NOTICE OF PUBLIC HEARING

Subject: Opportunity to comment on proposed rules authorizing and regulating "microtrenching" by the City's telecommunications franchisees.

Date / Time: July 26, 2013

Location: Board Room, DoITT, 255 Greenwich Street, 9th Floor, Manhattan

Contact: Tanessa Cabe
Telecommunications Counsel
Department of Information Technology and Telecommunications
255 Greenwich Street, 9th Floor
New York, New York 10007

Proposed Rules

Pursuant to the authority vested in the Commissioner of the Department of Information Technology and Telecommunications by section 1043 of the Charter, the Department of Information Technology and Telecommunications proposes to amend Title 67 of the Rules of the City of New York. The rule was not included in the agency's most recent regulatory agenda because it was not anticipated at the time the agenda was created.

Instructions

- Prior to the hearing, you may submit written comments about the proposed amendment to DoITT by mail or electronically through the NYC Rules website at www.nyc.gov/nycrules by **7/25/2013.**

- To request a sign language interpreter or other reasonable accommodation for a disability at the hearing, please contact DoITT by **7/8/2013.**

- Written comments and a summary of oral comments received at the hearing will be available until **8/26/2013** between the hours of 9:00 a.m. and 4:00 p.m. at Department of Information Technology and Telecommunications, 255 Greenwich Street, 9th floor, New York, New York 10007.

STATEMENT OF BASIS AND PURPOSE OF PROPOSED RULES

These rules revise the rules of the Department of Information Technology and Telecommunications (DoITT) by adding a chapter authorizing and regulating the use of microtrenching by the City's telecommunications franchisees.

Microtrenching is a technique for installing fiber-optic cable to provide telecommunications services. By contrast to conventional trenching, microtrenching involves a shallower and narrower cut that can be made either in the expansion joint between the sidewalk and the curb or within the roadway. Because microtrenching is a faster and less expensive method to install cable conduit, as demonstrated by the pilot program described below, microtrenching will support the City's goal of expanding broadband access to all of the City's neighborhoods.

Starting in November 2012, DoITT and the Department of Transportation conducted a pilot program with Verizon New York Inc. to test the viability of microtrenching as an alternative to conventional trenching. DoITT was interested in determining whether microtrenching would be faster and cost less than conventional microtrenching, and whether microtrenched fiber-optic cable would perform as well as fiber-optic cable installed by conventional trenching. The Department of Transportation was interested in determining whether microtrenching would be less disruptive to pedestrian and vehicular traffic and less destructive to the structural integrity of the streets.

During the pilot program, Verizon performed microtrenching in varied neighborhoods of all five boroughs. The pilot program demonstrated that microtrenching can be considerably faster and significantly less expensive than conventional trenching. The pilot program produced no indication of reduced fiber-optic cable performance. Based on the results of the pilot program, DoITT has decided to authorize microtrenching as an alternative to conventional trenching. The Department of Transportation has determined that microtrenching is less disruptive to traffic and requires less extensive restoration work, and therefore has also decided to authorize microtrenching as an alternative to conventional trenching. The Department of Transportation will issue separate rules for microtrenching permits.

These rules authorize telecommunications franchisees to perform microtrenching in compliance with Department of Transportation permits. The rules:

- specify the procedural requirements for microtrenching,
- provide for DoITT's monitoring of microtrenching after it is installed, and
- provide for penalties for violations of these rules.

In addition, the rules require the installation of “excess capacity” – extra ducts capable of housing fiber-optic cable owned by the City or by other telecommunications franchisees. The Verizon pilot program similarly required Verizon to install excess capacity and make the extra ducts available to the City and to other telecommunications franchisees. DoITT has determined that retention of the pilot program’s requirement to install excess capacity will serve DoITT’s interest in expanding residential and commercial access to broadband without undue cost to the telecommunications franchisee that performed the original microtrenching.

The rules also provide for DoITT to maintain an inventory of excess capacity, and it is DoITT’s intention that the inventory will ultimately be posted on the City’s web site.

These rules are promulgated pursuant to DoITT’s rulemaking authority under section 1043 of the Charter of the City of New York.

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Title 67 of the rules of the City of New York is amended by adding a new chapter 1, to read as follows:

Chapter 1 – Microtrenching

Section 1-01 Definitions

The following terms are defined for purposes of this chapter:

(a) "Conduit" means equipment installed by means of microtrenching to house fiber-optic cabling in multiple enclosed pathways or pipes.
(b) "Department" means the Department of Information Technology and Telecommunications.
(c) "Duct" means one enclosed pathway or pipe within a conduit.
(d) "Excess capacity" means ducts within a conduit that may not be used by the owner or for the owner's business. Each excess capacity duct must be no smaller than the largest duct within the conduit that is reserved for use by the owner, but in any event each excess capacity duct must have the capacity to house at least 96 strands of fiber-optic cable.
(e) "Low density residential block" means the side of a street on a City block that consists entirely of residential buildings with no more than three residential units each.
(f) "Microtrenching" means a technique for installing conduit to house fiber-optic cable to provide telecommunications services, utilizing a shallower and narrower cut that can be made in the expansion joint between the sidewalk and the curb as well as within the roadway.
(g) "Owner" means the holder of a current telecommunications franchise pursuant to section 1072(c) of the New York City Charter, that proposes to install or has installed conduit. A franchise is not "current" if the term of the franchise agreement has expired and the franchise is in holdover status.
(h) "Telecommunications franchisee" means the holder of a current franchise pursuant to section 1072(c) of the New York City Charter, or of a revocable consent from the City of New York for installation of telecommunications equipment above, below or on any of the streets within the City. A franchise is not "current" if the term of the franchise agreement has expired and the franchise is in holdover status.

Section 1-02 Microtrenching permitted; notifications to the Department

(a) An owner may perform microtrenching to the extent allowed by a permit issued by the Department of Transportation. New microtrenching will not be permitted where sufficient excess capacity is available in existing microtrenching. Before applying to the Department of Transportation for such a permit, the owner must obtain a certification from the Department that no excess capacity is available in the location the owner proposes for microtrenching. The owner must submit that certification to the Department of Transportation as part of the owner's application for a permit.

(b) Microtrenching will be permitted only in full-block or half-block segments. A full block segment is one side of a street, from corner to corner. A half-block segment is one side of a street, from one corner to the midpoint between two corners.

(c) Microtrenching will be permitted only for fiber-optic service to private property within the following zoning districts as defined pursuant to the New York City Zoning Resolution: R1, R2, R2A, R2X, R3, R3-1, R3-2, R3-A, R3-X, R4, R4-1, R4A, R4B, R5, R5-A, R5-B, R5-D, C1-1, C1-2, C1-4, C1-5, C2-1, C2-2, C2-3, C2-4, C2-5, C-3, C4 (but only to premises with a commercial floor area ratio of 2.0 or less), M-1 (but only to premises with a manufacturing floor area ratio of 2.0 or less), M-2, M-3, and special purpose districts (but only to premises with a floor area ratio of 2.0 or less).

(d) After obtaining a permit for microtrenching from the Department of Transportation, but before beginning microtrenching construction, an owner must notify DoITT of the intended dates of the start and completion of microtrenching construction. Notification must be made on a form and in a format prescribed by the Department. The owner must submit the following documents with the notification:

   a. *Proof of security.* "Proof of security" means proof that the issuer of any bond, insurance, letter of credit or other security issued in connection with the owner's telecommunications franchise agreements has agreed to extend the coverage of such security to the owner's microtrenching, without change to any other terms and conditions of such security that are for the benefit of the Department or the City. The Department will have the right to draw on the security to cover any unpaid fines assessed pursuant to section 1-07(c) of this chapter, or to cover any unmet obligation to remove conduit pursuant to section 1-06 of this chapter.

   b. *Indemnification.* "Indemnification" means an agreement to indemnify the Department and the City in the form that appears in appendix A to this chapter.

(e) Promptly after completion of microtrenching construction, and at most within 40 days after the Department of Transportation issued the permit for microtrenching,

the owner must file a document with the Department, in a format to be prescribed by the Department, containing the following information:

a. An "as-built" drawing of the conduit installed. The "as-built" drawing will be treated as proprietary and confidential, to the extent permitted by law.
b. A map showing the street location of the conduit including the side of the street the conduit is on, the beginning and ending points of the conduit, the number of ducts in the conduit, and the number of ducts of excess capacity in the conduit. The map must accurately reflect the addresses of buildings that are passed by the conduit. The map may be made public, by itself or in aggregation with other maps, at the discretion of the Department.

Section 1-03 Requirement to install excess capacity

(a) The owner must use microtrenching materials and equipment that will facilitate the use of excess capacity by telecommunications franchisees.
(b) On a low density residential block, all conduit must have excess capacity of at least four ducts.
(c) In any other location, all conduit must have excess capacity of at least six ducts.

Section 1-04 Ownership and maintenance of conduit

Except as provided in section 1-08(b) of this chapter, the owner must retain title to the conduit and must maintain the conduit in working order and good repair, and in compliance with the rules of this chapter. The owner must comply with all requirements, directives and orders of the Department of Transportation regarding microtrenching.

Section 1-05 Use and management of excess capacity

(a) The owner must make one duct of the excess capacity available without charge or fee to the City for installation of fiber-optic cable for use by the City for the City's direct benefit. The "City" includes any agency or office of New York City government, and any City-related public institution such as the New York City Housing Authority, the Health and Hospitals Corporation, the New York City Department of Education, and the Metropolitan Transportation Authority.
(b) The owner must make all other ducts of the excess capacity available without charge or fee to any telecommunications franchisee for installation of fiber-optic cable to serve the telecommunications franchisee's business or customers.
(c) Inquiries about the availability and ownership of excess capacity may be submitted to the Department.
(d) A City request to use excess capacity may be submitted to the owner only by the Department.

(e) A telecommunications franchisee's request to use excess capacity must be submitted by the telecommunications franchisee to the owner. The telecommunications franchisee must submit a copy of the request to the Department simultaneously with submission of the request to the owner.

(f) The owner must respond to a request to use excess capacity within five business days of the owner's receipt of the request. The owner's response must either approve or deny the request, and if the owner denies the request the owner must state the reasons for the denial. If the request is a City request, the owner must submit its response to the Department. If the request is by a telecommunications franchisee, the owner must submit its response to the telecommunications franchisee and simultaneously submit a copy of its response to the Department.

(g) The owner must make excess capacity available to telecommunications franchisees on a first-come, first-served basis. However, the owner is not obligated to provide excess capacity to a telecommunications franchisee other than for the actual use for the telecommunications franchisee's business or customers. That is, a telecommunications franchisee may not reserve or use excess capacity for the possibility of future use or for hoarding. Also, the telecommunications franchisee may not sublease excess capacity.

(h) The owner must make excess capacity available to a telecommunications franchisee no later than 30 calendar days of the owner's receipt of the telecommunications franchisee's request, unless the owner denies the request as provided by paragraph (f) or (g) of this section.

(i) Making excess capacity available to the City and to telecommunications franchisees include making available the opportunity to enter and connect to the conduit at the nearest manhole or similar utility access space.

(j) No later than ten days after the end of each calendar quarter, the owner must submit a report to the Department, in a format to be prescribed by the Department, stating:

    a. The name of each telecommunications franchisee that took occupancy of excess capacity during the previous quarter, and, for each such telecommunications franchisee, the location of the beginning and ending points of each length of duct the telecommunications franchisee occupied; and

    b. The name of each telecommunications franchisee that vacated excess capacity during the previous quarter, and, for each such telecommunications franchisee, the location of the beginning and ending points of each length of duct the telecommunications franchisee vacated.

(k) No later than January 20 of each year, the owner must submit a report to the Department, in a format to be prescribed by the Department, stating the location of each conduit repair and service outage that occurred in the owner's microtrenching during the previous year.

Section 1-06 The owner's obligation to remove or otherwise dispose of conduit

(a) If an owner no longer intends to maintain conduit in working order and good repair, the owner must either remove the conduit at its own expense, or, at the Department's option, transfer the conduit to another owner, or otherwise dispose of the conduit as directed by the Department.
(b) If an owner's telecommunications franchise or microtrenching permit is terminated or revoked by the Department of Transportation, or if an owner's right to own microtrenching is revoked by the Department, the owner must either remove the conduit at its own expense, or, at the Department's option, transfer the conduit to another owner, or otherwise dispose of the conduit as directed by the Department.
(c) If the Department determines that microtrenching is unsuitable or unsafe, either entirely or under specified conditions, the owner must remove the conduit and fiber-optic cable at the owner's expense, or, at the Department's option, transfer title to the conduit and fiber-optic cable to the City without fee or cost.

Section 1-07 Enforcement

(a) Telecommunications franchisees may submit complaints about owners' compliance with the rules of this chapter to the Department.
(b) The Department may audit or otherwise investigate or review an owner's use of microtrenching and compliance with the rules of this chapter. The owner and any telecommunications franchisee that uses or has applied to use the owner's excess capacity must cooperate with the Department in the conduct of such an audit, investigation or review, and must cooperate with any other governmental entity lawfully authorized to conduct such an audit, investigation or review. The owner must provide access to individuals, documents, records and information as may be reasonable and appropriate to such audit, investigation or review.
(c) In the event of a violation of the rules of this chapter, the Department may initiate proceedings before the Office of Administrative Trials and Hearings (IOATH) to seek the imposition of penalties on an owner, including fines or revocation or other limitation of the owner's right to engage in microtrenching. The rules of OATH will apply to such proceedings. Those rules are set forth in title 48, chapter 1 of the Rules of the City of New York.

a. Following a hearing, an administrative law judge will issue a report and recommendation to the Commissioner of the Department or his or her designee. The report and recommendation will state proposed findings of fact and conclusions of law, and a recommended disposition. The responding party will have ten days from the date of the report and recommendation to submit comments on the report and recommendation to the Commissioner. The Commissioner will issue a final decision, subject only to judicial review.
b. Penalties may include fines no less than $100 and no more than $25,000 per violation, termination of the owner's right to engage in additional microtrenching, and revocation of the owner's right to own microtrenching. Factors relevant to the determination of the penalty may include the severity of the offense; whether the offense was willful or inadvertent; whether the offense furthered the owner's evasion of oversight and monitoring; the degree of the cost, disadvantage or inconvenience imposed on others by the offense; and the owner's history of offenses, if any.
c. Violations may include the following. (Descriptions are for informational purposes only; the text of the rule itself determines the scope and meaning of the rule.)
    i. Section 1-02(a): Performing microtrenching without or beyond the scope of a Department of Transportation-issued microtrenching permit.
    ii. Section 1-02(c): Providing fiber-optic service by microtrenching where prohibited.
    iii. Section 1-02(d): Failure to notify the Department, or to timely notify the Department, of the intended dates of microtrenching construction.
    iv. Section 1-02(e): Failure to file, or to timely file, drawings as required after conclusion of microtrenching construction.
    v. Section 1-03: Failure to install required excess capacity.
    vi. Section 1-04: Failure to maintain conduit in good repair, in compliance with these rules, or in compliance with requirements of the Department of Transportation.
    vii. Section 1-05: Failure to make excess capacity available; failure to make excess capacity available timely; attempt to overcharge for excess capacity; failure to respond or respond timely to a request for excess capacity; failure to offer excess capacity on a first-come, first-served basis.

viii. Section 1-05(j): Failure to report to the Department as required.

ix. Section 1-06: Failure to remove or dispose of conduit as directed.

x. Section 1-07(b): Failure to cooperate with an audit, investigation or review.

xi. Any other violation of the rules of this chapter.

Section 1-08 Miscellaneous provisions

(a) Conduit that was installed before the effective date of this chapter, in compliance with the terms of a microtrenching pilot program, will be allowed to remain in place despite any non-compliance with sections 1-02 or 1-03 of this chapter. All of the other rules of this chapter apply to such conduit.

(b) An owner may transfer ownership of conduit to another entity that would be an "owner" as defined by section 1-01(g) of this chapter. A transfer may not be made effective before the submission to the Department of the contract or other document effectuating the transfer.

(c) To the extent that any applicable federal or state law or regulation might require an owner to make excess capacity available to a person or entity more expeditiously or on any other term more favorable to that person or entity than a term provided for by the rules of this chapter, then the applicable federal or state law or regulation applies with respect to such persons or entities instead of the term provided for by the rules of this chapter.

APPENDIX A

INDEMNIFICATION

1. The Owner's Indemnification Obligations: The Owner agrees to indemnify, defend and hold the City, its officers, agents and employees (the "Indemnitees") harmless from any and all liabilities, suits, damages, claims and expenses (including, without limitation, reasonable attorneys' fees and disbursements) ("Damages") that may be imposed upon or asserted against any of the Indemnitees arising out of the Owner's performance of, or its failure to perform, its obligations under Title 67, Chapter 1, of the Rules of the City of New York ("Rules") and/or its undertaking of activities or provision of services thereunder, provided, however, that the foregoing liability and indemnity obligation of the Owner pursuant to this Section 1 shall not apply to any Damages to the extent arising out of any willful misconduct or gross negligence of an Indemnitee. Insofar as the facts and law relating to any Damages would preclude the City from being completely indemnified by the Owner, the City shall be partially indemnified by the Owner to the fullest extent provided by law, except to the extent such Damages arise out of any willful misconduct or gross negligence of any Indemnitee. This indemnification is independent of the Owner's obligations to obtain insurance as provided under the Rules.

2. Defense of Claim, Etc.: If any claim, action or proceeding is made or brought against any of the Indemnitees by reason of any event to which reference is made in Section 1 of this Appendix, then upon demand by the City, the Owner shall either resist, defend or satisfy such claim, action or proceeding in such Indemnitee's name, by the attorneys for or approved by the Owner's insurance carrier (if the defense of such claim, action or proceeding is provided by the insurance carrier) or by the Owner's attorneys. The foregoing notwithstanding, in the event an Indemnitee believes additional representation is needed, such Indemnitee may engage its own attorneys to assist such Indemnitee's defense of such claim, action or proceeding, as the case may be, at its sole cost and expense. The Owner shall not settle any claim with respect to which the Owner is required to indemnify the Indemnitees pursuant to Section 1 of this Appendix without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed.

3. No Claims Against Officers, Employees, or Agents: the Owner agrees not to make any claim against any officer or employee of the City or officer or employee of an agent of the City, in their individual capacity, for, or on account of, anything done or omitted in connection with the Owner's performance of, or its failure to perform, its obligations under the Rules, to the extent that such officer or employee of the City or officer or employee of an agent

of the City was acting within the lawful course and scope of his employment or agency. Nothing contained in the Rules or in this Appendix shall be construed to hold the City liable for any lost profits, or any consequential damages incurred by the Owner or any person acting or claiming by, through or under the Owner.

4. Limitation on Indemnification: As between the City and the Owner, the indemnification obligations of the Owner pursuant to Section 1 above shall not apply to any Damages arising out of the distribution of programming over the Governmental/Educational Access Channels, the Institutional Network available to and used by the City, and/or the Public Access Channels, as such terms are defined pursuant to other agreements between the Owner and the City, to the extent that such claim does not arise out of an act or failure to act by Owner.

_____

Execution by the Owner

Dated: _____

NEW YORK CITY LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007
212-788-1087

CERTIFICATION PURSUANT TO

CHARTER §1043(d)

RULE TITLE: Use of Microtrenching in Telecommunications Services

REFERENCE NUMBER: 2013 RG 053

RULEMAKING AGENCY: Department of Information Technology and Telecommunications

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

(i) is drafted so as to accomplish the purpose of the authorizing provisions of law;

(ii) is not in conflict with other applicable rules;

(iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and

(iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN Date: June 19, 2013
Acting Corporation Counsel

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400

CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Use of Microtrenching in Telecommunications Services

REFERENCE NUMBER: DOITT-2

RULEMAKING AGENCY: DOITT

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

(i) Is understandable and written in plain language for the discrete regulated community or communities;

(ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and

(iii) Does not provide a cure period because the rule provides various steps within the enforcement process where a condition may be corrected before a violation is issued.

/s/ Francisco Navarro — *June 19, 2013*
Mayor's Office of Operations — Date