STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AMERICAN CABLEVISION OF QUEENS	:	DETERMINATION DTA NO. 814428
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1987 through August 31, 1990.	: :	

Petitioner, American Cablevision of Queens, c/o Time Warner Cable, 5680 Greenwood Plaza Blvd., Englewood, Colorado 80112, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1987 through August 31, 1990.

A hearing[1] was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 13, 1996 at 9:15 A.M., continued on August 14, 1996 at 10:45 A.M., continued on November 4, 1996 at

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[1]The hearing in this matter was a consolidated hearing in which the petition of American Cablevision of Queens was heard along with the petitions of the following five related petitioners: (1) ARP 113, Inc./ Paragon Manhattan, DTA No. 814427; (2) American Television & Communications Corp., DTA No. 814429; (3) Capital Cablevision Systems, DTA No. 814430; (4) Greater Rochester Cablevision, Inc., DTA No. 814431; and (5) Paragon Communications/ Paragon Cable, DTA No. 814432. At the continuation of the hearing in this matter on March 24, 1997, two executed stipulations for discontinuance, with reference to ARP 113, Inc./ Paragon Manhattan, DTA No. 814427 and Paragon Communications/ Paragon Cable, DTA No. 814432, were marked into evidence as Petitioners' Exhibits "7" and "8", respectively. Further, by a letter dated June 24, 1997 of the Division of Taxation's representative, Brian J. McCann, three executed stipulations for discontinuance were filed with reference to American Television & Communications Corp., DTA No. 814429, Capital Cablevision Systems, DTA No. 814430, and Greater Rochester Cablevision, Inc. DTA No. 814431, respectively.

9:15 A.M., continued on November 5, 1996 at 9:15 A.M., continued on November 6, 1996 at 9:15 A.M., and continued to conclusion on March 24, 1997, with all briefs to be submitted by October 31, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Cowan, Leibowitz & Latman, P.C. (Ronald W. Meister, Esq., Robert Giordanella, Esq. and Meichelle MacGregor, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann , Esq., of counsel).

ISSUES

I. Whether certain journal entries represented reclassifications for accounting purposes only, rather than purchases of tangible personal property, on which the Division of Taxation erroneously assessed sales and use tax.

II. Whether certain purchases by petitioner of services involving surveying and make-ready work were subject to the imposition of sales and use tax.

III. Whether certain payments made by petitioner to subcontractors for the installation of petitioner's distribution system qualified for the capital improvements exemption from the imposition of sales and use tax.

IV. Whether penalties are properly imposed on any sales and use tax determined herein to be due from petitioner.

FINDINGS OF FACT

1. During the period at issue, petitioner, American Cablevision of Queens, provided cable television programming to subscribers in the borough of Queens in New York City pursuant to a franchise agreement with the City of New York dated July 19, 1983. Under this

agreement, petitioner was granted a "special franchise"[2] to run cable from an origination point through the public way in order to provide cable television programming to its subscribers throughout the borough of Queens. As compensation for the franchise granted by the City, petitioner was required to make payments to the City "as provided in Appendix M to this Agreement", which, however, was not made a part of the record. In addition, a separate franchise tax assessed by the New York State Board of Equalization and Assessment, that is based on the miles of cable installed, was paid by petitioner.

2. Petitioner's sister entity, known as Manhattan Cable, had been providing cable television programming in Manhattan since 1970. Petitioner and Manhattan Cable are now part of Time Warner Cable of New York City which provides cable television programming to all of Manhattan and Queens as well as to about a third of Brooklyn. In turn, Time Warner Cable of New York City is part of a collection of cable television systems throughout the United States which now come under the umbrella of the National Division of Time Warner Cable, one of the operating divisions of American Television and Communications Corp.

3. During the period at issue, March 1, 1987 through August 31, 1990, which consists of 14 sales tax quarters, petitioner reported total gross sales of $66,914,186.00, of which $1,322,567.00 was treated as subject to sales and use tax. In addition, petitioner reported purchases subject to sales and use tax of $3,070,556.00. Applying the New York City sales and

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[2]The term "special franchise" is defined by the New York State Real Property Tax Law § 120(17) as:

> The franchise, right, authority or permission to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place, mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance.

use tax rate of 8.25% to the total amount of $4,393,123.00 ($1,322.567.00 plus $3,070,556.00), petitioner reported sales and use tax due for the audit period of $362,433.39.

4. The Division of Taxation ("Division") issued a Notice of Determination dated March 2, 1992 against petitioner asserting sales and use tax due of $8,015,610.84 plus penalty and interest for the period March 1, 1987 through August 31, 1990. The issuance of this statutory notice was based upon a test period audit conducted by the Division. The audit report summarized the results as follows:

	Additional Taxable	Additional Tax Due
Sales	$ 711,370.07	$ 58,688.03
Purchases/Expenses	9,651,036.80	796,210.54
Assets	86,765,929.00	7,158,189.18
Jurisdictional Error		2,523.09
Totals	$97,128,335.87	$ 8,015,610.84

5. This assertion of sales and use tax due in an amount which was 22 times greater than the amount of tax reported by petitioner, resulted primarily from petitioner's failure to substantiate with documentation the nontaxability of various purchases of assets and expenses recorded in its general ledger. The auditor testified that her audit of petitioner's recurring purchases consisted of an examination of petitioner's general ledger for a two-month test period of March and April of 1989. Any item on the general ledger that was not identified as sales tax paid or use tax accrued was treated by the auditor as subject to tax. Her audit of petitioner's fixed assets was conducted similarly except the test period was for the entire calendar year of 1988. Petitioner was provided with the opportunity to submit invoices or other documentation to substantiate that tax was not due on the items which the auditor had treated as taxable. However, according to the auditor, who conducted the audit at the offices of the corporate parent in the Denver, Colorado

area, she was informed by Eric Skeen, a tax manager for the corporate parent that "[h]e was not getting cooperation from [the cable companies, including petitioner and the sister companies noted in Footnote '1']" (tr., p. 89). Consequently, during the audit stage, petitioner failed to substantiate the nontaxability of most of the assets and expenses recorded in its general ledger.

6. A conciliation conference was conducted in this matter on May 13, 1993, and by a conciliation order dated July 28, 1995, tax asserted due in the statutory notice of $8,015,610.84 plus penalty and interest was reduced to $6,784,819.71 plus penalty and interest. According to the auditor, even at the conciliation stage, petitioner failed to produce invoices or other documentation to substantiate the nontaxability of most of its recurring purchases and fixed asset purchases. Nonetheless, the error rate calculated for fixed assets decreased to approximately 10.25% from 11.9% and for expenses to approximately 1.5% from 2.1% as a result of the conciliation order.

7. As noted at the beginning of this determination, this matter was called for hearing on six separate days over the course of approximately 19 months. During this period, petitioner finally provided for the auditor's review approximately two thousand pages of invoices and other documentation concerning its recurring purchases and fixed asset purchases. In fact, on the first day of hearing, petitioner brought 25 boxes of documents to the hearing. Barbara Heaton, a senior tax manager employed by Time Warner Cable who became actively involved in this matter shortly before the conciliation conference, coordinated a huge and time-consuming effort to organize documentary support for petitioner's position that its recurring purchases and fixed asset purchases were, for the most part, nontaxable. As a result, based upon additional documents provided by petitioner for the auditor's review in the course of the hearing in this matter, the parties were able to narrow the issues that remain in dispute. By a stipulation dated

September 3, 1997 by petitioner's representative and September 8, 1997 by the Division's representative, the parties agreed that certain amounts of tax were due for specified categories of purchases and also defined what remained at issue as detailed in Findings of Fact "8" through "11".

8. The parties agreed that for the sample audit period, the following tax is due for the specified categories of purchases:

Nature of Purchase	Exhibit E-2 Schedule	Reference Numbers	Amount
Installation services, capital	2	740-513	$ 142.10
Installation services, expense	2	363-125	-0-
Other services, capital (Except survey and make-ready)	2	1045, 1001-1017	932.81
Other services, expense	2	203-334	-0-
Tax paid, capital	3	980-915	435.68
Tax paid, expense	3	173-56	729.73
Pole rental, capital	4	768-452	-0-
Capital improvements, capital	5	484	63.94
Miscellaneous, capital	6	418-786	753.97
Miscellaneous, expense	6	206-100	1,427.08
Missing invoices, capital	7	955-636	33.00
Missing invoices, expense	7	120-183	1,158.63

Nature of Purchase	Exhibit E-2 Schedule	Reference Numbers	Amount
Other capital (Previously agreed, not scheduled)			1,804.40
Other expense (previously agreed, not scheduled)			252.06
Sales revenue (Not scheduled)			-0-
Tax rate difference (Not scheduled)			2,523.09

9. For the sample audit period, the parties also stipulated that the following are the tax amounts at issue for the specified categories of purchases:

Nature of Purchase	Exhibit E-2 Schedule	Reference Numbers	Amount
Survey and make-ready work, capital	2	997-1042, 1039-1046	$ 27,894.95
Improving special franchise, capital	9	709-1048	103,360.85

10. In addition, the parties reached agreement on the taxability or nontaxability of 60 journal entries leaving only 9 journal entries in dispute.

The following 33 journal entries appearing on Exhibit E-2, schedule 1, capital, were agreed to be not taxable: reference numbers 364, 366, 365, 388, 398, 396, 400, 402, 401, 408, 406, 409, 410, 411, 412, 404, 405, 522, 541, 543, 542, 641, 642, 645, 812, 644, 722, 769, 960, 913, 914, 640, 933. The following 24 journal entries appearing on Exhibit E-2, Schedule 1, expense, were agreed to be not taxable: reference numbers 139, 150, 130, 193, 82, 362, 152, 141, 174, 169, 287, 5, 9, 89, 13, 1, 123, 122, 106, 327, 84, 168, 131, 140.

The following two journal entries appearing on Exhibit E-2, schedule 1, capital, were agreed to be taxable: reference number 533 of $153.45 and reference number 923 of $738.32. The following one journal entry appearing on Exhibit E-2, schedule 1, expense, was agreed to be taxable: reference number 282 of $6.24.

Disputed Journal Entries

11. The parties dispute the taxability of the following nine journal entries appearing on Exhibit E-2, schedule 1, capital: reference numbers 367, 368, 369, 370, 371, 372, 373, 374, and 375.

12. The auditor testified that all of the journal entries came from her review of petitioner's general ledger where they were categorized as asset accounts, so called "1600" accounts. The auditor treated them as subject to tax because no documentation concerning the underlying transactions was made available to her. In the course of the hearing in this matter, petitioner offered documentation of the underlying transactions and, as noted above, the parties reached agreement concerning the vast majority of these journal entries.

13. The nine journal entries which remain in dispute were all listed on the auditor's workpaper "V" as "J/E MCTV Asset Transfer" (i.e., journal entry, Manhattan Cable Television asset transfer). These nine journal entries, all dated January, 1988, total approximately $9,000,000.00:

Reference Number	Amount
367	$3,297,104.00
368	1,226,776.00
369	664,979.00
370	301,365.00
371	451,556.00
372	1,873,840.00
373	295,233.00
374	178,779.00
375	481,707.00
Total	$8,771,339.00

14. At the hearing, petitioner introduced into evidence photocopies of journal entry cards, which were accounting devices used by petitioner to prepare its journal entries. All of the amounts shown above for the nine journal entries can be traced to Exhibit "Q-8" consisting of four pages. The nine journal entries at issue were all entered on the same date, January 27, 1988, and reflect the reclassification of various assets that had been maintained on the general ledger of petitioner's sister company, Manhattan Cable, on petitioner's behalf.

15. As noted in Finding of Fact "1", Manhattan Cable had been providing cable television programming in Manhattan since 1970. In contrast, although its franchise agreement with New York City to deliver cable television programming to subscribers in Queens was dated July 19, 1983, petitioner turned on service to its first subscribers at the end of 1986. According to the credible testimony of Howard Szarfarc, who currently serves as senior vice-president of Time Warner Cable of New York City as well as general manager of the Manhattan area of Time Warner Cable of New York City and who during the years at issue served as petitioner's vice-

president of finance, petitioner in 1986 was a skeleton business which operated out of a trailer with only six or seven employees and did not have a "home" (tr., p. 240). Its sister company, Manhattan Cable, provided petitioner with bookkeeping, payroll and billing services, which included the maintenance of petitioner's accounts in its own general ledger. According to Mr. Szarfarc, at the time petitioner moved into its own building in early 1988, "we simply reclassified those transactions into our ledger" (tr., p. 241). The journal entries in dispute do not represent the purchase of any goods or services by petitioner. None are credits to a cash or liability account, and the supporting journal entry cards describe all the entries in the explanation section as account reconciliations. Nor do these journal entries represent a change in ownership of assets from Manhattan Cable to petitioner. Mr. Szarfarc's testimony was in harmony with that of Barbara Heaton, a senior tax manager of Time Warner Cable, and Ivy Parish, the controller of the National Division of Time Warner Cable, who also testified that the journal entries represented reclassifications of bookkeeping entries and did not represent purchases.

16. Mr. Szarfarc, in his testimony, detailed the nature of the particular reclassification for each of the nine journal entries that remain in dispute:

Reference Number	Nature of Reclassification
368	Distribution system reclassified into proper fixed asset account
369	Head-end equipment reclassified into proper fixed asset account
370	Subscriber wiring costs reclassified into proper fixed asset account
371	Cost of converter boxes reclassified into proper fixed asset account
372	Leasehold improvements reclassified into proper fixed asset account
373	Office equipment reclassified into proper fixed asset account

374	Two-way radios and test equipment reclassified into proper fixed asset account
375	Vehicle purchases reclassified into proper fixed asset account

Disputed Survey and Makeready Work

17. As noted in Finding of Fact "8", the parties dispute whether expenses incurred by petitioner for survey and makeready work performed by Con Edison and New York Telephone, which amounted to $338,120.61 during the test period, is subject to the imposition of sales and use tax in the amount of $27,894.95. In dispute are 17 amounts recorded on petitioner's general ledger as invoice amounts for survey and makeready services. At the hearing, Howard Szarfarc identified backup documentation for each of these 17 general ledger entries in dispute. Focusing on the first amount in dispute of $45,209.14, as an example, petitioner introduced into evidence as its Exhibit "Q-61" photocopies of four checks[3] as follows:

Payee	Check Amount	Description of Work on Attached Statement
Con Edison	$ 6,868.84	Make-Ready for Walk
Con Edison	10,403.45	Make-Ready for Walk
New York Telephone Co.	2,740.40	Make-Ready for Walk
New York Telephone Co.	25,196.45	Post-Survey and Make-Ready for Walk
Total	$45,209.14	

Also included in Exhibit "Q-61" are two corresponding documents entitled "Con Edison CATV Make-Ready Work Invoice and Authorization to Proceed" each dated March 31, 1988 on

[3]The checks each show the payer as A.T.C. Construction-Queens N.Y. 0855, which is identified as a Division of American Television & Communications Corporation, a subsidiary of Time, Incorporated. The checking account appears to be under the name of American Television & Communications Corporation, whose name is preprinted on the checks with A.T.C. Construction-Queens N.Y. 0855 typed above the corporate name. The record does not disclose the exact relationship between A.T.C. Construction- Queens N.Y. 0855 and petitioner.

which the amounts due Con Edison are broken down. For example, the amount of $6,868.84 listed above as the first check amount to Con Edison consists of the following:

Estimated costs of make-ready work and post-construction inspection based upon attached construction layout and cost summary	$5,023.20
Costs and engineering time expended in field survey, preparation of layout, cost estimate and this invoice	1,845.64
Total	$6,868.84

Another invoice breaks down the amount of $25,196.45 paid to New York Telephone as follows:

Description	Quantity	Unit Cost	Charges
Post-construction inspection	209	$ 8.05	$ 1,682.45
Place auxiliary anchor eye	3	29.00	87.00
Guy moved-anchor not replaced	13	38.00	494.00
Aerial cable moved	20	202.00	4,040.00
Small pole mounted unit moved or transf.	13	171.00	2,223.00
Pole stepping	2	60.00	120.00
Drop wire moved	66	225.00	16,550.00
Total charges			$25,196.45

18. The survey and makeready work at issue consisted of the utility companies, i.e., Con Edison and New York Telephone, walking along petitioner's trunk or distribution route in order to inspect the poles, verify the routes and determine if there was sufficient clearance for the various aerial strands to comply with mandatory safety codes. The National Electrical Code requires certain distances to be maintained between power, cable and telephone strands, i.e., there must be 40" from power to cable and 12" from cable to telephone, with electrical power always at the top.

19. Most of the poles used by petitioner to run its cable are owned by Con Edison and New York Telephone, so that, in effect, the survey and makeready work serves to ensure that the poles of the utility companies are ready for petitioner's installation of cable. No construction,

installation or repair work by the utility companies is involved, although the utilities occasionally move their own wires as a result of the survey and makeready work. However, they never touch any of petitioner's plant or play any part in its maintenance or repair. Sometimes, the utilities conduct "post-survey" work, inspecting petitioner's installation after it is completed which is reflected in the breakdown shown above.

Installation of Distribution System

20. Petitioner's cable television system consists of three major components: (1) the head end, (2) the distribution system, and (3) the subscriber connection. The head end is where petitioner receives all of its signals, i.e., from a satellite, such as ESPN and CNN signals, from fiber optics transmission and from over-the-air broadcasts. Petitioner's distribution system or trunk system, which comes out of the head end, consists of petitioner's cable lines that go off in different directions so as to carry signals from the head end out to each of the neighborhoods that are served by the head end. The subscriber connection, commonly referred to as the drop system, drop line or hookup, consists of the wire from the distribution system into the customer's home.

21. Petitioner's distribution system or trunk system consists of (1) cable in conduit construction underground and (2) aerial construction. Approximately 10 to 12% of petitioner's distribution system, also referred to as its "total plant", consists of cable in conduit underground with the remaining 88 to 90% consisting of aerial distribution. Petitioner used one contractor, Queens Network Cable Petrocelli Electric of Long Island City, to install all of its cable in the public way, both the aerial and underground portions. As noted in Finding of Fact "8", remaining at issue is tax in the amount of $103,360.85 on total payments by petitioner of $1,252,858.81 to this contractor during the one-year test period of 1988. These payments were recorded by petitioner in its general ledger as "improving special franchise, capital."

22. Cable in conduit construction underground is in the nature of heavy construction, involving the excavation of streets, removal of sidewalks, use of backhoes and rock saws to cut concrete, boring through streets and building foundations, and then backfilling and repaving streets and sidewalks. Vincent Pombo, the vice president of engineering for the Queens and Brooklyn systems of Time Warner Cable of New York City, described the nature of this underground construction as follows:

> Cable in conduit in Queens is used in underground areas whereby you would either trench with a backhoe machine or you dig a trench between 18 and 36 inches deep. The cable in conduit is placed in the trench. It is covered with a minimum of six inches of concrete and then there are steel plates placed on top of that to prevent digups from other contractors. It's backfilled to the surface, and if it's a paved area or it's asphalt or concrete, that material is placed on top of it. (Tr., p 962.)

23. Because of the nature of the underground construction, the cable is never removed. It is cut to specific lengths and cannot be reused. Further, if the cable fails, it is not removed. Rather, petitioner builds a parallel run of cable.

24. The aerial distribution system is installed with heavy boom assemblies and lashing equipment. John Herrewyn, chief engineer of one of petitioner's sister cable systems, as well as Thomas Foster, the vice president of engineering for another one of petitioner's sister cable systems, each described the construction of the aerial system in detail. A crew consisting of three or four men, with mechanical trucks with boom assemblies, drill holes in a pole. A through bolt is installed, to which a suspension bolt is then affixed. A quarter-inch galvanized steel strand is then put up in the suspension bolt. The steel strand is tensioned to support the additional weight of the coaxial cable, which conducts the cable television signals, that will follow. After strand crews have installed thousands of feet of steel strand, cable crews then pull the coaxial cable up on the steel strand. The coaxial cable is placed on rollers, sometimes referred to as blocks,

positioned 30 to 50 feet apart. As the cable is pulled a few thousand feet at a time, another device called a lashing machine fits over the top of the strand and wraps the coaxial cable to the steel strand, using stainless steel fine gauge wire wrapped in a circular motion. The lashing wire is tied off to five-eighths inch diameter heavy galvanized clamps, and as the lashing machine comes up to a pole, the lineman will then cut that piece of cable, wrap it around a clamp, mark it, match the lashing mark to the other side of the pole and continue lashing.

25. Once the cable is lashed onto the steel strand, the cable never comes down. If the cable should fail, new cable is put up and lashed to the existing bundle by use of a larger size lashing machine. Even at the end of its useful life, aerial cable is not removed. There is no machine that can unlash the coaxial cable from the steel strand. Further, the cable cannot be removed without material damage to itself and to the distribution system, both of which would be rendered useless.

26. Petitioner's aerial distribution lines connect to poles owned by New York Telephone and Con Edison. But, in addition, petitioner has put in its own poles, which Mr. Rosenblum testified numbered "over a thousand poles" (tr., p. 160). The Division introduced into evidence as its final exhibit approximately 1000 pages representing numerous pole attachment agreements. The first agreement included in this exhibit includes a provision requiring petitioner, in the event of termination of its authorizations under the agreement:

> [to] remove its facilities from the poles and anchors within thirty (30) days of the effective date of the termination. . . . If the Licensee [petitioner] fails to remove its facilities within the specified period, the Licensor [New York Telephone] shall have the right to remove such facilities at the Licensee's expense and without any liability on the part of the Licensor for damage or injury to such facilities or interruption of Licensee's services.

The specific article of the sample agreement concerning "terminations of authorizations" provides the following reasons for terminations: (1) petitioner's facilities are maintained or used in violation of any law or in aid of any unlawful act or undertaking, (2) petitioner ceases to have authority to construct and operate its facilities on public or private property at the location of the particular pole or anchor covered by the authorization, (3) petitioner fails to comply with any of the terms and conditions of the agreement, (4) petitioner attaches to a utility pole and or anchor without having first been issued authorization, (5) petitioner ceases to provide its services, (6) petitioner's facilities are used by others not a party to the agreement, (7) petitioner sublets or apportions part of the licensed pole attachment to an entity not a party to the agreement, (8) petitioner's insurance carrier notifies petitioner that its policy required by the agreement has been canceled, (9) petitioner has failed to pay any sum due under the agreement, (10) any authorization required by any governmental or private authority for petitioner's construction, operation and maintenance of its facilities on a utility pole or anchor has been denied or canceled.

27. Petitioner introduced into evidence photocopies of invoices from Queens Network Cable Petrocelli Electric, as well as photocopies of checks, to document its payments to this contractor for the amounts at issue during the test period for both underground and aerial installation of cable.

Petitioner's Franchise Agreement With New York City

28. As noted in Finding of Fact "1", petitioner provided cable television programming to subscribers in the borough of Queens in New York City pursuant to a franchise agreement with the City of New York dated July 19, 1983. This franchise agreement is a complex document consisting of 92 pages. Pursuant to section 2.2.02 of the agreement , petitioner was granted the authority to provide cable television programming in the borough of Queens from July 19, 1983

"to the termination of this Agreement . . . ." Section 2.2.03 specifies that the termination of this agreement shall occur upon the earliest of:

> (i) any of the events listed in Section 2.3.02 hereof [i.e., events relating to the New York State Commission on Cable Television's failing to approve the agreement]; (ii) the expiration of the term of the franchise granted pursuant to this Agreement, as provided in Section 2.3.04 hereof [i.e., fifteen years]; or (iii) the adoption by the Board [of Estimate of the City of New York] of a resolution terminating this Agreement in accordance with the termination rights provided in this Agreement and fixing the date of such termination.

29. Nearly six pages of the agreement, at section 17.4, "Material Breach", address the nature of a material breach of the agreement which would support the termination of the agreement. In approximately four pages of the agreement, at section 17.5 "Rights upon Termination", New York City is provided with a series of options in the event petitioner's franchise terminates. The first is the ability to direct petitioner to operate the system on behalf of New York City pursuant to the franchise agreement as well as some additional terms for up to 12 months. It also gives New York City the right to authorize any other person to operate the system on behalf of the City upon such terms and conditions as are agreeable to the City and petitioner. If the agreement is terminated due to material breach of the agreement, the City may order that the entire system shall become the sole property of New York City, in which event petitioner shall be entitled to payment from the City for the system equal to the fair value thereafter as appropriate consistent with the City charter. The agreement also provides New York City with the option, if the agreement is terminated due to material breach, with the right to direct petitioner to remove its system:

> 17.5.05 Upon any termination of this Agreement [for cause], if so directed by the [Board of Estimate of the City of New York], [petitioner] shall, at its own cost and expense, promptly remove that part of the System located in the Streets and shall restore all affected Streets and municipal structures therein to a condition satisfactory to the Board.

Upon termination of the agreement due to the expiration of the 15-year term of the franchise, including any renewal of the term, section 17.5.07 of the agreement provides that the Board of Estimate of the City of New York "may in its sole discretion elect to direct [petitioner] to remove that part of the System located in the Streets" pursuant to section 17.5.05, the provision noted above.

30. Barry Rosenblum, currently the president of Time Warner Cable of New York City and during the period at issue petitioner's president, in his credible testimony noted that, in his opinion, it would be inconceivable that New York City would require the removal of petitioner's distribution system in the public way:

> I don't think it's conceivable and it's not conceivable for a couple of reasons. The primary reason is that you can't remove the system without once again digging up the streets. To go through that process again, I don't think is something that the city itself would allow. The Department of Transportation, who awards us with permission to do street construction, would not give us permission to do that once again. There is also something that--in the City of New York called protected streets, which says for five years after a street is repaved by the city, nobody is allowed to go in and break those streets again. And the other reason that I don't think it would ever happen is that the city would be out of cable service for a lot of years until somebody else could come in and build a cable system (tr., pp. 154-155).

31. Mr. Rosenblum also testified that to his knowledge after checking with the National Cable Television Association, to which virtually every cable system in the United States belongs, no cable system has ever been removed.

32. From petitioner's point of view, Mr. Rosenblum testified that the installation of the distribution system was intended to remain forever. This intent, he explained, was supported by (1) the fact that the lease on the head end ran beyond the end of the franchise term of 15 years, (2) a current $400 million upgrade of the entire cable system of Time Warner of New York City "which is taking place about two years before the term of the

franchise is due for renewal and renegotiation", and (3) building is permanent when it involves digging up streets because "you're getting special permission to do that, and you really only do it once" (tr., p. 139).

SUMMARY OF THE PARTIES' POSITIONS

33. Petitioner maintains that it has provided evidence tracing every journal entry remaining in dispute to a journal entry card which, together with the testimony of Howard Szarfarc, petitioner's vice-president of finances, establishes that the journal entries do not represent the purchase or rental of any property or services. Rather, they are all nontaxable bookkeeping entries.

Petitioner argues that the survey and makeready work at issue did not involve construction, installation or repair work but rather was in the nature of inspection work to ensure code compliance. Consequently, such work was not an enumerated taxable service under Tax Law § 1105.

Turning to the major issue dividing the parties, petitioner contends that its labor cost to improve its special franchise by the installation of its distribution system in the public right of way, both by underground and aerial construction, was exempt from the imposition of sales and use tax as a capital improvement. Petitioner maintains that it is undeniable, and that the Division has not contested, that the construction of its distribution system (i) substantially added to the value of real property or appreciably prolonged the useful life of real property, and (ii) became part of real property or was permanently affixed to real property so that removal would cause material damage to the property or distribution system itself. Consequently, according to petitioner, only the third prong of the statutory definition of capital improvement under Tax Law § 1101(b)(9), which requires that the

construction is intended to become a permanent installation, is at issue. With regard to this third requirement, petitioner argues that "the extensive evidence of permanence on this record, which was never challenged by the Department, overwhelms any inference the auditors seek to draw from a theoretical removal clause that has never been applied in the history of cable television" (Petitioner's brief, p. 16). Petitioner rejects the Division's reliance on ***Capital Dist. Better TV v. Tax Appeals Tribunal*** (200 AD2d 911, 606 NYS2d 930). According to petitioner, this decision does not stand for the proposition that a removal clause automatically outweighs all other evidence of intended permanence.

Further, petitioner argues that the provisions of the Federal Cable Act at 47 USC § 546 make it virtually impossible for a city not to renew a cable franchise provided that the franchise holder has the financial and technical wherewithal for operating the system.

34. The Division counters that a bookkeeping entry, including a journal entry, "can support a finding of taxability", citing the decision of the Tax Appeals Tribunal in ***Matter of Hygrade Casket Corp***. (March 18, 1993) (Division's brief, p. 4). The Division asserts that petitioner failed to introduce any documentation "to show that the transactions allegedly underlying the journal entries . . . were exempt, tax paid or otherwise not properly subject to tax" (Division's brief, p. 5). The Division rejects reliance upon the testimony of Mr. Szarfarc.

The Division also argues that the survey and makeready work at issue is properly taxable as maintaining, servicing or repairing of real property, which has been broadly defined by the former State Tax Commission in ***Matter of People's Cable Company*** (December 14, 1982) and in advisory opinions. In addition, the Division, citing the State Tax Commission decision in ***Matter of Rochester Gas & Electric Corp.*** (June 17, 1985)

argues that the survey and makeready work at issue are like the diagnostic services held taxable by the Commission.

With regard to the main issue in dispute, the Division maintains that both the underground and aerial construction of petitioner's distribution system fail to meet the statutory test for a capital improvement. With regard to the aerial construction, the Division argues that petitioner failed to show that removal of the aerial distribution system would materially damage the utility poles or the cable system. With regard to the permanency requirement, the Division contends that the removal clause in the franchise agreement governs. According to the Division, petitioner "is barred by the parol evidence rule [from relying on other evidence] since it would contradict the express terms of the various agreements with the City of New York and the local utilities" (Division's brief, p. 24). The Division also points out that contrary to petitioner's claim, a cable franchise was denied renewal in ***Cox Cable Communications, Inc. v. United States*** (699 F Supp 917).

35. In its reply brief, petitioner emphasizes that the Division's auditors based their assessment upon a detailed review of petitioner's general ledger for a sample test period. The auditors questioned thousands of items and assessed every entry relating to a purchase for which they could not verify that tax was paid. Therefore, according to petitioner, the auditors did not miss any purchases whether relating to journal entries or not. Further, in addition to the journal entry cards and the testimony of Howard Szarfarc, petitioner presented the testimony of Barbara Heaton, a senior tax manager of Time Warner Cable, and of Ivy Parish, the controller of the National Division of Time Warner Cable, who supported Mr. Szarfarc's testimony that the journal entries in issue represent reclassifications of bookkeeping entries and do not represent purchases. Petitioner stresses

that the journal entries at issue did not effectuate any transfer of title or possession of property from Manhattan Cable, petitioner's sister company, to petitioner so that the Division's reliance on ***Matter of Hygrade Casket* (*supra)*** is misguided.

Petitioner also points out in its reply brief that neither New York Telephone nor Con Edison installed or otherwise touched any of petitioner's distribution system or played any role in its maintenance, service or repair. The purpose of the survey and makeready work at issue was to ensure compliance with mandatory safety code requirements for clearance between high voltage electric power cable and transmission wires. Petitioner rejects the Division's analogy to taxable diagnostic services:

> [T]he services in question— to determine if the design of existing transmission systems could accommodate petitioner's cables— are far more similar to the non-taxable design services than to the taxable diagnostic tests [in ***Matter of Rochester Gas & Electric Corp.*** (***supra***) the case relied upon by the Division] (Petitioner's reply brief, p.12).

Turning to the main issue, petitioner reiterates that its special franchise construction is a capital improvement. Petitioner argues that it has introduced overwhelming evidence of intended permanence including the following:

> 1. The nature of the construction, which includes digging up streets, installing over 1000 poles, burying in concrete, and affixing galvanized steel to poles, all with the use of heavy construction equipment;
> 2. The virtual impossibility of removing cable from underground, or unlashing it from poles;
> 3. The extremely high cost of installation;
> 4. The prohibitive cost of removal;
> 5. The negative salvage value;
> 6. The length of time the construction has been in place;
> 7. Petitioner's recent $ 400 million system upgrade;
> 8. Petitioner's recent renewal of long-term leases at its head-end;
> 9. The practice of routing around failed cable, or overlashing new aerial cable, instead of removing it;
> 10. The absence of any reason for removal, because trench space for [cable in conduit] and airspace for aerial construction are not in limited supply;

11. The civic disruption that would be caused by removal;
12. Legal restrictions on repeated digging up of streets;
13. The history of this type of construction, which has never been removed by any cable television system;
14. The statutory restrictions on franchise termination;
15. The interconnection between systems, which would disable adjacent systems if this plant were removed (Petitioner's reply brief, pp. 21-22).

Petitioner contends that the Division is wrongly creating an irrebuttable presumption based upon the removal clauses in the franchise agreement and pole rental agreements. Petitioner maintains that it has introduced countervailing evidence that establishes:

> [B]y objective criteria, petitioner contemplated its multi-million dollar construction would remain in place "until worn out or superseded by another article more suitable to the purpose," the standard established in ***Troncillito v. Farm Family Mutual Ins. Co.***, 63 AD2d 1042, 1043, 406 NYS2d 143, 144, *aff'd* 47 NY2d 736, 417 NYS 2d 253 (Petitioner's reply brief, p. 14).

Petitioner points out that ***Cox Cable Communication (supra)*** "in no way rebuts the testimony in this case that no cable television distribution plant has ever been *removed*" (Petitioner's reply brief, p. 22, footnote 9 [emphasis in original]).

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) provides for the imposition of sales tax upon the "receipts from every sale of tangible personal property . . . ."

B. Tax Law § 1101(b)(5) defines "sale" as:

> Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor. . . .

C. As noted in Finding of Fact "15", the nine journal entries in dispute do not represent the purchase of any goods or services by petitioner. Nor do they represent a change in ownership or transfer of assets from Manhattan Cable to petitioner. Rather,

petitioner has shown that they represent reclassifications of bookkeeping entries. While petitioner was a skeleton business operating out of a trailer with only six or seven employees, its sister company, Manhattan Cable, maintained petitioner's accounts in its own general ledger. When petitioner moved into its own building in early 1988, which corresponds to January 1988, the date of all of the journal entries in dispute, petitioner, in Mr. Szarfarc's words "simply reclassified those transactions into our ledger." Consequently, the nine journal entries totaling approximately $9,000,000.00 are not subject to the imposition of sales and use tax. The decision of the Tax Appeals Tribunal in ***Matter of Hygrade Casket Corp.*** (December 16, 1993) does not require a contrary result. In ***Hygrade***, there was a transfer of possession of tangible personal property, i.e., caskets, from the subsidiary, Hygrade Casket Corp. to its parent corporation.

D. Pursuant to Tax Law § 1105(c)(3), sales tax is also imposed upon the receipts from every sale of the service of "[m]aintaining, servicing or repairing tangible personal property . . . not held for sale in the regular course of business. . . ." Similarly, Tax Law § 1105(c)(5) imposes sales tax upon the receipts from every sale of the service of "maintaining, servicing or repairing real property. . . ." These provisions do not create an exception to the imposition of sales tax. Rather, they define a particular service activity that is subject to tax. As a result, in analyzing these provisions, which may be viewed as "imposition statutes," ambiguities are construed against the Division and in favor of the taxpayer (***see, Matter of Penn York Energy Corp.***, Tax Appeals Tribunal, October 1, 1992).

E. The Division relies upon the decision of the State Tax Commission in ***Matter of People's Cable Company*** (December 14, 1982) in support of its position that petitioner's payments to New York Telephone and Con Edison to perform services described as survey

and makeready work were subject to sales and use tax. Initially, it is noted that decisions of the State Tax Commission are not binding on the Division of Tax Appeals (***see, Matter of Racal Corp.***, Tax Appeals Tribunal, May 13, 1993). Furthermore, a close review of the State Tax Commission's decision reveals that the Commission made only minimal factual findings consisting of two sentences concerning the work at issue in ***People's Cable*** as follows:

> Between December 1975 and February 1976, petitioner contracted with Jackson Communications Corp. for cable rearrangement on the poles in order to accommodate the various utility and cable television lines. Invoices for this work totalled $16,691.02.

Most important, the work at issue in ***People's Cable*** was described by the Commission as cable rearrangement, rather than survey and makeready work. Further, other than a citation to Tax Law § 1105(c)(3), there is no legal analysis by the Commission.

In contrast, as noted in Findings of Fact "17" through "19", the survey and make-ready work at issue has been detailed along with an analysis of the specific invoices at issue. Rather than involving any rearrangement of petitioner's cable, the work performed by the utility companies involved their employees' walking along petitioner's trunk or distribution route in order to inspect the poles, verify the route and determine if there was sufficient clearance for the various aerial strands to comply with safety codes so as to ensure that the poles of the utility companies were ready for petitioner's installation of cable. The employees of the utility companies never touched any part of petitioner's plant or played any part in its maintenance, repair or servicing.. Further no construction, installation or repair work by the utility companies was performed, although they occasionally moved their *own* wires as a result of the survey and makeready work.

In ***Building Contractors Ass'n, Inc. v. Tully*** (87 AD2d 909, 449 NYS2d 547), demolition and construction debris removal services were determined not to fit within the definition of "maintaining, servicing or repairing real property" because such services did not *keep* real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition. Rather, such services related to the preparation of a work site for future construction of a capital improvement. Similarly, the survey and makeready work at issue did not "relate to *keeping* real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition" (20 NYCRR 527.7[a][1]). Rather it related to surveying and readying the utility poles so that petitioner could then properly install its distribution system.

Furthermore, petitioner is correct that the services in question are far more similar to the nontaxable design services than to the taxable diagnostic tests in ***Matter of Rochester Gas & Electric Corp. (supra)***.

F. In support of its position, the Division cites to 20 NYCRR 527.7(a)(1) and the related regulation at 20 NYCRR 527.5(a)(3) which provide that the maintaining, servicing or repairing of (i) real property and (ii) tangible personal property, respectively, covers "all activities that relate to keeping real property in a condition of fitness, efficiency, *readiness* or safety or restoring it to such condition." (Emphasis added.)

To the extent that this regulation might be viewed as supporting the taxation of the survey and makeready activities at issue, it is rejected as overly expansive and not a plain reading of the statutory phrase at issue (***see, Matter of Calandra***, Tax Appeals Tribunal, September 29, 1988 [wherein the Tribunal applied the "ordinary, everyday" meaning of a statutory term]). The services at issue did not (i) maintain, i.e., "preserve from failure or

decline" (Webster's Ninth New Collegiate Dictionary 718 [1983]), or (ii) service, i.e., "repair or provide maintenance for" (Webster's Ninth New Collegiate Dictionary 1076 [1983]), or (iii) repair, i.e., "restore to a sound or healthy state" (Webster's Ninth New Collegiate Dictionary 998 [1983]) real property or tangible personal property. Rather, the services at issue made it possible for petitioner, in the first instance, to install its distribution system, which was not the subject of any maintenance, service or repair within the ordinary meaning of such terms. In sum, it is concluded that the survey and makeready work at issue, which was done to ensure compliance with safety codes, did not constitute "repairing, maintaining or servicing property."

G. Tax Law § 1105(c)(3)(iii) excepts from the sales tax imposed by said paragraph (3) receipts from the services of installing tangible personal property "which, when installed, will constitute a capital improvement of real property, property or land. . . ." "Capital improvement" for purposes of subparagraph (iii) is defined in Tax Law § 1101(b)(9) as follows:

> Capital improvement. An addition or alteration to real property which:
> (i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
> (ii) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
> (iii) Is intended to become a permanent installation.

Each of these three separately numbered requirements must be met in order for an addition or alteration to qualify as a capital improvement and thus not be subject to sales tax.

H. Initially, it is noted that Real Property Tax Law § 102(12)(h) defines as real property for tax purposes the long-term special franchise granted by a municipality to a cable

company to run a distribution or trunk system under and above the public streets. (***See,*** Tax Law § 1105[c][3][iii] [Real Property Tax Law applies to determine what is real property].)

I. The Division has conceded that the installation of petitioner's distribution system met the first prong of the three-part test noted above, i.e., that it substantially added to the value of real property. With reference to the second prong of the three-part test, the Division argues, citing the State Tax Commission's majority decision (one commissioner dissented) in ***Matter of Glenville Cablesystems Corp***. (October 9, 1986, ***confirmed*** 142 AD2d 851, 531 NYS2d 137), that the aerial portion[4] of petitioner's distribution system did not become part of real property or meet the affixation requirement. This argument is rejected. First, since the distribution system, as noted in Conclusion of Law "H" is, by definition, real property, it is difficult to conceive how it may be argued that it does not become part of real property. Further, as noted in Findings of Fact "24" and "25", the steel strand and the cable lashed to it are permanently installed, are never taken down, and if taken down would be damaged, so that it may be concluded that the affixation requirement is met. Although, pursuant to the representative pole attachment agreement, as noted in Finding of Fact "26", petitioner would be required to remove its facilities from the poles upon the termination of the agreement, the second prong of the three-part test, or the affixation requirement, has still been met. The removal provision is relevant for purposes of analyzing the third prong of the capital improvement test as discussed below.

Further, as noted in Conclusion of Law "E", the decisions of the State Tax Commission are not binding on the Division of Tax Appeals. In any event, a close review

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[4]The Division concedes that the underground portion of the distribution system meets the second prong of the three-part test.

of the State Tax Commission's decision in ***Glenville Cablesystems Corp., (supra)*** discloses that the Commission discussed affixation only with regard to antennas and towers, which are not at issue in this matter, and did not analyze the installation of the aerial cable in terms of whether it met the affixation requirement. With regard to the antennas and towers, the Commission noted that:

> They do not become part of the real property nor are they permanently affixed to the real property so that their removal would cause material damage to the property or to the assets themselves.

With reference to the aerial cable,[5] the Commission merely noted that the second and third prongs of the three-part test were not met because "[b]y the terms of petitioner's lease agreements with the utilities, the plants must be removed upon termination of the respective leases." There is no specific discussion by the Commission of the affixation requirement.

Moreover, petitioner is correct that the Tax Appeals Tribunal in ***Matter of Capital District Better TV, Inc***. (December 27, 1991, ***confirmed as modified*** 200 AD2d 911, 606 NYS2d 930) decided that a cable television distribution system in Ithaca, New York, which included aerial distribution, met the capital improvement test because its underlying franchise agreement did *not* have a removal clause. Consequently, although not specifically articulated, the Tribunal's decision impliedly recognized that the affixation requirement was met by the aerial distribution portion of a cable television distribution system.

J. The decision of the Tax Appeals Tribunal in ***Matter of Capital District Better TV, Inc. (supra)*** is pivotal in analyzing the primary issue in this matter, whether the permanency

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[5]The Commission discusses the treatment of Glenville Cablesystem's "distribution plant" which the Commission found consists of the principal elements of the trunk cable, trunk amplifier, distribution cable, distribution amplifier and taps.

requirement, or the third prong of the three-part test has been met. In this earlier matter, which involved some of the same petitioners who were parties in the consolidated hearing as noted in footnote "1" and also involved the representation of attorney Ronald W. Meister, the Tribunal analyzed the third prong of the three-part test described above in determining whether the installation of a cable distribution system constituted a capital improvement.

Matter of Capital District Better TV, Inc. (supra) involved five separate cable television systems. The Tribunal decided that one system, as noted in Conclusion of Law "I" met the capital improvement test for the installation of its distribution system where its underlying franchise agreement did not have a removal provision:

> The other relevant factors in this case are . . . derived from the credible and competent testimony of two witnesses which indicated that the installation of the cable is intended to be permanent, that it is not feasible to remove the cable, and that such removal is impossible without causing material damage to the cable. We believe that this credible testimony, absent any evidence to the contrary, is sufficient to prove that petitioner American Television Communications Corporation intended the cable it installed in Ithaca to be a permanent installation. Since there is no dispute that the other aspects of the definition of capital improvement were satisfied, we find in favor of American Television Communications Corporation on this installation.

The Tribunal also decided that the installation of a cable system in the Town of Colonie by Capital District Better TV, Inc. was not a capital improvement because "it has not been established that the Colonie installation was intended to be permanent." With regard to this installation, the underlying franchise agreement included a removal clause which provided in relevant part as follows:

> [i]n the event of a termination then, the Company shall execute such documents as may be necessary to transfer title of the system to the Town, whereupon the Town shall proceed to hold a sale and sell the system . . . . *The Town reserves the right to require the Company to remove its supporting structures, poles, transmission and distribution systems and*

> *appurtenances* from the streets, ways, lanes, alleys, parkways, bridges, highways, and other public places in, over, under or along which they are installed and to restore the areas to their original condition. If such removal is not completed within six (6) months of such termination, the Town may deem any property not removed as having been abandoned (emphasis in original).

Because of the above removal clause, petitioner did not meet its burden of proving that the installation of its cable system was permanent. Petitioner's proof of permanency in the Tribunal's words in ***Matter of Capital District Better TV, Inc. (supra)*** consisted of "testimony and the reality that 'never - - ever in the history of New York State has any municipality, no matter what the relations have been with the cable operator, demanded or required removal of the plant'." The Tribunal, quoting its own decision in ***Matter of Emery Air Freight Corp***. (October 17, 1991, ***confirmed*** 188AD2d 772, 591 NYS2d 264) noted that this proof was insufficient to outweigh the lack of permanency shown by the removal clause:

> [T]he intent of the parties should be gleaned from the terms of the contract, rather than from contradictory testimony, for 'absen[t] . . . fraud, accident or mistake, the parol evidence rule prohibits resort to extrinsic evidence to vary the meaning of a contract when the language of the contract is unambiguous' (citations omitted).

K. On appeal, the Tribunal's decision in ***Matter of Capital District Better TV, Inc. (supra)*** was confirmed as modified by the court in ***Capital Dist. Better TV v. Tax Appeals Tribunal*** (200 AD2d 911, 606 NYS2d 930). The Court held that the Tribunal's decision that the installation of the cable system in the Town of Colonie by Capital District Better TV did not constitute a capital improvement was "rational and supported by substantial evidence [citations omitted]" ***(Capital Dist. Better TV v. Tax Appeals Tribunal, supra***, 606 NYS2d at 933). The Court viewed this portion of the Tribunal's decision as rational because the

removal clause, detailed in Conclusion of Law "J", constituted "objective evidence of the parties' intent at the time the system was installed, notwithstanding DCBTV's testimony that it intended its system to remain permanently with the special franchise" ***(Capital Dist. Better TV v. Tax Appeals Tribunal, supra***, 606 NYS2d at 932-933). However, with regard to the installation of the three cable systems by the three sister companies, the Court decided that the Tribunal wrongly concluded that these other systems were installed pursuant to agreements that contained removal provisions. Without evidence that the respective agreements had such removal provisions, there was no evidence to support a conclusion that the installation of the companion cable systems were not intended to be permanent. Consequently, it is fair to read the Court's decision as holding that a cable company's installation of its distribution system is, ordinarily, properly treated as a capital improvement.

L. The question then becomes whether in the matter at hand the removal clause in petitioner's franchise agreement, which shows lack of permanency, may be outweighed by the evidence introduced by petitioner, which shows that it intended the installation of its distribution system to be permanent. Petitioner is correct that the fact that there is a removal clause does not mean that it must *automatically* lose its case, rather "all the circumstances" must be considered (***Matter of Emery Air Freight Corp***., Tax Appeals Tribunal, October 17, 1991, ***supra***, [wherein the Tribunal noted that the removal provision in a lease meant that finding that the intent of the installation was permanent was "unlikely", but, impliedly, not impossible]).

M. First, it is observed that the specific removal clause in the matter at hand may be distinguished from the specific removal clause analyzed in ***Capital District Better TV, Inc.,***

(supra). As noted in Finding of Fact "29", in approximately four pages of the franchise agreement, New York City is provided with a series of options in the event petitioner's franchise terminates. Consequently, New York City's option to require the removal of the hundreds of miles of distribution plant, as permitted by the removal clause, is properly viewed as only an option, and the removal clause at issue as a contingent provision. Therefore, petitioner may introduce evidence to show the possibility of such contingency occurring. Parol evidence would not bar such evidence since it does not *contradict* a contractual provision but rather provides an explanation and a context for what, in this instance, is *clearly* a contingency provision (***cf., Matter of Shechter***, Tax Appeals Tribunal, October 13, 1994).

N. It cannot be denied that petitioner's representative has been given another opportunity to revisit the issue of permanency in the situation where the underlying franchise agreement has a removal clause. In this instance, petitioner has created an administrative record, unlike the one in the earlier matter of ***Capital District Better TV, Inc. (supra)*** (as can be surmised from a review of the reported determinations and decisions in the earlier litigation) which includes much evidence, as indicated in paragraph "35", which clearly supports a conclusion that the installation of petitioner's distribution system was intended to be a permanent installation, and that, in reality, New York City would not request the removal of the distribution system based upon the unlikely termination of petitioner's franchise.

O. The fact that petitioner's pole attachment agreements with the utilities include removal clauses does not affect the conclusion that the installation of petitioner's distribution system was intended to be permanent. Even in the unlikely situation that a

utility company would require petitioner to remove its facilities from a rented pole, petitioner's cable system itself would still be extant, i.e., in existence, and petitioner would have to find an alternative distribution route perhaps utilizing its own poles, as noted in Finding of Fact "26". The fact that the installation of petitioner's distribution system was intended to be permanent would remain unaltered.

P. In light of the above analysis, the issue designated "IV" at the beginning of this determination is rendered moot.

Q. The petition of American Cablevision of Queens, as amended as a result of the stipulation between the parties, is granted, and the Notice of Determination dated March 2, 1992 is to be further modified to so conform.

DATED: Troy, New York
April 16, 1998

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE