DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Verizon Communications Inc., et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comments received on the proposed Final Judgment in *United States* v. *Verizon Communications Inc. et al.,* Civil Action No. 1:12–CV–01354–RMC, which were filed in the United States District Court for the District of Columbia on March 11, 2013, together with the response of the United States to the comments.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the District of Columbia

United States of America, and State of New York, Plaintiffs, v. *Verizon Commnications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc., and Bright House Networks, LLC, Defendants.*

Case: 1:12-cv-01354 (RMC)

Plaintiff United States's Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''APPA'' or ''Tunney Act''), the United States hereby files the public comments concerning the proposed Final Judgment in this case and the United States's response to those comments. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court, pursuant to 15 U.S.C. 16(b)-(h), to enter the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register** pursuant to 15 U.S.C. 16(d).

I. Procedural History

On August 16, 2012, the United States and the State of New York filed a Complaint in this matter, alleging that certain agreements among Verizon Communications Inc. (''Verizon''), Cellco Partnership d/b/a Verizon Wireless (''Verizon Wireless''), Comcast Corporation (''Comcast''), Time Warner Cable Inc. (''Time Warner Cable''), Bright House Networks LLC (''Bright House Networks''), and Cox Communications, Inc. (''Cox'') unreasonably restrain trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

Simultaneously with the filing of the Complaint, the United States filed a Competitive Impact Statement (''CIS''), a proposed Final Judgment, and a Stipulation and Order signed by the parties consenting to entry of the proposed Final Judgment after compliance with the requirements of the APPA. Pursuant to those requirements, the United States published the proposed Final Judgment and CIS in the **Federal Register** on August 23, 2012, *see* 77 FR 51048; and had summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, published in *The Washington Post* on August 18, 19, 20, 21, 22, 23, and 24 of 2012. The Defendants filed the statement required by 15 U.S.C. 16(g) on August 27, 2012. The sixty-day period for public comments ended on October 23, 2012. The United States received four comments, as described below and attached hereto.

II. The Investigation and the Proposed Resolution

A. Investigation

In December 2011, Verizon Wireless and each of Comcast, Time Warner Cable, Bright House Networks, and Cox (the ''Cable Defendants'') entered into a series of commercial agreements (the ''Commercial Agreements'') that allow them to sell bundled offerings that include Verizon Wireless services and a Cable Defendant's residential wireline voice, video, and broadband services. In addition, Verizon Wireless and each of the Cable Defendants (except Cox) entered into an agreement (the ''JOE Agreement'') to develop integrated wireline and wireless telecommunications technologies through a research and development joint venture, Joint Operating Entity LLC (''JOE'').

The proposed Final Judgment is the culmination of an investigation by the Antitrust Division of the United States Department of Justice (''Department'') and the Office of the Attorney General of the State of New York into the Commercial Agreements and the JOE Agreement. The Department conducted dozens of interviews with the parties' wireline and wireless telecommunications competitors, media content suppliers, public interest groups, and other interested third parties. The Department obtained testimony from the Defendants' officers and employees and required the Defendants to respond to interrogatories and provide large quantities of documents. Throughout its investigation, the Department coordinated closely with the Federal Communications Commission, which conducted its own parallel investigation into the same agreements. The Department carefully analyzed the information obtained and thoroughly considered all of the relevant issues.

As a result of the investigation the Department filed a Complaint on August 16, 2012, alleging that aspects of the Commercial Agreements and the JOE Agreement were likely to unreasonably restrain competition. A proposed Final Judgment was filed concurrently with the Complaint that, if entered by the Court, would resolve the matter by remedying the violation alleged in the Complaint.

B. The Proposed Final Judgment

The proposed Final Judgment is designed to preserve competition in numerous local markets for broadband, video, and wireless services. In certain parts of the country, Verizon Wireless's parent company [1] Verizon offers fiber-based voice, video, and broadband services under the trade name ''FiOS.'' Verizon offers FiOS service in numerous geographic areas where one of the Cable Defendants also sells wireline voice, video, and broadband services, including parts of New York City, Philadelphia, and Washington, DC. In those areas, the Commercial Agreements would have resulted in Verizon Wireless retail outlets selling two competing ''quad-play'' [2] offerings: One including Verizon Wireless services and a Cable Defendant's services and the

[1] Verizon Wireless is a joint venture owned by Verizon (55%) and Vodafone Group Plc (45%), but is operated and managed by Verizon.

[2] ''Quad play'' refers to a bundle of four telecommunications services: A ''triple play'' of wireline video, broadband, and telephone services, plus mobile wireless services.

other including Verizon Wireless services and Verizon FiOS services. In addition, the Commercial Agreements and the JOE Agreement contained a variety of mechanisms that likely would have diminished Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings.

The Commercial Agreements and the JOE Agreement also threatened the Defendants' long-term incentives to compete insofar as they created a product development partnership of potentially unlimited duration. Innovation and rapid technological change characterize the telecommunications industry, but the agreements failed reasonably to account for such change and instead would have frozen in place relationships that, in certain respects, may have been harmful in the long term. Exclusive sales partnerships and research and development collaborations between rivals which have no end date can blunt the long-term incentives of the Defendants to compete against each other, and others, as the industry develops.

The proposed Final Judgment forbids Verizon Wireless from selling the Cable Defendants' wireline telecommunications services (''Cable Services'') in areas where Verizon offers, or is likely soon to offer, FiOS services,[3] and removes contractual restrictions on Verizon Wireless's ability to sell FiOS,[4] ensuring that Verizon's incentives to compete aggressively against the Cable Defendants remain unchanged. In addition, after December 2016 the proposed Final Judgment forbids Verizon Wireless from selling Cable Services to customers in areas where Verizon today sells Digital Subscriber Line (''DSL'') Internet service (subject to potential exceptions at the Department's sole discretion),[5] thereby preserving Verizon's incentives to expand its FiOS network and otherwise compete using DSL or other technologies. Finally, the proposed Final Judgment limits the duration of JOE and other features of the agreements,[6] ensuring that the agreements will not dampen the Defendants' incentives to compete against one another over the long term.

The proposed settlement also requires the Commercial Agreements to be amended so that:

- Verizon retains the ability to sell bundles of services that include Verizon DSL and Verizon Wireless services as well as the video services of a direct broadcast satellite company (i.e., DirecTV or Dish Network);[7]
- The Cable Defendants may resell Verizon Wireless services using their own brand at any time, rather than having to wait for four years;[8] and
- Upon dissolution of JOE, all members receive a non-exclusive license to all of the venture's technology, and each may then choose to sublicense to other competitors.[9]

The proposed Final Judgment also forbids any form of collusion and restricts the exchange of competitively sensitive information.[10] Finally, Verizon is required to provide regular reports to the Department to ensure that the collaboration does not harm competition going forward.[11]

III. Standard of Judicial Review

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see also United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States* v. *InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.'').

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States's Complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[12] In determining whether a proposed settlement is in the public interest, a

[3] Proposed Final Judgment, *United States et al.* v. *Verizon Communications Inc. et al.,* Civ. No. 1:12–cv–01354 (RMC), § V.A (D.D.C. filed Aug. 16, 2012) (''Proposed Final Judgment''), *available at http://www.justice.gov/atr/cases/f286100/286102.pdf.*

[4] *Id.* § IV.B.

[5] *Id.* § V.B.

[6] *Id.* §§ V.D, V.F.

[7] *Id.* § IV.C.

[8] *Id.* § IV.F.

[9] *Id.* § IV.E.

[10] *Id.* §§ V.J, V.K.

[11] *Id.* § VI.D.

[12] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''); *see generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's ''prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case'').

Courts have less flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As the United States District Court for the District of Columbia confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[13] Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: ''[T]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[14]

IV. Summary of Public Comments and the United States's Response

During the 60-day public comment period, the United States received comments from the following entities: The Communications Workers of America, a trade union representing workers in the telecommunications industry;[15] RCN Telecom Services, LLC, a facilities-based provider of wireline voice, video, and broadband services;[16] Montgomery County, Maryland;[17] and the City of Boston, Massachusetts.[18] The following is a summary of the issues raised by the commenters and the United States's responses to them. Part A addresses issues that were raised by more than one commenter; Part B addresses issues raised by individual commenters.

A. Response to Issues Raised by Multiple Commenters

1. The Proposed Final Judgment Properly Prohibits Verizon Wireless From Selling Cable Services in All Geographic Markets at Risk of Reasonably Foreseeable Anticompetitive Effects

The proposed Final Judgment prohibits Verizon Wireless from selling Cable Services in areas where Verizon presently offers FiOS or is likely to do so in the foreseeable future. Each of the four commenters argues that the proposed Final Judgment should prohibit Verizon Wireless from selling Cable Services in a broader geographic area.[19] The commenters argue that unless Verizon Wireless is prohibited from selling Cable Services in areas where Verizon operates wireline facilities but does not offer FiOS,

[13] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[14] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298 at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

[15] The Tunney Act Comments of the Communications Workers of America on the Proposed Final Judgment (Oct. 23, 2012) (''CWA Comments''), attached hereto as Exhibit A. On February 19, 2013 CWA submitted an ''Addendum'' to its comment, in which it alleges that Comcast and Verizon violated the proposed Final Judgment by exchanging competitively sensitive information pursuant to an FCC proceeding. Although the Addendum was submitted well outside the 60-day comment period specified in the statute, the Department includes it here as Exhibit B. The Department notes in response to CWA's Addendum that Verizon's disclosure of subscriber data to Comcast apparently occurred in late 2011, well before the proposed Final Judgment was filed with the Court and, therefore, cannot constitute a violation of the proposed decree. *See* Opposition to Motion to Dismiss of Comcast Cable Communications, LLC, *In the Matter of Comcast Cable Communications, LLC Petitions for Determination of Effective Competition in Communities in New Jersey,* FCC MB Docket Nos. 12–152 et al. (Feb. 19, 2013), *available at http://apps.fcc.gov/ecfs/comment/view?id=6017164408.*

[16] Comments Regarding the proposed Final Judgment Submitted on Behalf of RCN Telecom Services, LLC (Oct. 22, 2012) (''RCN Comments''), attached hereto as Exhibit C.

[17] Opposition of Montgomery County, Maryland, to proposed Final Judgment (Oct. 22, 2012) (''Montgomery County Comments''), attached hereto as Exhibit D.

[18] Opposition of the City of Boston, Massachusetts to Proposed Settlement (Oct. 22, 2012) (''Boston Comments''), attached hereto as Exhibit E.

[19] *See* CWA Comments at 14; RCN Comments at 6–10; Montgomery County Comments at 23; Boston Comments at 10.

Verizon will have no incentive to expand its FiOS network.[20]

The Department carefully considered the potential impact of the Commercial Agreements on the likelihood that Verizon would expand its FiOS network. Under its existing franchise obligations, Verizon is required to build FiOS to millions of additional households over the next few years, and as discussed further below, these households are covered by the proposed remedy. However, the Department's investigation also found that, well before entering into the Commercial Agreements at issue in this matter, Verizon had decided not to build its FiOS network throughout its entire wireline footprint.[21] As early as March 2010, Verizon publicly stated that it had no plans to obtain additional franchise agreements or build beyond where it is obligated under existing agreements, and had chosen to focus on increasing its penetration in areas where it has already obtained cable franchise agreements.[22] Accordingly, it appears unlikely that Verizon would have expanded FiOS significantly beyond areas with existing franchise agreements for at least the next several years even in the absence of the Commercial Agreements. Thus, competitive harm resulting from the Commercial Agreements appears unlikely in these areas, and it would be very difficult for the Department to prove a significant risk of such harm.

The proposed Final Judgment therefore takes a bifurcated approach to areas that do not currently have FiOS: (1) In areas where FiOS buildout is likely in the next few years (e.g., areas with franchise agreements or build commitments), the decree immediately prohibits Verizon Wireless from selling Cable Services; and (2) in areas where Verizon does not have a franchise agreement or build commitment, but does offer DSL service as of the date of entry of the Final Judgment—areas in which it is unlikely to build FiOS for at least the next several years—the decree prohibits Verizon Wireless from selling Cable Services after December 2, 2016.

With respect to the first category, the proposed Final Judgment ensures that Verizon will retain whatever incentive it has to maintain and expand its FiOS network in areas where such an expansion is plausible. Section V.A prohibits Verizon Wireless from selling Cable Services to households in the ''FiOS Footprint,'' as well as from selling Cable Services in stores that are located in the FiOS Footprint. Contrary to what the comments may suggest, the FiOS Footprint is defined broadly to include not only areas where Verizon currently offers FiOS, but all areas in which it is either obligated or authorized to provide any fiber-based video service.[23] Thus defined, the FiOS Footprint includes all of New York City and Washington, DC, despite the fact that Verizon has only just begun to build FiOS in those cities. Verizon thus has the same incentive to fully build out in those cities, and in other areas where it is authorized but has not yet built, as it had before entering into the Commercial Agreements.

With respect to the second category, although it appears unlikely that Verizon would, in at least the next few years, expand FiOS beyond the areas where it currently has authorization to build, the Department recognized that developments in the technology and economics of FiOS deployment may make additional expansion attractive. Accordingly, Section V.B of the proposed Final Judgment expands the prohibition on Verizon Wireless's sale of Cable Services to include the ''DSL Footprint'' as of December 2, 2016.[24] Thus, even in areas where Verizon has no plans to expand FiOS, and FiOS expansion is unlikely for the foreseeable future, the proposed Final Judgment has the added protection that Verizon may be prohibited from selling Cable Services beyond the end of 2016 if such selling would adversely impact competition (e.g., by adversely affecting the incentives to engage in additional expansion of FiOS).

The Department believes that, taken together, Sections V.A and V.B preserve Verizon's incentives to continue to invest in FiOS, and that the alternatives proposed by the commenters are overbroad and unjustified by the facts. For instance, the City of Boston and Montgomery County would ban Verizon Wireless from selling Cable Services, and the Cable Defendants from selling Verizon Wireless services *anywhere* in California or Texas, even though Verizon offers wireline services in only a small portion of those states.[25] Such a prohibition would deprive millions of consumers in those states of a potentially attractive quad-play offer of wireline voice, video, and broadband services along with wireless services, despite the fact that those areas have no prospect of being served by Verizon wireline services.

RCN's proposal to ban Verizon Wireless's sales of Cable Services in entire Designated Marketing Areas (''DMAs'') where FiOS is authorized to be offered to 10% of residents[26] is less sweeping, but nonetheless overbroad. RCN argues that ''the most logical and economical area for FiOS expansion is adjacent to the area that [FiOS] presently serves or is authorized to serve.''[27] Although Verizon is likely to expand FiOS in the areas in which Verizon already is authorized to build (and, therefore, the prohibition on Verizon Wireless selling Cable Services immediately applies to those areas), expansion beyond those areas is unlikely to occur in the near term. To the extent further FiOS expansion does eventually occur, the most promising areas are likely within the DSL Footprint, much of which is adjacent to the FiOS Footprint, and thus, beginning on December 2, 2016, the prohibition on Verizon Wireless selling Cable Services expands to Verizon's entire DSL Footprint.

Ultimately, there is little or no justification to expand the immediate prohibition on Verizon Wireless's sale of Cable Services to areas where it is unlikely—and hence the Department could not prove—that Verizon would build out FiOS in the absence of the Commercial Agreements.

[20] *See, e.g.,* Boston Comments at 9; Montgomery County Comments at 12–13.

[21] *See Competitive Impact Statement, United States et al.* v. *Verizon Communications Inc. et al.,* Civ. No. 1:12–cv–01354 (RMC), at 15, 17–18 (D.D.C. filed Aug. 16, 2012) (''CIS''), *available at http://www.justice.gov/atr/cases/f286100/286108.pdf; see also* Boston Comments at 6 (showing that in 2008 Verizon planned to build FiOS only to certain parts of the Boston metropolitan area).

[22] *See* Yu-Ting Wang & Jonathan Make, *Cities Seek Alternatives as Verizon Halts Further FiOS Expansion,* COMMC'NS DAILY, Mar. 31, 2010, at 4.

[23] *See* Proposed Final Judgment § II.M ('' 'FiOS Footprint' means any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) Has built out the capability to deliver FiOS Services, (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement.'').

[24] *See id.* § II.J ('' 'DSL Footprint' means any territory that is, as of the date of entry of this Final Judgment, served by a wire center that provides Digital Subscriber Line ('DSL') service to more than a *de minimis* number of customers over copper telephone lines owned and operated by [Verizon], but excluding any territory in the FiOS Footprint. Verizon Wireless may petition the United States to allow continued sales of Cable Services in the DSL Footprint or subsets thereof, which the United States shall grant or deny in its sole discretion.'').

[25] Boston Comments at 11; Montgomery County Comments at 24.

[26] RCN Comments at 9–10.

[27] *Id.* at 9.

2. National and Regional Advertising of Cable Services by Verizon Wireless Will Not Undermine the Proposed Final Judgment

CWA and RCN each argue that Section V.C of the proposed Final Judgment undermines the prohibition on Verizon Wireless's sale of Cable Services by allowing Verizon Wireless to advertise Cable Services in national or regional advertising that may reach households in the FiOS Footprint.[28] This, they argue, will ''inevitably result in Verizon marketing Cable Services to large numbers of residents who live within the FiOS Footprint.''[29]

Section V.C states:

Notwithstanding V.A and V.B, Verizon Wireless may market Cable Services in national or regional advertising that may reach or is likely to reach street addresses in the FiOS Footprint or DSL Footprint, *provided that* Verizon Wireless does not specifically target advertising of Cable Services to local areas in which Verizon Wireless is prohibited from selling Cable Services pursuant to V.A and/or V.B. Further notwithstanding V.A and V.B, Verizon Wireless may, in any Verizon Store:

i. service, provide, and support Verizon Wireless Equipment sold by a Cable Defendant; and

ii. provide information regarding the availability of Cable Services, *provided that* Verizon Wireless does not enter any agreement requiring it to provide and does not receive any compensation for providing such information in any Verizon Store where Verizon Wireless is prohibited from selling Cable Services pursuant to V.A and/or V.B.

Importantly, Section V.C does nothing to eviscerate the prohibition on Verizon Wireless selling Cable Services. Rather, Section V.C relates solely to advertising. Even if customers within the FiOS Footprint receive regional or national advertising, Verizon Wireless is nonetheless prohibited by Sections V.A and V.B from selling them Cable Services.

Section V.C, like the rest of the proposed Final Judgment, is designed to balance the Commercial Agreements' potential to result in procompetitive outcomes against their potential to bring about anticompetitive effects. It is possible that the Commercial Agreements will enable the Defendants to create innovative new products that integrate wireline and wireless technologies. Should the Defendants wish to bring such products to market, one expects that they would advertise the products as broadly as possible in order to attract customers from their competitors.[30] Section V.C allows Verizon Wireless to market the availability of Cable Services in national or regional advertising that may reach households within the FiOS Footprint or DSL Footprint, provided that Verizon Wireless does not specifically target advertising of Cable Services to those areas. Absent Section V.C, Verizon Wireless would be prohibited from all national advertising of Cable Services, despite the fact that it is prohibited from selling Cable Services only in a relatively small subset of the nation. Regional and national advertising is generally much more efficient than advertising that can reach only a small, limited audience. Without the ability to efficiently advertise Cable Services, Verizon Wireless would have less ability to market, and ultimately less incentive to develop, innovative technologies through JOE. The proposed Final Judgment properly addresses the need for Verizon Wireless to purchase advertising on an economically efficient scale, while nonetheless preventing Verizon Wireless from conducting marketing activities specifically targeted to areas where it is prohibited from selling Cable Services.

3. Verizon Wireless's Ability To Provide Information About Cable Services on a Voluntary and Uncompensated Basis Will Not Undermine the Proposed Final Judgment

CWA and RCN argue that Section V.C(ii) of the proposed Final Judgment, which allows Verizon Wireless to provide information about Cable Services in Verizon Stores, undermines the prohibition against Verizon Wireless selling Cable Services.[31] The Department believes that allowing Verizon Wireless to provide information about the availability of Cable Services will not cause any anticompetitive harm of the type alleged in the Complaint. The proposed Final Judgment is intended to preserve competition between the respective Cable Defendants and FiOS; it does not require every customer who desires a quad play with Verizon Wireless to purchase FiOS instead of Cable Services. There may be many instances, in fact, when the proposed Final Judgment prevents Verizon Wireless from selling Cable Services to consumers who do not even have the *option* of purchasing FiOS. For example, there will be some customers who live within the FiOS Footprint but do not yet have FiOS available at their homes, and others who live outside the FiOS Footprint but shop at FiOS Footprint Stores.[32] Although the proposed Final Judgment prevents Verizon Wireless from selling Cable Services in those situations, there is no reason to prohibit Verizon Wireless from providing information about the availability of Cable Services on a purely voluntary basis. Indeed, allowing Verizon Wireless to provide this information benefits consumers who visit Verizon Wireless retail stores and are interested in a quad play, but for whom FiOS services are not available.

Because the proposed Final Judgment prohibits Verizon Wireless from receiving any compensation from the Cable Defendants to provide such information, Verizon Wireless has no significant incentive to promote Cable Services in lieu of Verizon products where available, nor is it likely that Verizon Wireless will spend significant resources informing consumers about a product that it cannot actually sell.[33] Section V.C(ii) merely allows Verizon Wireless to provide potentially helpful information to consumers on those occasions when it chooses to do so, perhaps, for instance, to enhance customer satisfaction. The provision does not undermine Verizon Wireless's incentives to promote and sell Verizon's own FiOS products, which was the harm alleged in the Complaint.

B. Responses to Issues Raised by Individual Commenters

1. Communications Workers of America

a. Sections IV.A and IV.B Adequately Ensure That Verizon Wireless Will Be Permitted To Sell Verizon Wireless and Verizon Telecom Services

Sections IV.A and IV.B of the proposed Final Judgment clearly require that the Commercial Agreements be amended to remove any restrictions on Verizon Wireless's ability to sell Verizon Wireless and Verizon Telecom[34] services. Nevertheless, CWA

[28] RCN Comments at 10–13; CWA Comments at 10.

[29] RCN Comments at 11; *see also* CWA Comments at 10 (''The inclusion of this loophole is the functional equivalent of not having included any prohibited conduct in the first place.'').

[30] Indeed, as one of the Defendants' competitors, RCN appears to be concerned about this very possibility. *See* RCN Comments at 12–13.

[31] CWA Comments at 10–11; RCN Comments at 13–15.

[32] For example, the City of Alexandria, VA is outside the FiOS Footprint, but Alexandria residents likely shop in nearby Arlington, VA or Washington, DC, which are within the FiOS Footprint.

[33] RCN argues that Verizon Wireless has an incentive, independent of commissions, to promote the use of JOE-developed technologies. RCN Comments at 12–13. This is likely true. But within the FiOS Footprint, Verizon Wireless will have a greater incentive and ability to promote JOE technologies deployed by FiOS than those deployed by the Cable Defendants.

[34] Verizon Telecom is the business unit through which Verizon offers consumer wireline services,

argues that Section IV.C somehow ''dismantles'' these requirements.[35] CWA's complaint appears rooted in a misreading of the proposed Final Judgment, because Section IV.C addresses a different issue than Sections IV.A and IV.B.

The proposed Final Judgment is designed to address the competitive concerns outlined in the Complaint, which predominantly relate to the effect of the Commercial Agreements on direct horizontal competition between Verizon and the Cable Defendants rather than its incentives to promote third-party products. Accordingly, Sections IV.A and IV.B are designed to ensure that Verizon Wireless—the Verizon entity that is party to the Commercial Agreements—is freely able to sell Verizon Wireless and Verizon Telecom services. Those two Sections are not intended to interfere with restrictions on Verizon Wireless's ability to sell third-party video and wireline broadband services.[36]

Section IV.C addresses another issue, namely, what Verizon *Telecom* may or may not sell. As explained in the CIS, Section IV.C serves to remove an ambiguity in the Commercial Agreements, which, as originally drafted, arguably prohibited Verizon *Telecom*— which is not a party to the Commercial Agreements—from selling Verizon Wireless along with third-party video services.[37] Thus, Section IV.C requires the Defendants to amend the Commercial Agreements to clarify that the Commercial Agreements do not restrict Verizon Telecom's ability to sell a bundle that includes Verizon Telecom services, Verizon Wireless services, and third-party video services.[38] The language cited by CWA simply clarifies that the Commercial Agreements may restrict Verizon *Wireless* from actively marketing this form of combined sale by Verizon Telecom. Thus, Verizon Telecom may resell Verizon Wireless services as part of a triple- or quad-play bundle, but the Commercial Agreements may restrict Verizon Wireless's ability to initiate bundled sales with broadband, telephony, or video services from any firm other than Verizon Telecom or the firms that are parties to the Commercial Agreements.

b. Verizon Wireless's Ability To Service, Provide, and Support Verizon Wireless Equipment Sold by the Cable Defendants Will Not Undermine the Proposed Final Judgment

CWA also objects to Section V.C(i) of the proposed Final Judgment, which permits Verizon Wireless to ''service, provide, and support Verizon Wireless Equipment sold by a Cable Defendant.'' As explained in the CIS, the Cable Defendants do not operate retail stores on a widespread basis.[39] Instead, most of the Cable Defendants' sales of video and broadband services are generated through telephone, Internet, and door-to-door sales channels, and it is likely that their sales of Verizon Wireless products will be as well. Customers who purchase Verizon Wireless handsets through the Cable Defendants might wish to obtain their devices, or seek assistance with setting up their service, at a Verizon Wireless store. Section V.C(i) makes clear that Verizon Wireless will not violate the proposed Final Judgment by providing such services at Verizon Wireless stores within the FiOS Footprint or to customers who live in the FiOS Footprint.

According to CWA, this provision ''eliminates the marketing advantage held by Verizon FiOS, which otherwise may have been able to capitalize on the retail presence of Verizon Wireless.''[40] The Department disagrees. FiOS still will have a marketing advantage in the FiOS Footprint. Verizon Wireless stores in the FiOS Footprint will be able to advertise and sell FiOS, but will be prohibited from selling Cable Services. In addition, the proposed Final Judgment allows the Cable Defendants to sell Verizon Wireless services to customers who live in the FiOS Footprint using their own sales channels—indeed, inhibiting them from doing so would deprive customers in the FiOS Footprint of a choice of quad-play offers. But once a customer chooses to purchase a quad play from a Cable Defendant instead of a FiOS-based quad play from Verizon, there is no reason not to allow that customer to seek support for his wireless services at a Verizon Wireless store.

c. The Proposed Final Judgment Prohibits, Rather Than Permits, Collusion

CWA objects to Sections V.I[41] and V.J[42] on the grounds that they permit the Defendants to collude on price.[43] To the contrary, these provisions are designed to enable the Department to monitor the Defendants' compliance with the proposed Final Judgment without unreasonably burdening either the Department or the Defendants. The Department brought its Complaint in this matter to prevent harm to competition arising from the implementation of the Commercial Agreements. Section V.I is intended to prohibit the Defendants from entering into new agreements that might also threaten competition, or even simply executing new versions of the Commercial Agreements, without notifying, and receiving approval from, the Department.

Section V.I does contain enumerated exceptions, but these are not anticompetitive ''loopholes,'' as CWA argues.[44] Instead, they are categories of agreements that the Department has determined to be likely to occur in significant volume, but unrelated to the sorts of agreements that are the subject of the Complaint and therefore unlikely to pose significant competitive concerns. For instance, Section V.I excepts ''content agreements between the Verizon Defendants and Cable Defendants who provide video content.'' Absent this exception, Verizon and the Cable Defendants would need to seek prior approval from the Department before entering into, extending, or amending an agreement for FiOS to carry channels owned by Comcast. The Defendants will likely enter into dozens of such agreements over the term of the proposed Final Judgment, none of which are likely to pose the sorts of

including FiOS services as well as DSL and traditional telephone services.

[35] CWA Comments at 8.

[36] The Commercial Agreements as originally drafted authorized Verizon Wireless to sell Cable Services as agents of the Cable Defendants but prohibited Verizon Wireless from selling other third-party video or wireline broadband services (except for FiOS Services).

[37] *See* CIS at 24.

[38] For example, Verizon Telecom markets DirecTV service in its DSL service area; should Verizon Telecom wish to offer a quad-play bundle including Verizon Wireless services and DirecTV, Section IV.C ensures that it will be able to do so. *See* Proposed Final Judgment § IV.C (''Defendants shall amend the Commercial Agreements so that there is unambiguously no restriction on Verizon Wireless's ability to authorize, permit, or enable VZT to sell a Verizon Wireless Service in combination with VZT Services *or any Person's* Broadband Internet, telephony, or Video Programming Distribution service.'' (emphasis added)).

[39] CIS at 19–20.

[40] CWA Comments at 10.

[41] Section V.I states in relevant part that ''[n]o Verizon Defendant shall enter into any agreement with a Cable Defendant nor shall any Cable Defendant enter into any agreement with a Verizon Defendant providing for the sale of VZT Services, the sale of Verizon Wireless Services, the sale of Cable Services, or the joint development of technology or services without the prior written approval of the United States in its sole discretion.'' Section V.I excludes certain types of agreements from its coverage. *See infra* page 21.

[42] Section V.J states in relevant part that ''[n]o Defendant shall participate in, encourage, or facilitate any agreement or understanding between VZT and a Cable Defendant relating to the price, terms, availability, expansion, or non-expansion of VZT Services or Cable Services.'' Section V.J excludes certain types of agreements from its coverage. *See infra* page 22.

[43] CWA Comment at 13.

[44] CWA Comments at 13.

competitive concerns identified in the Complaint. Rather than burden the Department with reviewing each such transaction, and the Defendants with waiting for the Department's approval, Section V.I allows the Defendants to continue entering into video content agreements without undue delay.

Unlike Section V.I, Section V.J prohibits certain agreements outright, rather than conditioning them on the prior approval of the Department. Section V.J's exceptions were designed to allow generally benign transactions between the Defendants while ensuring that anticompetitive conduct does not go unnoticed or unpunished. Section V.J prohibits the Defendants from entering into agreements that relate to the ''price, terms, availability, expansion, or non-expansion of VZT Services or Cable Services,'' with exceptions for certain categories of agreements: ''(1) intellectual property licenses between JOE LLC and VZT, (2) the negotiation of and entering into content agreements between Verizon Defendants and Cable Defendants who provide video programming content, (3) the purchase, sale, license or other provision of commercial or wholesale products or services (including advertising and sponsorships) and the lease of space in the ordinary course among or between the Defendants, or (4) any interconnection agreement between any Cable Defendant and the Verizon Defendants.'' As CWA notes, ''[i]t is impossible for the Defendants to discuss these topics without discussing 'price, terms, availability, expansion, or non-expansion of VZT or Cable Services.' '' [45] That is precisely the point. Strictly construed, absent the exceptions enumerated above Section V.J would prohibit the Defendants from entering into even routine interconnection agreements. But interconnection agreements do not implicate the type of harm alleged in the Complaint and are unlikely to be anticompetitive in most circumstances. Prohibiting them would serve no useful purpose but would greatly disrupt the functioning of the Internet.

In order to avoid any misunderstanding that Section V.J's exceptions serve to condone anticompetitive agreements, as CWA is concerned, the provision contains a savings clause making clear that ''in no event shall a Defendant participate in, encourage, or facilitate any agreement or understanding between VZT and a Cable Defendant that violates the antitrust laws of the United States.'' This savings clause ensures that an agreement that falls within Section V.J's exceptions may nonetheless violate the decree if it violates the antitrust laws.

d. The Court Did Not Refuse To Enter the Proposed Final Judgment in *United States* v. *Comcast Corp.*

CWA urges the Court to refuse to enter the proposed Final Judgment, citing the example of *United States* v. *Comcast Corp.* CWA misrepresents that case. In *Comcast,* U.S. District Judge Richard Leon held a hearing in which he raised concerns about arbitration provisions in the proposed Final Judgment in that matter. However, Judge Leon did not ''determin[e] that the binding arbitrations are not in the public interest,'' as CWA asserts.[46] Judge Leon entered the proposed Final Judgment, but also issued a Memorandum Order setting forth certain reporting requirements ''to ensure that the Final Judgment is, and continues to be, in the public interest[.]'' [47]

2. RCN

a. The Mandatory Licensing of JOE Technology Is Not Justified Based on the Harms Alleged in the Complaint

RCN urges the Court to require that ''products developed by JOE [ ] be available to other wired broadband providers on a commercially reasonable and nondiscriminatory basis.'' [48] RCN believes that ''because of the size of the participants in the JOE, the technology that it develops for the exclusive use of its members will become the industry standard for integration of wired and wireless technologies, and those that have no ability to use that technology will find themselves unable to compete.'' [49] RCN thus believes that JOE could harm competition among wireline firms by foreclosing some of them from access to JOE-developed technologies.

As RCN notes, the proposed Final Judgment does not address this concern. That is because the Department did not allege such harm in its Complaint. Instead, the Complaint alleges that JOE may unreasonably restrict the JOE members' abilities to innovate outside the joint venture.[50] JOE's exclusivity provisions and unlimited duration could reduce the Defendants' incentives and abilities to compete against one another through product development.

The proposed Final Judgment addresses this harm in two ways. First, Section V.F requires each JOE member to exit the joint venture by December 2, 2016, unless the Department decides in its sole discretion that the member's participation will not adversely impact competition. In exercising its discretion, the Department may rely in part on periodic reports on the activities of JOE that Verizon Wireless is required to furnish to the Department under Section VI.A. Second, Section IV.E requires the Defendants to amend the JOE Agreement to ensure that parties exiting JOE will take with them any intellectual property rights owned by JOE as of the date they exit. Defendants exiting JOE (including those exiting JOE pursuant to Section V.F) each will be free to license any such technologies to other firms, including RCN. These two provisions address the harm identified in the Complaint by ensuring that (1) the joint venture does not lock its members into an exclusive partnership that reduces their incentives to compete with one another over the long term, and (2) each member is free immediately to use the fruits of the venture upon its dissolution without anticompetitive interference by the others. Any further mandatory licensing requirement that would require the Court to determine whether any given set of licensing terms is ''commercially reasonable'' is unnecessary here and unjustified by the competitive harm that the Department alleged in its Complaint.

b. RCN's Desired Backhaul Remedies Are Not Justified Based on the Harms Alleged in the Complaint

RCN complains that the Commercial Agreements require Verizon Wireless to give the Cable Defendants preferential treatment when purchasing backhaul services, the means by which data are carried from wireless cell sites to the core wireline networks that underlie the wireless communications infrastructure. Backhaul services are provided by wireline network operators, including the Cable Defendants, cable overbuilders (e.g., RCN), and traditional telephone carriers (e.g., Verizon, AT&T, CenturyLink).

The proposed Final Judgment does not address this issue because the United States's Complaint does not allege any anticompetitive harm relating to backhaul services. Absent any such allegation, there is no justification for a remedy relating to backhaul services.

[45] *Id.* at 14.

[46] *Id.*

[47] *United States et al.* v. *Comcast Corp. et al.,* 808 F. Supp. 2d 145, 150 (D.D.C. 2011).

[48] RCN Comments at 18.

[49] *Id.*

[50] Complaint, *United States et al.* v. *Verizon Communications Inc. et al.,* Civ. No. 1:12–cv–01354 (RMC), ¶ 40 (D.D.C. filed Aug. 16, 2012) (''Complaint''), *available at http://www.justice.gov/atr/cases/f286100/286100.pdf.*

c. The Definition of ''FiOS Footprint'' Unambiguously Includes the District of Columbia

RCN argues that the phrase ''non-statewide franchise'' in the proposed Final Judgment's definition of ''FiOS Footprint'' creates ambiguity as to the District of Columbia. According to RCN, Verizon could ''take the position that its franchise to provide service throughout the District of Columbia is not a 'non-statewide franchise' because the District of Columbia has many of the attributes of a State.'' [51]

The FiOS Footprint is defined in the proposed Final Judgment to mean ''any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) Has built out the capability to deliver FiOS Services, (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement.'' [52] Even if, as RCN argues, there is ambiguity as to whether Verizon's franchise to provide service in the District of Columbia is a ''statewide'' or ''non-statewide'' franchise, there is no ambiguity as to whether Verizon ''has a legally binding commitment in effect to build out the capability to deliver FiOS Services'' there. Verizon's video franchise agreement with the District of Columbia requires it to offer video service to residential areas throughout the District by 2018.[53] The entirety of the District of Columbia is therefore unambiguously included within the definition of the FiOS Footprint.

3. Montgomery County, Maryland

a. Mandatory Build Out Requirements Are Not Justified Based on the Harms Alleged in the Complaint

Montgomery County asks that ''[a]s a condition of approval, Verizon and the Cable Defendants should be ordered to provide a 100 percent build out of their respective service footprints without any limitations.'' [54] The proposed Final Judgment does not place any requirements on Verizon or the Cable Defendants to extend or upgrade their networks.

The Complaint alleges harm to competition resulting from the Commercial Agreements' diminishing the incentives to compete between Verizon, on the one hand, and a relevant Cable Defendant, on the other. The purpose of the proposed Final Judgment is therefore to ensure that Verizon and the Cable Defendants have the same incentives to compete against each other, including by extending and upgrading their respective networks, as they had before they entered the Commercial Agreements. The proposed remedy accomplishes this. The proposed Final Judgment is not a vehicle for Montgomery County to obtain through this Court what it has been unable to obtain as a local franchising authority.[55] The County heretofore has not required Comcast, Verizon, or RCN for that matter, to build their networks to every single residential unit in the county ''without any limitations,'' [56] and indeed such a requirement would be extraordinary and inappropriate to this proceeding.

b. The Proposed Final Judgment Properly Balances the Potential Benefits of Cooperation With the Need for Strong Protections of Competition

Montgomery County asserts that the proposed Final Judgment is not in the public interest because it allegedly permits an ''[u]nprecedented [l]evel [o]f [c]ooperation [a]nd [c]ollaboration'' among competitors and will lead to the ''allocation'' of wireless and wireline markets.[57]

The Department carefully considered the potential impact of the Commercial Agreements and the JOE Agreement on the likelihood and intensity of competition among the parties in the future. The Department's investigation did not uncover any anticompetitive ''allocation'' of markets. Moreover, the Department's investigation revealed that the cooperation and collaboration enabled by the Commercial Agreements have the potential both to benefit competition and consumers (e.g., through the introduction of new products) but also to create competitive risks. The proposed Final Judgment seeks to allow the realization of the benefits from the Commercial Agreements while, by imposing certain restrictions, minimizing the potential competitive risks. For example, recognizing risks from indefinite collaboration, the Department included in the proposed Final Judgment automatic time limits on participation in JOE and certain exclusivity provisions of the Commercial Agreements.[58] It also mandated vigorous reporting requirements, document retention, and mandatory antitrust education for all Defendants.[59] The Department reserves the right to pursue any illegal conduct, and stands ready and willing to enforce the antitrust laws should violations occur in the future.

c. Montgomery County's Grievances With the Contemporary Practice of Bundling Are Irrelevant to the Harms Alleged in the Complaint

Montgomery County devotes a substantial portion of its comments to explaining how, in its view, bundled sales tend to work to the benefit of producers rather than consumers.[60] These remarks are irrelevant to the question of whether the proposed Final Judgment adequately remedies the harms alleged in the Complaint and is therefore ''within the reaches'' of the public interest.[61] The Complaint filed by the Department alleges no harm resulting from the bundling of wireless and wireline services. Montgomery County is not entitled to substitute its own hypothetical complaint for the one filed in this case by the Department of Justice.[62]

d. The Proposed Final Judgment Is Workable and Enforceable

Finally, Montgomery County suggests that the proposed Final Judgment is ''obviously fraught with problems,'' ''will lead to consumer confusion,'' and ''will be difficult to monitor, interpret, and enforce.'' [63] However, the County provides no explanation as to why it believes the proposed Final Judgment will be unworkable or unenforceable. The Department of Justice has carefully crafted the proposed Final Judgment exactly so that it will be understandable and enforceable throughout the life of the decree, and does not foresee any significant difficulties with its interpretation or enforcement.

[51] RCN Comments at 20.

[52] Proposed Final Judgment § II.M.

[53] Cable Franchise Agreement Between the District of Columbia and Verizon Washington, DC Inc. (Apr. 30, 2009), *available at http://www.oct.dc.gov/information/legal_docs/verizon/doc_viewer.asp?document=Verizon_DC_Franchise_Agrement_2009.pdf.*

[54] Montgomery County Comments at 25.

[55] *See* Montgomery County Comments at 5–8.

[56] *See id.* at 6 n.13.

[57] *See id.* at 11–19; *see also* Boston Comments at 9–10 (arguing that the Commercial Agreements will enable Verizon Wireless and the Cable Defendants to ''remain the dominant players in their respective broadband markets avoiding direct competition with each other'').

[58] *See, e.g.,* Proposed Final Judgment §§ V.D, V.F.

[59] *See, e.g., id.* §§ VI, VIII.

[60] *See* Montgomery County Comments at 19–23.

[61] *See Microsoft,* 56 F.3d at 1461.

[62] *See id.* at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20.

[63] *See* Montgomery County Comments at 23–24.

V. Conclusion

After reviewing the public comments, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments and this response are published in the **Federal Register**.

Dated: March 11, 2013.

Respectfully submitted,

/s/ Jared A. Hughes

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Department of Justice, Antitrust Division 450 5th Street, N.W., Suite 7000 Washington, DC 20530 and STATE OF NEW YORK, Office of the Attorney General 120 Broadway New York, NY 10271, *Plaintiffs*, v. VERIZON COMMUNICATIONS INC., 140 West Street 29th Floor New York, NY 10007 CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, One Verizon Way Basking Ridge, NJ 07920 COMCAST CORPORATION, One Comcast Center Philadelphia, PA 19103 TIME WARNER CABLE INC., 60 Columbus Circle New York, NY 10023 COX COMMUNICATIONS, INC., 1400 Lake Hearn Drive Atlanta, GA 30319 and	Civil Action No. 1:12-cv-01354 Judge: Collyer, Rosemary M.

BRIGHT HOUSE NETWORKS, LLC,
5000 Campuswood Drive
East Syracuse, NY 13057

Defendants.

TUNNEY ACT COMMENTS OF THE COMMUNICATIONS WORKERS OF AMERICA ON THE PROPOSED FINAL JUDGMENT

INTRODUCTION

The Communications Workers of America ("CWA") is the largest telecommunications union in the United States, representing over 700,000 workers in communications, media, airlines, manufacturing, and the public sector. CWA has an interest in this proceeding because CWA members, their families, and the communities in which they live could experience higher prices, reduced service, less innovation, reduced investment and fewer jobs if the anti-competitive harm implicated in this transaction is not adequately addressed.

The Department of Justice ("DOJ") and the State of New York challenged the transaction alleging that it would "unreasonably restrain competition in numerous local markets for broadband, video, and wireless services" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, Comp. ¶42, but then agreed to settle the case with a consent decree, as reflected in the proposed Final Judgment (also referred to as "the consent decree"). The anticompetitive effects identified by the DOJ in the Complaint are accurate and thorough. The DOJ explained "the Commercial Agreements contain a variety of mechanisms that are likely to diminish Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings, and they create an opportunity for harmful coordinated interaction among the Defendants regarding, among other things, the pricing of competing offerings." Comp. ¶2. The

DOJ acknowledged that the Cable Defendants each have market power in "numerous local geographic markets for both broadband and video services." Comp. ¶33. The DOJ also determined that "[t]he Commercial Agreements unreasonably restrain future competition" Comp. ¶42 and "significantly and adversely affect Verizon's long-term incentives to … build out FiOS beyond its current commitments." Comp. ¶43.

Notwithstanding these broad and substantial concerns, the DOJ agreed to a consent decree that fails to alleviate the clear competitive harms identified in the Complaint. CWA focuses in these comments on the weaknesses in the remedies related to the Commercial Agreements. The fundamental problem in the consent decree related to the Agreements lies with the series of loopholes, exceptions, and qualifiers in the DOJ's proposed Final Judgment that renders any intended remedy ineffective. The consent decree prohibits Verizon Wireless from selling the Cable Defendants' products in the "FiOS Footprint" (the territories in which Verizon's FiOS competes with the Cable Defendants' video and broadband services.) Yet, the exceptions effectively undermine this remedy. One loophole enables the parties to prohibit Verizon Wireless from marketing or initiating the sale of a wireless/FiOS bundle, disadvantaging FiOS vis-à-vis a wireless/cable bundle. A second loophole permits Verizon Wireless to provide information regarding the availability of Cable Services in the FiOS footprint and to promote Cable Services through regional and national advertising that may reach or is likely to reach customers in the FiOS footprint. A third loophole allows the Defendants to exchange almost any competitively sensitive information, including price, terms, availability, or expansion, so long as they exchange this information under a series of broad exceptions. With these loopholes, the proposed Final Judgment opens the door to Defendants' opportunity for harmful coordinated interaction and reduces Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offering.

CWA submits these comments pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 ("Tunney Act"). Congress has made this Court the final arbiter of the propriety of mergers under the antitrust laws. The Court must "determine that the entry of such judgment is in the public interest."[1] As this Court has observed

> It does not follow... that courts must unquestionably accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the "rubber stamp" rile which was at the crux of the congressional concerns when the Tunney Act became law.

U.S. v. AT&T, 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd *sub nom.*, *Maryland v. U.S.*, 460 U.S. 1001 (1983). If the Court cannot make this finding, it must reject the proposed Final Judgment unless more adequate provisions are made to protect the public interest. CWA respectfully argues that the consent decree is not in the public interest because it fails to address adequately the substantial harm to competition identified in the Complaint and provides too many avenues for the Defendants to undermine intended remedial measures. CWA urges this court to reject the proposed Final Judgment or, in the alternative, to create prophylactic measures sufficient to prevent the harm identified by the DOJ but unaddressed in the consent decree.

I. Overview of the Anticompetitive Effects of the Commercial Agreements

The DOJ recognized the potential harm to competition that will result from this joint venture, and identified three categories of harm: (1) Commercial Agreements that neutralize competition in the markets for broadband and video services, including a bundle that combines these products; (2) the removal of the Cable Defendants as competitors in the market for wireless services; and (3) the pooling and restriction of the use of intellectual property necessary

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[1] 15 U.S.C. § 16(e). *See, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995).

to compete in the future market of bundled broadband/video/telephony/wireless services (colloquially termed a "quad play"). CWA's comments address the DOJ remedial steps as they relate to the first category, the Commercial Agreements.[2]

The DOJ properly concluded that each of the Cable Defendants has market power in numerous local geographic markets, and correctly described FiOS[3] as a disruptive force in challenging this market power, stating "FiOS has been, and remains, a significant competitive threat to cable in the regions where it has been built. Verizon's FiOS offerings have been aggressive in terms of both price and quality, and the cable companies have reacted to FiOS by upgrading their broadband networks and improving the quality of their video products." Competitive Impact Statement ("CIS") at 12. CWA research confirms this analysis. The charts below compare the prices and services available to consumers when both a Cable Defendant and FiOS are available.

Price and Services when FiOS Competes with Comcast and Time Warner

	Comcast	Verizon FiOS	Verizon Price Difference
Top Tier	$189.99 200+ channels, 5 premium 28/5 Mbps normal, with "burst" at 30/6 Mbps	$144.99 380+ channels, 4 premium 75/35 Mbps	- $40 or -28%
Middle Tier	$149.99 290+ channels 28/5 Mbps normal, with "burst" at 30/6 Mbps	$104.99 290+ channels 50/25 Mbps	- $45 or 43%
Basic Tier	$89.00 80+ channels 18/3 Mbps normal, with "burst" at 20/4 Mbps	$94.99 210+ channels 15/5 Mbps	+$5.99 or 6%
Source: Comcast website http:/www.comcast.com/Corporate/Learn/Bundles/bundles.html and Verizon website http://www22.verizon.com/home/shop/shopping.html (Data for Washington DC)			

[2] CWA limits its Tunney Act comments to the Commercial Agreements because this is the area in which CWA has researched and analyzed the negative impact of the joint venture, and this is where CWA can offer the most insight to the court. This limitation does not mean that CWA does not believe there are concerns with other categories of the joint venture, particularly the pooling of intellectual property and the limitations on the use of that intellectual property that might one day negatively impact other firms' ability to compete in a market for quad play services. However, CWA's comments will not provide detail on these concerns.

[3] The DOJ defines "FiOS Service" to mean "any wireline Broadband Internet service, telephony service, or Video Programming Distribution service offered by Verizon that operates over fiber to the home over facilities owned or operated by Verizon." Proposed Final Judgment at 5.

	Time Warner	Verizon FiOS	Verizon Price Difference
Top Tier	$199.99 200+ channels 50 Mbps "burst," but normal speed is less	$144.99 380+ channels, 4 premium 75/35 Mbps	- $55 or -38%
Middle Tier	$164.99 200+ channels 20 Mbps "burst," but normal speed is less	$104.99 290+ channels 50/25 Mbps	- $60 or 57%
Basic Tier	$89.99 200+ channels 10/1 Mbps	$94.99 210+ channels 15/5 Mbps	+$5 or 5%
Source: Time Warner website https://order.timewarnercable.com/OfferList.aspx and Verizon website http://www22.verizon.com/home/shop/shopping.html (Data for Albany NY)			

As the data reveals, FiOS is considerably cheaper than its competition, offers more channels, and faster internet for the middle and top tiers. The disruptive nature of FiOS cannot be overstated, as it provides a legitimate alternative while compelling incumbent dominant Cable Defendants to compete on both price and service.

Having firmly established the importance of Verizon's FiOS as a disruptive force, the DOJ details the various harms to competition that will result from the Commercial Agreements. The Commercial Agreements – by requiring Verizon Wireless to sell the Cable Defendants' product on an "equivalent basis" to its own FiOS product and for a commission – would impair Verizon's incentive and ability to compete with Cable Defendants in those territories in which Verizon's FiOS overlaps with the wireline territory of a Cable Defendant (identified as the "FiOS Footprint").[4] The DOJ concludes that this alliance turns competitors into partners, gives Verizon a financial interest in the success of the Cable Defendant's traditional wireline services, and facilitates anticompetitive coordination among the Defendants. Comp. ¶ 38. The DOJ correctly emphasizes the value of marketing channels in this industry, and adeptly recognizes

[4] The DOJ defines the "FiOS Footprint" to mean "any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) has built out the capability to deliver FiOS Services; (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement." Proposed Final Judgment at 5.

that the Commercial Agreements "deprive Verizon of the ability to exploit fully a valuable marketing channel and alter Verizon's incentives with respect to pricing, marketing, and innovation." Comp. ¶ 39. The Commercial Agreements also drastically alter Verizon's long-term perception of the wireline broadband/video market. The DOJ acknowledges that these Commercial Agreements represent the end to any incentive for Verizon to revisit its FiOS deployment options as a result of changes in technology, economics of FiOS deployment, or macroeconomic changes.[5] Comp. ¶ 43. Finally, the DOJ's Complaint attempts to summarize the problematic open-endedness of the deal, stating that "the Commercial Agreements also unreasonably restrain competition due to ambiguities in certain terms regarding what conduct Verizon can, and cannot, engage in." Comp. ¶ 44.

The DOJ accurately describes the anticompetitive effects of the Transaction. However, the proposed Final Judgment that the DOJ presents to this court fails to protect consumers and those relying on competition in the telecommunications industry from the harm the DOJ has identified.

II. Remedial Measures Suggested are Rendered Moot by Exceptions and Loopholes

Despite identifying multiple broad concerns about this joint venture, the DOJ's remedies regarding the Commercial Agreements fail to prevent fully the harm it anticipates.[6] While there are numerous shortcomings in the proposed Final Judgment, the exceptions, loopholes, and

[5] The DOJ accepts Verizon's assertion of a pre-existing plan not to build out FiOS beyond its current commitments. CWA provided evidence to both the DOJ and the FCC to refute this decision. *See* "Analysis of FiOS Profitability and Strategic Options," Appendix B attached to CWA Comments, In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent to Assign Licenses, WT Docket No. 12-4, July 10, 2012.

[6] For example, by allowing Verizon Wireless to sell Cable Defendants' broadband and video services outside the "FiOS Footprint," for at least the next four years, the DOJ not only ignores the fact that Verizon's DSL broadband service competes directly with cable's broadband service, the DOJ also fails to impose a remedy that would eliminate incentives that "adversely affect Verizon's long-term competitive incentives to reconsider, in future years, its pre-existing decision not to build out FiOS beyond its current commitments." Comp. ¶ 43.

qualifying language are the most problematic. CWA focuses on three loopholes that are particularly egregious. The net effect of these loopholes is the de facto acquiescence by the DOJ to conduct that the DOJ has identified as anticompetitive and likely to harm consumers.

1. Section IV: Required Conduct

In Subsections IV.A and IV.B of the proposed Final Judgment, the DOJ takes appropriate steps to ensure that Verizon Wireless can continue to market and sell products that compete with the Cable Defendants' products, including Home Fusion (wireless broadband connectivity at the home), Home Phone Connect (home telephony over a wireless connection), and any Verizon Telecom (VZT) service,[7] including FiOS. The DOJ expressly eliminates the requirement in the original Commercial Agreements that would have required Verizon Wireless to sell Verizon Telecom services, such as FiOS, on an "equivalent basis" as Cable Services, and attempts to prevent Verizon from sacrificing the marketing and point-of-sale advantages it has through its retail presence. Proposed Final Judgment at 8.

However, the next paragraph in Subsection IV.C dismantles this effort. The paragraph requires the Defendants to amend the Commercial Agreements to allow Verizon Communications to sell Verizon Wireless services as part of a bundle, but then explicitly permits the Commercial Agreements to "prohibit Verizon Wireless from initiating or marketing such a combined sale." Proposed Final Judgment at 9. Thus, in one sentence, the DOJ's consent decree undermines Verizon's marketing and point-of-sale advantages that it clearly intended to protect in the previous Subsections IV.A and IV.B. This limitation is particularly confusing because the proposed Final Judgment defines "Sell" to include "offer, promote, market, or sell" and all correlative terms. Proposed Final Judgment at 6. Thus the proposed Final Judgment

[7] The DOJ defines Verizon Telecom (VZT) Service to mean "any Broadband Internet service, telephony service, Video Programming Distribution service, or any other consumer service offered by VZT, or any bundle thereof, including FiOS Services, over facilities, owned, operated, or leased by VZT." Proposed Final Judgment at 7.

simultaneously requires amendments that may not restrict or condition the ability of Verizon Wireless to "offer, promote, market, or sell" VZT Service, but then allows them to limit the offering and marketing of these services if combined in a joint sale. The net effect is that Verizon Wireless may be prohibited from initiating or marketing the sale of a Verizon Wireless/FiOS quad play bundle, but no similar restriction applies to a Verizon Wireless/Cable Defendant quad play bundle. It is difficult to understand how a Verizon Wireless customer would know about the availability of a wireless/FiOS bundle if the agent at the store is not allowed to "initiate or market" the bundle. This loophole gives the Defendants the incentive and ability to marginalize FiOS in favor of a wireless/cable bundle, contrary to the intended goal of the DOJ remedy. The exception consumes the rule.

2. Section V: Prohibited Conduct

Sections V.A and V.B of the proposed Final Judgment strive to limit Verizon Wireless' ability to sell Cable Defendant products within the FiOS Footprint. Subsection V.A bans Verizon Wireless sale of a Cable Service to a street address in the FiOS Footprint or from a store within the FiOS Footprint. Subsection V.B places a four-year limit on the ability to sell Cable Services within the broader DSL Footprint (where Verizon Communications offers wireline broadband but not fiber optic services).[8] These measures are designed to "maintain Verizon's incentives to aggressively market FiOS against the Cable Defendants in the areas in which both services are available and to ensure vigorous competition in the future." Competitive Impact Statement at 17.

[8] The DOJ defines "DSL Footprint" to mean "any territory that is, as of the date of entry of this Final Judgment, served by a wire center that provides Digital Subscriber Line ("DSL") service to more than a *de minimis* number of customers over copper telephone lines owned and operated by VZT, but excluding any territory in the FiOS Footprint." Proposed Final Judgment at 4.

Then, in Subsection V.C, the proposed Final Judgment provides marketing and sales loopholes that are so broad they eviscerate the effect of Subsections V.A and V.B. Section V.C begins "Notwithstanding V.A and V.B, Verizon Wireless may market Cable Services in national or regional advertising that may reach or is likely to reach street addresses in the FiOS Footprint or DSL Footprint…" Proposed Final Judgment at 11. The DOJ attempts to salvage some aspect of that provision by stating that Verizon Wireless may not "specifically target" advertisements of Cable Defendants' products within these restricted areas. Of course proving this *mens rea* element would be nearly impossible, especially considering the fact that national and regional advertising campaigns will be more efficient than targeted campaigns. The inclusion of this loophole is the functional equivalent of not having included any prohibited conduct in the first place. A customer living in an area in which a Cable Defendant and FiOS are both offered, but adjacent to an area where FiOS has not yet expanded, will see advertising from both the Cable Defendant and Verizon Wireless for a wireless/cable bundle. This reduces Verizon's incentive and ability to compete against the Cable Defendants in the FiOS Footprint.

The proposed Final Judgment follows this enormous loophole with more. First, Verizon Wireless may service, provide, and support in any store, including those in the FiOS Footprint, any Verizon Wireless product sold by a Cable Defendant. This eliminates one of the few marketing advantages that had not already been specifically eliminated. When a Cable Defendant sells a Verizon Wireless product as part of its arrangement under this Joint Venture, even when included in a bundle with its own services, the Cable Defendant may direct the customer to the Verizon Wireless store to retrieve the item. This eliminates the marketing advantage held by Verizon FiOS, which otherwise may have been able to capitalize on the retail presence of Verizon Wireless. Second, Verizon Wireless may "provide information regarding the availability of Cable Services" as long as Verizon Wireless is not contractually bound to provide this information, and provided it does not receive compensation for stores in the FiOS Footprint. Thus imagine a customer living in an area in which a Cable Defendant and FiOS are both offered, but adjacent to an area where FiOS has not yet expanded. Verizon Wireless will be permitted to 1) advertise the Cable Defendant's product "regionally or nationally" to this customer while perhaps opting not to advertise FiOS, 2) provide information about the Cable Defendant's product in its retail store, and 3) deliver and service the Verizon Wireless products sold by the Cable Defendants.

The Competitive Impact Statement mentions the confused customer "who wishes to purchase Cable Services but is confused about a particular Verizon Wireless store's ability to sell those services." CIS at 20. This confusion is inevitable, and is a symptom of the anticompetitive spirit of the Commercial Agreements. It is improper and against the public interest to permit these competitors to rectify the harmful results of their anticompetitive conduct through more anticompetitive conduct. Rather, it is in the public interest to prevent the confusion in the first place. It is completely incoherent to ban the sale of a competitor's services in one breath, and then allow these exceptions in the next. Verizon Wireless will be able to advertise and market the Cable Defendants' services, and the system will be designed in a way that it is not technically Verizon Wireless completing the sale. Then, the Verizon Wireless store will serve as a point of contact for delivery, service, and support for the bundled sale, as well as a secondary source of information regarding its competitors' products. In this way, Verizon and the Cable Defendants easily circumnavigate the prohibition against cross-marketing in the FiOS Footprint. Verizon's disincentives to compete aggressively against Cable Defendants that the DOJ identified in the complaint remain intact.

The DOJ asserts in its Competitive Impact Statement that exceptions allow Verizon Wireless to advertise efficiently and provide a service to customers who have already purchased a Cable Defendant's product. CIS at 19. Allowing competitors to advertise efficiently but not preventing discrimination for its own product will result in the marginalization of FiOS. The Competitive Impact Statement goes on to say that because Cable Defendants do not operate retail outlets, this exception does not harm competition. CIS at 20. The presence or lack thereof of retail outlets does not define whether this arrangement harms competition. The key to evaluating competitive harm is understanding how economic incentives change as a result of the Commercial Agreements and the proposed Final Judgment. By allowing these competitors to perform so many services for each other, the proposed Final Judgment fails in its mission to prevent competitive harm.

These competitive concerns are not speculative. A September 25, 2012 *New York Times* story cites Time Warner and Comcast executives' plans to use loopholes to get around the proposed Final Judgment's ban on cross-marketing in the FiOS Footprint.[9] According to the article, that prohibition appears to be "malleable," and notes that "Time Warner Cable says it plans to have a presence in select Verizon stores in New York City, although FiOS is available in much of the area. Comcast says it plans to enter the Northeast market, too, possibly via the Verizon website if it is not permitted to enter stores in FiOS areas." Perhaps summarizing the lack of concern stemming from a weak proposed Final Judgment, Comcast's executive vice president proclaims "We'll work around that and figure it out while complying with the consent decree." The purpose of the government's regulatory oversight is not to challenge companies to violate antitrust laws in a more creative fashion. The task of the DOJ is to protect consumers by promoting competition. It is clear that this proposed Final Judgment fails that task.

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[9] Amy Chozick, *Mobile Services and Cable TV are Unexpected Allies,* NEW YORK TIMES, September 23, 2012.

3. Sections V.I and V.J: Broad Exceptions to Prohibited Conduct

A third loophole relates to the very real and widely overlooked coordinated effects threat stemming from having competitors sharing sensitive information. Media technology is a price sensitive market, and the gravest threat lies in a coordinated agreement to raise prices. The DOJ attempts to restrict these opportunities in Subsections V.I and V.J which prohibit, respectively, agreements between Verizon Defendants and Cable Defendants regarding the sale of the other's services, and the participation in or encouragement of agreements between the Defendants relating to "price, terms, availability, expansion, or non-expansion of VZT or Cable Services." Proposed Final Judgment at 14. However, as with other instances, the consent decree then allows a set of exceptions so numerous and broad that it swallows the prohibition. These exceptions allow negotiations concerning content agreements over video programming; the purchase, sale, or license of wholesale products; agreements executed in the ordinary course of business pursuant to the Commercial Agreements or the Joint Operating Entity (JOE) Agreement; and any interconnection agreement between the Defendants. It is impossible for the Defendants to discuss these topics without also discussing "price, terms, availability, expansion, or non-expansion of VZT or Cable Services." This broad loophole condemns consumers of broadband and video services to an industry with fewer competitors, fewer options, aligned incentives to forego price competition, and unmitigated opportunity for these providers to do so.

CONCLUSION

The Department of Justice Antitrust Division's Policy Guide to Merger Remedies states "The touchstone principle for the Division in analyzing remedies is that a successful merger remedy must effectively preserve competition in the relevant market. That is the appropriate goal of merger enforcement." U.S. DEP'T. OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO

MERGER REMEDIES, June 2011. The DOJ has not accomplished its goal in this instance. When the DOJ is unable to represent appropriately the public interest, it is imperative that this court intervene. In June 2011, Judge Richard Leon refused to sign a proposed Final Judgment granting approval to the merger between Comcast and NBC Universal after determining that the binding arbitration provisions are not in the public interest.[10] Though different in kind, the shortcomings in the consent decree between the Cable Defendants and Verizon are as egregious as the shortcomings of the arbitration procedures identified by Judge Leon. Here, we have a Complaint that concisely and articulately explains the anticompetitive harm that will result from a merger, and then a proposed Final Judgment that qualifies each remedial action with loopholes and exceptions so pervasive that they render the remainder of the Order ineffective.

The DOJ's should close these loopholes. First, CWA agrees that the Commercial Agreements should be amended as outlined in Section IV.A and IV.B, but believes the Commercial Agreements should not be allowed to prohibit Verizon Wireless from initiating and marketing products necessary to maintain Verizon FiOS as a legitimate competitor in the market – including a wireless/Verizon Telecom Services bundle. Second, CWA agrees with the cross-marketing ban within the FiOS Footprint, and even believes it would be in the optimal consumer interest to ban cross-marketing within the DSL Footprint. Notwithstanding the scope of the ban, the DOJ should remove the exceptions allowing for advertising, product servicing, and information distribution in the FiOS Footprint. CWA disagrees with the assertion that these exceptions allow for efficient consumer benefit without harming competition. Rather, they facilitate anticompetitive conduct on the pretext of consumer benefit. Third, the exceptions outlined in Subsections V.I and V.J are too broad and virtually impossible to monitor. Given the

[10] U.S. v. Comcast Corp., 808 F. Supp.2d 145 (2011). *See also, e.g.*, Stephanie Gleason & Thomas Catan, *Judge Threatens Comcast, NBCU Merger Delay*, WALL ST. J., July 28, 2011.

precarious position in which this transaction leaves FiOS, it is crucial that the government erect barriers to further anticompetitive conduct. As such these exceptions should be much more limited.

CWA respectfully argues that the consent decree is not in the public interest because it fails to address adequately the substantial harm to competition identified in the Complaint and provides too many avenues for the Defendants to undermine intended remedial measures. The loopholes are numerous and the exceptions broad, and the impact on competition will be deleterious. Consumers will experience fewer competitors and less innovation, leading to higher prices, decreased quality, and the creation of a de facto quad-play monopoly. CWA urges this court to reject the proposed Final Judgment or, in the alternative, to create prophylactic measures sufficient to prevent the harm identified by the DOJ but unaddressed in the consent decree.

Respectfully Submitted,

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Counsel to Communications Workers of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice, Antitrust Division
450 5th Street, N.W., Suite 7000
Washington, DC 20530

and

STATE OF NEW YORK,
Office of the Attorney General
120 Broadway
New York, NY 10271,

Plaintiffs,

v.

VERIZON COMMUNICATIONS INC.,
140 West Street
29th Floor
New York, NY 10007

CELLCO PARTNERSHIP
d/b/a VERIZON WIRELESS,
One Verizon Way
Basking Ridge, NJ 07920

COMCAST CORPORATION,
One Comcast Center
Philadelphia, PA 19103

TIME WARNER CABLE INC.,
60 Columbus Circle
New York, NY 10023

COX COMMUNICATIONS, INC.,
1400 Lake Hearn Drive
Atlanta, GA 30319

and

Civil Action No. 1:12-cv-01354

Judge: Collyer, Rosemary M.

BRIGHT HOUSE NETWORKS, LLC,
5000 Campuswood Drive
East Syracuse, NY 13057

Defendants.

TUNNEY ACT COMMENTS OF THE COMMUNICATIONS WORKERS OF AMERICA ON THE PROPOSED FINAL JUDGMENT - ADDENDUM

INTRODUCTION

The Communications Workers of America ("CWA") is the largest telecommunications union in the United States, representing over 700,000 workers in communications, media, airlines, manufacturing, and the public sector. CWA has an interest in this proceeding because CWA members, their families, and the communities in which they live could experience higher prices, reduced service, less innovation, reduced investment and fewer jobs if the anti-competitive harm implicated in this transaction is not adequately addressed.

CWA files this addendum to Tunney Act comments filed on October 23, 2012 in the above captioned matter to bring to light yet another example of how the Proposed Final Judgment fails to protect consumers and competition. In the initial filing CWA outlined the reasons the Proposed Final Judgment fails to address the numerous and legitimate competition concerns resulting from the *de facto* merger of Comcast, Verizon Telecommunications, TimeWarner, and Bright House Networks. To summarize, the Department of Justice ("DOJ") identified three categories of harm: (1) Commercial Agreements that neutralize competition in the markets for broadband and video services, including a bundle that combines these products; (2) the removal of the Cable Defendants as competitors in the market for wireless services; and (3) the pooling and restriction of the use of intellectual property necessary to compete in the future market of bundled broadband/video/telephony/wireless services. CWA limited their Tunney Act comments to the first category, the Commercial Agreements. CWA articulated in October 2012 and continues to believe that the DOJ accurately identified the competitive harm resulting from this transaction in its Complaint. However, the Proposed Final Judgment does not adequately address the harm to competition anticipated by the Complaint. These agreements contain opaque language and gaping loopholes that fail to protect consumers from the very harm that the DOJ identified as likely to occur as a result of this transaction.

It has only been six months since the DOJ and the defendants entered into a stipulation and order on August 24, 2012, and already the inherent failures of the Proposed Final Judgment are manifesting themselves. CWA highlighted a *New York Times* article in its initial filing that noted the fact that executives of the defendants are publically acknowledging their intent to exploit the Proposed Final Judgment's loopholes.[1] Notwithstanding the DOJ's desire to preserve competition at the retail level, it is evident that the members of the joint venture are content to work around contours of the agreement to achieve their anticompetitive truce.[2]

On February 8, 2013 an even more disturbing allegation came to light. In a series of nine proceedings[3] (collectively "New Jersey Effective Competition Cases" pursuant to the FCC's own shorthand) before the Federal Communications Commission ("FCC") Comcast has petitioned the FCC for "a determination that Comcast is subject to effective competition in several

[1] Amy Chozick, *Mobile Services and Cable TV are Unexpected Allies,* NEW YORK TIMES, September 23, 2012.

[2] Verizon Wireless provides more info on the MSO bundle offers at www.verizonwireless.com/twc and www.verizonwireless.com/cox. The operators' websites are www.twc.com/verizonwireless and www.cox.com/wireless.

[3] MB Docket No. 12-152, CSR-8649-E; MB Docket No. 12-159, CSR-8650-E; MB Docket No. 12-160, CSR-8651-E; MB Docket No. 12-161, CSR-8652-E; MB Docket No. 12-164, CSR-8655-E; MB Docket No. 12-165, CSR-8656-E; MB Docket No. 12-166, CSR-8657-E; MB Docket No. 12-180, CSR-8668-E; MB Docket No. 12-183, CSR-8671-E; MB Docket No. 12-190, CSR-8675-E.

communities located in New Jersey."[4] According to the FCC's explanation of the case, "In its attempt to demonstrate that its systems meet the effective competition requirements of Section 623(l)(1)(B) of the Communications Act, Comcast relies upon subscriber data obtained from Verizon New Jersey Inc. ("Verizon") and from two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV"), and DISH Network ("DISH")."[5]

On Monday February 8, 2013 *Communications Daily*, one of the leading telecommunications news providers, reported that the New Jersey Division of Rate Counsel[6] ("Rate Counsel") filed a motion to dismiss Comcast's petition for a declaration of effective competition.[7] The Rate Counsel argues that dismissal is proper because "Comcast relies on competitively sensitive data provided by Verizon Communications ("Verizon") that violates restrictions contained in the Spectrum Decision."[8] Rate Counsel Motion to Dismiss at 2. The Rate Counsel points out that the fact that the FCC granted a protective order confirms the fact that the information submitted by Comcast with its petitions is competitively sensitive information. Thus, according to Rate Counsel, Comcast is violating the terms of the FCC's Order in the *Spectrum Decision*.

Not only does this action violate the FCC Order, but it also violates the terms of the Proposed Final Judgment entered into by Comcast and Verizon to placate the Antitrust Division's concerns. Section V.K of the PFJ states "No Verizon Defendant shall disclose

[4] Media Bureau Order, Protective Order Adopted in NJ Effective Competition Cases, Dec. 20, 2012, *available at* http://apps.fcc.gov/ecfs/document/view?id=7022088078.
[5] *Id.*
[6] The New Jersey Division of Rate Counsel represents the interests of consumers of electric, natural gas, water/sewer, telecommunications, cable TV service, and insurance (residential, small business, commercial and industrial customers). For more information see: http://www.state.nj.us/rpa/.
[7] Motion to Dismiss on Behalf of New Jersey Division of Rate Counsel, Feb. 8, 2013, *available at* http://apps.fcc.gov/ecfs/document/view?id=7022119433.
[8] *I/M/O Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC, etc.*, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95, WT Docket No. 124, ULS Files Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598, WT Docket NO. 12-175 (Released August 23, 2012). ("Spectrum Decision").

competitively sensitive VZT information to any Cable Defendant, nor shall any Cable Defendant disclose any competitively sensitive Cable information to VZT." PFJ at 15. The Analysis to Aid Public Comment explains "Section V.K ensures that no competitively sensitive information passes between the Cable Defendants and Verizon's consumer wireline business, in order to prevent collusion or other lessening of the intensity of the competitive rivalry between FiOS and the Cable Defendants." CIS at 26.

The Rate Counsel articulates the argument well: "Comcast relies on Verizon FiOS subscriber data in conjunction with satellite subscriber data in an attempt to show that competitive subscribership satisfies the Competing Provider Test. However, the use of the Verizon data violates the FCC's restrictions on use of competitively sensitive data contained in its Spectrum Decision. Verizon's subscriber information is competitively sensitive data and its use by Comcast and Verizon where both companies are competing for cable customers is foreclosed by the conditions imposed by the FCC in its Spectrum Decision. There is no question that the Verizon data is not public data and that Verizon considers such data to be proprietary competitively sensitive data." Rate Counsel Motion to Dismiss at 6.

It is already apparent that the Proposed Final Judgment and Stipulation and Order are ineffective in preventing the anticipated anticompetitive conduct. In less than six months after agreeing to modify both the contracts and behavior, Comcast and Verizon are exchanging and using each other's competitively sensitive data in the most brazen of ways. Not only is Comcast violating the letter and spirit of the agreement, and harming competition in the process (as anticipated by many, including the DOJ), but it is doing so in a petition <u>seeking a determination that it is subject to effective competition.</u> Comcast's behavior demonstrates unequivocally that the terms of the Proposed Final Judgment cannot and will not constrain anticompetitive behavior in any meaningful way.

The terms of the Proposed Final Judgment fail the public interest test. A district court must not rubber stamp an antitrust settlement if it believes "the competitive impact of such judgment, including... any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest"[9] does not pass muster. What better competitive considerations could there be than actual, egregious, and blatant misuse of competitive information in direct contradiction to the terms of the settlement being analyzed?

CWA requests the court to carefully analyze and consider whether the Proposed Final Judgment truly is in the public interest. It is hard to fathom how allowing competitors to 1) cease competing against each other; 2) share competitively sensitive information; and 3) use this information to seek deregulation on the grounds that competition is present could possibly benefit the public interest.

Dated: February 19, 2013

Respectfully Submitted,

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[9] 15 U.S.C. § 16(b)–(h) (2000).

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

STEFANIE A. BRAND
Director

February 8, 2013

Electronically Filed
Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: I/M/O Petitions of Comcast Cable Communications, LLC
For a Determination of Effective Competition in Communities in New Jersey
MB Docket No. 12-152, CSR-8649-E
MB Docket No. 12-159, CSR-8650-E
MB Docket No. 12-160, CSR-8651-E
MB Docket No. 12-161, CSR-8652-E
MB Docket No. 12-164, CSR-8655-E
MB Docket No. 12-165, CSR-8656-E
MB Docket No. 12-166, CSR-8657-E
MB Docket No. 12-180, CSR-8668-E
MB Docket No. 12-183, CSR-8671-E
MB Docket No. 12-190, CSR-8675-E

I/M/O Docket Established for Monitoring Recent Verizon Wireless Transactions, WC Docket No. 12-234

Motion toDismiss

Dear Secretary Dortch:

Enclosed for filing is a Motion to Dismiss on behalf of the New Jersey Division of Rate Counsel in connection with the above referenced matter.

This Motion will be electronically filed through the Commission's Electronic Filing system. Service of the Motion will also be by electronic mail.

Very truly yours,

Stefanie A. Brand
Director, Division of Rate Counsel

By:

José Rivera-Benitez, Esq.
Assistant Deputy Rate Counsel

cc: Service List (via electronic mail)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **Comcast Cable Communications, LLC** **On behalf of its subsidiaries and affiliates**	
For a Determination of Effective Competition in:	
Beachwood, NJ–Area Franchise Areas	**CSR-8650-E** **MB Docket No. 12-159**
East Windsor, NJ–Area Franchise Areas,	**CSR-8651-E** **MB Docket No. 12-160;**
Hazlet, NJ (NJ0405),	**CSR-8652-E** **MB Docket No. 12- 161**
Chatham, NJ–Area Franchise Areas,	**CSR-8657-E** **MB Docket No. 12-166**
Buena, NJ–Area Franchise Areas,	**CSR-8656-E** **MB Docket No. 12-165**
Delaware, NJ–Area Franchise Areas,	**CSR-8668-E** **MB Docket No. 12-180**
Berkeley Heights, NJ– Area Franchise Areas,	**CSR-8671-E** **MB Docket No. 12-183**
Bellmawr, NJ–Area Franchise Areas,	**CSR-8675-E** **MB Docket No. 12-190**
North Arlington, NJ (NJ0298) & **Rutherford, NJ (NJ0294),**	**CSR-8649-E** **MB Docket No. 12-152**
Bordentown (City), NJ (NJ0511) & **Bordentown (Township), NJ (NJ0461),**	**CSR-8655-E** **MB Docket No. 12-164**
In the Matter of Docket Established for Monitoring **Recent Verizon Wireless Transactions**	**WC Docket 12-234**

To: Secretary, FCC

Chief, Media Bureau

Chief, Wireline Competition Bureau

MOTION TO DISMISS ON BEHALF OF NEW JERSEY DIVISION OF RATE COUNSEL

The New Jersey Division of Rate Counsel ("Rate Counsel")[1] hereby moves to dismiss the above captioned ten Petitions ("Petitions") filed on behalf of Comcast Cable Communications ("Comcast") with the Federal Communications Commission ("FCC") Media Bureau ("Bureau") seeking a declaration of effective competition in the multiple franchises covered by the respective Petitions. By letter dated January 22, 2013, the Media Bureau set February 22, 2013 as the date for Rate Counsel to file opposition in these matters.

Dismissal of the Petitions is warranted because Comcast relies on competitively sensitive data provided by Verizon Communications ("Verizon") that violates restrictions contained in the *Spectrum Decision*.[2] As explained more fully below, the *Spectrum Decision* precludes the sharing and use of competitively sensitive data between Verizon and Comcast. As a result, the subject Petitions must be refiled without Verizon's competitively sensitive data. In addition, as discussed below, Comcast should be directed to refile the Petitions with updated subscriber data and household data that reflects the effects of Hurricane Sandy. Hurricane Sandy resulted in substantial losses of homes which directly impact both subscriber data and the number of household used in the application of the Competitive Provider Test under which the subject Petitions were filed.

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[1]/ Rate Counsel is authorized to represent the public interest of New Jersey public utility and cable television service consumers before State and Federal regulatory bodies. See N.J.S.A. 52: 27 EE - 48, 55.

[2]/ *I/M/O Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC, etc.*, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95, WT Docket No. 12-4, ULS Files Nos. 0004942973, 0004942992, 0004952444, 0004949596, and 0004949598, WT Docket N0. 12-175 (Released August 23, 2012). ("*Spectrum Decision*").

Rate Counsel also request that the comment period be stayed pending Media Bureau action on this motion as discussed below.

LEGAL ARGUMENT

DISMISSAL OF THE PETITIONS IS NECESSARY DUE TO COMCAST'S RELIANCE ON PROHIBITED DATA

As part of the Competitive Provider Test analysis, Comcast relies upon confidential competitively sensitive data provided by Verizon. The Media Bureau entered a Protective Order regarding the use and disclosure of this proprietary data in this proceeding. The issuance of the Protective Order confirms that Verizon's data included in the filing is proprietary competitively sensitive information. Rate Counsel submits that use of this competitively sensitive data by Comcast violates specific conditions contained in and imposed upon Comcast and Verizon in the FCC's *Spectrum Decision*. Hence, the Petitions should be dismissed and Comcast directed to refile the subject Petitions without the competitively sensitive Verizon information.

Section 543 of the Communications Act of 1934, as amended by Section 623 of the Telecommunications Act of 1996,[3] provides that subscriber rates of cable television systems are subject to either local or federal regulation where effective competition is absent.[4] The Comcast franchises at issue here are currently subject to the regulatory jurisdiction of the Local Franchise Authority ("LFA") for the State of New Jersey, the New Jersey Board of Public Utilities ("Board"), based on the FCC's certification that

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3/ Pub. L. No. 104, 100 Stat. 56, approved February 8, 1996, codified at 47 *U.S.C.* § 151 *et se.*

4/ 47 *U.S.C.* § 543(a)(2).

effective competition is not present there. Under FCC rules, a cable operator, who claims that effective competition exists in a particular franchise, and seeks to rebut the statutory presumption against the existence of effective competition, must satisfy one of four tests set forth in Section 76.905(b) of the Commission's rules.[5] The statutory burden of proof rests exclusively with the cable operator to rebut the presumption by competent evidence.[6]

In these Petitions, Comcast relies upon the Competing Provider Test for its claim that effective competition exists in each subject franchise. Under this test, Comcast must provide competent evidence demonstrating that each claimed franchise is subject to effective competition because the franchise is:

> (1) served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable programming to at least 50 percent of the households in the franchise area; and,
>
> (2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.[7]

A finding of effective competition exempts a cable operator from rate regulation.[8] Comcast bears the burden of proof and must affirmatively demonstrate that each claimed

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5/ 47 *C.F.R.* § 76.905(b).

6/ Regardless of whether an effective competition is contested or not, the cable operator's failure to sustain the burden of proof must result in denial and dismissal of the Petition. *See Cox Southwest Holdings, LP, ten Unopposed Petitions for Determination of Effective Competitions in 17 Local Franchise Areas*, CSR 6877-E, etc., DZ 07-933 (Released March 2, 2007); *I/M/O Time Warner Entertainment Co. LP*, CSR 5136-E, DA 99-234 (Released January 26, 1999).

7/ 47 *U.S.C.* § 623(l)(1)(B); See also, 47 *C.F.R.* §76.905(b)(2).

8/ 47 *C.F.R.* § 76.905.

franchise is subject to effective competition by satisfaction of the Competing Provider Test.[9]

Comcast asserts that it meets the Competing Provider Test based upon data on direct broadcast satellite ("DBS") service (from providers DirecTV and DISH Network) penetration data and based upon proprietary competitively sensitive data from Verizon service on households served in each the subject franchisees for which effective competition status is sought.

Comcast's use and submission of competitively sensitive Verizon subscriber data is inappropriate and contrary to the conditions imposed upon Comcast and Verizon in its *Spectrum Decision*. The sharing of competitively sensitive data between Verizon and Comcast is prohibited by the *Spectrum Decision*.

Thus, such Verizon data cannot be used in this matter to substantiate the claim of effective competition. As a result, the Petitions should be dismissed and Comcast should be directed to refile the Petitions without Verizon's competitively sensitive data. In addition, upon refiling, Comcast should be directed to update both subscriber data and household data to reflect the effects of Hurricane Sandy as discussed below.

I. THE VERIZON SUBSCRIBER DATA CANNOT BE USED TO SUPPORT THE FILED PETITONS.

Comcast relies on Verizon FiOS subscriber data in conjunction with satellite subscriber data in an attempt to show that competitive subscribership satisfies the

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9/ *See In re C-Tec Cable Systems of Michigan, Inc.*, 10 F.C.C.R. 1735, 1736 (1995); *See also, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 5631, 5669-70 (1993) ("*Report and Order*").

Competing Provider Test. However, the use of the Verizon data violates the FCC's restrictions on use of competitively sensitive data contained in its *Spectrum Decision*.

Verizon's subscriber information is competitively sensitive data and its use by Comcast and Verizon where both companies are competing for cable customers is foreclosed by the conditions imposed by the FCC in its *Spectrum Decision*. There is no question that the Verizon data is not public data and that Verizon considers such data to be proprietary competitively sensitive data.[10]

As a result, use of this data by Comcast violates the conditions imposed by the FCC precluding sharing of competitively sensitive data by and between Verizon and Comcast. Therefore, the Media Bureau should dismiss the Petition and direct refiling without the use and reliance upon the Verizon competitively sensitive information.

In the *Spectrum Decision*, the FCC noted that Verizon and Comcast (as part of SpectrumCo LLC) had negotiated a Consent Decree with the United States Department of Justice ("DOJ") addressing the public interest concerns posed by the sale of spectrum held by SpectrumCo to Verizon. The FCC specially found that the Consent Decree coupled with the DOJ restrictions were sufficient to protect the public interest for the time being, and hence, would not impose further restrictions to guard against anti-competitive or anti-consumer conduct by any of the parties.[11] The Consent Decree clearly established the prohibition on disclosure of competitively sensitive information by either

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[10]/ See, *In the Matter of Comcast Cable Communications, LLC Petitions for Determination of Effective Competition in Communities in New Jersey*, Order, DA 12-2069 (Released December 20, 2012).

[11]/ Spectrum Decision, ¶¶ 144, 145.

Verizon or Comcast, one of the cable carriers involved.[12] Section V, subpart K of the Final Judgment provides, in pertinent part, that:

> No Verizon Defendant shall disclose competitively sensitive VZT information to any Cable Defendant, nor shall any Cable Defendant disclose any competitively sensitive Cable information to VZT.[13]

Comcast's disclosure and use of Verizon's subscriber data in support of the Petition for which Comcast seeks a finding of effective competition is conduct that is foreclosed and precluded by the Consent Decree and inconsistent with the FCC's approval based upon compliance with the terms and conditions of the Consent Decree. Comcast and Verizon are improperly sharing Verizon's competitively sensitive data in franchise areas where they both are competing in direct contravention of the restrictions contained the Consent Decree which the FCC relied upon to approve the spectrum sale transaction in the first instance. Absent the FCC modifying its *Spectrum Decision* and its reliance on the Consent Decree, Comcast cannot use Verizon's data in support of its Petitions. Therefore, dismissal of these Petitions is justified, subject to refiling based on removal of the competitively sensitive Verizon data.

Concerning any refiled Petition, competitive subscriber data submitted by Comcast must account for any cancellations in the months that lapsed between the time of the usual SBCA satellite subscriber counts and the filing of the Petition, and account for any service cancellations due to the effects of Hurricane Sandy, since November 1,

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[12]/ *United States of America and State of New York v. Verizon Communications, INC., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., et. als.*, Stipulation and Order and Proposed Final Judgment, No. 1:12-cv-01354 (D.C., filed August 16, 2012) ("Consent Decree").

[13]/ *Id*, at Section V, Subpart K.

2012. New Jersey Governor Christie cited the following Hurricane Sandy impact on New Jersey in his recent State of the State address:

> Sandy was the worst storm to strike New Jersey in 100 years. 346,000 homes were damaged or destroyed. Nearly 7 million people and 1,000 schools had their power knocked out. 116,000 New Jerseyans were evacuated or displaced from their homes. 41,000 families are still displaced from their homes.

The satellite subscriber and household data time lag and the absence of accounting for such a horrific weather event undermine the reliability of both the household and the satellite penetration data.[14]

Rate Counsel respectfully request that the comment period be stayed pending Media Bureau action on this motion.[15] A copy of this Motion is also being filed in Docket No. 12-234, established by the FCC for the purpose of monitoring issues that arise from its recent approval of the sale of spectrum in the Spectrum Decision.

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[14]/ As recent as February 5, 2013, the FCC held open forums for discussion on the impact of Hurricane Sandy in New Jersey and New York. Additionally, the attached State of the State Speech by New Jersey Governor Chris Christie provides gross impact details on households due to lost homes and displaced families.

[15]/ Under the current schedule, Rate Counsel's opposition is due on February 22, 2013. This filing is being made on February 8, 2013. Rate Counsel submits once all matters regarding this motion are resolved, Rate Counsel should have 14 days to file any supplemental comments.

CONCLUSION

For the foregoing reasons, dismissal of the subject Petitions is warranted. Any refiled Petition must not include Verizon competitively sensitive data and the refiling should reflect updated household and subscriber data based upon the effects of Hurricane Sandy.

Respectfully submitted,

STEFANIE A. BRAND
Director,
New Jersey Division of Rate Counsel

By: Jose Rivera-Benitez
Jose Rivera-Benitez
Assistant Deputy Rate Counsel
New Jersey Division of Rate Counsel

Dated: February 8, 2013

Trenton, New Jersey
January 8, 2013

Lt. Governor Guadagno, Madam Speaker, Mr. President, members of the Legislature, fellow New Jerseyans.

Since George Washington delivered the first State of the Union in New York on this day in 1790, it has been the tradition of executive leaders to report on the condition of the nation and state at the beginning of the legislative year. So it is my honor and pleasure to give you this report on the state of our state.

One year ago, we were scheduled to gather on this second Tuesday in January when our friend and colleague Alex DeCroce passed suddenly the night before, causing us to delay this report. I miss the hard work and kind spirit of Alex. I think of him often, but I am so pleased to see his wife Betty Lou here in this chamber as a duly elected member of the Assembly today. She continues his work and does honor to his memory.

Just three months ago, we were proceeding normally with our lives, getting ready for a national election and the holidays to follow. Then Sandy hit.

Sandy was the worst storm to strike New Jersey in 100 years. 346,000 homes were damaged or destroyed. Nearly 7 million people and 1,000 schools had their power knocked out. 116,000 New Jerseyans were evacuated or displaced from their homes. 41,000 families are still displaced from their homes.

Sandy may have damaged our homes and our infrastructure, but it did not destroy our spirit.
The people of New Jersey have come together as never before. Across party lines. Across ideological lines. Across ages, races and backgrounds. From all parts of our state. Even from out of state. Everyone has come together.

So today, let me start this address with a set of "thank yous" from me on behalf of the great people of this state.
First, I want to thank the brave first responders, National Guard, and emergency management experts who prepared us for this storm and kept us safe in its aftermath.

I want to thank the members of this Legislature for their cooperation in answering Sandy's challenges and for being by my side as I toured so many of the devastated areas of our state.

I want to thank the Community Food Bank of New Jersey, the Southern Baptists, the Salvation Army and the American Red Cross – who helped us deliver over one million pounds of food and over five million meals and snacks to families who needed them.
They are part of a network of organizations, a family really, who make life better in New Jersey every day – and who really came through when the times were toughest.

I want to thank the New Jersey Business and Industry Association, the state Chamber of Commerce, the Commerce and Industry Association of New Jersey and the National Federation of Independent Businesses -- for keeping us in touch with the needs of small businesses in the wake of the storm, so New Jersey can help get these businesses back on their feet.

I want to thank the 17,000 out-of-state utility workers who came to New Jersey from all over America and joined with 10,000 of our own to get power restored as quickly as possible – so that within nine days of this horrific storm, electric power had been restored to 90% of customers.

I want to thank the members of my cabinet and senior staff, who for days before the storm and weeks after it, put their own personal losses aside, worked 18 hours a day and slept very little. They led their departments and their dedicated colleagues in putting the safety and well-being of others ahead of their own.

To everyone who opened their homes, assisted senior citizens, fed their neighbors, counseled the grief-stricken, or pitched in to clear debris, remove sand, or get a school back opened, I say "thank you." You have helped define New Jersey as a community, one which – when faced with adversity – rolls up its sleeves, gets back to work, and in word and deed shows that it will never, ever give up.
And make no mistake. We will be back, stronger than ever.

The spirit of our New Jersey community was shown in the days immediately after

the storm. In Sea Bright, Mary Pat was by the side of one small businessman at the moment when he was allowed to return to his business and see what Sandy had done to his restaurant, a pizzeria. As the plywood was removed, allowing him to see for the very first time the destruction of his means of earning a living, he turned and said without hesitation: "Don't worry. We will build this back better than it was."
His words were forceful. They were optimistic. And they were emblematic – capturing the indomitable spirit of this state.

And he was just one example of how New Jersey and its citizens were showing our whole country how to bravely and resolutely deal with a crisis.

Citizens like Frank Smith, Jr., the Volunteer Chief of the Moonachie First Aid Squad. His home was destroyed during the storm. His headquarters were destroyed during the storm. After securing the safety of his three young children, he did not take himself to higher ground. No, he led his team through fires and flood waters, through buildings and trailer parks, and saved over 2,000 lives. Moonachie's citizens were saved because he put them first. Frank thanks for your bravery.

In Toms River, Marsha Hedgepeth, an emergency room technician, had the day off when Sandy hit her hometown. She could have gotten herself to safety and forgotten about her colleagues at the community medical center and most importantly her patients. Instead, facing several feet of water on her flooded street, she swam to higher ground, then hitchhiked with a utility worker from Michigan and got to the hospital for a 12-hour shift treating her fellow citizens. Swimming through flood waters to save lives—thank you Marsha for setting such a great example.

In Brick, Tracey Keelen and Jay Gehweiler watched as the flood waters consumed their town. Concerned about Jay's father, they tried to reach him and could not. Not content to wait, they put on their wet suits, got in their row boat and rescued Jay's dad. In the process, they saw dozens of others stranded in their homes. They turned back around and, one by one, saved over 50 of Jay's father's neighbors along with their pets. Then, for those they rescued who had no place to go, they housed them as well. They admitted they did not know these neighbors that well before the storm, but they didn't care—they put extending a helping hand in a crisis ahead of social comfort. Thank you to

Tracey and Jay for saving lives and making a difference.

New Jerseyans are among the toughest, grittiest and most generous people in America. These citizens are a small example of that simple truth. Our pride in our state in our moment of loss and challenge is reflected in the eyes of these extraordinary people.

You see, some things are above politics. Sandy was and is one of those things. These folks stand for the truth of that statement.

We now look forward to what we hope will be quick Congressional action on a full, clean Sandy aid bill – now, next week -- and to enactment by the President. We have waited 72 days, seven times longer than victims of Hurricane Katrina waited. One thing I hope everyone now clearly understands—New Jersey, both Republicans and Democrats, will never stand silent when our citizens are being short changed.

The people of New Jersey are in need, not from their own actions but from an act of God that delivered a natural, human, and financial disaster --- and we are thankful to the people of America for honoring the tradition of providing relief. We have stood with the citizens of Florida, Alabama, Mississippi, Louisiana, Iowa, Vermont, California and Missouri in their times of need—now I trust that they will stand with us.

So make no mistake. New Jersey's spirit has never been stronger. Our resolve never more firm. Our unity never more obvious.
Let there also be no mistake: much work still lies ahead. Damage that comes only once in a century will take in some cases years to repair.

Here is some of what we have done already:

We have created a cabinet-level position to coordinate the State's efforts across every agency – and Marc Ferzan is here today – ready to work with you on this restoration effort.

We've requested the federal government to pay 100% of the costs of the significant debris removal that we require – and have already received $18 million for that task.

We have secured $20 million from the Federal Highway Administration for emergency repair of our roads, bridges and tunnels – a down payment on a major infrastructure task ahead.

We have directed our Department of Environmental Protection to streamline approvals for restoring critical infrastructure.

We have overseen the removal of over 2.5 million cubic yards of debris to date and counting. 17 towns have already completed debris removal. Over 1,000 trucks are working daily to continue dry land debris removal with 26 more towns moving towards completion. We are now removing debris from our waterways. New Jerseyans need to know—nearly 1,400 vessels were either sunken or abandoned in our waterways during Sandy. In Mantoloking alone, 58 buildings and 8 cars were washed into Barnegat Bay. We will remove this debris and dredge the bay to reduce the risk of flooding and to improve the health of the bay—beginning the very same week that this Administration furthers its commitment to the health of the bay by implementing the toughest fertilizer law in America.

We have helped get temporary rental assistance for 41,000 New Jersey families, and where necessary, secured transitional shelters in hotels or motels or even in Fort Monmouth.

We have worked with the Small Business Administration to secure nearly $189 million in loans for thousands of home and small businesses, and through our New Jersey EDA, we have provided lines of credit for businesses awaiting insurance reimbursement, grants for job training, and benefits for displaced workers.

Our New Jersey DOT has been one of the busiest agencies – removing over 4,400 truckloads of debris from state and local roads, and cleaning another 4,300 truckloads of sand to restore and replenish our beaches.

Our Department of Education has worked night and day to get schools re-opened right away, and where that wasn't possible, to get them restored by the next school year – all while maintaining our commitment to a full 180-day school year of education for our kids.

Executive Order 107 makes sure that when insurance payments do come, they are not compromised by excessive deductibles and ensures that our citizens maximize their reimbursement.

While there are dozens of other examples of the never quit attitude of this Administration and our citizens, there is none better than the miracle of Rt. 35 in Mantoloking. At the Mantoloking Bridge, Rt. 35 had been completely washed away by Sandy—I stood at the spot where the Atlantic Ocean flowed into the bay where Rt. 35 once carried thousands of cars a day to vacations down the shore. Within days, Commissioner Jim Simpson, the Department of Transportation and our private sector partners had a temporary road built to allow emergency vehicles onto the island. Now, merely 10 weeks after our state's worst storm, you see a permanent Rt. 35 already being rebuilt. That's what an effective government can do. That's what a determined people can do. That is how and where we will lead New Jersey in the months and years ahead.

There is no question that Sandy hit us hard – but there is also no question that we're fighting back with everything we've got.

Sandy took a toll on New Jersey's economy.
Just when we were coming back from the national recession, Sandy disrupted our economic life: cars weren't bought, homes weren't sold, and factories couldn't produce. From those things we can catch up, and we are catching up. But make no mistake, as common sense would tell you, Sandy hurt New Jersey's economy.

Some losses we will never get back – electric power that wasn't produced, visitors who didn't come to our casinos or our downtown centers.

In all, Sandy cost us over 8,000 jobs in November – mostly in our leisure and hospitality industries. But we were relatively fortunate. Louisiana lost 127,000 jobs after Hurricane Katrina.

Sandy may have stalled New Jersey's economy, but there is plenty of evidence that New Jerseyans have not let it stop our turnaround.

The direction is now clear.

Here is the latest economic report:

Unemployment is coming down.

2011 was our best private sector job growth year in eleven years and 2012 is also positive.

Personal income set a record high in New Jersey for the seventh quarter in a row.

Gross income tax receipts are exceeding the Administration's projections for this fiscal year prior to Sandy.

Sales of new homes are up.

Consumer spending is up.

Industrial production is up.

Since I took this office, participation in New Jersey's labor force is higher than the nation as a whole and the number of people employed has grown. That means that more people have the confidence to be out looking for jobs, and more people actually have jobs.

In total, we have added nearly 75,000 private sector jobs in New Jersey since we took office in January 2010.

I mention the words 'private sector' advisedly, because we have not grown government. Quite the contrary. We have gotten our house in order by keeping our promise to reduce the size of government.

In the last three years, we have cut more than 20,000 government jobs. In 2012, we had fewer state government employees than at any time since Governor Whitman left office in January 2001. We promised to reduce the size of government and we have delivered.

We have also held the line on taxes. We have held the line on spending. We have made New Jersey a more attractive place in which to grow a business, to grow jobs, to raise a family.

This Legislature knows the history.

In fiscal year 2010, we faced a $2 billion budget deficit with only 5 ½ months left in the fiscal year when we took office. We cut over 200 programs and balanced the budget with no new taxes.

In fiscal year 2011, the picture was even worse: a projected $11 billion deficit – on a budget of $29 billion – in percentage terms, the worst in the nation. In total, we cut 832 programs. Each department of government was reduced. An 8% cut in spending – in real dollars spent -- not against some phony baseline. But with this Legislature's help, again we balanced the budget without raising taxes.

Because we had made the tough choices, last year's budget was a bit easier – we were able not only to balance the budget, but to actually begin to reduce taxes by enacting the first year of tax relief for job-creating small businesses in New Jersey. Meanwhile, we devoted a record amount in aid to schools in New Jersey.

And in the budget which governs the current year, even with growth in the national economy slowing again, we have been able to achieve balance with not only no new taxes, but with a second year of small business tax relief.

And let me make this point clearly and unequivocally. Despite the challenges that Sandy presents for our economy, I will not let New Jersey go back to our old ways of wasteful spending and rising taxes. We will deal with our problems but we will continue to do so by protecting the hard earned money of all New Jerseyans first and foremost. We will not turn back.

Our handling of the budget is but one example of the change that I told New Jersey had arrived with our inauguration. I've come to this chamber in the years since that day urging us to do the big things to transform our state; to make the tough decisions we had avoided for far too long.

We asked this in the context of a state where only 27% of our citizens felt that government was moving our state in the right direction in January 2010. We asked this while the citizens of our country watched a dysfunctional, dispirited and distrustful government in Washington bicker and battle not against our problems but against each other. Against that backdrop, few would have bet on us; few would have bet on New Jersey leading the way to restore people's belief that government could accomplish things for them. But here we are, three years later, and look at all of those things some called impossible in this town that we have made a reality.

A real 2% property tax cap. Interest arbitration reform. Pension and health benefit reform. Teacher tenure reform. Higher education restructuring resulting in Rutgers now being in the top 25 in research dollars and the newest member of the Big 10. $1.3 billion in new capital investment in all our universities for the first time in 25 years. A ground breaking teacher contract in Newark that finally acknowledges merit pay. Three years ago, a national reputation for corruption and division and waste. Today, a national model for reform and bipartisanship and leadership. Let's review this new reality specifically, to remind our constituents and ourselves how far we have come and to resolve to never return to the old, dark days of our past in Trenton.

Four years. Four balanced budgets. No new taxes. New tax relief to create 75,000 new private sector jobs.

A far different picture from the prior eight years, which saw 115 increases in taxes and fees. It hasn't been easy, but we have done it together. And the people of New Jersey are better off for it.

The story is the same on property taxes, maybe even better. They had increased 70% in the prior 10 years --- the most in the nation.

Together, we enacted a 2% per year cap on growth and the interest arbitration reform that was needed to make that cap work.

Many said it wouldn't work, but the record tells a different story.

Last year, property taxes in New Jersey grew by only 1.7% -- the lowest rise in two decades.

And our pension system, which was on a path to insolvency, is now on much more sound footing. With your help, we tackled the problem head on – modestly raising the retirement age, reducing incentives for early retirement, suspending COLAs until the plan is 80% funded, and yes, asking for something slightly closer to market in terms of employee contributions.

In total, the pension and health benefits reform package that you passed will save taxpayers over $120 billion over the next 30 years. Just as importantly, it will help make sure the pension is actually there when our public employees and school teachers retire. Other states have noticed: this reform is becoming a model for America.

When we combine this needed discipline on spending and taxes, with responsibility in addressing our long-term liabilities, with pro-growth actions on the regulatory side, we have made New Jersey a better place to do business.

The combination of policies that are not hostile to business, and an environment which actually welcomes new businesses and new jobs, is working.

It is clear. In a competitive world, policies matter. Companies have choices. Job-creators have choices. That is why our work is far from done.

That is why a top priority must be to continue New Jersey's record of excellence in education, and to fix problems where we are failing.

In higher education, the task force led with skill by former Governor Tom Kean has helped us develop strategies for making New Jersey's institutions more competitive. We need to turn New Jersey's universities – including Rutgers – from good to great, because that will help us keep more talented New Jersey students in New Jersey, and will strengthen the link between higher education and high quality jobs.

At the heart of these reforms we need, of course, is the plan to make sure that New Jersey's critically important medical and health sciences institutions remain world class. By merging Rutgers and UMDNJ in the north and Rowan and UMDNJ's Stratford campus in the south, we will enhance three established hubs of educational excellence in north, south, and central New Jersey. And we will bring Rutgers, and New Jersey medical education, into the 21st century. I thank you for passing this plan, and I was proud to sign it into law this summer.

In K-12 education, we have made great strides, but there is much more to be done.

Who would have thought, just three years ago, in the face of entrenched resistance, that I could stand here and congratulate us today for the following:

Ensuring accountability by passing the first major reform of tenure in 100 years;

Establishing performance-based pay in Newark through hard-nosed collective bargaining so that we can reward and retain the very best teachers where we need them most;

Implementing inter-district school choice, which has tripled its enrollment in the last 3 years and will grow to 6,000 students next year;

Growing the number of charter schools to a record 86 in New Jersey;

Signing the Urban Hope Act to turn failing schools into Renaissance Schools in Newark, Trenton, and Camden;

And finally, investing the largest amount of state aid to education in New Jersey history-- $8.9 billion in this year's budget, over $1 billion higher than in Fiscal Year 2011.

In New Jersey, we have combined more funding with needed reform. Both money and reform of our schools are essential, but neither alone is sufficient. In New Jersey, we are leading the way for the nation by providing both.

As we assess the state of our state this afternoon, we should be proud of our record. The state is stronger today than it has been in years. We are recovering and growing, not declining and descending.

We are working together, not just as a people in digging out from Sandy and rebuilding our economy. Here in Trenton, in this chamber, we have had our fights. We have stuck to our principles. But we have established a governing model for the nation that shows that, even with heartfelt beliefs, bipartisan compromise is possible. Achievement is the result. And progress is the payoff.

So I want to thank President Sweeney and Speaker Oliver, Leaders Kean and Bramnick-- for your hard work, for your frankness when we disagree, and for your willingness to come together on the truly important issues – on the big things.

Maybe the folks in Washington, in both parties, could learn something from our record here. Our citizens certainly have—now 61% of them believe our state is moving in the right direction—more than double the amount that believed it on that cold day in January three years ago.

Make no mistake; our work is far from finished.

Rebuilding the homes and infrastructure damaged and destroyed by Sandy is the next big challenge and it will take years. We will need to spend our funds wisely and efficiently. We will need to cooperate. We will need to learn the lessons from past disasters and listen to each other.

The good news is that strong leadership and bipartisan cooperation makes all

these things possible. Our work over the last three years proves that beyond argument. Having worked hard to tackle our most urgent legacy problems – having faced up to and corrected some poor decisions from the past – we now have more freedom to chart a course of excellence in the future.
As we begin this new legislative year, we can now look ahead from Sandy, ahead from the national recession, to a brighter day for New Jersey.

The author Bern Williams once said, "Man never made any material as resilient as the human spirit."

For all I have seen and experienced as your governor in this extraordinary year, one experience will be indelibly etched in my memory. Her name is Ginjer.

As I walked around the parking lot of the fire department in Port Monmouth in one of the days soon after Sandy had laid waste to so much of our state, I saw so many of the scenes that I had come to expect in the aftermath of the storm. Neighbors helping neighbors. Food being prepared for the hungry. First responders helping the homeless. Then I met nine-year-old Ginjer. Having a nine-year-old girl myself, her height and manner of speaking was immediately familiar and evocative. Having confronted so many crying adults at that point I felt ready to deal with anything. Then Ginjer looked at me, began to cry and told me she was scared. She told me she had lost everything; she had lost her home and her belongings. She asked me to help her.

As my eyes filled with tears, I took a deep breath and thought about what I would say to my Bridget if she said the same thing to me. If she had the same look on her face. If she had the same tears in her eyes. I asked her where her mom was and she pointed right behind her. I asked her if her dad was ok. She told me he was. So I told Ginjer, you haven't lost your home; you've just lost a house. A house we can replace, your home is with your mom and dad. I hugged her and told her not to cry—that the adults are in charge now and there was nothing to be afraid of anymore. Ginjer is here today—we've kept in touch—and I want to thank her for giving voice to New Jersey's children during Sandy and helping to create a memory of humanity in a sea of despair.

In this year ahead, let us prove the truth of the words I spoke to Ginjer that day. Let's put aside destructive politics in an election year. Let's put aside accusations and false charges for purely political advantage. Let's work together to honor the memories of those lost in Sandy. Let's put the needs of our most victimized citizens ahead of the partisan politics of the day. Let's demonstrate once again the resilience of New Jersey's spirit. And let us continue what we have started:

Rebuilding from Sandy with pride and determination;

Restoring our economy to growth and prosperity after a decade of decline and high taxes; and

Reclaiming the promise of New Jersey for future generations – presenting to our children renewed excellence in our schools, a sound and balanced budget, and a vibrant economy with jobs for those willing to work hard.

That is our mission – to hurdle barriers no matter how high, to fight the elements of doubt or disaster, and to leave this place better than we found it.

Let us prove, once and for all, that what I said to Ginjer is undeniably true: the adults are in charge. Let's accomplish the mission of rebuilding our battered state and restoring the hope and the faith and the trust of our people that government can work in a bipartisan way to restore our great way of life to all New Jerseyans.

In the year ahead, I look forward to working with all of you on that most important mission of all.

Thank you, God bless you, and God bless the great State of New Jersey.

CERTIFICATE OF SERVICE

I, Jose Rivera-Benitez, of full age, being duly sworn according to law, upon my oath depose and state:

I am an attorney at law in the State of New Jersey, in good standing, and an Assistant Deputy Rate Counsel, with the New Jersey Division of Rate Counsel in the Division's Telecommunications and Cable Section. I have on this 8th day of February 2013, sent a true and correct copy of the foregoing "Motion to Dismiss" via electronic mail to the following:

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All municipal franchises involved.

Jose Rivera-Benitez, Esq.
Assistant Deputy Rate Counsel
New Jersey Division of Rate Counsel

COMMENTS REGARDING THE PROPOSED FINAL JUDGMENT

IN

UNITED STATES OF AMERICA and STATE OF NEW YORK
vs.
VERIZON COMMUNICATIONS INC., CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, COMCAST CORP., TIME WARNER CABLE INC., COX COMMUNICATIONS, INC., and BRIGHT HOUSE NETWORKS, LLC

Submitted on behalf of

RCN Telecom Services, LLC.

I. INTRODUCTION AND SUMMARY

RCN Telecom Services, LLC ("RCN"), through its undersigned counsel, hereby expresses its concern that the Proposed Final Judgment ("PFJ")[1] fails to prevent the harms to competition that the Competitive Impact Statement ("CIS")[2] recognizes will arise as a result of the commercial agreements entered into among Verizon Wireless and the Cable Defendants. RCN is a robust competitor and the only cable over-builder that competes in several major U.S. geographic markets directly with cable companies and Verizon FiOS/DSL in three product markets (*i.e.*, wireline voice, wireline broadband Internet access, and wireline video programming). RCN provides these services in Boston, Philadelphia, and the Washington DC metropolitan area in competition with Comcast and Verizon FiOS/DSL and in competition with Time Warner Cable and Verizon FiOS/DSL in portions of New York City. RCN also provides

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1 *U.S. and State of New York v. Verizon Communications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC,* Proposed Final Judgment, Civ. Action No. 12-01354 (D.D.C. Aug. 16, 2012) ("*Proposed Final Judgment*" or "*PFJ*").

2 *U.S. and State of New York v. Verizon Communications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC,* Competitive Impact Statement, Civ. Action No. 12-01354 (D.D.C. Aug. 16, 2012) ("*Competitive Impact Statement*" or "*CIS*").

these services in Chicago in competition with Comcast and AT&T's U-verse/DSL and in the Pennsylvania Lehigh Valley in competition with Verizon FiOS/DSL and Service Electric Company. In these RCN markets, the incumbent cable company and the incumbent local exchange carrier, combined, dominate the three retail product lines in which RCN competes.

RCN also competes with Comcast, Time Warner Cable and others in providing transmission services known as "backhaul" to Verizon Wireless and other wireless carriers from their cell sites to their switches. Like other cable companies, RCN does not currently offer wireless telephone or wireless broadband services. Additionally, RCN does not have resale agreements with any wireless provider and no wireless provider resells RCN's services.

RCN's principal concerns are as follows:

1. The definition of "FiOS Footprint" in the PFJ is too narrowly drawn, and as a result, Verizon Wireless will be permitted to sell the Cable Defendants' Cable Services in the most logical locations for FiOS expansion, thereby diminishing the effectiveness of FiOS as a potential competitor in those locations.

2. The PFJ allows Verizon Wireless to engage in regional advertising of the Cable Defendants' Cable Services throughout metropolitan areas where Verizon offers FiOS, thereby diminishing the competition between Verizon FiOS and the Cable Defendants and inhibiting Verizon from expanding FiOS to portions of the area where it is not now offered.,

3. Verizon is permitted to provide sales information about Cable Services in Verizon Stores, even within the FiOS Footprint, as long as it does not make actual sales of Cable Services in a FiOS Footprint Store or to persons residing in the FiOS Footprint. This, too, reduces both actual and potential competition between Verizon FiOS and the Cable Defendants.

4. The Defendants' creation of a joint operating entity (the "JOE") designed to develop technology that integrates Defendants' wireless and wireline products and services, disadvantages competitors that offer only wireline or wireless services. While RCN does not object to technological advancement, when this type of integration is performed by entities with very large market shares, and competitors are excluded from use of the integration product competition is likely to be significantly diminished.

5. The Cable Defendants are provided preferential treatment in bidding for contracts to provide backhaul from Verizon Wireless's cell sites, thereby competitively disadvantaging other backhaul providers such as RCN.

II. TUNNEY ACT STANDARD

Before approving an antitrust consent judgment, the Tunney Act requires that a court decide whether the Department of Justice's proposed final judgment is "in the public interest."[3] This determination is "generally left to the discretion of the Court."[4] However, while precedent indicates that district courts should show deference to the government's evaluation of the adequacy of the proposed settlements, a court may not "rubber-stamp" proposed settlements and must engage in an "'independent' determination of whether a proposed settlement is in the public interest."[5]

Although what is considered to be "in the public interest" is not defined in the statute, courts are required to consider:

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3 15 U.S.C. § 16(e)(1).

4 *United States v. SBC Communications, Inc.*, 489 F.Supp.2d 1, 10 (D.D.C.2007) (citing 15 U.S.C. § 16(f)).

5 *Id.* at 15. *See also United States v. AT&T, Inc.*, 541 F. Supp. 2d 2, 6-7 (D.D.C. 2008).

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[6]

In addition, a court should assess a proposed judgment's clarity, should closely examine compliance mechanisms, and should review any allegations that the proposed settlement would cause harm to a third party.[7] The statute further permits the court to conduct an evidentiary hearing, allow third parties to intervene, or take any further action it deems appropriate to inform its final determination.[8] In sum, the court must evaluate whether there is a "factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable."[9]

III. U.S. DEPARTMENT OF JUSTICE'S COMPETITIVE IMPACT STATEMENT CONCLUSIONS

In its CIS, the Antitrust Division reached a series of conclusions that absent relief, the commercial agreements between Verizon Wireless and the Cable Defendants would have anticompetitive consequences. These conclusions establish a benchmark that must be considered in evaluating whether the relief provided in the PFJ adequately addresses these anticompetitive

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6 15 U.S.C. § 16(e)(1).

7 *United States v. SBC Communications, Inc.*, 489 F.Supp.2d at 17 (citing *United States v. Microsoft*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995)).

8 15 U.S.C. § 16(e)(2), (f).

9 *United States v. SBC Communications, Inc.*, 489 F.Supp.2d at 15-16.

consequences and therefore meets the public interest standard under 15 U.S. C. § 16(e). Among the conclusions regarding competitive harm that the Antitrust Division set forth in the CIS are the following:

- "[T]he Commercial Agreements contain a variety of mechanisms that are likely to diminish Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings."[10]
- "The Commercial Agreements contain a number of provisions that are likely to harm competition in the markets for broadband, video, and wireless services."[11]
- "The Cable Defendants are dominant in many local markets for both video and broadband services .... Each Cable Defendant has market power in numerous local geographic markets for both broadband and video services."[12]
- "The Commercial Agreements diminish the incentives and ability of Verizon and the Cable Defendants to compete in those areas where the Cable Defendants' territories overlap with those in which Verizon has built, or is likely to build, FiOS infrastructure. They transform the Defendants' relationship from one in which the firms are direct, horizontal competitors to one in which they are also partners in the sale of the Cable Defendants' services."[13]
- "Verizon will be contractually required and have a financial incentive to market and sell the Cable Defendants' products through Verizon Wireless channels in the same local geographic markets where Verizon also sells FiOS."[14]

The CIS further asserts that the PFJ contains "relief designed to eliminate the anticompetitive provisions, or aspects, of the Commercial Agreements while at the same time allowing the aspects that might be procompetitive to proceed."[15] RCN agrees with the DOJ's conclusions that the commercial agreements contain anticompetitive provisions and aspects. RCN does not, however, agree that the relief provided in the PFJ is a reasonable means "to eliminate the anticompetitive provisions, or aspects of the Commercial Agreements."

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10 *CIS* at 3-4.
11 *CIS* at 8.
12 *CIS* at 11.
13 *CIS* at 13.
14 *Id.*
15 *CIS* at 16.

IV. PROPOSED FINAL JUDGMENT CONDITIONS

To the extent that they are relevant to the concerns raised by RCN, the provisions of the PFJ relating to marketing provide as follows:

- Verizon Wireless is barred from selling Cable Services for a street address within the FiOS Footprint and from selling Cable Services in Verizon Wireless retail stores located within the FiOS Footprint. (PFJ § V.A.)
- After December 2, 2016, Verizon Wireless must stop selling Cable Services in the DSL Footprint. (PFJ § V.B.)
- Verizon Wireless may not "specifically target advertising of Cable Services to local areas in which Verizon Wireless is prohibited from selling Cable Services." (PFJ § V.C.)

To the extent that they are relevant to the concerns raised by RCN, the provisions of the PFJ relating to the JOE provide as follows:

- Defendants must exit the JOE by December 2, 2016. (PFJ §V.F.)
- Time Warner Cable and Bright House Networks have the right to pursue any technology that they have presented to the JOE if the JOE has not determined to pursue it. (PFJ § IV.D)
- Members of the JOE are entitled to royalty-free licenses upon their exit. (PFJ § IV.E.)

RCN shows below that these provisions do not eliminate the anticompetitive provisions or aspects of the Commercial Agreements.

V. PERSISTENT COMPETITIVE HARMS

A. FiOS Footprint Is Too Narrowly Defined

The CIS correctly concludes that the joint marketing agreements "unreasonably diminish competition between Verizon and the Cable Defendants"[16] in that they transform "the Defendants' relationship from one in which the firms are direct, horizontal competitors to one in

16 CIS at 14.

which they are also partners in the sale of the Cable Defendants' services."[17] To remedy that harm, the PFJ bars Verizon Wireless from selling any high-speed Internet service, telephony service, or video programming distribution services offered by Comcast, Time Warner Cable, Bright House Networks, or Cox, or any bundle of such services to a street address that is within the "FiOS Footprint" or in a "FiOS Footprint Store."[18] "FiOS Footprint" is defined in § II.M as "any territory in which Verizon at the date of entry of this Final Judgment or at any time in the future: (i) has built out the capability to deliver FiOS Services, (ii) has a legally binding commitment in effect to build out the capability to deliver FiOS Services, (iii) has a non-statewide franchise agreement or similar grant in effect authorizing Verizon to build out the capability to deliver FiOS Services, or (iv) has delivered notice of an intention to build out the capability to deliver FiOS Services pursuant to a statewide franchise agreement."

DOJ explains that its prohibition seeks "to maintain Verizon's incentives to aggressively market FiOS against Cable Defendants in the areas in which both services are available and to ensure vigorous competitive in the future"[19] and is intended to "prohibit Verizon Wireless from selling the Cable Defendants' services ("Cable Services") in areas in which Verizon offers, or is likely to offer in the near term, FiOS service."[20] DOJ asserts that the prohibition is "necessary to ensure that Verizon receives no financial return from sales diverted from FiOS to the Cable Defendants."[21]

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17 *CIS* at 13.

18 *PFJ*, § V.A. ("Verizon Wireless shall not sell any Cable Service: (a) for a street address that is within the FiOS Footprint or (b) in a FiOS Footprint Store. Verizon Wireless shall not permit any other Person to sell any Cable Services in a FiOS Footprint Store."); *see also PFJ*, § II (definitions of Cable Service, FiOS Footprint, FiOS Footprint Store, and Person).

19 *CIS* at 17.

20 *Id.*

21 *Id.*

As an initial matter, RCN contends that the PFJ targets only a portion of the actual geographic market affected by the anticompetitive harms stemming from the parties' Commercial Agreements. More specifically, RCN contends that the term "FiOS Footprint" used to establish the boundaries of prohibited conduct under the PFJ is too narrowly defined and does not encompass the entire region affected by the anticompetitive harms of the Commercial Agreements. As a result, the PFJ permits the Commercial Agreements to discourage Verizon from expanding its FiOS services, even into immediately adjacent territories within the same city, town, or metropolitan area.

In its Complaint, DOJ stated that the relevant geographic markets for "broadband services include the local markets throughout the United States where Verizon offers, or is likely soon to offer, FiOS within the franchised territory of a Cable Defendant."[22] DOJ also noted that "the requirement and financial incentive for Verizon Wireless to sell the Cable Defendants' services … could, in the long-term, create a disincentive to additional buildout in some areas within Verizon's wireline territory but outside the currently planned FiOS footprint."[23]

RCN agrees with DOJ's assessment that the "Commercial Agreements diminish the incentives and ability of Verizon and the Cable Defendants to compete in those areas where the Cable Defendants' territories overlap with those in which Verizon has built, or is likely to build,

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[22] *U.S. and State of New York v. Verizon Communications Inc., Cellco Partnership d/b/a Verizon Wireless, Comcast Corp., Time Warner Cable Inc., Cox Communications, Inc. and Bright House Networks, LLC,* Complaint, ¶ 30, Civ. Action No. 12-01354 (D.D.C. Aug. 16, 2012) ("*Complaint*"). See also CIS at.10.

[23] *CIS* at 15. *See also, CIS* at 13 ("Rather than having an unqualified, uninhibited incentive and ability to promote its FiOS video and broadband products as aggressively as possible, Verizon will be contractually required and have a financial incentive to market and sell the Cable Defendants' products through Verizon Wireless channels in the same local geographic markets where Verizon also sells FiOS.")

FiOS infrastructure."[24] RCN agrees in particular with DOJ's recognition that it should be concerned that Verizon Wireless's ability to sell the Cable Defendants' services could "create a disincentive to additional buildout . . . outside the currently planned FiOS footprint." This recognition is important, because Verizon has incorrectly argued that the possibility of additional FiOS buildout beyond the currently planned FiOS footprint should be ignored. RCN contends that the most logical and economical area for FiOS expansion is adjacent to the area that it presently serves or is authorized to serve. As currently worded, the PFJ allows Verizon Wireless to sell Cable Services in a Verizon Store that is "next door" to locations where Verizon is selling FiOS, as long as it does not sell to persons residing in a location where FiOS is sold, authorized to be sold, or Verizon has indicated that it will sell FiOS and the store itself is outside that territory. Thus, the fact that Verizon Wireless can earn revenue by marketing the Cable Defendants' Cable Services in adjacent towns and neighborhoods will dampen Verizon's incentive to expand its FiOS offering into those same adjacent towns and neighborhoods. This will eliminate FiOS as a potential competitor in those regions and essentially solidify the current boundaries for which FiOS is available. Instead, Verizon Wireless should be precluded from selling Cable Services in a larger area that more accurately reflects where FiOS may be expanded.

Attached as Exhibit A is a map of the Boston area, with FiOS territory marked with cross-hatching, RCN territory marked with purple shading, Verizon Wireless stores with an "X." Comcast offers service throughout the Boston area.[25] Given that FiOS is typically deployed contiguously in towns and neighborhoods within a single metropolitan area, but not in all towns

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24 *CIS* at 13.

25 Based on RCN's experience, this map is typical of the pattern of build-out in metropolitan areas.

and neighborhoods within the area, RCN asserts that a more realistic definition of the physical area in which DOJ should not permit the competitive harms of the Commercial Agreements to exist is in within a single market region. Accordingly, RCN believes that the region where Verizon Wireless offering of Cable Services should be restrained is within any Designated Market Area ("DMA") in which FiOS is offered or authorized to be offered to at least 10% of residents. At the very least, Verizon Wireless should be precluded from marketing Cable Services in any Zip Code adjacent to a Zip Code in which Verizon offers FiOS or is authorized to offer FiOS.

By slightly expanding the zone where Verizon Wireless and the Cable Defendants cannot engage in prohibited conduct, the PFJ would preserve Verizon's incentive to expand FiOS service beyond its current locations.

B. Regional Marketing Exceptions Subsume Prohibitions

Section V.C. of the PFJ states that "Verizon Wireless may market Cable Services in national or regional advertising that *may reach or is likely to reach* street addresses in the FiOS Footprint …, *provided that* Verizon Wireless does not specifically target advertising of Cable Services to local areas in which Verizon Wireless is prohibited from selling Cable Services."[26] In other words, so long as Verizon Wireless does not specifically target a particular local area, Verizon Wireless can market and advertise Cable Defendants' Cable Services to entire regions where FiOS customers are likely to be found or where Verizon is planning to deploy FiOS services.

Verizon has received authorization to deploy its FiOS Services in many locations within each metropolitan area but has not sought authorization throughout a given metropolitan area.

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[26] *PFJ*, V.C. (emphasis added).

Accordingly, there are many "pockets" within a metropolitan area where Verizon FiOS is not authorized, although its FiOS is offered in a neighboring community. For example, Exhibit A shows the regions within the Boston DMA where Verizon is authorized to provide FiOS service and the location of Verizon Stores. For many Zip Codes within the Boston DMA, Verizon is not authorized to provide FiOS service but is authorized to provide service in a neighboring area.

From a practical perspective, regional advertising disseminated through television, radio, and print media cannot be narrowly focused so as to be able to exclude those locations within their expected audience where Verizon provides or plans to provide FiOS services. Allowing Verizon Wireless to advertise over a regionally defined area may be reasonable, but allowing Verizon Wireless to advertise Cable Services regionally is not. It defeats the purpose of the prohibitions in that the locations reached by the advertisements will contain many customers within the FiOS Footprint.

Because the PFJ permits such regional marketing, advertising will inevitably result in Verizon marketing Cable Services to large numbers of residents who live within the FiOS Footprint. In fact, within a metropolitan area's DMA, potential Cable Services customers within the FiOS Footprint will receive exactly the same information that Defendants have developed to solicit customers in non-FiOS regions. Accordingly, potential Cable Services customers within the FiOS Footprint will be able to act on the same information available to potential customers outside of the FiOS Footprint.

While Verizon Wireless may be prohibited from actually selling the Cable Services to the prospective customer residing in a location in which FiOS is offered, Verizon Wireless's advertisements will still produce the competitive harm identified by the DOJ – diminished competition between Verizon FiOS and the Cable Defendants' Cable Services. The fact that

Verizon will be spending significant resources to promote the Cable Defendants' Cable Services will reduce Verizon's incentive to compete aggressively through FiOS within the FiOS Footprint or in neighboring regions. The same advertising and the commissions earned by Verizon on sales of Cable Services will reduce Verizon's incentives to expand the FiOS Footprint further.[27] FiOS will pose less of a threat as a potential competitor in areas outside, but close to, the FiOS Footprint, thereby increasing the Cable Defendants' already great market power in those areas.

More importantly, even if it cannot earn commissions on sales of Cable Services to locations within the narrowly defined FiOS Footprint, Verizon Wireless has significant monetary incentives to promote products and services that enhance its wireless offerings. During the second quarter of 2012 ending June 30, 2012, Verizon Wireless' reported operating revenues were $18.6 billion with an operating income margin of 30.8%.[28] For that same time period, Verizon's wireline business unit had operating revenues of $9.9 billion with an operating income margin of only 1.9%.[29] Representing over 65% of Verizon's revenue and 96.8% of its profits for the quarter,[30] Verizon obviously has very strong reasons to sell its wireless services.

As discussed in Section V.D, below, Defendants have agreed to a joint venture ("the JOE") that will integrate Verizon Wireless's services with those of the Cable Defendants. Given that Verizon Wireless sells wireless data plans that will allow smartphone and tablet users to

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27 *See CIS* at 12 ("Verizon still considers, from time to time, whether to invest further in the expansion of its FiOS infrastructure. Its decision whether to do so will be affected by, among other things, whether technological or business conditions become more conducive to additional buildout in future years.")

28 Press Release, "Verizon Reports Continued Double-Digit Earnings Growth and Strong Operating Cash Flow in Second-Quarter 2012," July 19, 2012 (found at http://www.sec.gov/Archives/edgar/data/732712/000119312512306829/d380431dex99.htm) ("*Verizon 8-K Filing*").

29 *See Verizon 8-K Filing*.

30 For 2Q2012, Verizon Wireless's Operating Income was $5,713 million and Verizon Wireline's was $188 million. *Verizon 8-K Filing*.

utilize next generation capabilities, Verizon Wireless has a clear incentive to have its customers obtain services from the Cable Defendants, which will deploy the proprietary products developed by the JOE.

Verizon Wireless therefore derives benefits from the sale of the Cable Defendants' services beyond just a commission – Verizon Wireless enhances its ability to sell its highly profitable wireless service to that same customer, who will likely want to take advantage of the technical advances included in the jointly developed wireless/wireline integration products. Consequently, independent of the incentive created by a commission, Verizon Wireless has an incentive to encourage the adoption of products developed by the joint venture because Verizon Wireless benefits when the Cable Defendants' services are also promoted.

As the PFJ is currently drafted, the regional advertsing budgets of Verizon Wireless and the Cable Defendant located in each metropolitan area can, and likely will, be combined to promote the Cable Defendant's services, and to train their fire on competitors such as RCN.[31] Moreover, the threat of such a combined attack will intimidate other potential entrants, helping to preserve the Cable Defendant's monopoly (duopoly with FiOS in those portions of the metropolitan area where FiOS is offered). To prevent this, RCN contends that regional marketing should be prohibited in any DMA where FiOS is offered or authorized to be offered to at least 10% of residents.

C. Ubiquitous Provision of Cable Companies' Information

In addition to the distribution of marketing material regarding the Cable Defendants' Cable Services within FiOS Footprint regions, the PFJ also permits Verizon Wireless to "provide

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31 *See Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988) ("Advertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent.").

information regarding the availability of Cable Services" in any Verizon Store.[32] To emphasize the point, Verizon Wireless can market a Cable Defendant's Cable Services in the FiOS Footprint and can provide information and answer questions about those services in the Verizon Stores within the FiOS Footprint. Because customers are not immediately identifiable as living inside or outside the FiOS Footprint, Verizon Wireless store displays and personnel will likely be providing substantial assistance to the Cable Defendants in selling to persons residing in the FiOS Footprint.

The only prohibition is that Verizon cannot receive direct compensation from providing such information in any Verizon Store where Verizon Wireless is prohibited from actually selling Cable Services to that prospective customer. However, as noted above, Verizon Wireless has significant pecuniary interests in having customers use the Cable Defendants' Cable Services because Verizon Wireless' services may be enhanced when paired with JOE developed products.

Allowing information about the availability of Cable Services to be provided in any Verizon Store, regardless of location, dilutes efforts to constrain anticompetitive conduct. Accordingly, by allowing Verizon Wireless to disseminate information about the Cable Services within the Verizon Stores, the PFJ allows Verizon Wireless and the Cable Defendants to engage in every sales and marketing effort to promote Cable Services within the FiOS Footprint except for one thing – the actual sale of that service. At that point, all Verizon Wireless has to do is provide the customer a toll-free number or a website address.

Given that many customers shop "brick and mortar" stores before making purchases either online or over the telephone, the fact that Verizon Wireless is prohibited from making the sale of Cable Services in the store has a relatively minimal impact of the actual sales of Cable

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32 *PFJ*, V.C.ii.

Services. Thus only conduct prohibited by the exception is the "impulse buys" of someone within a Verizon Store located within a Zip Code where FiOS is offered or authorized.

Accordingly RCN contends that Verizon Wireless should be precluded from providing anything but the contact information of the Cable Defendants within any Designated Market Area in which FiOS is offered or authorized to be offered to 10% or more of the residences and prohibit Verizon Wireless Stores within the FiOS Footprint or in a DMA in which FiOS is offered or authorized to be offered to at least 10% of residents.

D. JOE LLC Raises Competitive Concerns Not Addressed by the PFJ

Relatively little information has been made publicly available regarding JOE, LLC. Virtually all that is publicly known is set forth in public statements of the Defendants, the CIS, the PFJ, and the heavily redacted public record of FCC WT Docket 12-4. For example, in December 2011, Defendants announced, simultaneous with the spectrum transaction, that the companies had "formed an innovation technology joint venture for the development of technology to better integrate wireline and wireless products and services"[33] In testimony before the U.S. Senate Judiciary Committee in March 2012, Verizon Wireless stated that the "companies are working together to create next-generation technical capabilities enabling customers to more seamlessly have wireless devices such as smartphones and tablets interact with home entertainment systems and wired computers."[34] In addition, the CIS states that the JOE is "a joint venture to develop and market integrated wireline and wireless technologies" and "the technology developed within the JOE is exclusively available for use by Verizon, the Cable

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33 Press Release, "Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for $3.6 billion," December 2, 2011.

34 *See* filed U.S. Senate Judiciary Committee testimony at http://www.judiciary.senate.gov/pdf/12-3-21MilchTestimony.pdf.

Defendants that are members of the JOE, and potentially other cable companies that agree to sell Verizon Wireless services as agents." (CIS at pp. 8-9.)

RCN believes that there is a real threat that because of the size of the participants in the JOE, the technology that it develops for the exclusive use of its members will become the industry standard for integration of wired and wireless technologies, and those that have no ability to use that technology will find themselves unable to compete. As asserted publically by Public Knowledge in FCC WT Docket 12-4, "practically speaking, the JOE is intended to give its Members control over the *de facto* standards for the next generation of fundamental technology for broadband, video, and voice service providers."[35] Likewise, a group of the largest local telephone carriers other than AT&T and Verizon has publically asserted that "if they are unable to complete seamless and integrated handoffs between wireline and wireless networks, competitors to the Defendants will be at a disadvantage in competing for residential customers"[36] and:

> The JOE . . . is about creating the integration of services, networks, and technologies in a new kind of industry that . . . would be focused on one large partnership capable of integrated telecommunications services--wireless, wireline, and content. . . There is currently no precedent to define the market forces in such a venture, and there appears to be no other possible industry combination that could compete against the partnership. The JOE's initiative is, therefore, like a land rush into new territories to capture the most fertile and unclaimed properties, before other competitors realize the stakes.[37]

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35 "The Anticompetitive Effects of the Verizon/SpectrumCo Agreements" at p. 11, attachment to Comments of Public Knowledge, filed July 10, 2012 in FCC WT Docket 12-4.

36 *Ex parte* letter of Genevieve Morelli and Micah Caldwell, filed July 10, 2012 in FCC WT Docket 12-4, at p. 3.

37 Balhoff Williams, LLC White Paper at pp. 16-17, enclosure to *ex parte* letter of Genevieve Morelli, filed July 18, 2012 in FCC WT Docket 12-4.

The Communications Workers of America has asserted publically that the "JOE agreement creates an anticompetitive patent pool that gives the parties enormous market power in the evolving wired/wireless broadband market." [38] RCN further agrees with the statement of the Communications Workers of America that "the JOE members could find themselves in the position of others that control numerous patents upon which other companies rely. If the government waits until the technology exists and market participants are clamoring for reasonable licensing terms, it will be too late."[39]

The JOE runs afoul of the Department of Justice & FTC, Antitrust Guidelines for Collaborations Among Competitors in several respects. First, as the Guidelines observe, "Joint R&D agreements … can create or increase market power or facilitate its exercise by limiting independent decision making or by combining in the collaboration, or in certain participants, control over competitively significant assets or all or a portion of participants' individual competitive R&D efforts."[40] The JOE allows Defendants to use their market power anticompetitively to protect their own respective market positions while retarding the pace of competitors' research and development efforts.[41] This reduces the number of competitors and leads to fewer, lower quality, and/or delayed products and services.[42]

The Guidelines also state that these joint ventures "are more likely to raise competitive concerns when the collaboration or its participants already possess a secure source of market power over an existing product and the new R&D efforts might cannibalize their

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38 "Analysis of FiOS Profitability and Strategic Options" at 25, Appendix B to Comments of the Communications Workers of America, filed July 10, 2012 in FCC WT Docket 12-4.

39 *Id.* at p. 29.

40 Department of Justice & FTC, Antitrust Guidelines for Collaborations Among Competitors (2000) at § 3.3.1

41 *See id.*

42 *See id.*

supracompetitive earnings," especially if the R&D competition is confined to entities with specialized assets like intellectual property, or when regulatory approval processes limit new competitors' ability to catch up with incumbent companies.[43]

The essence of the problem created by the JOE, from RCN's perspective, is that a cartel consisting of the largest players in the wireless and wireline broadband industries has been designed to create a technology that will link the industries, meeting an enormous consumer demand for seamless integration. Smaller players in the wireline industry, such as RCN, that have been denied participation in the JOE venture, will be unable to compete with JOE members such as Comcast and Time Cable. Since the JOE members have decided to exclude RCN from the venture, they should be required to license its technology to nonmembers on a commercially reasonable, nondiscriminatory basis.

If Verizon Wireless customers can integrate these services only with those of Cable Defendants, competing providers of broadband services will not be able to compete for the business of Verizon Wireless customers. To preserve competition, products developed by JOE must be available to other wired broadband providers on a commercially reasonable and nondiscriminatory basis.

E. Preferential Treatment of Cable Companies in Providing Backhaul from Verizon Wireless Cell Sites Is Anticompetitive

As with the JOE, the confidential nature of the provisions of the commercial agreements regarding Verizon Wireless's purchase of backhaul from its cell sites makes it necessary to piece together the terms of the agreements from scraps of publically available information, which is not consistent with the spirit of the Tunney Act. The CIS and the PFJ do not discuss this issue. However, an expert report submitted to the FCC by SpectrumCo asserts that under these

43 *Id.*

provisions, "to win VZW's business," independent providers of backhaul services "must offer terms that are better than those of an MSO that is also competing to offer backhaul services to VZW."[44] The first respect in which this is anticompetitive is that the cable MSO wins in case of a tie. But more importantly, there is ambiguity as to which party's terms are "better."

For example, suppose that RCN, whose business includes providing backhaul to wireless carriers from their cell towers, offers to supply backhaul to Verizon Wireless for 50 cell towers in a market that are in RCN's footprint at a price of $500 per tower, while Comcast offers to supply backhaul at a price of $550 per tower for the 70 cell towers that are in Comcast's footprint. Comcast could argue that even though its unit price is higher, its price is as good as or better than RCN's because the towers in Comcast's package are on balance more costly to serve. Faced with a choice between accepting RCN's bid, which may result in litigation with Comcast, or accepting the bid of its partner, Comcast, which would not result in RCN having any basis to litigate, Verizon Wireless would clearly favor Comcast. In addition to the fact that the two bids may cover sets of towers that only partially overlap, there are also non-price considerations in a bid for backhaul service, making it even more complicated to determine which bid is "better," once quality of service and ability to construct the backhaul quickly are considered. The presence of a multitude of objective and subjective considerations will make it even more likely that Verizon Wireless will shy away from a potential claim of breach by Comcast by accepting Comcast's bid.

The fact that the commercial agreements will make it harder for other providers of backhaul service to compete with the Cable Defendants extends beyond the provision of

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44 Mark Israel, "Implications of the Verizon Wireless & SpectrumCo/Cox Commercial Agreements for Backhaul and Wi-Fi Services Competition. At p. 9, Attachment to *ex parte* letter of Michael H. Hammer, counsel for SpectrumCo, filed August 2, 2012, FCC WT Docket 12-4.

backhaul to Verizon Wireless. This is because there are substantial economies in serving a second wireless provider on a cell tower once one provides backhaul to an "anchor tenant" on the tower. So once the Cable Defendant obtains the backhaul business of Verizon Wireless as an "anchor tenant," it will be much more difficult for RCN to compete with the Cable Defendant for the backhaul business of Sprint, T-Mobile, or another wireless carrier.

Many of the filings in FCC WT Docket 12-4 echo the concerns expressed by RCN, including the concern that the special access market, which includes the market for wireless backhaul, is already highly concentrated, leading to excessive prices, but for the most part, the concerns are articulated in confidential portions of the filings.[45] RCN urges the Antitrust Division to review the unredacted versions of these filings, if it has not already done so.

F. Use of "Non-Statewide Franchise" Is Confusing for the District of Columbia

The use of the phrase "non-statewide franchise"[46] in the definition of "FiOS Footprint" of the PFJ creates additional ambiguity with respect to the District of Columbia. Verizon may take the position that its franchise to provide service throughout the District of Columbia is not a "non-statewide franchise" because the District of Columbia has many of the attributes of a State. RCN contends that the PFJ should make clear that for purposes of this provision, Verizon's franchise for the District of Columbia is not "statewide."

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45 "Analysis of FiOS Profitability and Strategic Options" at 11-12, Appendix B to Comments of the Communications Workers of America, filed July 10, 2012 in FCC WT Docket 12-4; *ex parte* letter of Genevieve Morelli and Micah Caldwell, Independent Telephone & Telecommunications Alliance, filed July 10, 2012, at p. 4; Balhoff Williams, LLC White Paper at p. 17, enclosure to *ex parte* letter of Genevieve Morelli, filed July 18, 2012 in FCC WT Docket 12-4; "The Anticompetitive Effects of the Verizon/SpectrumCo Agreements" at p. 9, attachment to Comments of Public Knowledge, filed July 10, 2012 in FCC WT Docket 12-4. *Ex parte* letter of Eric Branfman, counsel for Level 3 Communications, LLC, filed May 16, 2012 in FCC WT Docket 12-4, at pp. 1-3.

46 *PFJ*, § II.M(iii).

VI. NECESSARY MODIFICATIONS TO PROPOSED FINAL JUDGMENT

RCN suggests that to eliminate the anticompetitive provisions and aspects of the commercial agreements discussed above, it is necessary to make several modifications to the PFJ. First, because the anticompetitive effects associated with marketing within the FiOS Footprint cannot be reasonably curtailed given the practicalities of how advertising is sold and distributed within a market, the first sentence in § V.C of the PFJ should be modified so that it permits national or regional advertising in a Designated Market Area only if FiOS is neither offered nor authorized to be offered to 10% or more of the residences in the Designated Market Area. As shown above, using a Designated Market Area to establish the boundaries for marketing restrictions is reasonable as marketing expenditures are in the video and broadband markets are made on the basis of those boundaries.

Second, these boundaries should also extend to the provision of information related to Cable Services. Therefore, the remainder of § V.C of the PFJ should be modified to prohibit Verizon Wireless Stores within the FiOS Footprint or in any Designated Market Area in which FiOS is offered or authorized to be offered to 10% of more of the residences from providing any information regarding Cable Services apart from referring consumers to Internet sites or providing toll-free numbers. Using boundaries similar to those used in the prohibition on regional joint marketing will provide greater clarity concerning where Verizon Wireless would be permitted to market Cable Services. Moreover, basing the boundary on the store location will virtually eliminate the problem of Verizon store employees unknowingly attempting to sell Cable Services to customers whose residences are served by FiOS, an activity that undermines Verizon's incentive to sell FiOS in competition with Cable Services.

Third, to prevent products developed by JOE LLC to integrate wireless and wireline broadband from being used to ensure that (1) Verizon Wireless customers buy their wireline broadband only from Verizon or one of the Cable Defendants and (2) the Cable Defendants' customers buy their wireless service only from Verizon Wireless, the MFJ should be modified to require non-exclusive licensing of intellectual property developed by JOE LLC on commercially reasonable and nondiscriminatory terms.[47]

Fourth, all provisions of the commercial agreements providing the Cable Defendants with any preferential treatment with respect to selling backhaul to Verizon Wireless should be removed.

Fifth, the PFJ should be revised to make clear that for purposes of this provision, Verizon's franchise for the District of Columbia is not "statewide."

Respectfully submitted

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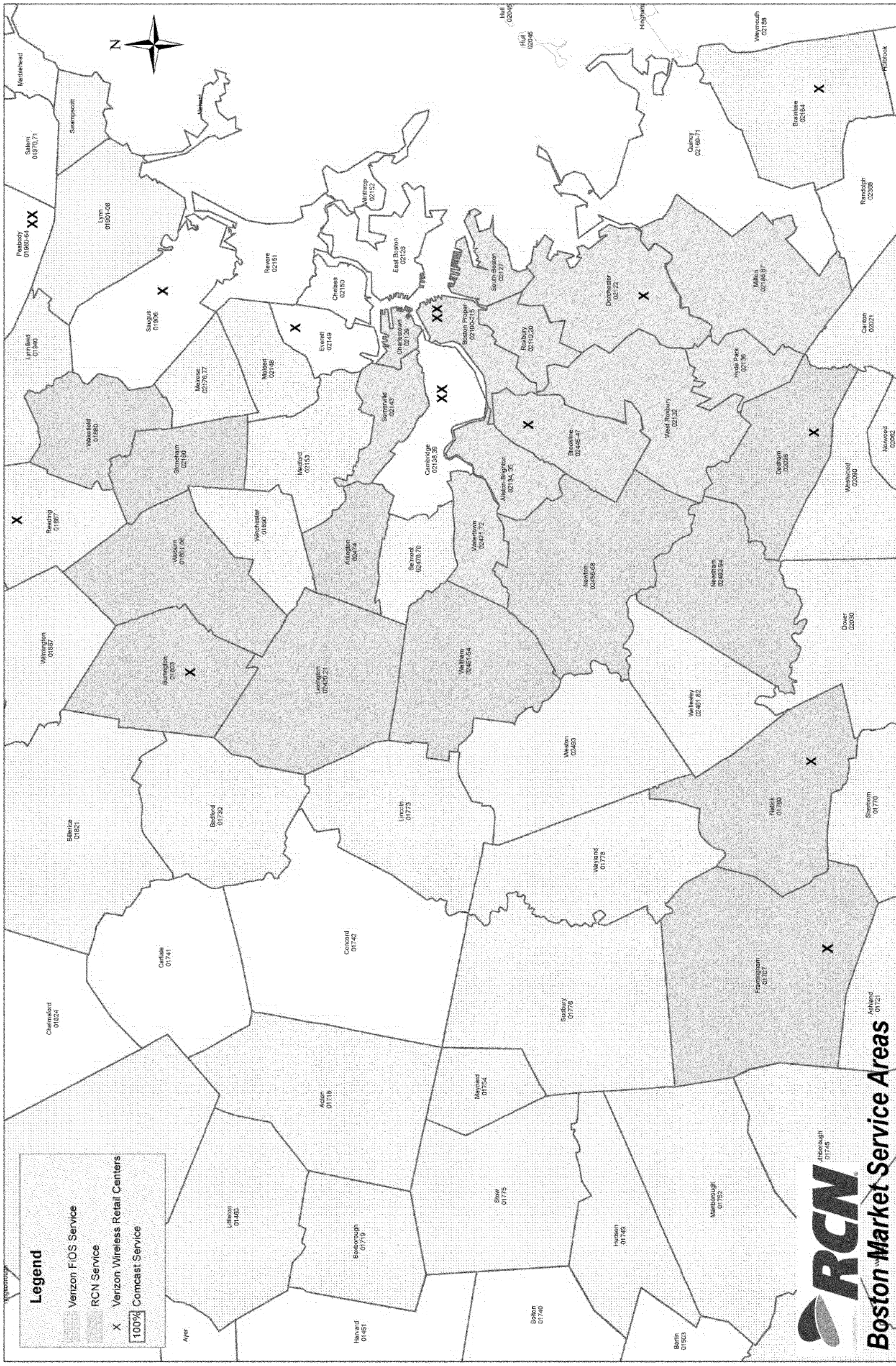
47 What constitutes reasonable and nondiscriminatory licensing terms was discussed by Acting Assistant Attorney General Joseph F. Wayland in "Oversight of the Impact of Exclusion Orders to Enforce Standards-Essential Patents" before the Senate Committee on the Judiciary, 112th Cong. (2012).


Legend
Verizon FiOS Service
RCN Service
X Verizon Wireless Retail Centers
100% Comcast Service
RCN
Boston Market Service Areas

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, and STATE OF NEW YORK, *Plaintiffs,* v. VERIZON COMMUNICATIONS INC., CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, COMCAST CORP., TIME WARNER CABLE INC., COX COMMUNICATIONS, INC., and BRIGHT HOUSE NETWORKS, LLC, *Defendants.*	Civil Action No.: 1:12-cv-01354

OPPOSITION OF MONTGOMERY COUNTY, MARYLAND TO PROPOSED FINAL JUDGMENT

I. INTRODUCTION

Montgomery County, Maryland (the "County") respectfully submits these comments on the Proposed Final Judgment ("PFJ") in the above-captioned case which was published in the Federal Register[1] and made available for public comment as required by federal law.[2] The County opposes the PFJ and contends that the PFJ is not in the public interest for the following reasons:

[1] 77 Fed. Reg. 51048 *et seq.* (Aug. 23, 2012).

[2] Antitrust Procedures and Penalties Act, 15 U.S.C. § 16.

(1) the PFJ permits an unprecedented level of cooperation and collaboration by and among Verizon and its primary incumbent competitive providers of services in the video, voice, broadband and wireless markets through commercial agreements ("Commercial Agreements"). The practical competitive harms from these Commercial Agreements are only slightly modified by the PFJ.

(2) In particular the PFJ will permit the dominant wireline and wireless broadband providers in each geographic market to collaborate and potentially to allocate the broadband market among themselves rather than to compete against each other. This will limit the incentive for Verizon, a wireless broadband company with national coverage, to offer wireline broadband services in competition with the wireline broadband offerings of Comcast and the other Cable Defendants[3] in every geographic market where the joint marketing takes effect.

(a) In Montgomery County, where portions of the County are served competitively by both Verizon and Comcast wireline systems, the PFJ limits the incentives for either company to compete head-to-head.

(b) In parts of the County where neither Comcast nor Verizon is offering wireline services, or in places such as Baltimore City where Verizon does not offer FiOS service, the PFJ provides no incentive for Comcast or Verizon to expand deployment of their wireline services.

(3) The PFJ permits the cable companies to engage in a new level of service bundling (quad play) which will further entrench their wireline market dominance. This will allow them to obtain increased profits and inhibit competitive entry by alternative broadband providers, and yet, will provide little, if any, consumer benefits.

(4) The PFJ creates an unworkable scheme for joint marketing that will cause customer confusion and be difficult to monitor, interpret and enforce.

[3] The Cable Defendants are Comcast, Cox, Time Warner, and Bright House.

The Defendants are the dominant companies in the video, broadband, wireless, and voice markets. Verizon Wireless is the single largest wireless carrier in the country and has a significant market share of the voice and wireless broadband service markets.[4] Comcast, Time Warner Cable, Cox, and Verizon are the nation's four largest *wireline* video services providers.[5] Bright House is the eighth largest.[6] Comcast, Time Warner Cable, Cox, and Bright House are incumbent cable operators and generally do not compete with each other because they have developed a business pattern of not seeking competitive franchises in any territory served by one of the other Defendants. As a result, their service territories do not overlap. Each generally dominates the video and wireline (cable modem) broadband service markets in its respective territory. All four companies also offer voice-over Internet Protocol (VOIP) voice service in their service territories as well. Wireline telephony, broadband and video service offered as a single priced bundle by these providers is known as a "triple play." This triple play bundle is offered at a significantly lower price than the combined price of purchasing these services separately.

Verizon is an incumbent telephone company and offers its own triple play bundle. Verizon is a relatively recent entrant into the wireline video service and high speed broadband markets. Its FiOS fiber network is available in certain markets in direct competition with the Cable Defendants and others. In markets where Verizon has not built out its FiOS network, it offers traditional telephone service and a slower, and less competitive, DSL internet service (DSL footprint), but no video service.

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[4] Notably, the Competitive Impact Statement does not state Verizon's market share.

[5] Wireline rankings exclude satellite (DBS) providers, DirecTV and Dish.

[6] Notably, the Competitive Impact Statement does not state the video services and wireline broadband market shares of the Cable Defendants.

As a local regulator, the County has closely followed the development of these services markets, and its experience informs these comments.

A. **Demographics of Montgomery County, Maryland**

Montgomery County is a microcosm of the United States as a whole. The County is a 496-square mile jurisdiction adjacent to Washington, DC with a population of 971,777,[7] and approximately 376,000 households. The County includes density populated urban and suburban communities, as well as low density exurban and rural communities.[8] Although home to biotech, computer science, hospitality and military contractor companies, one-third of the County's land mass is reserved for agriculture use.[9] The County is home to a high and middle income highly-educated workforce, but also has a significant number of low income residents.[10] The age of the County's population is similar to the U.S. overall,[11] but more ethnically and racially diverse.[12]

[7] Montgomery County is the 41st largest county in America and 42 percent of the American population lives within the largest 100 U.S. counties. 2010 U.S Census data compiled at http://en.wikipedia.org/wiki/List_of_the_most_populous_counties_in_the_United_States (last visited October 22, 2012).

[8] There are 45 "planning places" within the County. As of 2010, 39 percent of the County's residents live within the top five planning places and 64 percent are concentrated within the top ten planning places within the County. See Montgomery County 2010 and 2011 Demographic Profile, http://www.montgomeryplanning.org/viewer.shtm#http://www.montgomeryplanning.org/research/data_library/census/2010/documents/moco_profile_sf12010_mdp.pdf (last visited October 22, 2012). 378,396 people live with Bethesda, Germantown, Silver Spring, and Gaithersburg and Vicinity. An additional 239,341 live within Wheaton, Aspen Hill, Potomac, North Bethesda, and Fairland.

[9] For example, Montgomery County is home to: IGEN and the Human Genome Science Inc.; Sodexho, Marriott and Choice Hotels and Lockheed Martin. For a list of biotech and hospitality companies, *see* http://www6.montgomerycountymd.gov/content/ded/downloads/Biotech%20Companies.pdf (last visited October 22, 2012) and http://www.choosemontgomerymd.com/business-community/industry-sectors/hospitality-tourism (last visited October 22, 2012).

[10] Per capita income 2006-2010: the County's per capita income in the past 12 months (2010 dollars) ($47,310) is 42 percent greater than in the United States overall ($27,334) and the 2006-2010 median household income in the County ($70,647) is 26 percent larger than in the United States overall ($51,914). However, 32 percent of children (47,365) in Montgomery County public schools were eligible for free or reduced-priced meals (FARMs) in 2011-12 school year. U.S. Census Quick Facts at www.census.gov and Montgomery County Public Schools FARMs data.

[11] As of 2011, Montgomery County's population as compared to the United States population: Under age 5, both 6.5 percent; under age 18, both 23.7 percent; and age 65 or older, 12.6 percent versus 13.3 percent. U.S. Census Quick Facts at www.census.gov.

[12] Montgomery County is now one of 336 "majority-minority" counties in the United States. The United States as a whole is 74.5 percent white. As of 2010, Non-Hispanic Whites make up 49.3 percent of the County's population.

Thus, as a local video franchising authority, the County must balance the interests of rural and urban population centers, high income and low income residents, and an ethnically diverse population.

B. Video and Broadband Competition Within Montgomery County

The County has a strong interest in stimulating and fostering deployment of competitive commercial video and broadband services to densely populated high- and middle-income areas concentrated within relatively small geographic portions of the County, while simultaneously also providing incentives for those same companies to deploy video and broadband services to all other areas of the County with relatively low population densities.

The County is served by three franchised cable operators who provide high-speed cable modem service and voice over Internet Protocol (VOIP) service. In the mid-1980's, County granted its first cable franchise and required the cable operator over the life of its 15-year franchise to build-out its cable system to serve the entire County. The cable operator requested and County agreed to add further conditions favorable to the cable operator in areas of the County where the housing densities were below certain levels. When the cable operator began to provide cable modem service, as result of the build-out requirement, Internet access service became available throughout the County. When the cable operator began to upgrade its system to provide broadband service and renewed its franchise in 1998, similar to the initial build-out requirement, the County conditioned the franchise on the cable operator agreeing to upgrade its system throughout the County over the life of its second franchise. When Comcast subsequently

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Hispanics and Latinos are now the County's second largest population group (17.0 percent) followed by African Americans and Blacks (16.6 percent), Asian and Pacific Islanders (13.9 percent) and Other (3.2 percent). Four percent of the County's population are people of more than one race. Montgomery County 2010 and 2011 Demographic Profile. Based 2006-2010 data, 30.9 percent of the County's residents are foreign born, as compared to 12.7 percent of U.S. population, and 37.5 percent of the County's residents speak a language other than English at home, as compared to 20.1 percent of the U.S. population. U.S. Census Quick Facts at www.census.gov.

acquired this cable system, the build-out and upgrade requirements imposed by the County helped to ensure that Comcast's high-speed broadband service was available through the County.[13]

The County granted its second cable franchise to RCN-Starpower in 1999. Similar to the Comcast franchise, the initial RCN-Starpower franchise also required the cable operator to build-out its system throughout the County over the life of the 15-year franchise. The competitive pricing power exerted by Comcast limited RCN-Starpower's ability to achieve significant market share within the portions of the County that it had begun to serve. A subsequent inability to acquire necessary market capital lead RCN-Starpower to sell off many of its cable systems in the Boston to Virginia area and eventually, RCN-Starpower requested that its franchise service area be reduced so that it was no longer required to serve the entire County and could focus of increasing its penetration rate in the areas where it had already built out its system. Comcast objected to a reduction in RCN-Starpower's franchise service area. In the interest of preserving competition in at least some parts of the County, the County agreed to a reduction in RCN-Starpower's franchise service area.

In 2006, the County granted its third competitive cable franchise to Verizon. Similar to its other franchises, the County required Verizon to build-out its system throughout the County, subject to minimum housing density requirements.[14] Verizon has substantially completed its build-out and deployment of its cable and broadband system throughout the County.

[13] Comcast's franchise commitment is to serve all areas of the County as long as the following conditions are satisfied, per Section 4 of its franchise: (A) the new subscriber requesting service is located 400 feet or less from the termination of Comcast's cable system; and (B) the number of dwelling units to be passed by the extension is equal to or greater than 15 per mile measured from any point on the system. Homes that do not meet these requirements may have service extended to them only if they share in the cost of the line extension.

[14] Verizon's franchise commitment in Section 3 of its franchise. Verizon must build out portions of its franchise territory over six years, expanding the service areas from an initial area to others as certain thresholds are met. Verizon's line extensions commitment also has a staggered implementation schedule with the density requirements

Thus, the County's cable franchise requirement that each franchisee had to build out the entire area of its franchise has guaranteed that competitive high-speed broadband is deployed throughout the County and that the majority of County residents have access to at least two wireline high-speed broadband service providers. Of 376,000 County housing units, approximately 99.6% are passed by one wireline cable company providing broadband service and at least 65.6% are passed by two wireline cable companies providing broadband service; of 357,086 occupied County households, approximately 72 percent subscribe to cable service.[15] Because of bundled pricing incentives, most cable subscribers tend to purchase broadband service from their cable service providers, so the number of cable subscribers is an approximate estimate of the number cable modem broadband subscribers within the County. Based on anecdotal evidence, the County also has reason to believe that cable operators may have a significant number of customers who subscribe to broadband service, but not to cable services. The broadband deployment and broadband adoption rate within the County is greater than 72 percent.

Although the build out requirements have ensured that the majority of residents have access to competing service offerings from Verizon and Comcast (and in some areas also from RCN), there pockets of the County where residents do not have such service. These are in low density areas where Verizon has no obligation to serve, and where Comcast need only serve if the resident agrees to pay a portion of the line extension costs.

starting at thirty (30) residences per mile during years 1 through 7 of the term of the franchise, and changing to twenty (20) residences per mile during the years 8 to 10 and finally fifteen (15) residences per mile during the years 11 to 15 of the term of this franchise.

[15] 2010 U.S. Census, Profile of General Demographics for Montgomery County, MD; confidential information provided to the Montgomery County Office of Cable and Broadband Services.

II. THE SHERMAN ACT VIOLATIONS AND PROPOSED REMEDIES

The purpose of the Sherman Act "is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. … [C]oncerted activity covered by § 1…[is] 'inherently is fraught with anticompetitive risk.'" (citations omitted). *Spectrum Sports v. McQuillan*, 506 U.S. 447, 458-459 (U.S. 1993).

The Plaintiffs' Complaint alleges that the likely effect of the Commercial Agreements is to unreasonably restrict competition in numerous local markets for broadband, video, and wireless services throughout the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, because they deny consumers the benefits of unrestrained competition between the Verizon Defendants and the Cable Defendants.

The primary anticompetitive effects of the Commercial Agreements identified by the Plaintiffs in the Complaint, and the remedies proposed in the PFJ may be summarized as follows:

- Harm (Paragraph 38): Commercial Agreements harm competition in video and wireline broadband services markets where Verizon's FiOS territory overlaps with the wireline territory of a Cable Defendant because they impair the ability and incentives for Verizon and the Cable Defendants to compete aggressively against each other (Verizon Wireless stores must market FiOS and Cable Defendant's services on an "equivalent basis" or neither at all, and Verizon Wireless is required to sell each Cable Defendant's services in direct competition with FiOS for a commission for each such sale. These requirements reduce Verizon's incentives and ability to compete aggressively against the Cable Defendants with FiOS, and facilitates anticompetitive coordination among the Defendants.

- Harm (Paragraph 39): Commercial Agreements diminish the incentives and ability of Verizon and the Cable Defendants to compete where Verizon has built, or is likely to build, FiOS infrastructure that overlaps Cable Defendants' territory, transforming the Defendants' relationships from direct, horizontal competitors to partners in the sale of the Cable Defendants' services. Rather than having an unqualified, uninhibited incentive and ability to promote its FiOS video and broadband products as aggressively as possible, Verizon will be contractually required and have a financial incentive to market and sell the Cable Defendants' products through Verizon Wireless channels in the same local geographic markets where Verizon also sells FiOS, unreasonably diminishing competition between Verizon and the Cable Defendants—competition that is critical to maintaining low prices, high quality, and continued innovation.

- Proposed Remedy (Paras. 38 and 39): No sale of Cable Services in FiOS footprint.

- Harm (Paragraph 40): The Commercial Agreements create an enhanced potential for anticompetitive coordination, unreasonably diminishing future incentives to compete for product and feature development pertaining to the integration of broadband, video, and wireless services through the JOE technology joint venture of a potentially unlimited duration, and containing restrictions on its members' ability to innovate outside of the JOE.

- Proposed Remedy: Upon dissolution of the technology joint venture, all members receive a non-exclusive license to all the joint venture's technology, and each may then choose to sublicense to other competitors.

- Harm (Paragraph 41): The Commercial Agreements unreasonably diminish the Cable Defendants' incentives and ability to pursue in the future—as they have in the past—their own wireless services offerings for their customers who want a bundle including such services. The Cable Defendants are explicitly prohibited from competing in wireless for the first four years of the agreements, and meanwhile they may only offer Verizon Wireless services as sales agents, diminishing the incentive to invest in potential wireless offerings and inhibiting the ability to bring those offerings to market in a timely manner.

- Proposed Remedy: The cable companies can elect to resell Verizon Wireless services using their own brand at any time as provided for under the amended agreements.

- Harm (Paragraph 42): The Commercial Agreements unreasonably restrain future competition for the sale of broadband, video, and wireless services to the extent that the availability of these services as part of a bundle, including a quad-play bundle, becomes more competitively significant. The unlimited duration of the wireless exclusivity is unreasonable and unnecessarily restrains competition in the long term, when partnerships between the Cable Defendants and other wireless providers can serve as an important source of competition for the sale of integrated wireline and wireless bundles. Should the ability to offer integrated bundles develop into an important characteristic of competition, these agreements would unreasonably prevent wireless carriers from offering those bundles with the most significant providers of broadband and video services. The reduction in future competition to offer bundled products would result in harm in the markets for each constituent product.

- Proposed Remedy: After five years, the Cable Defendants are no longer barred from selling the wireless services of Verizon Wireless's competitors, and may partner with other wireless providers.

- Harm (Paragraph 43): The Commercial Agreements significantly and adversely affect Verizon's long-term competitive incentives to reconsider, in future years, its pre-existing decision not to build out FiOS beyond its current commitments. The requirement and financial incentives for Verizon Wireless to sell the Cable Defendants' services, combined with the unlimited duration of the Commercial Agreements, creates a disincentive to additional buildout in areas within Verizon's wireline territory but outside the currently planned FiOS footprint, particularly in those Verizon DSL territories in which buildout might be most profitable.

- Proposed Remedy: Term of Commercial Agreements shortened to a fixed term.
- Harm (Paragraph 44): The Commercial Agreements unreasonably restrain competition due to ambiguities in certain terms regarding what conduct Verizon can, and cannot, engage in. As written, the ambiguous terms could be interpreted to prevent Verizon Wireless from engaging in certain competitive activities, including selling wireless services as a residential (as opposed to mobile) service and allowing Verizon to sell Verizon Wireless services along with other companies' services.
- Proposed Remedy: Verizon retains the ability to sell bundles of services that include DSL, Verizon Wireless and the video services of a direct broadcast satellite company (i.e., DirecTV or Dish Network).

The County suggests that this list is incomplete, and has identified a further harm and proposes a further remedy in its discussion below as to why the Proposed Final Judgment is not in the public interest.

III. THE PROPOSED FINAL JUDGMENT IS NOT IN PUBLIC INTEREST

A. Public Interest Standard

Per 15 U.S.C. § 16(e)(1), before this court may enter any consent judgment proposed by the Plaintiffs, "the court shall determine that the entry of such judgment is in the public interest." The statute *requires* the court to consider a specific list of factors:

(A) the competitive impact of such judgment, including:

- termination of alleged violations,
- provisions for enforcement and modification,
- duration of relief sought,
- anticipated effects of alternative remedies actually considered,
- whether its terms are ambiguous, and

- any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment

- upon competition in the relevant market or markets,
- upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

As discussed further below, the County believes a careful analysis of these factors will result in a determination that the PFJ is not in the public interest.

B. The Public Interest Standard Has Not Been Met By the Proposed Final Judgment

1. The PFJ Permits An Unprecedented Level Of Cooperation And Collaboration By And Among The Most Dominant Companies In The Video, Voice, Broadband And Wireless Markets Through Commercial Agreements That Are Only Slightly Modified By The PFJ.

Both the scope and scale of the arrangements for joint marketing and collaboration in the Commercial Agreements are unparalleled.[16] In the Competitive Impact Analysis, it is admitted that collaboration of this sort is harmful, especially over extended periods of time:

> As the Department of Justice and Federal Trade Commission have stated before, in general, the longer that would-be competitors collaborate with one another on a joint venture, the less likely they are to compete against one another.

Competitive Impact Statement at 20-21. Although the PFJ creates some time limits (whereas the pre-PFJ arrangements had no end dates) and shortens the time limits of some arrangements, the PFJ permitted agreements and commitments remain broad in scope and extended in duration. By contrast, in another recent proceeding before the FCC, a number of the same companies involved

[16] In the companies' filing with the Federal Communications Commission (FCC) they gave examples of agency deals with retailers such as Radio Shack or AT&T's deal with a satellite provider, but these are simply not comparable.

in this transaction insisted that their commitments must be limited to at most three years because of the rapid changes in the sector.[17]

During the period that these highly problematic agreements are in force, the negative impact on the competitive landscape in Montgomery County will be substantial, as it will be elsewhere in Maryland, and in markets across the nation. The Commercial Agreements will have harmful competitive effects in the State, and in particular will mean that the residents of the City of Baltimore will be unlikely to ever receive a competitive wireline broadband service offering by Verizon. Residents of Montgomery County will also be negatively impacted if the PFJ is approved and the Commercial Agreements are allowed to stand. This collaboration among dominant players will dampen competition between them and create disincentives for further competitive network investment.

2. In Particular The PFJ Will Permit The Dominant Wireline And Wireless Broadband Providers To Collaborate To Allocate The Broadband Market Among Themselves Rather Than To Compete With Each Other In It, Discouraging Any Form Of Competitive Wireline Broadband Offering In Rural Areas Within The County (And Elsewhere), And In Urban Centers Such As Baltimore City (And Elsewhere) Which Do Not Have FiOS Service.

As noted in the filings of others in the related FCC proceeding, Verizon has refused to build out its FiOS fiber network in Baltimore City.[18] If Verizon is allowed to partner with

[17] Letter from the National Cable & Telecommunications Association to Marlene H. Dortch, Secretary, FCC, attaching letter to Chairman Julius Genachowski, MB Docket No. 11-169 (filed July 25, 2012), , urging that a commitment to provide equipment at no cost to subscribers in connection with encryption of the basic service tier of video programming should sunset after 3 years unless FCC were to extend it, considering among other factors, the ever-changing state of technology and the marketplace. http://apps.fcc.gov/ecfs/document/view.action?id=7021992753 (last accessed October 22, 2012).

[18] Letter from William H. Cole IV, Baltimore City Council to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 16, 2012); Letter from Curt Anderson, The Maryland House of Delegates to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 7, 2012); Letter from Roger Manno, The Senate of Maryland to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 20, 2012); Letter from Elbridge James, NAACP Maryland State Conference to Marlene H. Dortch, Secretary, FCC, WT Docket No. 12-4 (filed March 8, 2012); Letter from Marceline White, Maryland Consumer Rights Coalition to Marlene H. Dortch, Secretary, FCC,

Comcast to jointly market Verizon Wireless service, then Verizon will have even less incentive to build out FiOS in Baltimore or elsewhere, including in rural areas of Montgomery County. What is especially worrisome is that these Commercial Agreements provide a incentive for Verizon, particularly in areas where building costs are high (such as in urban areas) or where median incomes are lower, to *never* build out its FiOS network to provide a competitive choice for consumers in these markets.

a. Reduced Incentives for Competition in Areas of Head-to-Head Competition

Specifically, the County is concerned that the joint marketing removes the incentive for both companies (Verizon and Comcast) to expand their respective wireline facilities in areas of potential direct wireline competition. Comcast and Verizon have local cable franchises that require them to serve the entire County, where specific housing density requirements exist, as discussed earlier.[19] The Commercial Agreements will create further disincentives to build out in areas in which the two companies will directly compete.

In the broadband services market, the Verizon and the Cable Defendants dominate the broadband infrastructure into consumers homes, do not have to share network facilities,[20] and have repeatedly challenged the validity of any FCC rules intended to ensure fair and open access to the Internet.[21] Allowing their collaboration will further strengthen their dominance in the broadband market, both wireline and wireless. It is particularly bad for broadband competition because it allows providers of two alternative broadband technologies to divide up the broadband

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WT Docket No. 12-4 (March 15, 2012). Residents of Baltimore City comprise 10 percent of the State's population and 64 percent are African American. 2010 U.S. Census.

[19] See discussion *supra.*

[20] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB 12-203 (filed September 10, 2012), Netflix Comments at 10 ("Netflix Comments").

[21] *Comcast Corp. v. Federal Communications Commission*, 600 F.3d 642 (DC Cir. 2010); *Verizon et al. v. Federal Communications Commission*, D.C. Circuit, Case No. 11-1355.

market. Verizon will be permitted to focus on wireless and Cable Defendants to focus on wireline. All will be permitted to collaborate in pricing and marketing strategies through exclusivity, cross-marketing, and product development agreements. The companies will thus remain the dominant players in their respective broadband markets avoiding direct competition with each other.

For example, Verizon will be able to require the Cable Defendants to sell Verizon Wireless services exclusively until at least December 2016 (*i.e.*, Cable Defendants cannot sell wireless services of Verizon's competitors). This is a long enough period to establish a strong foothold in a bundled quad market, with its harmful effects, as discussed below. Any period of exclusivity incentivizes Verizon to focus on investments in wireless broadband (through Verizon Wireless) without risk that any of the Cable Defendants will partner with a competitor of Verizon Wireless to offer a quad play. It further incentivizes the Cable Defendants to focus on wireline broadband without risk that Verizon will make further investments in its wireline FiOS business to compete with the Cable Defendants. Indeed, by requiring the Cable Defendants to sell Verizon Wireless exclusively and also allowing Verizon Wireless to offer its own quad play with FiOS, Verizon Wireless wins no matter which wireline provider is involved. Allowing them to allocate the broadband market between themselves rather than to compete against each other within it. The PFJ effectively denies consumers the benefits of unrestrained competition and destroys competition itself contrary to the Sherman Act.

b. Reduced Incentives for Competition in Areas With No Head-to-Head Competition

The PFJ discourages any form of competitive wireline broadband offering in rural areas within the County (and elsewhere), and in urban centers such as Baltimore City (and elsewhere) which do not have FiOS service. For example, the County has observed a failure by both

Comcast and Verizon to build out the entire County, although they both have authority to do so. Where the number of homes per mile falls below 15 or 30 per mile, residents have difficulty obtaining wireline service from either Comcast or Verizon. As discussed previously, within these rural, low housing density areas of the County, Verizon has no obligation to provide wireline services and Comcast must only provide such wireline services if the resident agrees to share the deployment costs which may run over $40,000 per mile. Under the terms of the PFJ, there is no public interest obligation imposed on either Verizon or Comcast to make an investment in further deployment of wireline broadband services in return for the benefits conferred upon them by approval of the PFJ. Under the PFJ, Verizon is not permitted to sell Comcast service, thereby depriving Comcast of an incentive to expand its wireline deployment. Furthermore, Comcast can market Verizon's wireless services in its existing footprint, without having to expand into these unserved areas.

c. Negative Impacts on Every Relevant Services Market

More broadly, these Commercial Agreements can expect to have a negative impact on *every* relevant services market. In the video services market, federal law banned exclusive cable franchises in 1992.[22] DBS is not a true competitor to wireline video service providers.

The recent market entry of Verizon FiOS (as well as AT&T U-verse) has improved customer choice in selected markets, but not in the majority of the local video markets in the

[22] In Montgomery County, as well as elsewhere, competition from satellite video (DBS) providers has permitted the FCC to declare "effective competition" has been achieved, preempting local rate regulatory authority. But in 2007, the FCC recognized that DBS "competition" is insufficient to curb the market power of a wireline cable operator. In its Order imposing new federal regulations on the franchising process, the FCC based its measures on an imperative need for *wireline* competition to incumbent cable operators. The Commission stated that "[t]he record demonstrates that new cable competition reduces rates far more than competition from DBS" and indicated that wireline competitors, not DBS, bring down rates. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television* Consumer *Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, 22 FCC Rcd 5101 (rel. March 5, 2007) at ¶ 50; *see also Id.* at ¶ 35 (analyzing the new entrant as the "second provider," without counting DBS companies as competing providers). These statements were based on cable price data from 2005, and as discussed further *infra*, areas with effective competition now have higher prices than regulated areas.

country. The majority of homes do not have a choice of wireline video providers. A recent FCC report indicated ***65.7 percent of homes*** only have access to the incumbent cable operator or DBS (85.9 million homes).[23]

The entry of Verizon FiOS and AT&T U-verse have had a limited impact on prices. A *de facto* duopoly between the incumbent telephone and cable provider has developed. The FCC's most recent Cable Prices Report chronicles a relentless rise in the average monthly price of expanded basic service (excluding taxes, fees and equipment charges) even in the face of increased competition, noting the average price of expanded basic service for all communities increased at a compound average annual growth rate of 6.1 percent during the period 1995-2011 whereas CPI increased at only 2.4 percent over the same period.[24] Even worse, Commission reports since 2009 have reported the average prices are ***higher*** in effective competition communities than in communities without effective competition ($58.74 in effective competition communities vs. $56.82 in noncompetitive communities).[25] The FCC itself has recognized that the price difference is now statistically significant.[26] And these service rate increases do not include the costs of equipment needed to view services, an increasingly necessary component of service delivery. Though the historical information is less detailed, the cable prices reports have chronicled increases in equipment rates as well.[27] Within Montgomery County, there has been a

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[23] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 07-269, Fourteenth Video Competition Report ("Fourteenth Video Competition Report") (rel. July 20, 2012), Table 2 (on page 18) Because the two DBS providers are included in that tally, only areas that have 4 or more MVPDs have two wireline providers.

[24] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service*, Cable Programming Service, and Equipment, MM 92-266 (rel. Aug. 13, 2012), at ¶ 2 ("Cable Prices Report").

[25] Cable Prices Report at ¶ 3.

[26] Cable Prices Report at ¶¶ 3-4.

[27] Cable Prices Report at ¶ 19 ("Most equipment prices increased on an annual basis.")

similar increase in cable prices since the introduction of competition within the market for video services, as evidenced by the table below.

Table 1 – Cable Service Rates in Montgomery County

	2007	2008	2009	2010	2011	2012	2007-12 Percent Increase
Comcast							
Basic*	$17.30	$17.25	$19.10	$19.10	$21.10	$19.00	0.09%
Standard/Digital Starter*	$58.10	$60.35	$63.30	$64.65	$67.80	$71.15	22.4%
RCN							
Basic*	n.a.	n.a.	$17.95	$22.97	$22.97	$22.97	27.9%**
Signature Lineup*	$56.94	$61.44	$65.50	$70.50	$73.50	$79.50	39.6%
Verizon							
Basic*	$12.99	$12.99	$12.99	$12.99	$12.99	$12.99	0%
Expanded Basic (includes basic)	$39.99	$47.99	$47.99	$57.99	$64.99	$64.99	62.5%

n.a = price not available.
* Analog service eliminated in 2009.
** RCN Basic percentage increase is from 2009-2012.

Cable rates in most areas of Montgomery County were deregulated in 2009 as a result of the Commission's "effective competition" order,[28] but even with head to head competition among these providers, prices for cable services and equipment continue to rise in the County. Consumers cannot realistically expect to benefit if Comcast and Verizon Wireless are permitted to collaborate as envisioned in the Commercial Agreements. Comcast and Verizon will have even less incentive to compete on price going forward.

Some of the more recent service offerings, such as the multi-platform availability of video programming on TVs, computers, handheld devices and the like, are innovative but these new offerings also come at a cost to consumers. For example, to view video programming on

[28] *See In the Matter of Comcast of Potomac, LLC Petition for Determination of Effective Competition in 13 Franchise Areas in Montgomery County, Maryland, MD*, Memorandum Opinion and Order, DA 09-2192 (rel. October 8, 2009).

multiple platforms a consumer must subscribe to both Internet and video service from the same provider. Moreover, the largest DBS provider, DirecTV, cautions that due to trends in bundling, and multi-platform video programming delivery, the "video only market" no longer captures competitive challenges, broadband is becoming the "anchor" product of the wireline video providers and service bundles that include broadband are difficult for DBS providers to compete with.[29]

Moreover, the wireless market will be harmed because the Commercial Agreements effectively eliminate the Cable Defendants as competitors until certain triggering conditions are met.[30] And they continue to severely limit the development of competitive alternatives with other wireless providers. Verizon's wireless exclusivity remains until December 2, 2016, and may be extended by petitioning the United States for permission to continue its exclusive sales agreements with the Cable Defendants.

Finally, the Defendants are dominant providers in the voice services market, including traditional telephone services offered by Verizon, VOIP phone services offered by the cable operators in competition with the traditional phone companies, and wireless voice services offered by Verizon Wireless. Allowing collaboration among the Defendants will hamper robust competition in this market as well, and the County notes with concern that the Competitive Impact Statement does not even consider the impacts on this market in any comprehensive way, focusing only on wireless services.

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[29] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB 12-203 (filed September 10, 2012), DirecTV Comments at 2, 13, 15-18 ("Direct TV Comments").

[30] The PFJ allows the Commercial Agreements to condition a particular Cable Defendant's election to operate as a reseller of Verizon Wireless Services on another Cable Defendant's first making such election, that is, only after a lead Cable Defendant made such an election. The PFJ preserves that.

3. The PFJ Permits The Companies To Engage In A New Level Of Service Bundling (Quad Play) Which Will Further Entrench Their Market Dominance, Allowing Them To Obtain Increased Profits And Inhibiting Competitive Entry Yet Provide Little If Any Consumer Benefits.

The Competitive Impact Statement notes several advantages of bundling for the Defendants: "Telecommunications providers perceive several advantages to offering services in bundles: (1) provisioning more than one service at a time often generates cost efficiencies for the provider; (2) purchasers of bundles tend to spend more; and (3) purchasers of bundles are less likely to switch to another provider." Competitive Impact Statement at 5-6.

The Competitive Impact Statement further notes that while consumers "frequently choose bundled plans, which allow them to have a single relationship for customer service, installation, and billing[,]" they have expressed little interest in bundles including residential voice, video, and broadband services, the so-called quad play. Verizon, however, perceives an opportunity to offer quad plays almost nationwide through a combination of Verizon Wireless services with FiOS and with the Cable Defendants which each have a large customer base, and together cover a broad geographic footprint. Competitive Impact Statement at 5-6.

Comcast executives publicly tout the fact that the Commercial Agreements will permit cable operators to offer a "quad play" to consumers without building a wireless network.[31] The County notes that however positive a "quad play" may sound on its face, there is no evidence in the record that there is any consumer interest in, or benefit from further bundling of services in these markets. To the contrary, as described further below, the benefits of "bundling" go overwhelmingly to the providers, ***not*** to the consumers.

[31] "Comcast Execs: Verizon deal to bring the 'quadruple play" http://www.digitaltrends.com/mobile/comcast-execs-verizon-deal-to-bring-the-quadruple-play/ (last accessed October 22, 2012).

Bundling is presented as a convenience to the consumer — one stop shopping, so to speak. An alternative purpose of bundling is to create a new product for the provider to sell. The consumer is not really buying three separate services. What the consumer actually buys is a single complex product, which is even harder to evaluate on its own merits and compare to other products than the individual components. Creating this new product — with its mix of features individual consumers might not choose to purchase if they could choose or reject them separately — thus helps the provider maximize revenue.

Research conducted under one of the Defendants' research programs concludes that the potential reasons why consumers bundle are because:

1) it is their only option;

2) perceived price savings; and

3) they value receiving one bill.[32]

Whether any of these reasons are "benefits" is questionable. For example, the first reason – only option – would not be a benefit at all because it is the only option.[33]

The second reason – lower prices – would be a benefit, but price savings can be fleeting as they may only exist for a limited period of time as a promotion, or the standalone offerings may be unreasonably high prices so that bundles are preferred but include services not really desired by the customer.[34] In the County's experience, bundling does lower prices, as long as the consumer is only looking at the cost of the bundle as compared to the cost of purchasing all three

[32] Jeffrey Prince, " The Dynamic Effects of Triple Play Bundling in Telecommunications" Time Warner Cable Research Program on Digital Communications (Winter 2012) at 7. http://www.twcresearchprogram.com/pdf/TWC_PrinceReport.pdf (last accessed October 22, 2012) ("Prince Paper").

[33] *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees,* Memorandum Opinion and Order, MB Docket No. 10-56, (rel. Jan. 20, 2011), at ¶¶ 101-103.

[34] *See* discussion in Prince Paper at 6 re bundling of channels.

services from the same provider. But the consumer cannot get the benefit of the lower "bundled" price on individual services without paying for all three. Moreover, competition between standalone services is reduced. Furthermore, bundled packages typically include progressively higher levels of both video and Internet service; subscribers typically cannot choose a high level of Internet service and the lowest tier of cable service, for example. Thus, consumers may well end up paying more than they would if they could pay the discounted rates for each service from different providers. Bundling also favors providers because consumers cannot readily buy different services from different providers: although it is possible to do so, the cost differential makes this irrational for the vast majority of customers. So long as customers have no benchmark by which to compare bundlers from different providers, providers will be able to minimize the role price plays in purchasing decisions, and consequently will be able to charge more than they otherwise would. Bundles thus limit competition, because although the price of choosing service from more than one provider is a total higher rate, the price of choosing bundled service from a single provider may also be greater than the consumer would pay if he or she had more control over the content of the bundle.

The third reason – single billing – may be of only marginal benefit in current times when there are numerous convenient ways to pay bills, such as automated charges to credit cards or debit cards, and online payments. In summary then, the benefits of bundles to consumers are questionable.

The story is very different for providers. The same research paper surveys the research as to why businesses, especially recurrent services businesses such as those involved here in video, voice, broadband and wireless markets, bundle, noting several potential reasons:

- An attempt to extend market power (Whinston, 1990).
- An attempt at price discrimination. For example, Crawford (2008) shows that bundling of cable channels within tiers rather than "a la carte" is an effective way of second degree price discrimination, which enables the firm to recover its high fixed costs across a customer base with heterogeneous (and hidden) preferences.
- Other popular reasons to bundle include: the presence of economies of scope in production, and bundling as a means to simplify the choice set for consumers.[35]

The research paper concludes by suggesting that for recurrent services businesses such as those involved in video, voice, broadband and wireless markets, the principal reason for bundling is to reduce churn (customer turnover) which allows higher margins and dissuades competitive market entry.[36] Bundling protects providers at the expense of consumers because of the costs to subscribers of switching. First, to get the benefit of the lower prices offered through a bundle, subscribers often must sign long-term contracts, which raises the cost of switching. Second, there is simply the likelihood that existing subscribers will accept increases in the price of a bundle because it will be hard for them to tell if a different bundle is cheaper or has gone up proportionately less. Third, there is the cost associated with changing providers, which has significant intangible components. For example, changing from one triple-play provider to another typically entails a change in e-mail addresses.

In addition, in the County's experience, bundling favors providers because customers are forced to choose between providers based on confusing and incomplete information. In a fully competitive marketplace, it might be in the interest of at least one provider to make available full information about its product, so that potential customers could make informed decisions, but this is not the case in an oligopoly. Bundles actually make it harder to compare prices and services

[35] Prince Paper at 6-7.

[36] Prince Paper at 26.

because it is practically impossible for prospective customers to compare the bundles to an objective standard or to each other. In comparing two triple-play packages, for instance, none of the services may be readily comparable: one video service may be analog and another digital, the number of channels may differ significantly, and there may be significant differences in the program offerings. The speed of the broadband services may differ substantially. And even the voice services may be different, since packages may include VoIP, traditional copper wire telephone service, fiber-based switched digital voice, or copper-based switched service provided by the cable company.

4. The PFJ Creates An Unworkable Scheme For Joint Marketing That Will Cause Customer Confusion And Be Difficult To Monitor, Interpret And Enforce.

The changes proposed in the PFJ make some improvements to the Commercial Agreements, but these are only around the edges, and they create confusion, and leave the most fundamental problems in place. The PFJ is practically unworkable and will cause customer confusion over available services, and where they can be purchased, and will deter expansion of the FiOS footprint.

For example, in Montgomery County:

- Comcast may sell only Verizon Wireless services in a quad play.
- Verizon may offer a quad play with its own wireless services and FiOS.
- Verizon Wireless is not permitted to sell Comcast's service within the County because the entire County is within the FiOS footprint.

Notwithstanding the above restrictions:

- Verizon Wireless may, in any Verizon Wireless store (1) service, provide and support Verizon Wireless equipment sold by Comcast and (2) provide information regarding the availability of Comcast service, provided that Verizon Wireless does not enter into any agreement requiring it to provide, and does not receive any compensation for providing, such information in any Verizon Wireless store where Verizon Wireless is prohibited from selling Comcast service.

- Verizon Wireless may market Comcast service in national or regional advertising that is likely to reach street addresses in the FiOS footprint or DSL footprint provided that Verizon Wireless does not specifically target advertising of Comcast service where it is prohibited from selling Comcast service.

This proposal is obviously fraught with problems that will lead to customer confusion.

Moreover, it will be difficult to monitor, interpret and enforce.

IV. REMEDY SOUGHT BY COUNTY

In terms alternatives to the PFJ, the Competitive Impact Statement dismisses the idea that pursuing the Complaint and seeking a preliminary and permanent injunctions against the Commercial Agreements in their entirety would yield a better result.[37] In light of the above, the County disagrees, and urges the Court to reject the PFJ as it is not in the public interest.

In the alternative, the County urges the Court to modify the PFJ such that if the proposed transaction is eventually approved at all, it ameliorates customer confusion and disincentives for Verizon to expand the FiOS footprint and Comcast to expand its wireline footprint into unserved areas of existing franchise territories. ***At the very least*** any final judgment should provide:

1. Neither Verizon Wireless nor any of the Cable Defendants should be able to sell each others' services in any state where Verizon has either a FiOS footprint *or a DSL footprint*. That would mean Comcast could not sell Verizon Wireless service in Montgomery County, and Verizon Wireless would not be able to sell Comcast cable service anywhere in Maryland (it could sell Verizon FiOS service). Other jurisdictions that would also be similarly affected because they are in the Verizon FiOS and/or DSL footprints include California, Connecticut,

[37] Competitive Impact Statement at 30-31 ("The United States is satisfied…that the revisions to the agreements described in the proposed Final Judgment, along with the prohibition of sales by Verizon Wireless of the Cable Defendants' services in areas where Verizon offers FiOS in competition with the Cable Defendants, will preserve competition for the provision of video and residential broadband service in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.").

Delaware, Florida, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Virginia, and the District of Columbia.

2. As a condition of approval, Verizon and the Cable Defendants should be ordered to provide a 100 percent build out of their respective service footprints without any limitations. This should be an explicit *quid pro quo* of public benefits in return for the benefits conveyed to the companies by approval of the modified Commercial Agreements.

October 22, 2012

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF NEW YORK, Plaintiffs, v. VERIZON COMMUNICATIONS INC., CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, COMCAST CORP., TIME WARNER CABLE INC., COX COMMUNICATIONS, INC., and BRIGHT HOUSE NETWORKS, LLC, Defendants.	Case No. 1:12–cv–01354

OPPOSITION OF THE CITY OF BOSTON, MASSACHUSETTS TO PROPOSED SETTLEMENT

I. SUMMARY

The City of Boston, Massachusetts[1] (the "City") files these comments to express the City's ongoing opposition to the spectrum transfers and related commercial agreements entered into between Verizon and the cable operator Applicants.[2]

1 The Mayor's Office of Cable Communications was established in July of 1980 and given the task of researching and planning the development of Boston's cable television and communication system. The idea of cable for the City of Boston was first explored in 1973, but was abandoned because the City found that it would have to bear an unfair financial burden. Mayor Kevin White revisited the cable issue in 1979 and it was decided that the City would move forward with a franchise system. The Office of Cable Communications was the sole office within the City government that dealt exclusively and specifically with the cable franchising process in Boston; and as such, the office served an important policy-making function as the principle advisor to the Mayor on the cable franchise issue. Under Massachusetts' law, the Mayor of Boston has the exclusive power to award the cable franchise license. Presently the Office of

The City also wishes to make clear its deep disappointment in the actions of the Federal Communications Commission and the Department of Justice in approving the spectrum transfers and the commercial agreements between Verizon and the cable operators as the transactions are anti-competitive, unlawful, and not in the public interest. If the transaction is approved as proposed, it could leave Boston and Bostonians permanently on the wrong side of the digital divide. The City urges the Court to deny the Applications, and to exercise its authority-- in this proceeding and/or by initiating a separate proceeding – to halt the implementation of the related commercial agreements. The City strongly believes that the spectrum transfers and related commercial agreements create significant disincentives for Verizon to make any future investments in its FiOS fiber network which in turn will harm Boston consumers, who lack robust competition and investment in wireline broadband services. The City would recommend that the Court reject the proposed settlement, and suggest that, if the proposed transaction is eventually approved at all, in order to ameliorate customer confusion and disincentives to expand the FiOS footprint, ***at the very least*** any settlement should provide that neither VZW nor any of the cable defendants should be able to sell each others' services in any state where Verizon has either a FiOS footprint or a DSL footprint.

Put simply, the City is concerned that these transactions are designed to ensure that Verizon and Comcast collaborate and never compete in Boston, thereby effectively depriving our communities, citizens, small businesses, schools, hospitals and educational facilities the benefits

Cable Communications still handles all cable related business for the City and is located in the Mayor's cabinet under the Chief Information Officer.

2 Applications were filed on December 16, 2011 by Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and SpectrumCo, LLC ("SpectrumCo"), and on December 21, 2011 by Verizon Wireless and Cox TMI Wireless, LLC, a subsidiary of Cox Communications, Inc. ("Cox"), to assign spectrum licenses held by SpectrumCo and Cox Wireless to Verizon Wireless. See also, Public Notice, DA-12-67, WT Docket No. 12-4 (rel. Jan. 19, 2012); Order, DA-12-367, WT Docket No. 12-4, (rel. Mar. 8, 2012).

of video and broadband competition that is available in most of eastern Massachusetts' surrounding suburbs and in other parts of the country.

II. INTRODUCTION

Boston is a world-class city whose major industries include innovative technology, research, healthcare, education and hospitality. These industry sectors demand access to broadband to grow and succeed in their respective fields and their customers expect nothing less. Affordable broadband is critical to economic development, quality of life, and opportunity for the residents and small businesses in our City.

A. THE CITY OF BOSTON IS A STRONG PROPONENT OF BROADBAND DEPLOYMENT

The City of Boston has actively advocated for broadband investment and video competition throughout our city and particularly in under-served and lower-income neighborhoods. We encourage the introduction of new technologies and competition through innovative policies and investments. For example:

- Boston has invested over $18 million over the last five years in our city fiber network to support broadband for use by constituent services and our public schools.
- Boston developed informal and expedited franchising processes. In Boston, we renew, transfer, amend and dissolve franchises, quickly, as the situation(s) warrant, in order to be responsive to changes in law, regulation and/or market conditions.
- Boston has taken the lead in piloting an affordable wireless solution for our residents through the Boston Wi-Fi Project.

- The City streamlined access for broadband and wireless telecommunications businesses seeking to provide services to Boston's residents and businesses, establishing a single point of entry for telecommunications services applicants.
- Boston has negotiated agreements with providers such as RCN, Next G, American Tower and Extenet in order to introduce some measure of competition and new technologies in wireless communications.
- Boston is in the midst of an aggressive Boston Technology Opportunity Program designed to reach schoolchildren and families in need of technical skills and training, thanks to funding support from the American Recovery and Reinvestment Act.

Collectively, all of these efforts are designed to provide our citizens, neighborhoods and businesses with the resources necessary to succeed in a digital economy. Vital to our efforts is the development of a healthy and competitive market for broadband.

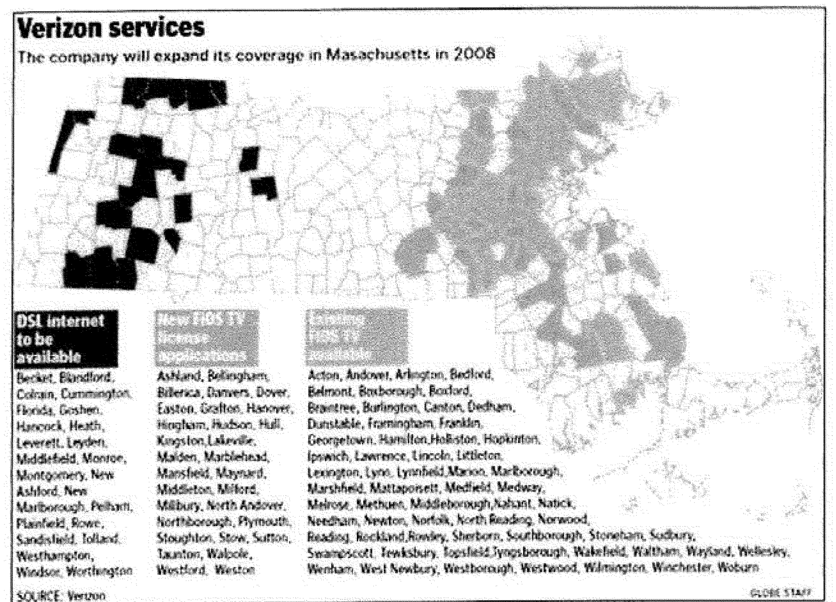
B. BOSTON LACKS A ROBUST AND COMPETITIVE MARKET FOR WIRELINE BROADBAND AND VIDEO SERVICES

Verizon is the predominant landline telephone company serving the Boston area, and Comcast is the predominant cable operator. The City of Boston understands that advanced communications networks hold out the promise of video competition and the potential benefit to consumers of lower prices, improved customer service and new, expanded video and broadband services. Thus, when Verizon announced plans for the launch of its "nationwide" FiOS fiber build out, the City and its residents welcomed the news, knowing that in the past, cable companies rushed to build systems in densely populated cities and larger towns.

Unfortunately, Verizon chose not to build out its fiber network to offer FiOS services in Boston. Verizon, instead, focused its investment on securing cable franchises in lower density, suburban communities surrounding Boston. As Verizon invested in its fiber network in suburban communities to offer competitive digital TV services, VoIP and faster Internet speeds, it also launched an aggressive regional marketing campaign. Boston residents, attracted by these advertised choices and competitive prices, cannot understand why these options are not available to them. Residents, frustrated with the lack of competition for cable services and skyrocketing prices, often call City Hall to complain.

The City reached out to Verizon repeatedly to discuss with company leadership the need for upgrades and new services over the last eight years, looking for any opportunity to negotiate a Verizon FiOS cable franchise. Our purpose has been to build a mutual dialogue to accommodate Verizon's entry in the new video market in order to bring more competition and increased broadband service offerings to Boston residents.

There is no compelling need to amend laws or avoid regulation; companies can do business in Boston at lightning speed. Yet, Verizon has declined the City's invitations to enter into cable franchise negotiations.



As illustrated in the preceding Boston Globe chart published in February, 2008,[3] Verizon chose to build out its FiOS network in the yellow and light blue areas which represent suburban communities. It chose *not* to provide FiOS service in Boston and all surrounding urban communities. Hence, a number of residents in those communities rightly perceive Verizon to be redlining, or at the very least cherry-picking. As the statewide map displays, urban Greater Boston is the hole in the Verizon FiOS donut.

Verizon's decision to bypass Boston in favor of surrounding suburban communities disproportionately affects minority and lower-income neighborhoods, small businesses, and seniors. It can have a deleterious effect on the ability to attract jobs and promote growth into the urban ring. We fear that without the broadband infrastructure and robust competition envisioned

3 Johnson, Carolyn Y., "Paying a Bundle for Cable Upgrade," The Boston Globe, Business Section, February 29, 2008.

in the Telecommunications Act of 1996, Boston, and the urban communities of eastern Massachusetts will suffer economically.

III. PROPOSED DEAL

In 2005, Verizon began building out its FiOS fiber network and now offers *wireline* video services and high speed internet service in certain markets (its FiOS footprint) in direct competition with the cable companies. In markets such as Boston where Verizon has not built out its FiOS network, it offers no video service, and a slower, and less competitive DSL internet service (DSL footprint).

The defendant cable companies acquired wireless spectrum (cellular) licenses from the FCC in 2006 but never developed cellular services. Late last year, VZW and the cable defendants reached a deal with two components: (1) *Spectrum Sale*: Cable companies will sell their wireless spectrum licenses to VZW; and (2) *commercial agreements*: (a) VZW and cable companies will act as sales agents of one another's services; (b) each of the cable companies may become resellers of VZW services; and (c) all of the companies (other than Cox) will enter into a technology joint venture to develop ways to integrate wired video, voice, and high-speed Internet with wireless technologies.

On August 16, 2012, the United States Department of Justice and State of New York announced a proposed settlement with the companies that includes modifications to some terms in the commercial agreements. This proposed settlement must be approved by the US District Court for the District of Columbia and interested parties such as the City of Boston were given this opportunity to offer comments to the court on this proposed settlement.

On August 23, 2012, the Federal Communications Commission released an order approving the applications to transfer the spectrum licenses from the cable defendants to VZW, with some conditions related to implementation of the commercial agreements.[4] As part of its review, the FCC had sought comments from the public on the applications, and received opposition from a variety of sources including consumer groups, labor unions, and local governments, including the City of Boston. Further, the City supports the legal arguments of consumer and public interests organizations[5] that filed with the Federal Communications Commission to demonstrate that:

(i) the commercial agreements violate provisions of the Communications Act, including 47 U.S.C. § 572 (concerning joint ventures among cable operators and telephone companies) and 47 U.S.C. § 548 (concerning unfair methods of competition or unfair or deceptive acts or practices) and

(ii) the Commission has ample authority to take enforcement measures under those provisions.[6]

IV. BOSTON'S OPPOSITION

The City opposed the proposed deal in a filing to the FCC[7], and in particular expressed concern that the unparalleled scope and scale of the arrangements for joint marketing and

[4] *In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC For Consent To Assign Licenses*; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC For Consent To Assign Licenses (WT Docket No. 12-4), Memorandum Opinion and Order and Declaratory Ruling FCC 12-95 (rel. Aug. 23, 2012). A petition for reconsideration was filed by NTCH, Inc. on September 24.

[5] Petition to Deny of Public Knowledge, Media Access Project, New America Foundation Open Technology Initiative, Benton Foundation, Access Humboldt, Center for Rural Strategies, Future of Music Coalition, National Consumer Law Center, on Behalf of Its Low-Income Clients, and Writers Guild of America, West, WT Docket No. 12-4,(filed Feb. 21, 2012)at 5 ("Petition to Deny").

[6] Petition to Deny at pages 36, 41-42, 45-46; RCA - The Competitive Carriers Association Petition to Condition or Otherwise Deny Transactions, WT Docket No. 12-4, (filed Feb. 21, 2012) at 41; Petition to Deny of the Rural Telecommunications Group, Inc., WT Docket No. 12-4 (filed Feb. 21, 2012) at 8.

[7] A copy of the City's filing is attached hereto.

collaboration in the commercial agreements would have negative impacts on competition in the City and elsewhere, and would not advance the goal of encouraging the private sector to build out competitive broadband networks and to expand wireless broadband. If Comcast and VZW are permitted to collaborate, consumers cannot realistically expect to benefit, as Comcast and Verizon will have even less incentive to compete on price for wireline services going forward. Verizon would also be less likely to build out its FiOS network in places such as Boston.[8]

The proposed settlement and the conditions in the FCC order approving the spectrum license transfers do not adequately address the City's concerns about this transaction. The City's opposition to the proposed settlement presented to the District Court would express the following concerns:

A. TRANSACTION UNREASONABLY RESTRAINS TRADE AND COMMERCE

Overall the transaction continues to unreasonably restrain trade and commerce because it permits a high level of cooperation and collaboration by the dominant players in the wireline and wireless services markets. The collaboration will dampen competition among them and create disincentives for further competitive network investment. It is particularly bad for broadband competition because it allows providers of two alternative broadband technologies to divide up the broadband market (VZW focused on wireless and cable defendants focused on wireline) and to collaborate in pricing and marketing strategies through exclusivity and cross-marketing

[8] A competitive market for video services in Boston has not developed. Recently, in response to an Emergency Petition[8] of the City for Recertification as a rate regulatory authority, the Federal Communications Commission overturned its former conclusion that a sufficient number of Bostonians would have a choice of wireline cable providers. (In re *Petition of the City of Boston For Recertification to Regulate the Basic Cable Service Rates of Comcast Cable Communications, LLC* (CSR 8488-R), Memorandum Opinion and Order (Apr. 9, 2012). The Emergency Petition is relevant to the present proceeding as well because it provides clear and compelling evidence of the consumer harms happening now in the City of Boston due to lack of robust competition, which will only get worse if Comcast and Verizon are permitted to join forces.

arrangements, and product development agreements so that the companies will remain the dominant players in their respective broadband markets avoiding direct competition with each other. For example, VZW will be able to require the cable defendants to sell VZW services exclusively (i.e., they cannot sell wireless services of Verizon's competitors) until at least December 2016 (as originally proposed in the commercial agreements, this exclusivity was for an unlimited term). Any period of exclusivity incentivizes Verizon to focus on investments in wireless broadband (through VZW) without risk that any of the cable defendants will offer a quad play with a competitor of VZW, and it incentivizes the cable defendants to focus on wireline broadband without risk that Verizon will make further investments in its wireline FiOS business that competes with the cable defendants. Indeed, by allowing the cable defendants to sell VZW exclusively and also allowing VZW to offer its own quad play with FiOS, VZW wins no matter which wireline provider is involved.

B. SETTLEMENT IS PRACTICALLY UNWORKABLE AND WILL CAUSE CUSTOMER CONFUSION

The proposed settlement is practically unworkable and will cause customer confusion over available services, and where services can be purchased, and will deter expansion of the FiOS footprint. For example, in the City of Boston:

- Comcast may sell VZW services.
- VZW is permitted to sell Comcast's service for a street address in Verizon's DSL footprint at least until December 2016 (then it would have to petition the Department of Justice to continue).
- VZW is not permitted to sell Comcast's service for a street address that is within the FiOS footprint or in a VZW store located in the FiOS footprint.

- Notwithstanding the above restrictions:
  - o VZW may, in any VZW store (1) provide service and support for VZW equipment sold by Comcast and (2) provide information regarding the availability of Comcast service, provided that VZW does not enter into any agreement requiring it to provide and does not receive any compensation for providing such information in any VZW store where VZW is prohibited from selling Comcast service.
  - o VZW may market Comcast service in national or regional advertising that is likely to reach street addresses in the FiOS footprint or DSL footprint provided that VZW does not specifically target advertising of Comcast service where it is prohibited from selling Comcast service.

V. RECOMMENDATION

The City would recommend that the Court reject the proposed settlement, and suggest that, if the proposed transaction is eventually approved at all, in order to ameliorate customer confusion and disincentives to expand the FiOS footprint, ***at the very least*** any settlement should provide that neither VZW nor any of the cable defendants should be able to sell each others' services in any state where Verizon has either a FiOS footprint or a DSL footprint. That would mean Comcast could not sell VZW service in the City, and VZW would not be able to sell Comcast cable service anywhere in Massachusetts (it could sell Verizon FiOS service). Other jurisdictions that would also be similarly affected because they are in the Verizon FiOS and/or DSL footprints include California, Connecticut, Delaware, Florida, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Virginia, and the District of Columbia.

VI. CONCLUSION

The proposed transaction could harm consumers in Boston and therefore is not in the public interest. The City urges the Court to deny the relief requested or in the alternative condition the terms of the approval as outlined above.

Respectfully submitted,

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CITY OF BOSTON, MASSACHUSETTS

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