

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

and

STATE OF NEW YORK,

Plaintiffs,

v.

Civil Action No.: 1:12-cv-01354

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.

**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 Register¹ 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 Defendants³ 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.

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.; Sodexo, 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

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 are 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

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

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.

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,

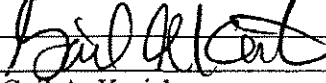
³⁷ Competitive Impact Statement at 30-31 ("The United States is satisfied...that the revisions to the agreements described in the proposed Final Judgment, along with the prohibition of sales by Verizon Wireless of the Cable Defendants' services in areas where Verizon offers FiOS in competition with the 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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