STATE OF NEW YORK
SUPREME COURT CHAMBERS
ALBANY COUNTY COURTHOUSE
16 EAGLE STREET - ROOM 411
ALBANY, NEW YORK 12207
TELEPHONE: (518) 285-8597
FACSIMILE: (518) 285-8215
E-MAIL: OCONNORCHAMBERS@NYCOURTS.GOV

HON. KIMBERLY A. O'CONNOR
JUDGE

JUSTINA CINTRÓN PERINO, ESQ.
LAW CLERK

DIANE K. DEYO
SECRETARY

July 21, 2017

Re: Town of Ramapo v. NYS Dept. of Tax + Finance
Index No.: 901131-15

Enclosed, please find:

☐	*Order* ☐ *Order to Show Cause*	☐	*Papers withdrawn*
☐	*Decision*	☐	*Papers for filing*
☐	*Decision & Order*	☐	*Case has settled/Discontinued*
☑	*Decision, Order & Judgment*	☐	*Stipulation of Discontinuance*
☐	*Order & Judgment*	☐	*"So Ordered" Letter*
☐	*Judgment*	☐	*Subpoena(s)*
☐	*Discovery/Scheduling Order*	☐	*Appointment Paperwork*
☐	*Matrimonial Papers (Signed)*	☐	*Warrant(s)*
☐	*Order of Transfer*	☐	*Mortgage Foreclosure*
☐	*QDRO*		☐ *Order of Reference*
☐	*DRO*		☐ *Judgment of Foreclosure*
☐	*Stipulation*	☐	*Correspondence for your review*

☑ *Original sent to* Mark G. Mitchell *and must be entered, filed and served on all parties in accordance with the CPLR.*

For any questions concerning the filing of these papers, please call the appropriate County Clerk's Office.

Very truly yours,

Kimberly A. O'Connor

Hon. Kimberly A. O'Connor
Acting Supreme Court Justice

cc: E. Browne

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

THE TOWN OF RAMAPO, ROCKLAND COUNTY,

Petitioner,

-against-

DECISION AND ORDER/JUDGMENT
Index No.: 901131-15
RJI No.: 01-15-11842

THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondents,

VERIZON NEW YORK INC.,

Respondent-Intervenor.

(Supreme Court, Albany County, All Purpose Term)

(Justice Kimberly A. O'Connor, Presiding)

APPEARANCES: GOLDMAN ATTORNEYS PLLC
Attorneys for Petitioner
(Erika C. Browne, Esq., of Counsel)
210 Washington Avenue Extension
Albany, New York 12203

HON. ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondents
(Mark G. Mitchell, Esq., Assistant Attorney General, of Counsel)
The Capitol
Albany, New York 12224-0341

CULLEN AND DYKMAN LLP
Attorneys for Respondent-Intervenor
(Karen I. Levin, Esq., of Counsel)
100 Quentin Roosevelt Boulevard
Garden City, New York 11530

O'CONNOR, J.:

Petitioner Town of Ramapo, Rockland County ("petitioner" or "Town") commenced this Real Property Tax Law ("RPTL") Article 7 proceeding to challenge the 2015 telecommunications ceilings established by respondent The New York State Department of Taxation and Finance's Office of Real Property Tax Services ("ORPTS") with respect to certain public utility mass real property owned by respondent-intervenor Verizon New York Inc. ("Verizon") and located in the Town. The Town now moves, pursuant to CPLR 3212, for an order awarding summary judgment in its favor: (1) correcting the 2015 telecommunications ceiling established by ORPTS to include the fair market value of the fiber optic cables, equipment, and facilities owned by Verizon on private property; and (2) correcting the 2015 assessment set as a result of the telephone ceilings established for the 2015 assessment rolls.

Respondents The New York State Department of Taxation and Finance ("Tax and Finance") and The Commissioner of the New York State Department of Taxation and Finance (collectively "respondents") oppose the motion, and cross-move for an order, pursuant to CPLR 3212, CPLR Article 4 and RPTL Article 7, granting summary judgment in their favor and dismissing this proceeding in its entirety with prejudice. Petitioner opposes the motion, and respondents have replied to the opposition.

Respondent-intervenor Verizon New York Inc. ("Verizon") also opposes the motion, and separately moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor: (1)

declaring fiber optic cable not taxable as "public utility mass real property" under RPTL § 499-hhhh(3); (2) declaring ORPTS' determination that fiber optic cable is not included within the definition of "public utility mass real property" under the New York Assessment Ceilings for Local Public Utility Mass Real Property statute correct; and (3) upholding Tax and Finance's final ceiling assessment, dated July 13, 2015. Verizon also seeks an award of costs and attorneys' fees. Petitioner opposes the motion, and Verizon has replied to that opposition.

The record discloses that Verizon owns public utility mass real property ("PUMRP") throughout the Town. Verizon's PUMRP consists of lines, wires, poles, cables and conduit located on private property, which is used to provide telecommunications and video services to public and private customers. Prior to January 1, 2015, PUMRP owned by a telephone company and located on private property was subject to local assessment. Similar PUMRP owned by other than a telephone company and located on private property was also subject to local assessment. In 2013, the Legislature passed the "Assessment Ceilings for Local Public Utility Mass Real Property" statute ("Ceiling Assessment Statute") (*see* RPTL §§ 499-hhhh through 499-ssss). Effective January 1, 2015, the Ceiling Assessment Statute established a process for the determination and utilization of assessment ceilings in assessing local PUMRP located on private land. Verizon's PUMRP is taxed pursuant to the Ceiling Assessment Statute.

Under the Ceiling Assessment Statute, the Commissioner of Tax and Finance is required to annually establish an assessment ceiling by valuing the PUMRP in each town, city, village or county assessing unit (*see* RPTL §§ 499-hhhh, 499-kkkk). The annual assessment ceiling is established by determining the local reproduction cost of the PUMRP, less depreciation and adjusting for economic or functional obsolescence, as applicable (*see* RPTL § 499-llll). The local PUMRP value is then

multiplied by the equalization rate factor, i.e., the final State equalization rate for each local assessing jurisdiction, the special equalization rate as provided for in RPTL Article 12, or the applicable class equalization rate (*see* RPTL §§ 499-kkkk, 499-nnnn). The resulting amount is the annual assessment ceiling, which is the maximum assessed value of PUMRP that can be placed on the assessment roll of the local taxing jurisdictions (*see* RPTL § 499-qqqq).

On or about March 2015, respondents gave notice of their tentative determination of the telecommunications ceiling for the 2015 tax year on PUMRP owned by Verizon within the Town. On or about April 24, 2015, petitioner filed a complaint with ORPTS objecting to the tentative determination.

A hearing was held before an ORPTS Hearing Officer on May 7, 2015 to address the Town's complaint. Post-hearing submissions were made by the Town and ORPTS, and on June 19, 2015, the Hearing Officer issued a report to the Commissioner of Tax and Finance, recommending that the tentative telecommunications ceiling be upheld. On July 10, 2015, the Commissioner of Tax and Finance determined that the final assessment ceiling for Verizon's PUMRP in the Town for the 2015 assessment roll be established as recommended by the Hearing Officer's report. ORPTS issued a certificate of final telecommunications ceiling for the Town on July 13, 2015.

Petitioner subsequently commenced this proceeding on September 10, 2015, claiming that the 2015 final telecommunications ceiling established by ORPTS with respect to Verizon's PUMRP is artificially low and substantially undervalued because it failed to include any value for Verizon's fiber optic cables, equipment, and facilities located on private property in the Town, and is erroneous as a matter of law because it violates the Equal Protection Clause of the United States and New York State Constitutions by permitting similarly situated properties to be taxed unequally. By letter dated

December 14, 2015, respondents advised the Court that pursuant to RPTL § 712, the allegations of the petition are deemed denied and that respondents were not required to serve an answer or written response to the petition. On or about January 15, 2016, Verizon was permitted to intervene in this proceeding.

The Court is mindful that summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (*see Andre v. Pomeroy*, 35 N.Y.2d 361, 364 [1974]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]; *Currier v. Wiltrom Assocs.*, 250 A.D.2d 956, 956 [3d Dep't 1998]). It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324; *see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d at 853).

When the moving party has demonstrated a right to judgment as a matter of law, the burden shifts to the party opposing the motion to establish, by admissible proof, the existence of a genuine issue of material fact requiring trial of the action, or demonstrate an acceptable excuse for the failure to do so (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; CPLR 3212[b]). The court's "function on a summary judgment motion is to view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference" (*Barra v. Norfolk S. Ry. Co.*, 75 A.D.3d 821, 822-823 [3d Dep't 2010], quoting *Boyce v. Vasquez*, 249 A.D.2d 724, 726 [3d Dep't 1998]), and "decide only whether [any] triable issues have been raised"

(*Barlow v. Spaziani*, 63 A.D.3d 1225, 1226 [3d Dep't 2009]; *see Boston v. Dunham*, 274 A.D.2d 708, 709 [3d Dep't 2000]). Applying these principles, the Court finds that the Town has failed to sustain its burden on the motion, and its motion must be denied. The Court, however, finds that respondents and Verizon have demonstrated entitlement to summary disposition as a matter of law, and their motions are granted.

As a preliminary matter, the Court finds that the Town failed to raise the exclusion of Verizon's equipment and facilities from its PUMRP as an issue at the administrative level. Petitioner only argued that fiber optic cables were improperly excluded from Verizon's PUMRP, and therefore, from the 2015 telecommunications ceiling and final ceiling assessment. As such, the exclusion of Verizon's equipment and facilities from its PUMRP has not been preserved for judicial review and will not be considered by the Court (*see Matter of Hudson River Valley, LLC v. Empire Zone Designation Bd.*, 115 A.D.3d 1035, 1037 [3d Dep't 2014]).

Turning to the merits of the motions, the Court begins by noting that in an Article 7 proceeding, "a property valuation by the tax assessor is presumptively valid" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v. Unmack*, 92 N.Y.2 179, 187 [1998]). It is only "when a petitioner challenging the assessment comes forward with 'substantial evidence' to the contrary [that] the presumption disappears" (*id.*). For the reasons that follow, petitioner has not presented substantial evidence to support a finding that Verizon's fiber optic cables are taxable property, and therefore, that correction of the 2015 telecommunications ceiling established by ORPTS and the resulting 2015 final ceiling assessment is warranted.

Pursuant to RPTL § 499-hhhh(3), "[p]ublic utility mass real property" means

real property, including conduits, cables, lines, wires, poles, supports and enclosures

> for electrical conductors located on, above and below real property, which is used in the transmission and distribution of telephone or telegraph service, and electromagnetic voice, video and data signals. Such term shall include all property described in paragraphs (d) and (i) of subdivision twelve of section one hundred two of [the RPTL]. Special franchise property as describe in subdivision seventeen of section one hundred two of [the RPTL], and all property described in the paragraphs (a) and (b) and subparagraphs (A), (B), (C) and (D) of paragraph (1) of subdivision twelve of seciton one hundred two . . . shall not be considered public utility mass real property for the purposes of [the statute].

RPTL § 102(12) defines "[r]eal property," "property," or "land' to include, among other things:

> (d) [w]hen owned by a telephone company[,] all telephone and telegraph lines, wire, poles, supports and inclosures for electrical conductors upon, above and underground. For purposes of [that] paragraph[,] the term "real property" shall not include station connections and the term "telephone company" shall mean a company subject to regulation by the public service commission which provides, to the general public, within its local exchange area, non-cellular switched local exchange telephone service at post of origination and termination of the signal.
>
> (f) [b]oilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting and equipment for the distribution of heat, light, power, gases and liquids, but shall not include movable machinery or equipment consisting of structures or erections to the operation of which machinery is essential, owned by a corporation taxable under article nine-a of the tax law, used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto[.]
>
> (i) [w]hen owned by other than a telephone company as such term is defined in paragraph (d) [of § 102(12)], all lines, wires, poles, supports and inclosures for electrical conductors upon, above and underground used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain, except that such property shall not include: (A) station connections; (B) fire and surveillance alarm system property; (C) such property used in the transmission of news wire services; and (D) such property used in the transmission of news or entertainment radio, television or cable television signals for immediate, delayed or ultimate exhibition to the public, whether or not a fee is charged therefor.

The Town argues that RPTL § 499-hhhh(3) broadens the definition of taxable PUMRP to expressly include "cables," "lines," and "wires" used in the transmission and distribution of

telephone or telegraph service, and electromagnetic voice, video, and data signals, and that fiber optic cables are "cables," "lines," and "wires" that are used in the transmission and distribution of telephone or telegraph service, and electromagnetic voice, video, and data signals over the electromagnetic field utilizing light. As such, the Town argues that Verizon's fiber optic cables are taxable PUMRP under the Ceiling Assessment Statute, and the value of those cables should have been included in the final ceiling assessment established by ORPTS. Relying on the Second Department's decision in *Matter of T-Mobile Northeast, LLC v. DeBellis* (143 A.D.3d 992 [2016]), the Town further asserts that fiber optic cables are taxable within the meaning of RPTL § 102(12)(i) since fiber optic cables and wires are used to transmit voice and data as the modern replacement for copper cables and wires that were previously used to deliver telephone services, which are treated as taxable real property. The Town also submits that Verizon's fiber optic cables are taxable according to RPTL § 102(12)(f), which defines taxable real property as "equipment for the distribution of heat, light, power, gases and liquid." In support of its motion, the Town offers, among other things, the sworn affidavit of Steve Rinkewich, a registered communications distribution design engineer with 33 years of experience in the field specializing in fiber optic communications, who avers that because light is part of the electromagnetic field, it follows that the transmission of light over fiber optic cable is the transmission and distribution of electromagnetic data.

In opposition to the Town's motion and in support of their cross motions, respondents and Verizon, respectively, submit that a plain reading of the clear and unambiguous language of RPTL § 499-hhhh(3), and the Third Department's decision in *Matter of Level 3 Communications, LLC v. Clinton County* (144 A.D.3d [2016]) establish, as a matter of law, that fiber optic cables are not

taxable property under the Ceiling Assessment Statute. In support of their motion, respondents submit, among other things, the sworn affidavit of Christopher Hayes ("Hayes"), employed by ORPTS as a Real Property Analyst II and whose responsibilities have included developing and administering Tax and Finance's telecommunications ceiling program. Hayes avers, based upon his personal knowledge of local PUMRP, that fiber optic cables consist of filaments of glass through which light beams are used to transport information and data from one point to another. Hayes asserts that they work by transmitting light signals over the cable, and that the cable terminates in an optical receiver that reads the light, decodes the signals, and sends electric signals to other sources such as computers, televisions, and telephones. According to Hayes, while fiber optic cables transmit light signals from one end of a network to another, that transmission does not result in the distribution of light, but rather results in the distribution of data.

Verizon's motion is supported, in part, by the sworn affidavit of Glenn Wellbrock ("Wellbrock"), Director of Verizon's network infrastructure planning who focuses on fiber and its associated optical transport equipment. In this role, Wellbrock oversees all prototype testing of passive and active equipment, including cables and fiber. Wellbrock's previous employment included work for MCI as a technician in the operations group and then as a senior manager in the network engineering/planning groups, and work for several startup companies as a director of product development focusing on new modulation techniques for high speed optical communication. In addition, Wellbrook has published chapters in technical journals, given talks at industry events, contributed to industry standards, and holds over 50 patents related to fiber and associated transport equipment. Wellbrook maintains that Verizon's fiber optic cables do not and cannot conduct electricity as it is technically impossible for them to do so. According to Wellbrook, Verizon's fiber

optics transmit only light via light impulses.

"The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature" (*People v. Finnegan*, 85 N.Y.2d 53, 58 [1995]). Since "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself" (*Matter of Price Chopper Operating Co., Inc. v. New York State Liquor Auth.*, 52 A.D.3d 924, 925 [3d Dep't 2008], citing *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 [1998]; *see also Matter of Kern v. New York State Dep't of Civil Serv.*, 288 A.D.2d 674, 676 [3d Dep't 2001]). Thus, "[w]here the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" (*Wise v Jennings*, 290 A.D.2d 702, 703 [3d Dep't 2002], quoting *Patrolmen's Benevolent Assn. of City of New York v. City of New York*, 41 N.Y.2d 205, 208 [1976][internal quotations and citations omitted]). Furthermore, "[w]hen the particular statute is one which levies a tax, it is well established that it must be narrowly construed and that any doubts concerning its scope and application are to be resolved in favor of the taxpayer" (*Debevoise & Plimpton v. New York State Dep't of Taxation & Finance*, 80 N.Y.2d 657, 661 [1993]).

Guided by "the basic rule that words of ordinary import in a statute are to be given their usual and commonly understood meaning, unless it is clear from the statutory language that a different meaning was intended" (*Debevoise & Plimpton v. New York State Dep't of Taxation & Finance*, 80 N.Y.2d at 661), the Court finds that fiber optic cables on private property are not taxable property under the Ceiling Assessment Statute. This finding is consistent with and supported by the Third Department's decision in *Matter of Level 3 Communications, LLC v. Clinton County*, which expressly incorporated the First Department's holding in *Matter of RCN New York Communications,*

LLC v. Tax Comm'n of City of New York.[1]

In *Matter of Level 3 Communications, LLC v. Clinton County*, the Third Department held that "petitioner's fiber optic installations are not real property taxable under RPTL [§] 102(12)" (144 A.D.3d 115, 120). "[R]esolution of [the] issue" in the case "turn[ed] upon the construction of RPTL 102(12)(f), which provides that real property shall include, among other things, 'equipment for the distribution of heat, light, power, gases and liquids'" (*id.* at 117). The Court explained that

> the RPTL does not define the term "distribution." Thus, in the absence of a controlling statutory definition, [a court must] "construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts in determining the meaning of a word or phrase" (*Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186, 192, 32 N.Y.S.3d 10, 51 N.E.3d 521 [2016] [internal quotation marks and citation omitted]; *see* McKinney's Cons. Laws of NY, Book 1, Statutes § 232 at 392-393; *People v. Finley*, 10 N.Y.3d 647, 654, 862 N.Y.S.2d 1, 891 N.E.2d 1165 [2008]). "Distribute" is commonly defined as "to divide among several or many," "to spread out so as to cover something" and "to give out or deliver especially to members of a group" (Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/distribute) (*id.* at 118).

The Court found that

> petitioner's fiber optic cables do not "distribute" light within [the] commonly understood meanings of the term. Rather, the light signals transmitted over the fiber optic cables terminate in an optical receiver, which reads the light, decodes the signals and sends electric signals to other sources such as computers, televisions and telephones. Thus, while the fiber optic cables at issue undeniably *transmit* light signals from one end of the network to the other, such transmission does not result in the "distribution" of light, but rather data (*id.* [emphasis in original]).

According to the Third Department, "[t]o attribute the same meaning to 'distribution' and

---

[1] The Court acknowledges the Second Department's holding in *Matter of T-Mobile Northeast, LLC v. DeBellis* that "the phrase 'for electrical conductors' as used in RPTL § 102(12)(i) does not modify the entire list 'lines, wires, poles, supports and inclosures,' but rather modifies only the final term 'inclosures,'" and that "[c]onsequently, T-Mobile's fiber optic cables . . . are 'lines' and 'wires' within the meaning of [the statute] and, thus, are taxable real property" (143 A.D.3d at 994). Such decision, however, is not binding on this Court.

'transmission' would render one of [those] terms superfluous," given their commonly understood meanings and the fact that distribution and transmission are independently used in separate subdivisions of the RPTL § 102(12), which is "an outcome that is to be avoided" (*id.* at 119). The Court "therefore treat[ed] the Legislature's distinct use of the terms as evincing a separate meaning of each," and "[c]onstruing RPTL § 102(f) narrowly and resolving any doubt as to its scope in favor of the petitioner [citations omitted], . . . conclude[d] that the fiber optic cables at issue do not constitute equipment for the 'distribution of light' within the meaning of the statute" (*id.*).[2]

Third Department went on further to state:

> As the First Department noted in finding that petitioner's fiber optic cables do not constitute taxable real property under RPTL [§]102(12)(i), "[t]he legislative history, including the 1985 reports by the Tax Commission and the State Board of Equalization and Assessment, reveals that the Legislature was aware of fiber-optic technology and that fiber-optic cables transmit light and do not conduct electricity. Yet, the Legislature chose to limit assessments under RPTL [§] 102(12)(i) to wires and other related property 'for electrical conductors'" (*Matter of RCN N.Y. Communications, LLC v. Tax Commn. of the City of N.Y.*, 95 A.D.3d at 457, 943 N.Y.S.2d 480). Inasmuch as subdivision (i) of RPTL [§] 102(12) specifically addresses the taxability of property used for telecommunication services, that subdivision – not subdivision (f) of the statute – would control in the event of a conflict between the two provisions (144 A.D.3d at 120 [certain internal quotation marks and citations omitted]).

The Third Department's holding in *Matter of Level 3 Communications, LLC v. Clinton County*, which is binding on this Court, makes clear that RPTL § 102(12)(i) controls in this circumstance, not RPTL § 102(12)(f). Nevertheless, even if the Court were to apply the definition of "real property" in RPTL § 102(12)(f), petitioner's argument fails, as a matter of law, since the

---

[2] Applying the same reasoning as the Third Department in *Matter of Level 3 Communications, LLC v. Clinton County*, the Fourth Department in *Matter of Level 3 Communications, LLC v. Chautauqua County* (148 A.D.3d 1702 [2017]) held that fiber optic cables do not distribute light, and therefore, are not taxable under RPTL §102(12)(f).

Third Department has expressly found that fiber optic cables do not "distribute" light, but rather data.

The Third Department's decision in *Matter of Level 3 Communications, LLC v. Clinton County*, incorporating the holding of the First Department in *Matter of RCN New York Communications, LLC v. Tax Comm'n of City of New York*,[3] also makes clear that the Legislature intended to limit assessments under RPTL § 102(12)(i) to "lines, wires, poles, supports and inclosures" which are "for electrical conductors." Furthermore, RPTL § 102(12)(d), the provision specific to telephone companies contains the same unambiguous language as RPTL §102(12)(i), defining assessable property as "lines, wires, poles, supports and inclosures" which are "for electrical conductors." Significantly, the Town neither argues nor offers any proof that Verizon's fiber optic cables conduct electricity, thereby bringing them within the purview of RPTL § 102(12). Respondents and Verizon, on the other hand, have demonstrated that fiber optic cables are not "for electrical conductors" and, therefore, do not fall within the definition of taxable real property under RPTL § 102(12).

Consistent with and incorporating the definitions of taxable real property in RPTL § 102(d) and (i), the Court holds that the clear and unambiguous language of RPTL § 499-hhhh(3) defines

---

[3] In *Matter of RCN New York Communications, LLC v. Tax Comm'n of City of New York*, the First Department held that fiber optic cables on private property are not taxable because they are not "for electrical conductors" within the meaning of RPTL § 102(12)(i) (95 A.D.3d 456, 457 [1st Dep't 2012]). In rendering this determination, the First Department found "[t]he language of RPTL [§] 102(12)(i) [to be] clear and [that] its interpretation does not require reference to external sources" (95 A.D.3d at 457). According to the Court, "[i]n unambiguous language, the statute defines assessable real property in pertinent part as 'all lines, wires, poles, supports and inclosures' which are 'for electrical conductors,'" and "[s]ince the cables at issue are not "for electrical conductors" they cannot be assessed under this statute" (*id.*). The Court went on further to state that "[a]ppellants' argument that fiber optic cables transmit voice, video and data signals and that light is part of the electromagnetic spectrum ignores the preceding language in subsection (i) which limits the assessable property to wires and related property which are 'for electrical conductors'" (*id.*).

taxable PUMRP as "conduits, cables, lines, wires, poles, supports and inclosures" which are "for electrical conductors." Because Verizon's fiber optic cables on private property do not conduct electricity, they are not taxable PUMRP under the Ceiling Assessment Statute, and ORPTS correctly excluded their value from the 2015 telecommunications ceiling and final ceiling assessment.

The Town's claim that the 2015 telecommunications ceiling established by ORPTS violates the Equal Protection Clause of the United States and New York State Constitutions because ORPTS includes the value of fiber optic cables when assessing real property located in public rights of way (special franchise assessment), but does not include fiber optic cables located on private property as PUMRP (ceiling assessment) has been reviewed and found to be without merit. While "[a] property owner may challenge an assessment pursuant to RPTL [A]rticle on several grounds, including that the assessment is excessive, unequal or unlawful," disparate treatment, alone, does not indicate unconstitutionality.

Indeed, the Court of Appeals has observed that, "[t]he Federal and State Constitutions do not prohibit dual tax rates or require that all taxpayers be treated the same. They require only that those similarly situated be treated uniformly. Thus, the creation of different classes for purposes of taxation is permissible and the taxes imposed are uniform within the class" (*Foss v. City of Rochester*, 67 N.Y.2d 247, 256 [1985]). Therefore, "[s]ubject to constitutional inhibitions, the Legislature has very nearly unconstrained authority in the design of taxing impositions," and only when "the distinction between classes is 'palpably arbitrary' or amounts to 'invidious discrimination' will a violation of constitutional equal protection guarantees be found" (*id.* at 257). The Court is not persuaded that including fiber optic cables located in public rights of way under the special franchise assessment, but excluding fiber optic cables located on private land from the telecommunications

ceiling assessment is palpably arbitrary or amounts to invidious discrimination.

Special franchise assessments are made utilizing the definition of "[s]pecial franchise" in RPTL § 102(17), wherein the Legislature expressly included "wires . . . for conducting . . . light" as taxable special franchise property.[4] Since Verizon's fiber optic cables located in the public right of way meet that definition, they are taxable.[5] Neither RPTL § 102(12) nor the Ceiling Assessment Statute include such language. Had the Legislature intended the ceiling assessment and special franchise assessment to be the same, it would have incorporated RPTL § 102(17) in RPTL § 499-hhhh(3). Instead, the Legislature chose to specifically exclude special franchise property from the ceiling assessment.

Any remaining arguments not specifically addressed herein have been considered and found to be lacking in merit or need not be reached in light of this determination. As a final note, the Court declines to award attorneys' Fees to Verizon as Verizon cites no authority permitting the Court to award attorneys' fees here. In any event, even if counsel fees could be awarded, Verizon has failed to submit an affidavit of attorney services supporting its application.

Accordingly, it is hereby

ORDERED, the Town's motion for summary judgment is denied; and it is further

ORDERED, that respondents' and Verizon's motions for summary judgment are granted

---

[4] "Special franchise" is defined in RPTL § 102(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," and "[f]or purposes of assessment and taxation" includes "the value of tangible property situation in, under, above, upon or through any public street, highway, water or other public place in connection therewith."

[5] Notably, "the special franchise tax law relates to licenses, permits, and grants of public property rights, as distinguished from rights in private property," and "public franchises to which the special franchise tax law relate are subject to control and regulation in the interests of the public" (*People ex rel. Bryan v. State Bd. of Tax Com'rs*, 146 A.D. 796, 806 [1st Dep't 1911, Laughlin, J., dissenting]).

to the extent that it is

ORDERED and **ADJUDGED**, that respondent New York State Department of Taxation and Finance's final ceiling assessment, dated July 13, 2015, is upheld; and it is further

ORDERED and **ADJUDGED**, that the petition is dismissed with prejudice.

This memorandum constitutes the Decision and Order/Judgment of the Court. The original Decision and Order/Judgment is being forwarded to the Attorney General for filing. A copy of the Decision and Order/Judgment is being forwarded to the Albany County Clerk. The signing of this Decision and Order, and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry and notice of entry of the original Decision and Order.

SO ORDERED.

ENTER.

Dated: July 21, 2017
Albany, New York

Kimberly A. O'Connor

HON. KIMBERLY A. O'CONNOR
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated February 17, 2017; Affirmation of Erika C. Browne, Esq., sworn to February 17, 2017, with Exhibits 1-6, including Affidavit of Steve Rinkewich, sworn to April 24, 2015; Affidavit of Thomas MacRobbie, sworn to February 17, 2017;
2. Notice of Motion, dated February 28, 2017; Affidavit of Joseph Greco in Support of Respondent-Intervenor's Motion for Summary Judgment, sworn to February 24, 2017; Affidavit of Glenn Wellbrock in Support of Respondent-Intervenor's Motion for Summary Judgment, sworn to February 24, 2017; Attorney's Affirmation (Jennifer A. McLaughlin, Esq.) in Support of Respondent-Intervenor's Motion for Summary Judgment, dated February 28, 2017; Exhibits A-I; Respondent-Intervenor's Memorandum of Law in Support of its Motion for Summary Judgment, dated February 28, 2017;
3. Notice of Motion, dated February 28, 2017; Affirmation of Mark G. Mitchell,

Esq., dated February 28, 2017, with Exhibit 1; Affidavit of Christopher Hayes, sworn to February 27, 2017; Memorandum of Law in Support of Respondents' Motion for Summary Judgment, dated February 28, 2017;

4. Affirmation in Opposition of Mark G. Mitchell, Esq., dated March 21, 2017;
5. Affirmation of Erika C. Browne, Esq., sworn to March 21, 2017;
6. Respondent-Intervenor's Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment, dated March 21, 2017;
7. Reply Affirmation (Mark G. Mitchell, Esq.) In Further Support of Respondents' Motion for Summary Judgment, dated March 30, 2017;
8. Respondent-Intervenor's Reply Memorandum of Law in Further Support of its Motion for Summary Judgment, dated March 30, 2017; Ex. A; *and*
9. Reply Affirmation of Erika C. Browne, Esq., sworn to March 30, 2017.