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> 5.3 . . . Franchisee shall make Cable Service available to all households in the Initial Service Area. Franchisee agrees that it shall not discriminate between or among any individuals in the availability of Cable Service or based upon the income of residents in a local area.

The provisions above are taken from the Cable Franchise Agreement by and between the City of New York and Cablevision Systems New York City Corporation for the Borough of Brooklyn.[69]

Note that fiber routes and spans are not disclosed in publicly available franchise agreements, and often are not disclosed to municipal authorities, due to franchisee claims they are "proprietary and confidential and is exempt from disclosure pursuant to New York Public Officer's Law 87(2)(c), (d), (f) & (i)."[70] (Unfortunately, this protection from disclosure may have partially enabled Verizon in the concealment of the true extent of its deployment, or lack thereof.) Deployment requirements were not incorporated into the 2008 franchise agreement with Lextent Metro Connect, LLC, the 2012 agreement with Mobilitie Investments II, LLC, the 2014 agreement with Citybridge LLC, or the August 4, 2015, agreement with Zenfi Networks, LLC. The differing contract terms appear to reflect the PUC's mandate to consider the size of the company in carrying out its regulatory responsibilities.

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[69] The following provisions are substantially the same: Cable Franchise Agreement by and between The City of New York and Cablevision Systems New York City Corporation for the Borough of the Bronx; Cable Franchise Agreement by and between The City of New York and Time Warner NY Cable LLC (Northern Manhattan), closing date not available, termination date July 18, 2020; Cable Franchise Agreement by and between The City of New York and Time Warner NY Cable LLC (Brooklyn), closing date not available, termination date July 18, 2020; Cable Franchise Agreement by and between The City of New York and Time Warner NY Cable LLC (Queens), closing date not available, termination date July 18, 2020; Cable Franchise Agreement by and between The City of New York and Time Warner NY Cable LLC (South Manhattan), closing date not available, termination date July 18, 2020; Cable Franchise Agreement by and between The City of New York and Time Warner NY Cable LLC (Staten Island), closing date not available, termination date July 18, 2020.

[70] NYC Franchise Appendices 5.15.08.

### A. Franchising Fees

An analysis of both the amounts and structures of franchising fees helps to demonstrate the discretion that municipalities have continued to exercise in negotiating their own franchise agreements with telecommunications providers. Franchise fees vary between carriers. Time Warner and Cablevision agreed to the following franchise fees:

> "Applicable Franchise Fee Collections" is defined as the sum of (x) the amounts received by the City from Franchisee pursuant to the first sentence of Section 10.1 of this Agreement, plus (y) the amounts received by the City from the Verizon Franchise franchisee under the first sentence of Section 10.1 of said Verizon Franchise (or successor provision thereof of similar effect), to the extent reasonably attributable to the geographic area covered by the TWC Service Area defined in this Agreement, plus (z) the amounts received by the City, from any other franchise or franchises granted by the City for Cable Services, pursuant to a provision comparable to the first sentence of Section 10.1 of this Agreement, to the extent reasonably attributable to the TWC Service Area.[71]

Verizon agreed to pay a five-percent franchise fee against its gross annual revenues,[72] which explicitly cannot be offset against its property taxes under N.Y. Real Property Tax Law Section 626.[73] Verizon also agreed to pay four million dollars to "in lieu of, and in satisfaction for, the Franchisee's obligation to provide free service outlets and free Cable Service to public buildings, and in order to further the City's objective of funding technological and educational needs throughout the City."[74] Here, through negotiation New York City permitted Verizon to pay a surplus to avoid a requirement to provide broadband hotspots which might have helped pave the way to free, publicly accessible—or municipal—broadband.

Lextent and Mobilitie agreed to a complex franchise compensation arrangement comprised of "Zone Compensation" and "Street Operations Pole Compensation."[75] Though it is unclear how the provision is enforceable against state and federal caps on franchise fees, Citibridge, LLC agreed that:

> The Franchisee shall pay to the City a Franchise Fee, with respect to each Contract Year, in an amount equal to the greater of (i) fifty percent (50%) of Gross Revenues for that Contract Year or (ii) the Minimum Annual Guarantee payment, as detailed in the table below. In

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[71] § 3.1(c), Cable Franchise Agreement.

[72] § 10.6, Cable Franchise Agreement (Verizon).

[73] § 10.6, Cable Franchise Agreement (Verizon).

[74] § 5.7, Cable Franchise Agreement (Verizon).

[75] Cable Franchise Agreement (Lextent and Mobilitie), Appendix D, 61-64.

> Contract Year Eight, the Percentage of Gross Revenue payable to the City shall increase to fifty-five (55%) percent for Gross Revenues derived by Franchisee from the display of Advertising on the PCS, but shall remain at fifty (50%) percent for all other Gross Revenues. In the event that the Agreement expires or is terminated by reason other than a Termination Default, before the completion of a Contract Year, the Franchisee shall pay to the City a pro-rated amount of the Minimum Annual Guarantee (based on the number of days in the Contract Year prior to such expiration or termination divided by 365). If within any Contract Year Franchisee makes payment to DoITT to satisfy any permitting fee relating to the installation of a Structure, such payment will be credited as payment towards the Minimum Annual Guarantee.[76]

Citybridge also agreed to provide New York City with letters of credit based upon a preestablished schedule for the establishment of a security fund,[77] payment of a performance bond,[78] and minimum equity contributions by the members of the franchisee corporation.[79]

## IV. The 2008 Franchise Agreement between Verizon and New York City

On April 15, 2008, Verizon and New York City entered into a twelve-year franchise agreement for the provision of cable service.[80] The PUC approved the agreement on May 27, 2008. Among the significant provisions in the agreement are the requirement that Verizon deploy FiOS across the whole of New York City, or, stated otherwise, that Verizon "pass" one hundred percent of residences within the city with FiOS before June 3, 2014.[81] Following is an analysis of I) terms of the FiOS deployment section of the franchise agreement, II) subsequent dispute between Verizon and the city regarding Verizon's adherence to the buildout provisions of the agreement, III) the proposed settlement agreement entered into in December 2020, and IV) how the city's statutory

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[76] Cable Franchise Agreement, Citybridge LLC, § 6.3.1.

[77] § 7.1 et seq.

[78] § 7.2 et seq.

[79] § 7.3.

[80] Cable Franchise Agreement (Verizon).

[81] § 5.1, Cable Franchise Agreement (Verizon). "Initial Deployment: Subject to the exceptions and checkpoint extensions set forth in this Article, the FTTP Network will pass all households served by Franchisee's wire centers within the Franchise Area in accordance with the table attached hereto as Appendix F, with final completion no later than June 30, 2014. For purposes of this Agreement including Appendix F, 'pass' or 'passage' of a household shall mean MDU's whether or not network created and single family units whether or not a drop is installed."

and regulatory posture may have affected, and may continue to affect, its FiOS build-out objectives.

### A. Terms of FiOS deployment pursuant to the 2008 franchise agreement between Verizon and New York City

Pursuant to the terms of the 2008 Cable Franchise Agreement between New York City and Verizon, Verizon agreed to "pass" all residential units within the city based upon a preset timetable, with the final installation to be completed by June 3, 2014.[82] The agreement allowed exceptions allowing for delays based upon force majeure.[83] Verizon agreed to cover the initial cost of deployment, and to recover its costs through a separately billed line-item on its subscribers' bills.[84] As a protection against default, Verizon was required to establish a cash security fund in the amount of one million dollars,[85] to provide the city with a letter of credit for twenty million dollars,[86] and to maintain performance bond in the amount of fifty million dollars.[87] As Verizon completed its scheduled FiOS, it would be allowed to draw down the amount of its performance bond.[88]

While New York City's arrangement had the benefit of assigning to Verizon all upfront costs associated with the FiOS installation (an expense it was permitted to recoup as a line-item charge directly from subscribers), it did not negotiate for municipal ownership or shared access to the deployed FiOS. Notwithstanding a provision requiring Verizon to design its system to be interconnected with other systems,[89] under the agreement Verizon was able to retain ownership and control over the FiOS network it installed. Because broadband currently remains regulated under Title I of the Telecommunications Act, it is not subject to regulation as a common carrier (and thus not subject to "open access" requirements which would force Verizon to provide access to its FiOS network to competitors on reasonable and regulated terms). It reasonably follows that New York City negotiated with the understanding that it could make use of its franchising and regulatory powers to control the deployment, price,

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[82] § 5.1 et seq, Cable Franchise Agreement (Verizon).
[83] Id., §§ 5.1.1, 5.5, and 18.5.
[84] Id. § 8.5.
[85] Id. § 15.11.
[86] Id. § 15.10.
[87] Id. § 15 et seq. Performance bond specific provisions at § 15.9.
[88] Id.
[89] Id. § 6.4.

customer service requirements and so forth *in lieu* of pursuing open access or municipally-owned broadband options.

As with most other forms of broadband and telecommunications infrastructure, deployment is of FiOS is expensive. Companies anticipate recoupment of FiOS deployment costs, in particular, over the span of decades, not months or years. Due to the cost of installation, it would be inefficient and expensive for different companies to deploy FiOS to the same areas without sharing infrastructure. By retaining ownership over any FiOS network it builds, Verizon bargained to advance its own position as the sole provider of high-speed FiOS connectivity in the region.

Although New York City did not pay for deployment, Verizon received federal subsidies through the FCC to apply to broadly defined "broadband" buildout.[90] The speeds required of the broadband being built with these subsidies was very low (4Mbps). Verizon was eligible to receive these subsidies for upgrading its copper wiring to FiOS, even though it would have had to maintain the copper anyway, meaning that it had no increased construction costs to offset. Additionally, Verizon maneuvered its agreement to deploy FiOS to one hundred percent of NEW YORK CITY to obtain permission to raise their rates to subscribers. [91]

### A. Dispute regarding adherence to FiOS deployment terms

In 2014, as Verizon asserted that its buildout was nearing completion, New York City lawmakers received increasing numbers of consumer complaints from residents wishing to subscribe to FiOS service who were told by Verizon that FiOS was unavailable in their area, in spite of living in an area that Verizon had claimed buildout was completed.[92] Verizon claimed that the property had been "passed" by FiOS. Nevertheless, subscribers in "passed" areas found themselves unable to purchase FiOS service.

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[90] Ashley Feinberg, "After Billions in Subsidies, The Final Verizon FiOS Map Is Bleak as Hell," Gizmodo (Jan. 30, 2015). https://gizmodo.com/after-billions-in-subsidies-the-final-verizon-fios-map-1682854728. Ben Popper, "Game of Phones: How Verizon Is Playing the FCC and Its Customers," The Verge (May 14, 2014). https://www.theverge.com/2014/5/14/5716802/game-of-phones-how-verizon-is-playing-the-fcc-and-its-customers

[91] Press Release, State of New York Public Service Commission, "Verizon Granted Residential Rate Increase," (June 18, 2009). https://www3.dps.ny.gov/pscweb/WebFileRoom.nsf/Web/B849A020314983A3852575D900530827/%24File/pr09054.pdf.

[92] Verizon FiOS Implementation Final Audit Report, June 18, 2015. (Page 3.)

The Department of Information Technology and Telecommunications (DoITT) was charged with auditing Verizon's buildout, and in its final audit report, dated June 18, 2015, it published findings revealing broad non-compliance the terms of the 2008 Agreement, including (but by no means limited to) refusal to provide information regarding the location of fiber installation or to provide maps of wire centers,[93] and using a "working definition of 'passing' . . . inconsistent with industry practice and . . . Section 5.4 of the franchise agreement."[94] The audit committee discovered that Verizon had adopted a fairly basic dictionary definition of "passing" such that it deemed a premises to have been passed if the fiber went "by, past, beyond, or through a place," though without any requirement as to proximity to a building or any requirement that subscribers living in a "passed" building actually have the ability to purchase service.[95] Verizon claimed that language typically included in such agreements that defined properties as having been " 'passed' when functioning System facilities have been installed in the street fronting the building in which the household is located" was deliberately omitted from the 2008 agreement as a bargained-for term.[96] Verizon further claimed that landowners who failed to cooperate with installation efforts were responsible for delays in deployment.[97] Upon scrutiny, evidence that subscribers were unable to purchase service was overwhelming, and Verizon never really attempted to claim that anyone who wanted to purchase FiOS could. Instead, Verizon dug down on its position that it had never agreed to deploy fiber to the extent that one hundred percent of residents had access, upon request. Whatever could not be justified by their definition of "passing a property," it blamed on non-compliant landlords.

Unfortunately, the 2008 agreement does not contain a definition for "to pass," "passing," or "passed," which has allowed the dispute over the definition of the term to balloon into a strong point of contention. Nevertheless, the 2008 agreement *does* contain ample provision for difficulty with obtaining landlord cooperation in

[93] Id. at 8, 9.

[94] Id. at 11.

[95] Id. *See* Letter from Craig L. Silliman (counsel for Verizon) to Anne Roest, New York City Commissioner, dated March 10, 2017, re: Cable Television Franchise between the City of New York and Verizon New York Inc. PDF available at: https://cdn.arstechnica.net/wp-content/uploads/2017/03/Verizon-Response-to-City-Letter-of-170203.pdf.

[96] March 10, 2017, Silliman-Roest letter.

[97] Id.

completing FiOS buildout. New York Public Service Law 228[98] is unambiguous in requiring landlords to cooperate with the installation of cable television facilities on their property. Under the NYPSL §228(1)(b), a landlord may not, in exchange for permitting installation of cable, "demand or accept payment from any tenant, in any form, . . . or from any cable television company therefore in excess of any amount which the commission shall . . . determine to be reasonable." In its regulations, the PUC has set the reasonable amount at zero, stating in the NYCRR § 898.1 that "no landlord shall demand or accept any payment from any cable television company in exchange for permitting cable television service or facilities on or within said landlord's property or premises."[99] The 2008 Agreement together with the New York Public Service Laws make ample provision for ensuring that landlords receive just compensation for losses associated with the installation, and that the installation be performed pursuant to the commission's regulatory standards.[100]

Verizon's claim that landlord non-compliance is responsible for its buildout failures may be partially true, but also appears substantially pretextual. It is true that Verizon filed over three thousand actions with the PUC related to landlord non-compliance.[101] However, the audit commission collected anecdotal evidence that in at least some portion of those actions, the landlords claimed to want FiOS buildout, and have been actively pursuing installation.[102] Additionally, some portion of the installation problems may legitimately have involved complexities of aging New York City infrastructure, difficulty identifying building owners and building management, and concerns regarding the aesthetics of installation.[103] Verizon has claimed that some landlords have attempted to extract kickbacks from it in exchange for permission to complete buildout.[104] However, even assuming that landlord obstinacy is just as ubiquitous as

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[98] § 5.5.2 et seq, Cable Franchise Agreement (Verizon).

[99] 16 NYCRR § 898.1

[100] 16 NYCRR § 895.5. § 5.3.1. Cable Franchise Agreement (Verizon).

[101] Joel Hruska, "New York City declares Verizon broke FiOS rollout agreement, could sue company," Extreme Tech. (Sept. 15, 2016.) https://www.extremetech.com/internet/235771-new-york-city-declares-verizon-broke-FiOS-rollout-agreement-could-sue-company.

[102] Verizon FiOS Implementation Final Audit Report, June 18, 2015. https://www1.nyc.gov/assets/doitt/downloads/pdf/verizon-audit.pdf

[103] Id.

[104] For a small sample of some of the considerations and thought processes that enter into the decisions of landlords with respect to complying with buildout, see the following threads from Reddit:

Verizon claims (and that New York City landlords universally fail to appreciate the increased rental value that FiOS brings to a property), the terms of the 2008 agreement and the New York Public Service Laws are sufficient that Verizon would have the means of legal recourse necessary to compel cooperation if it were motivated to do so. Thus, it is most reasonable to interpret Verizon's claim about landlord obstruction as pretextual. This interpretation is further bolstered by the fact that Verizon widely abandoned its FiOS deployment projects across the country in 2010.[105] New York is distinguishable from other locations where Verizon had pledged to deploy fiber in that it negotiated a contract with the company, and when confronted with Verizon's failure to deploy in accordance with expectations, New York was able to bring suit against the company for specific performance. It initiated the suit in March of 2017, and entered into settlement with the company in November 19, 2020.[106]

### B. Settlement agreement

New York City and Verizon settled the FiOS buildout dispute by negotiating franchise amendments, including provision that Verizon would complete an additional five hundred thousand installations on an established timetable ending on July 16,

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https://www.reddit.com/r/Landlord/comments/5wqrmk/landlord_usnyc_verizon_wants_access_to_my/ (concern that allowing installation means removing the copper, depriving future tenants of landlines), https://www.reddit.com/r/nyc/comments/5u2m48/if_you_live_an_nyc_and_your_building_doesnt_have/ (misunderstandings of the landlord and tenant rights and obligations under NY law, illegal exclusive deal arrangements within buildings), https://www.reddit.com/r/AskNYC/comments/ci5zve/how_to_do_i_get_my_landlord_to_install_verizon/ (tenants discussing how to entice their landlords to move forward by offering to pay more in rent), https://www.reddit.com/r/AskNYC/comments/89zrq0/how_do_you_get_verizon_to_install_fios_in_your/ (further discussions about illegal exclusive deal arrangements within buildings), https://www.reddit.com/r/nyc/comments/3b3vcu/nyc_verizon_demands_exclusive_deals_from/ (concerns that Verizon might be pursuing exclusive deal arrangements before installing in buildings, and preconditioning installation on all building residents "pledging" to purchase service after installation, and landlords receiving kickbacks from other companies in exchange for blocking installation).

[105] Phillip Dampier "FiOS Expansion is Still Dead: New Jersey's Efforts to Win Over Verizon for Naught," Stop the Cap!. (May 6, 2019). https://stopthecap.com/2019/05/06/fios-expansion-is-still-dead-new-jerseys-efforts-to-win-over-verizon-for-naught/

[106] Jon Brodkin, "Verizon wiring up 500k homes with FiOS to settle years-long fight with NYC," Ars Technica (Nov. 30, 2020). https://arstechnica.com/tech-policy/2020/11/verizon-wiring-up-500k-homes-with-fios-to-settle-years-long-fight-with-nyc/.

2023.[107] There are over one million residences within the city still lacking FiOS connectivity.[108] However, the terms of the settlement agreement specify where deployment must occur, and specifies the districts and exact addresses at which deployment is required.[109]

While the agreement never creates a definition for "pass," it does clarify that "With respect to any given residence, the term 'Video Network Create' means to *reach* Video Network Created status at such residence, and the term 'Video Network Creation' means the act of Video Network Creating such residence."[110] (*Emphasis added*).

What some may find disappointing in the settlement agreement is that it does not provide for sharing with New York City, or lay the foundation for municipal broadband. The settlement agreement is directed towards bargaining for some degree of compliance with the initial 2008 agreement, and establishing enforcement mechanisms for monitoring and compelling compliance.

## V. Impact of Statutory and Regulatory Posture on New York City's Long-Term FiOS Buildout Objectives

It may be too early to call whether the settlement agreement represents a good outcome for New York City or not. First, the PUC has not yet approved of the agreement, and there is a chance that the agreement will be renegotiated. Second, it is yet to be seen whether Verizon will comply with the terms of the renegotiated agreement any better than it did with the terms of the prior agreement. However, it does appear that by refusing to pass the proposed ROW legislation, and by entering into a contractual agreement with significant monetary leverage over the company, that New York City has retained significantly more negotiating power in its dealings with Verizon than other states.

New York already has some of the best FiOS networks in the country. Verizon only has Fios in nine states (originally twelve, including California, Florida, and Texas), most

[107] Settlement Agreement and Release between New York City and Verizon New York Inc. and Verizon Communications Inc. https://cdn.arstechnica.net/wp-content/uploads/2020/11/NYC-Verizon-Settlement-Agreement-with-Proposed-Franchise-Amendments.pdf. For updated timetable, refer to the Amended Franchise Agreement, amended § 5.3.2.

[108] Verizon Fios Coverage Map, Broadband Now. https://broadbandnow.com/Verizon-Fios

[109] Settlement Agreement, Exhibits W, X, Y, and Z.

[110] Settlement Agreement, Franchise Amendments, amended § 1.49.

of which is in the northeastern part of the country.[111] New York City's contractual agreement has enabled it to push for continued buildout after 2010, when Verizon stopped deploying FiOS elsewhere in the country. By contrast, states that simply took Verizon's word that it intended to complete buildout found that promise never materialized, and Verizon declared it was done with its FiOS rollout in 2010. They have no levers to compel further buildout. Even if more could be desired from the arrangement, and even if it falls short of the best-case scenario, it appears as though New York's regulatory structure has allowed it to compel concessions from telecom companies, and has enabled them to use the courts to compel compliance with failures in projected buildout where market forces have failed.

## Conclusion

New York State has analyzed the proposed legislation for the creation of a centralized franchising authority, and has commissioned the PUC to perform market analyses to evaluate the industry's claims of competitive advantage. However, New York has consistently declined to pass ROW legislation. New York State's legislative history suggests cognizance of the natural tendency of certain markets to function in anticompetitive ways, and an unwillingness to relinquish regulatory controls in favor of untested market forces. However, New York City also appears to have opted for a privatized model of telecommunications deployment that has, in practice, allowed market incumbents to retain or grow market share. While its refusal to deregulate appears to have served New York State well in its efforts to promote equitable broadband deployment for its population, New York City's experience with its Verizon franchise agreement suggests New York's model has limitations with respect to compelling private companies to widely complete fiber deployment.

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[111] Broadband Now. https://broadbandnow.com/Verizon-Fios. Data Sets: https://broadbandnow.com/data.