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City of New York v. Verizon New York, Inc.

Michael T. Leigh
New York Law School Class of 2010

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MICHAEL T. LEIGH

City of New York v. Verizon New York, Inc.

ABOUT THE AUTHOR: Michael T. Leigh is a 2010 J.D. candidate at New York Law School.

“The principle . . . is fundamental that ‘every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public[.]’”¹ Because the primary purpose of municipal streets is travel,² the use of streets for some other purpose constitutes a special privilege for which a private person or corporation must acquire a grant of permission from the appropriate public authority.³ The ability to grant such special permissions vests in the state legislature, but the state can delegate its authority to municipalities upon an express legislative provision to that effect.⁴ The New York legislature has done so in many cases, allowing municipal authorities to grant special permissions to use public rights-of-way.⁵ The reason for this is to allow local authorities to assume management of local public rights-of-way—both to ensure that rights-of-way remain usable for their primary purpose and to manage use by private entities so that the public will realize all potential benefits.⁶ Adequate and reasonable compensation for private use of public rights-of-way is one of the core benefits to which the public is entitled, and securing such compensation is a core responsibility of municipal authorities.⁷ Unfortunately, judicial interpretation of telecommunications companies’ permissions to use New York City streets has enabled those companies to use public resources without paying adequate and reasonable compensation for that use.

In *City of New York v. Verizon New York, Inc.*, the Supreme Court of New York addressed the issue of whether Verizon had the proper authority to use New York City streets and rights-of-way to lay fiber-optic cable, and if so, whether it adequately

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1. *Holmes Elec. Protective Co. v. Williams*, 228 N.Y. 407, 447 (1920) (Cardozo, J., dissenting) (quoting *Cent. Transp. Co. v. Pullman’s Palace Car Co.*, 139 U.S. 24, 49 (1891) and citing *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837)).
 2. 64 N.Y. JUR. 2D *Highways, Streets, and Bridges* § 1; *Sun Printing & Publ’g Ass’n v. City of New York*, 152 N.Y. 257, 265 (1897) (highways “were constructed for the passage of persons and the carriage of goods.”).
 3. *See People ex rel. Cent. Hudson Gas & Elec. Co. v. State Tax Comm’n*, 247 N.Y. 281, 285 (1928) (“A street crossing franchise consists of the right to cross a street, and to use it, when but for a grant of the right to do so from competent public authority it would be a trespass.”).
 4. *Village of Carthage v. Cent. N.Y. Tel. & Tel. Co.*, 185 N.Y. 448, 452 (1906).
 5. *See, e.g.*, N.Y. GEN. CITY LAW § 20(10) (McKinney 2003) (“Subject to the constitution and general laws of this state, every city is empowered . . . [t]o grant franchises or rights to use the streets, waters, water front, public ways and public places of the city.”); N.Y., N.Y., CHARTER ch. 14, § 363(a) (2008) (“Franchises shall be awarded only in accordance with the provisions of an authorizing resolution adopted by the council”); BUFFALO, N.Y., CHARTER ch. 413, art. I, § 4(A) (1996) (“No person shall place, put or deposit in or upon any public street . . . any substance or material whatsoever, except as permitted by ordinance.”).
 6. Frederick E. Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 SEATTLE U. L. REV. 475, 483 (2003).
 7. *See id.* at 490. Other facets of local management of public rights-of-way include: location and depth of placement of private equipment, provisions for traffic safety and disruption, indemnification of the local government for injuries to people and property, and relocation of private equipment and facilities for public improvements. *Id.* at 487.

and reasonably compensated the city for that use.⁸ The court held that Verizon had a state franchise granting it “an interest in perpetuity,” but that the record was insufficient to determine whether Verizon’s compensation to the city was adequate and reasonable.⁹ With this holding, the court followed a line of cases that essentially undermines the inalienability of city streets, and frustrates the public’s expectation of adequate and reasonable compensation for the private use of these public resources.

This case comment contends that although the holding of *Verizon* follows New York courts’ interpretation of Transportation Corporations Law (“TCL”) section 27, this legal standard has slowly and systematically undermined the principle that city streets belong to the people and that use and occupation of them must comport with public interests. By defining the grant of permission by the municipality to lay electrical conductor lines under city streets as the final step in the granting of a state franchise in perpetuity,¹⁰ the courts have removed the city’s ability to regulate the use and occupation of its streets for any company incorporated under the TCL. A better interpretation of the rights of corporations under section 27 is one that requires the city to allow telecommunications companies to access public rights-of-way, while permitting the city to set reasonable conditions for such access so as to preserve the inalienability of public streets and ensure reasonable and adequate compensation for that access.

TCL section 2 classifies transportation corporations into eight types, one of which is “[a] telegraph corporation, a telephone corporation or a telegraph and telephone corporation.”¹¹ Courts have held that while incorporation under TCL section 3 gives an entity the “same perfunctory” franchise¹² to operate as any business incorporated under New York Business Corporations Law,¹³ under TCL section 27, telegraph and telephone corporations are given certain additional rights.¹⁴ Specifically, such corporations are permitted to “erect, construct and maintain” the necessary

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8. *City of New York v. Verizon N.Y., Inc.*, No. 402961/03, 2008 N.Y. Misc. LEXIS 4572, at *1 (Sup. Ct. N.Y. County July 7, 2008). The court also faced questions of whether, if Verizon had such access to city streets, that franchise was valid as to fiber optic cables used by Verizon; the geographical scope of that franchise; and whether the franchise was preempted by the Federal Telecommunications Act, 47 U.S.C. § 253. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *7–8.
 9. *Id.* at *40. The court also determined that further briefing was required on the issue of the geographical extent of Verizon’s franchise. *Id.* at *28.
 10. *Id.* at *21.
 11. N.Y. TRANSP. CORP. LAW § 2 (McKinney 1996).
 12. TCL section 4 provides, in pertinent part, that “[t]he business corporation law applies to a corporation heretofore or hereafter formed under this chapter” N.Y. TRANSP. CORP. LAW § 4 (McKinney 1996). Section 202 of the Business Corporation Law provides for the general, or “perfunctory” powers of a corporation, such as, inter alia, perpetual duration; to sue and be sued, to have a corporate seal; to make contracts; and to adopt; amend; or repeal bylaws. N.Y. BUS. CORP. LAW § 202(a) (McKinney 2003).
 13. *See, e.g., People’s Cable Corp., v. City of Rochester*, 334 N.Y.S.2d 972, 975 (Sup. Ct. Monroe County 1972).
 14. *N.Y. Tel. Co. v. Town of N. Hempstead*, 41 N.Y.2d 691, 698 (1977) (“The assent of the town was in no wise required to authorize the Telephone Company to erect its poles”); *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *18–19; *People’s Cable Corp.*, 334 N.Y.S.2d at 975.

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infrastructure “upon, over or under any of the public roads, streets and highways”¹⁵ To construct its infrastructure *upon or over* public streets, a telephone or telegraph corporation needs no further permission than that which it already possesses under TCL section 27.¹⁶ However, by the language of an 1881 statute that was added to TCL section 27,¹⁷ a corporation needs a special franchise¹⁸ from the city to lay lines *under* public streets.¹⁹

In 1884 and 1885, the state legislature passed two “Subway Laws,” which together required that all telephone and telegraph companies operating in any city with at least 500,000 inhabitants remove aboveground lines to underground.²⁰ The Subway

15. N.Y. TRANSP. CORP. LAW § 27 (McKinney 1996).

16. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *18–19 (holding that Metro, New York and New Jersey Telephone Company, Long Island Telephone Company, and Staten Island Telephone Company acquired, by virtue of incorporation under TCL section 27, the unconditional rights to erect lines upon city streets); *N.Y. Tel. Co.*, 41 N.Y.2d at 693 (“Under the provisions of section 27 of the Transportation Corporations Law, New York Telephone Company when it was incorporated in 1896 received from the State of New York an unconditional right to erect and maintain poles for its lines upon public streets and highways”); *Village of Carthage*, 185 N.Y. at 451 (“It has long been the settled law of this state that telegraph and telephone companies derive the right to erect their poles and string their wires directly from the state.”).

17. *In re N.Y. Indep. Tel. Co.*, 118 N.Y.S. 290, 296–97 (1st Dep’t 1909), *aff’d*, 200 N.Y. 527 (1910). The language of the 1881 legislation was added to TCL section 102 (now section 27). *Id.*; N.Y. TRANSP. CORP. LAW § 27.

18. Courts use the term “franchise” in several senses, two of which are pertinent to Verizon. One sense is the grant of permission from the state to act as a corporation, generally. *See, e.g., People’s Cable Corp.*, 334 N.Y.S.2d at 975 (“The right to exist as a corporation and the privilege of using public streets for its equipment and lines are both called franchises, but each grants a different privilege.”); *City of New York v. Bryan*, 196 N.Y. 158, 163 (1909) (franchise to construct and operate a railroad on city streets is different from the franchise to be a corporation). Another is permission from municipal authorities for a private entity to use public rights-of-way, sometimes called a “secondary” or “special” franchise. *See People’s Cable Corp.*, 334 N.Y.S.2d at 975; *Bryan*, 196 N.Y. at 163; *see also Holmes Elec. Protective Co.* 228 N.Y. at 428 (Pound, J., dissenting); *Village of Stillwater v. Hudson Val. Ry. Co.*, 225 N.Y. 144, 150–51 (1931) (“The secondary franchise, which in these cases is the consent or permission given by local authorities for the use of its streets or highways, is not the franchise by and under which the corporation exists and has the right to function as a corporate being.”). This second sense of the word “franchise” means a right or privilege to access conferred by the government to “do that which does not belong to the citizens” of a city “by common right.” 36 AM. JUR. 2D *Franchises form Public Entities* § 1 (2008). The permission the corporation is required to attain from the city under TCL section 27 is in the vein of a “special franchise.”

19. The pertinent language of TCL section 27 reads:

Any such corporation is authorized, from time to time, to construct and lay lines of electrical conductors under ground in any city . . . subject to all the provisions of law in reference to such companies not inconsistent with this section; provided that such corporation shall, before laying any such line in any city . . . first obtain from the common council of cities . . . permission to use the streets within such city . . . for the purposes herein set forth.

N.Y. TRANSP. CORP. LAW § 27; *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *19 (“TCL § 27 also grants the right to place wires and equipment underground on condition that the telephone company obtain permission of the local common council.”); *In re N.Y. Indep. Tel. Co.*, 118 N.Y.S. at 297.

20. *See* Subway Laws, 1884 N.Y. Laws 647; 1885 N.Y. Laws 852; *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *4 n.3 (stating that overhead lines were deemed a nuisance by local and state authorities).

Laws stated that such removal was to be accomplished “subject to the rules and regulations” of the local authorities and placed oversight of the process in a local Board of Commissioners of Electrical Subways.²¹

Verizon’s predecessor through various consolidations, Metropolitan Telephone and Telegraph Company (“Metro”), was incorporated as a telephone and telegraph company in 1880.²² Incorporation granted Metro a state franchise to erect and maintain necessary infrastructure, including telegraph and telephone lines, upon any public streets of the city.²³ In 1881, Metro was granted permission by the New York City Board of Aldermen²⁴ to lay electrical conductor lines beneath city streets.²⁵ Metro began laying lines underground in Manhattan and the areas of the Bronx that were at the time part of the city.²⁶ The city’s permission²⁷ contained no temporal

21. See Subway Laws, 1885 N.Y. Laws 852, 853.

22. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *1; REPORT OF THE JOINT COMMITTEE OF THE SENATE AND ASSEMBLY OF THE STATE OF NEW YORK APPOINTED TO INVESTIGATE TELEPHONE AND TELEGRAPH COMPANIES, S. 38-133, 133rd Sess., at 1206 (N.Y. 1910) [hereinafter SENATE REPORT] (Statement Respecting Franchises of New York Telephone Company); SENATE REPORT, *supra*, at 1209 (Op. Corp. Counsel of New York City (1910)). Metro incorporated under the Telegraph Act of 1848 (1848 N.Y. Laws 392), which was the precursor state statute to the TCL. See *State of New York ex rel. N.Y. Elec. Lines Co. v. Squire*, 145 U.S. 175 (1892).

23. N.Y. TRANSP. CORP. LAW § 27; *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *1; see *N.Y. Tel. Co.*, 41 N.Y.2d at 693 (noting that the corporation received an unconditional right to erect and maintain poles for its lines upon public streets and highways as per N.Y. TRANSP. CORP. LAW § 27).

24. At the time, the Board of Aldermen was the “common council” of New York City. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *2 (citing N.Y., N.Y., CHARTER art. 2, § 2 (1873)); *Ghee v. N. Union Gas Co.*, 158 N.Y. 510, 516 (1899) (citing 1872 N.Y. Laws 1226).

25. Bd. of Aldermen of the City of N.Y. Res. on Dec. 13, 1881 [hereinafter 1881 Resolution], *reprinted in* SENATE REPORT, *supra* note 22, at 1207. The resolution read as follows:

Resolved, That permission be, and hereby is granted to the Metropolitan Telephone and Telegraph Company to use the streets within the city of New York for the purpose of constructing and laying lines of electrical conductors underground, from time to time, in tubes or otherwise, and for constructing, maintaining, and using such streets, from time to time, upon, above or below the surface of the ground, boxes, vaults or other fixtures suitable for distributing and testing, from time to time, the wires and insulators of said lines, and for access thereto. All excavations in streets, removals and replacements of pavements or sidewalks, shall be done under and according to the direction of the Commissioner of Public Works. The said Company in acting under this permission, shall be subject to so much of the provisions of Article XLI of chapter eight of the Revised Ordinances of 1880 as requires that one wire in each route shall be reserved for the use of the police and one for the fire-alarm telegraph, without charge to the city and county of New York. For each street opened and used by the Company, under this permission, for the purpose of laying therein its lines of electrical conductors, it shall pay to the city a sum equal to one cent for each lineal foot of such street occupied.

Id.

26. *Id.* at 1207. Brooklyn, Queens, what is now Staten Island, and the remaining portions of the Bronx were incorporated as part of the city under the Charter of 1898. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *3.

27. The *Verizon* parties and the court refer to the 1881 permission as a “franchise.” *E.g.*, *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *18. TCL section 27 refers to “permission” from the municipal common council, rather than a “franchise.” N.Y. TRANSP. CORP. LAW § 27. However, the case law under both former

limitation on its face, but did provide for compensation to be paid to the city at one cent per lineal foot of street occupied.²⁸ However, at the time the Board granted Metro permission, the 1873 City Charter in effect provided that no city franchise be awarded for a term exceeding five years.²⁹ Through a series of mergers during the late 1800s and early 1900s, Metro became New York Telephone Company (“NYT”), and by 1909 all the telephone and telegraph companies operating in the city were consolidated under that name.³⁰ Eventually, NYT became Verizon, which continued to lay lines above and below ground in all five counties of the city.³¹

In 2003, the city filed suit requesting declaratory judgment that Verizon’s occupancy of city streets exceeded the temporal limitation requirement within City Charter franchise provisions, and, therefore, it had to obtain a new franchise from the city.³² Verizon moved to dismiss the action, which the court treated as a motion for summary judgment.³³ The court pieced together its decision from the text of TCL section 27, precedent interpreting that section, the 1881 Board of Aldermen franchise, the Subway Laws, and interpretation of federal telecommunications laws.³⁴ The court held that Verizon possessed a state franchise in perpetuity to lay fiber optic cable under city streets.³⁵

Further, the court held that the 1881 permission from the city Board of Aldermen was the final step in creating a state franchise under TCL section 27³⁶ and, as a state

TCL section 102 and the current TCL section 27 uses the term “franchise” to describe the required municipal permission. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *19 (quoting *City of Rome v. Verizon N.Y., Inc.*, No. CA2002-00241, slip op. at 6 (Sup. Ct. Oneida County Jan. 24, 2006), *aff’d*, 828 N.Y.S.2d 226 (4th Dep’t 2007)). This comment will also refer to the municipal permission as a franchise.

28. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *3; 1881 Resolution, *supra* note 25.

29. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *3 n.2.

30. *Id.* at *4–6; *see also* SENATE REPORT, *supra* note 22, at 1206–09. The various companies eventually absorbed by NYT (and therefore Verizon) were the New York and New Jersey Telephone Company, the Long Island Telephone Company, and the Staten Island Telephone Company. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *4–5. Although Metro obtained permission to lay electrical conductor lines under city streets, there is no evidence to suggest that any of the other companies, which operated in the cities of Brooklyn, Queens, and what is now Staten Island (all of which were separate from New York City at the time), *see supra* note 26, obtained a franchise from their respective cities’ common council to lay electrical conductor lines under city streets. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *5.

31. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *6.

32. *Id.* at *7–8. Verizon removed the action to federal court under diversity jurisdiction, but the district court remanded the case for lack of subject matter jurisdiction. *Id.* (citing *City of New York v. Verizon N.Y., Inc.*, 331 F. Supp. 2d 222 (S.D.N.Y. 2004)). The city then filed an amended complaint in New York Supreme Court on November 15, 2004, the outcome of which is the subject of this comment. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *7.

33. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *1.

34. 47 U.S.C. § 253 (2006).

35. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *41.

36. *Id.* at *20–21 (citing *City of Rome v. Verizon N.Y., Inc.*, No. CA2002-00241, slip op. at 6 (Sup. Ct. Oneida County Jan. 24, 2006), *aff’d*, 828 N.Y.S.2d 226 (4th Dep’t 2007)).

franchise, the five-year limitation in the 1873 City Charter was inapplicable. Thus, Verizon's permission to lay lines under city streets was unrestricted as to duration.³⁷ The court further held that Verizon's permission extended to Brooklyn because the 1885 Subway Laws required all telephone companies to remove their aboveground lines to underground.³⁸ Finally, the court held that neither TCL section 27 nor the city's permission was preempted by federal telecommunications law³⁹ because the state franchise requirements for installing lines below city streets was competitively neutral, as required by federal law.⁴⁰ By holding that Verizon enjoys a perpetual franchise to occupy city streets, the court has solidified a long line of case law in New York that essentially removes the inalienable rights of the public to city streets with regard to telecommunications companies, and impairs the public's ability to secure adequate and reasonable compensation for private use of public rights-of-way.

Every New York City Charter since the Charter of 1873 has included a provision restricting the duration of franchises that can be conferred by the city to a private

37. *Id.* at *21.

38. *Id.* at *27. For this determination the court cited *Holmes Elec. Protective Co.*, which held that “[t]he consent of the city authorities was not necessary to do that which the law commanded.” *Holmes Elec. Protective Co.*, 228 N.Y. at 422. Because the summary judgment record did not indicate whether Staten Island, Queens, and those areas of the Bronx not part of the city when the Subways Laws were enacted had populations of at least 500,000 inhabitants, the court refrained from holding that Verizon possessed a grant to lay lines underground in those portions of the city since Verizon's predecessors-in-interest for those areas neglected to gain the city's permission pursuant to TCL section 27. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *27–28.

39. The Telecommunications Act of 1996, 47 U.S.C. § 253, provides that:

No State or local statute or regulation or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a non-discriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. §§ 253(a)–(c) (2006); *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *32–35.

40. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *34–35. The city contended that if the court held that Verizon possessed a franchise in perpetuity from the 1881 city permission, it would provide Verizon with a competitive advantage not enjoyed by its competitors in the telecommunications industry, and thus federal telecommunications law would preempt the franchise. *Id.* at *31–32. The court rejected this contention because to do so would “[stand] the Congressional intent [of the Telecommunications Act of 1996] on its head” by holding that “more regulation, greater barriers and higher costs are necessary to establish competitive equality between Verizon and other telecommunications providers.” *Id.* at *33–34. The preamble to the Act stated that it was “[a]n Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies[.]” (emphasis added). *Id.* at *33 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; *Bellsouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1175 (11th Cir. 2001)).

individual or corporation for access to public rights-of-way.⁴¹ Section 18 of the Charter of 1873 provided that no franchise granted by the city could last longer than five years.⁴² Municipalities in New York have long argued that these provisions, which also exist in the charters for cities other than New York City, control the duration of franchises that a municipality can authorize.⁴³ Courts, however, have accepted or rejected this argument based principally on when a telecommunications company was incorporated and whether the municipal permission contained an express temporal limitation.⁴⁴

In *Ghee v. Northern Union Gas Co.*, the Appellate Division held that under the TCL, the secondary franchise by the city to lay gas pipes under city streets was the final step in creating a state franchise.⁴⁵ The court stated, “the franchise comes from the state, but the act of the local authorities . . . constitutes the act upon which the law operates to create the franchise.”⁴⁶ The effect of declaring the franchise to be wholly from the state was to remove it from New York City franchise provisions, including the temporal limitation requirement.

Additionally, in *People v. O’Brien*, the Court of Appeals held that permission from the city, unless by its terms limited in duration, created a franchise in

41. See *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *3 n.2; SENATE REPORT, *supra* note 22, at 1210.

42. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *3 n.2. This was the charter that was in effect in 1881 when the city Board of Aldermen granted Metro permission to lay electrical conductor lines under city streets. The 1873 Charter remained in effect until the Charter of 1882, which in turn remained in effect until January 1, 1898, when the Greater New York City Charter, which consolidated New York City, Brooklyn, Queens, what is now Staten Island, and the remainder of the Bronx into the Greater City of New York. The 1898 Charter restricted city franchises to no longer than twenty-five years; the current Charter restricts franchises to at most fifty years. *Id.* at *3 n.2; *Ghee*, 158 N.Y. at 512; N.Y., N.Y., CH. 15 CHARTER § 383(h)(2).

43. See, e.g., *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *10–11; *People’s Cable Corp.* 334 N.Y.S.2d at 974 (cable company sought to annul ordinance granting a franchise to a rival cable company as being contrary to Rochester City Charter provisions); *Holmes Elec. Protective Co.*, 228 N.Y. at 421–22 (city argued that telegraph company was occupying city streets contrary to city franchise requirements); *Ghee*, 158 N.Y. at 512–13 (city argued that charter gave commissioner of public buildings, lighting and supplies and commissioner of highways the authority to grant consents to use streets).

44. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *26–27 (because NYNJ, LIT, and SIT all were incorporated prior to the Subway Laws, they were not required to obtain consent from the appropriate municipalities to lay lines underground); see *Holmes Elec. Protective Co.*, 228 N.Y. at 422–23 (holding that because Holmes Electric Protective Company was incorporated prior to the Subways Laws it was not required to obtain permission from the city, but had the company been incorporated subsequent to the Subway Laws it would have had to abide by the Subway Laws, and obtain city permission under charter requirements for municipal franchises); *In re N.Y. Indep. Tel. Co.*, 118 N.Y.S. at 294–95 (holding that New York Independent Telephone and Telegraph Company had no rights in the city because it was incorporated subsequent to the 1898 Charter, but that its predecessor-in-interest, the Mercantile Electric Company, had rights in the city because it was incorporated prior to the 1898 Charter).

45. 158 N.Y. 510, 513 (1899).

46. *Id.* Analogously, in *Bryan*, the Court of Appeals stated that a corporation’s ability to construct and operate a railroad in city streets was a state franchise and that the secondary franchise from the city was “[t]herefore . . . but a step in the grant of a single, indivisible franchise . . .” *Bryan*, 196 N.Y. 158 at 166.

perpetuity.⁴⁷ There, the New York City Board of Aldermen passed a resolution allowing the Broadway Surface Railroad Company to use tracks on city streets, and placed no temporal limitation on that grant.⁴⁸ Because the city did not expressly limit its grant, the court held that it was a franchise in perpetuity.⁴⁹ The holdings of *Ghee* and *O'Brien* were recently affirmed in *City of Rome v. Verizon New York, Inc.*⁵⁰

In *Holmes Elec. Protective Co.*, the Court of Appeals held that a telegraph company, incorporated prior to the enactment of the Subways Laws, was not required to regain permission from the city.⁵¹ In January of 1883, the plaintiff, through acquisition of Holmes Burglar Alarm Telegraph Company and the American District Telegraph Company, furnished “protective services” to homes and businesses throughout the city.⁵² Until 1891, the plaintiff maintained its wires over and upon public streets and rooftops of residences and businesses.⁵³ In 1891, pursuant to the requirements of the Subway Laws, the plaintiff replaced its overhead lines with lines underground.⁵⁴ In 1910, the city threatened to remove the underground wires, arguing that the plaintiff lacked a secondary franchise from the city under TCL section 102 (now section 27).⁵⁵

The Court of Appeals reversed the lower courts to find in plaintiff’s favor.⁵⁶ The court held that because Holmes incorporated prior to the enactment of the 1884 and 1885 Subway Laws, its ability to place lines below city streets was governed only by the Telegraph Act.⁵⁷ The court decided that the requirements for a secondary franchise were “permissive and not compulsory,” whereas the Subway Laws were “the first compulsory law requiring overhead lines to be put underground in cities of over 500,000 inhabitants.”⁵⁸ The court stated that “[Holmes’] acts were not voluntary but in obedience to the statutes and authorities established [under the Subway Laws] The consent of the city authorities was not necessary to do that which the law commanded.”⁵⁹

47. 111 N.Y. 1, 38 (1888).

48. *Id.* at 39.

49. *Id.* at 39–40.

50. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *20–21, 40.

51. *Holmes Elec. Protective Co.*, 228 N.Y. at 422–23.

52. *Id.* at 414–15.

53. *Id.* at 415.

54. *Id.* at 415, 426.

55. *Id.* at 415–16, 444.

56. *Id.* at 423.

57. *Id.* at 421–22.

58. *Id.* at 421.

59. *Id.* at 422. It is not clear why the court interpreted the Subway Laws, which “commanded” that aboveground lines be removed to underground, to displace the command of TCL section 102 (now section 27) to obtain city permission before laying any such lines under city streets. The court’s conclusion is especially questionable in light of the Subway Laws language that any permit to remove aboveground lines to underground, “shall be subject to the rules and regulations, not inconsistent

Relying on *Ghee*, *O'Brien*, and *Holmes*, the court in *Verizon* held that Verizon possessed a state franchise in perpetuity because (1) the permission was the final step in creating a state franchise for laying lines beneath city streets, and (2) that final step, by its terms, did not contain any temporal limitations.⁶⁰ The *Verizon* holding interprets TCL section 27 to say that no matter what the City Charter says is the power of a municipality to grant franchises for inalienable public rights-of-way, a secondary franchise is not subject to charter franchising requirements. Courts have held this to be true for only those telecommunications corporations organized under the TCL *prior to* the 1898 City Charter.⁶¹ For corporations, like Verizon, who were, or whose predecessors in interest were, incorporated *prior to* 1898, courts have uniformly held that they are not governed by temporal limitations. Courts reached this conclusion because prior to the 1898 Charter the charters for the city lacked explicit language that city streets were “inalienable”⁶² property.⁶³ Conversely, for telecommunications companies incorporated *subsequent to* enactment of the 1898 City Charter, courts have held that their permissions to lay lines are subject to temporal limitations.⁶⁴

The *Verizon* court, based on *Holmes*, held that enactment of the Subway Laws also gave Verizon a state franchise to lay lines underneath city streets in Brooklyn.⁶⁵ The court relied specifically on *Holmes* language that the “consent of the city authorities was not required to do that which the law commanded,”⁶⁶ despite the fact that the New York and New Jersey Telephone Company (“NYNJTC”), consolidation with which gave Metro its Brooklyn telephone and telegraph business, had never

herewith, prescribed or to be prescribed by the local authorities having control of such streets, avenues and other highways in such city” 1885 N.Y. Laws 852, 853. The Subway Laws provided that aboveground lines be placed underground, but placed regulation of that process in a local Board of Commissioners of Electrical Subways, thus evincing a desire to keep management of laying lines under city streets under the control of city authorities.

60. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *21–22.

61. *Holmes Elec. Protective Co.*, 228 N.Y. at 420–21.

62. “Inalienable” means “[n]ot transferable or assignable.” BLACK’S LAW DICTIONARY 345 (3d pocket ed. 2006).

63. See *In re N.Y. Indep. Tel. Co.*, 118 N.Y. at 294 (holding that whatever rights NYT possess in city streets exists by virtue of its predecessor-in-interest’s 1894 incorporation, which was prior to the 1898 Charter) (citing *People ex rel. Indep. Tel. Co. v. Monroe*, 30 N.Y. L.J. 488, *aff’d*, 86 N.Y.S. 1143 (1904) (realtor incorporated in 1899 could receive rights to use streets only in accordance with the provisions of the 1898 Charter)).

64. *Holmes Elec. Protective Co.*, 228 N.Y. at 422 (“Any company incorporated after [the 1884 Subway Laws] would . . . be obliged to comply with the subway act provisions, obtain the consent of the municipality, and, since the adoption of the [1898 Charter], comply with [City Charter franchising requirements].”); *In re N.Y. Indep. Tel. Co.*, 118 N.Y.S. at 294 (holding that NYT had no rights from its own incorporation because it incorporated in 1905, by which time the 1898 City Charter was in effect).

65. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *27.

66. *Id.* at *27 (quoting *Holmes Elec. Protective Co.*, 228 N.Y. at 422).

obtained permission to lay underground lines from the common council of Brooklyn.⁶⁷

The problem with the *Verizon* holding is that it implies a grant in perpetuity from a resolution in which no such language is evident, and ignores the five-year limit on city permissions required by the City Charter of 1873. The result undermines the public's ability to secure reasonable and adequate compensation for the use of city streets. TCL section 27 specifically states that both incorporation under that section and consent from the city is necessary to lay lines under city streets.⁶⁸

When the city granted Metro permission to lay lines under its streets, the 1873 Charter specifically stated that the city could not grant franchises or permissions for a period longer than five years.⁶⁹ Given that the city government exercises its powers only to the extent allowed by state law (i.e., the City Charter), a reasonable assumption is that the Board of Aldermen would have understood their permission to Metro to be governed by the City Charter.⁷⁰ Further, a safer assumption is that if the Board of

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67. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *25. The law also commanded that telecommunications companies obtain permission from municipal authorities before laying any lines below Brooklyn streets. N.Y. TRANSP. CORP. LAW § 27.
68. N.Y. TRANSP. CORP. LAW § 27. One rationale articulated in support of holding that the Subway Laws usurped the clear requirement of city permission under TCL section 27 is that “the state had full control over the streets of the city of New York and could grant [the company rights to use city streets] without the consent of the municipality[.]” *Holmes Elec. Protective Co.*, 228 N.Y. at 420. While this is a sound principle—that when the state legislature grants a municipality control over its streets that power exists concurrently with state power over municipal streets—it ignores that the state legislature did not step in and displace the requirement of city permission under TCL section 27. In other words, while the state could have directly granted permission to companies incorporated under the TCL to lay lines under city streets, it did not do so; it instead set up a two-step process: (1) incorporation under TCL, and (2) consent of the city's common council.
69. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *3–4 n.2.
70. *Town of Black Brook v. State*, 41 N.Y.2d 486, 488 (1977) (“A local government is merely a political subdivision created by the sovereign state.”); *Di Prima v. Wagner*, 215 N.Y.S.2d 705, 709 (1st Dep't 1961), *aff'd*, 10 N.Y.2d 728 (1961) (“The granting of city charters is purely a legislative function . . .”); *Incorporated Village of Atlantic Beach v. Kimmel*, 18 N.Y.2d 485, 488 (1966) (the powers of municipal corporations are such as are provided by the statutes under which they are constituted); *Seaman v. Fedourich*, 16 N.Y.2d 94 (1965) (“It is axiomatic that local governmental units are creations of, and exercise only those powers delegated to them by, the State . . .”); *Albany County v. Hooker*, 204 N.Y. 1, 9–10 (1912) (“The state, in the exercise of its sovereign power . . . has divid[ed] its territory into counties and impos[ed] on them certain governmental powers and duties.”); *Bd. of Educ. of Cent. Sch. Dist. No. 1, Towns of E. Greenbush., Renesselear County v. Allen*, 276 N.Y.S.2d 234, 237 (3rd Dep't 1966), *aff'd*, 20 N.Y.2d 109 (1967), *aff'd*, 392 U.S. 236 (1968) (“the municipality . . . is the creation of the state . . .”); *Brooklyn City R. Co. v. Whalen*, 182 N.Y.S. 283 (2d Dep't), *aff'd*, 229 N.Y. 570 (1920) (the New York City Charter, “and other general and specific laws applicable to it, are the measure of [the city's] powers.”); *People ex rel. Elkind v. Rosenblum*, 54 N.Y.S. 2d 295, 298 (Sup. Ct. Westchester County 1945), *aff'd*, 295 N.Y. 929 (1946) (“The city, which is a municipal corporation, is a creature of the law. The law defines its powers and duties. It has no more right to act in excess of the powers granted to it than has a private corporation.”); JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 538 (1872) (“As the highways of a state, including streets in cities, are under the paramount and primary control of the legislature, and as all municipal powers are derived from the legislature, it follows that the authority of municipalities over streets, and the uses to which they may be put, depend entirely upon their charters or legislative enactments applicable to them.”).

Aldermen knew that absent explicit language of temporal limitation in the resolution Metro and its successors-in-interest would never have to come back to the city to renegotiate, then the Board would have elected to include such language. The only language in the 1881 permission referring to time was that Metro would have permission to “from time-to-time” lay lines underground.⁷¹ The *Verizon* court held that because there was no language specifically limiting the permission, the grant was intended to be perpetual.⁷² A better interpretation of city permissions under TCL section 27 would require that, in order for a permission to one company to be perpetual, the municipal consent must mention that it extends rights to the company’s successors and assigns.⁷³ There is no language in the 1881 permission extending it to Metro’s successors and assigns.⁷⁴

The law essentially stands as thus: Any telecommunications corporation existing prior to enactment of the Subway Laws does not need permission from the city to lay its lines below city streets so long as in 1884 the population of the borough in question equaled or exceeded 500,000 inhabitants. For telecommunications corporations organized subsequent to the enactment of the Subway Laws, but prior to enactment of the 1898 City Charter, access to lay lines beneath city streets must be based on a state franchise, the final step of which is permission from the city. Such a franchise exists in perpetuity. And for telecommunications corporations organized after 1898, access to lay lines below city streets must be based on city permission *and* its franchise is not perpetual—it must regain permission from the city pursuant to the temporal limitations in the charter for city franchises.

The anomaly is that no matter which of these three categories a telecommunications company falls into, its burden on city streets is the same,⁷⁵ and thus the city’s need to manage its streets does not change. Yet, courts have changed the city’s ability to manage its streets by categorizing that ability not according to the burdens placed on

71. 1881 Resolution, *supra* note 25.

72. *Verizon*, 2008 N.Y. Misc. LEXIS 4572, at *21–22.

73. *See, e.g.*, *City of Covington v. So. Covington & Cin. St. Ry. Co.*, 246 U.S. 413, 415–16 (1918) (holding city franchise was in perpetuity because the city permission was to railroad company’s “successors and assigns” and the permission stated that it was for “all the right and authority that [the city had] the capacity to grant”); *City of Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 66 (1913) (holding grant by city ordinance to telephone company and its successors and assigns to occupy city streets was a franchise in perpetuity, unless restricted by some limitation by the state on the city’s corporate powers); *People ex rel. Pearce v. Commercial Tel. & Tel. Co.*, 115 N.E. 379, 382 (Ill. 1917) (holding municipal grant of permission was not transferable because it lacked language extending to telephone company’s successors and assigns).

74. *See* 1881 Resolution, *supra* note 25.

75. A city franchise to use public rights-of-way confers three rights of use:

- (a) the option to place facilities throughout the public rights-of-way, and thus to burden those rights-of-way; (b) the right to create actual burdens on the public rights-of-way through the construction work to install and maintain such facilities, and the continuing occupation of limited space in the streets; and (c) the ability to use the public rights-of-way in doing business.

Ellrod & Miller, *supra* note 6, at 489.

public rights-of-way and the benefits private companies realize from that use, but rather on factors such as when a telecommunications company was incorporated, when that company erected telegraph and telephone lines above ground, and when the state legislature saw fit to codify the common law principle of inalienable municipal streets.

The important practical effect of the *Verizon* court's construction is that the city must periodically litigate whether it is receiving adequate and reasonable compensation for a telecommunications corporation's access and use of public rights-of-way. A better interpretation of TCL section 27 is one that not only comports with the plain language of that section, but also aligns construction of that section with the mandate of the Subway Laws that telecommunications infrastructure be placed underground, the general principle, codified in the 1898 City Charter, that public rights-of-way are inalienable, and charter temporal limitation requirements on city franchises, which have always existed. As the law stands now, courts have construed TCL section 27 such that its provisions gut the language and purpose of some of these other state laws.

The purpose of charter franchise requirements, and of codifying the common law principle that city streets are inalienable, is to allow municipalities to protect public rights-of-way and ensure the public receives adequate and reasonable compensation for its use. The problem is not the ability to lay lines—a reasonable construction of TCL section 27 would be an interpretation prohibiting the city from unreasonably denying permission to use city streets. But by construing TCL section 27 in a way that preserves municipal control over public rights-of-way, and thus requiring special franchises granted pursuant to TCL section 27 to be revisited at the expiration of whatever temporal limitation the City Charter sets for city franchises, the courts would allow a system for regular review of the compensation received for access to city streets by telecommunications companies. Under such a rule, the public continues to enjoy its right to be adequately and reasonably compensated for use of its public rights-of-way.

Additionally, as the space under city streets becomes scarcer, corporations will pay higher amounts for the use of that scarce resource. This is sound policy from a standpoint of economic efficiency.⁷⁶ By requiring telecommunications companies—no matter when they were incorporated—to pay fair market value for the public property they use, resources are allocated most fairly, and investment in alternatives to market participants is attracted based on their actual price.⁷⁷ More important, perhaps, is that this alternative interpretation of use of public rights-of-way by telecommunications companies preserves the fundamental principle that the primary purpose of city streets is travel, and thus any grant of privilege to use streets for another purpose be construed “against the grantee and in favor of the public.”⁷⁸

76. *See id.* at 497–98.

77. *See id.*

78. *Holmes Elec. Protective Co.*, 228 N.Y. at 447 (Cardozo, J., dissenting) (quoting *Cent. Transp. Co. v. Pullman Palace Car Co.*, 139 U.S. 24, 49 (1891) and citing *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837)).