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.*	Civil Action No.:

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

The United States and the State of New York brought this lawsuit against Defendants 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") on August 16, 2012, to remedy violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that certain agreements among Comcast, Time Warner Cable, Bright House Networks, Cox (collectively, "Cable Defendants"), and Verizon Wireless unreasonably restrain trade and commerce.

At the same time the Complaint was filed, the United States also filed a Stipulation and Order, and a proposed Final Judgment, which is described in more detail in Section III below. The United States, the State of New York, and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Introduction

Residential voice, video, and broadband services are often purchased and provisioned in bundles with one other; such product bundles are commonly referred to as "double-plays" or "triple-plays." Telecommunications providers, such as the Defendants, have shown increasing interest in including mobile wireless services in these bundles, and creating integrated wireline-wireless bundles. These integrated wireline-wireless bundles include "quad-plays," i.e., bundles of each residential telecommunications service—voice, video, and broadband—along with a subscription to mobile wireless services. Few consumers today purchase wireline-wireless

bundles or quad-plays, more often opting to purchase their wireless services separately from their wireline services.

In December 2011, Verizon Wireless and 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, including "quad-plays." In addition, the Commercial Agreements allow Defendants to develop integrated wireline and wireless telecommunications technologies through a research and development joint venture, Joint Operating Entity LLC ("the JOE").[1]

In certain parts of the country, Verizon, which is Verizon Wireless's parent, offers fiber-based voice, video, and broadband services under the trade name "FiOS." Verizon sells its wireline FiOS services in several 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, D.C. In those areas of geographic overlap, the Commercial Agreements would result in Verizon Wireless retail outlets selling two competing quad-play offerings: one including Verizon Wireless services and a Cable Defendant's services and the other including Verizon Wireless services and Verizon FiOS services. In addition to setting up this unusual structure where one part of the Verizon corporate family (Verizon Wireless) must sell products in competition with another (Verizon Telecom), the Commercial Agreements contain a variety of

[1] At the same time that they negotiated the Commercial Agreements, the Cable Defendants agreed to sell to Verizon Wireless a significant number of wireless spectrum licenses that they purchased in 2006 but have not used. In June 2012, Verizon Wireless agreed to resell some of that spectrum to T-Mobile USA, the smallest of the nation's four nationwide wireless carriers. Plaintiffs are not here challenging those spectrum-related agreements, which facilitate the active use of an important national resource.

mechanisms that are likely to diminish Verizon's incentives and ability to compete vigorously against the Cable Defendants with its FiOS offerings and create an opportunity for harmful coordinated interaction among the Defendants regarding, among other things, the pricing of competing offerings.

The Commercial Agreements also harm the Defendants' long-term incentives to compete insofar as they create a product development partnership of potentially unlimited duration. Innovation and technological change mark the telecommunications industry, but the Commercial Agreements fail to reasonably account for such change and instead freeze in place relationships that, in certain aspects, may be harmful in the long term. For an unlimited term, the Cable Defendants collectively are restricted to one wireless partner, Verizon Wireless, and the participants in the joint technology venture are restricted to that forum—and limited to working with the partners in that venture—for integrated wireline and wireless product development. Moreover, Verizon Wireless's ability to sell Verizon's FiOS product is restricted to the currently planned FiOS footprint, even if in future years Verizon contemplates further FiOS expansion. Exclusive sales partnerships and research and development collaborations between rivals that have no end date can blunt the long-term incentives of the Defendants to compete against each other, and others, as the industry develops.

B. The Defendants

Verizon is a Delaware corporation headquartered in New York. Verizon's consumer wireline segment, Verizon Telecom, is one of the nation's largest providers of wireline telecommunications services, including both video and broadband services as well as bundles that contain those products.

Verizon Wireless is a Delaware general partnership headquartered in New Jersey, and is

the nation's largest provider of wireless services. Verizon Wireless is a joint venture owned by Verizon (55%) and Vodafone Group Plc (45%), but is operated and managed by Verizon.

Comcast is a Pennsylvania corporation headquartered in Pennsylvania. It is one of the nation's largest providers of wireline telecommunications services, including both video and broadband services as well as bundles that contain those products.

Time Warner Cable is a Delaware corporation headquartered in New York. It is one of the nation's largest providers of wireline telecommunications services, including both video and broadband services as well as bundles that contain those products.

Cox is a Delaware corporation headquartered in Georgia. It is a large multi-state provider of wireline telecommunications services, including both video and broadband services as well as bundles that contain those products.

Bright House Networks is a Delaware limited liability company headquartered in New York. It is a large multi-state provider of wireline telecommunications services, including both video and broadband services as well as bundles that contain those products.

C. Industry Background

Residential voice, video, and broadband services are commonly purchased together in bundles with one another. For example, Verizon offers a triple-play bundle of voice, video, and broadband FiOS services, and over 90% of FiOS customers subscribe to some form of bundle. Similarly, over 60% of Comcast customers subscribe to some form of bundle. 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. Consumers frequently choose bundled plans, which allow them to

have a single relationship for customer service, installation, and billing. Bundles are typically offered by providers that themselves provision each component service. However, some providers that cannot supply each component service partner with complementary providers to bundle their services in the marketplace.

Today, most consumers do not purchase wireless services in bundles including residential voice, video, and broadband services. For instance, Verizon sells some quad-play offerings in its FiOS territory, but its sales of quad-play bundles pale in comparison to the number of triple-play bundles it sells.

Technological developments, such as the advent of the smartphone and the increasing availability and demand for streaming video content, have the potential to increase demand for integrated wireline and wireless services. Verizon recognizes this potential and perceives an opportunity for growth in the development of products and features that integrate wireline and wireless services. But Verizon cannot fully exploit the perceived growth potential presented by wireline-wireless bundles on its own. Although Verizon Wireless offers service almost nationwide, Verizon offers FiOS in only a limited portion of the country. The Cable Defendants are particularly attractive potential partners because they each have a large customer base, and together they cover a broad geographic footprint. The Cable Defendants also owned valuable unused wireless spectrum that Verizon Wireless wished to acquire. Ultimately, Verizon Wireless and the Cable Defendants agreed to enter into the Commercial Agreements as well as agreements for the sale of the Cable Defendants' wireless spectrum to Verizon Wireless.

D. The Commercial Agreements

The Commercial Agreements enable Defendants to offer bundles combining wireline and wireless services, including in many local markets where they are unable to do so on their own because they do not themselves sell all the constituent services.

Specifically, in December 2011, Verizon Wireless and the Cable Defendants entered into a series of Commercial Agreements, which in combination (1) allow Verizon Wireless and each Cable Defendant, respectively, to sell each other's services; (2) create a structure for them to develop new products and services that integrate wireline and wireless services; and (3) create a future option for each of the Cable Defendants to operate a virtual wireless network using Verizon Wireless's network.

a. On December 2, 2011, (1) Verizon Wireless and, respectively, Comcast, Time Warner Cable, and Bright House Networks entered into reciprocal "Agent" (sales agency) agreements to sell each other's products on a commission basis; (2) Verizon Wireless, Comcast, Time Warner Cable, and Bright House Networks entered into a "Joint Operating Entity" agreement to collectively develop and market integrated wireline and wireless products; and (3) Verizon Wireless and, respectively, Comcast, Time Warner Cable, and Bright House Networks entered into "Reseller" agreements to provide Comcast, Time Warner Cable, and Bright House Networks the option to operate a virtual wireless network using Verizon Wireless assets; and

b. On December 16, 2011, defendants Verizon Wireless and Cox entered into (1) reciprocal "Agent" (sales agency) agreements to sell each other's products on a

commission basis; and (2) a "Reseller Agreement" to provide Cox with the option to operate a virtual wireless network using Verizon Wireless assets.

The Commercial Agreements contain a number of provisions that are likely to harm competition in the markets for broadband, video, and wireless services. First, the Commercial Agreements require Verizon Wireless to sell the Cable Defendants' products even where Verizon has its own directly competing FiOS products. Under these provisions, Verizon Wireless must sell the Cable Defendants' video and broadband services through its sales channels even though Verizon itself currently uses a significant number of Verizon Wireless stores to sell FiOS. In addition, Verizon Wireless receives a commission for each sale of one of the Cable Defendants' products, even in regions where Verizon offers competing FiOS services.

Second, the Commercial Agreements also contain an explicit restraint on Verizon FiOS sales, providing that Verizon Wireless may not market or sell FiOS services unless it also offers the Cable Defendants' services on an "equivalent basis." The "equivalent basis" provision limits Verizon's ability to offer, promote, market, and sell FiOS services in competition with the Cable Defendants' services through any Verizon Wireless distribution channel.

Third, the Commercial Agreements contain a long-term exclusivity provision that prohibits the Cable Defendants from partnering with any other wireless company.

Fourth, although the Commercial Agreements allow the Cable Defendants eventually to resell wireless services using Verizon Wireless's network under their own brands, the Cable Defendants must wait four years before they can do so.

Finally, the Commercial Agreements create the JOE, a joint venture to develop and market integrated wireline and wireless technologies. The JOE is to serve as its members' exclusive vehicle for research and development of certain wireline and wireless products: while

they remain in JOE, Defendants Verizon Wireless, Comcast, Time Warner Cable, and Bright House Networks cannot independently conduct any research and development on subjects within the JOE's exclusive field, even on projects that the JOE declines to pursue. The technology developed within the JOE is exclusively available for use by Verizon, the Cable Defendants that are members of the JOE, and potentially other cable companies that agree to sell Verizon Wireless services as agents.

The Commercial Agreements are potentially unlimited in duration. The Agent agreements have an initial five-year term, which renews automatically for another five-year term, and is subject to automatic renewals every five years thereafter. The JOE agreement has no fixed expiration.

E. Relevant Markets

1. Video Services

Video providers acquire the rights to transmit video content (e.g., broadcast and cable programming networks, television series, individual programs, or movies), aggregate that content, and distribute it to their subscribers or users. The distribution of professional video programming services to residential customers ("video services") is a relevant product market.

Consumers purchasing video services select from among those firms that can offer such services directly to their home. Although direct broadcast satellite and online video services can serve customers across the United States, wireline video providers such as the Cable Defendants and Verizon are only able to offer services where they have, with the requisite approvals from local authorities, built out their networks to homes in a particular area. Thus, the relevant geographic markets for video services include the local markets throughout the United States where Verizon offers, or is likely soon to offer, FiOS within the franchise territory of a Cable

Defendant. A small but significant price increase by a hypothetical monopolist of video services in any of these geographic areas would not be made unprofitable by consumers switching to other services.

2. Residential Broadband Internet Services

Residential broadband Internet services providers connect residential customers' electronic devices to the Internet at high speeds and in high data volumes, typically for a monthly fee. These services allow customers to access content containing large quantities of data, such as high-quality streaming video, gaming, applications, and various forms of interactive entertainment. The provision of broadband Internet services to residential customers ("broadband service") is a relevant product market.

Consumers purchasing broadband services select from among those firms that can offer such services directly to them at their homes. The relevant geographic markets for broadband services include the local markets throughout the United States where Verizon offers, or is likely to soon offer, FiOS within the franchise territory of a Cable Defendant. A small but significant price increase by a hypothetical monopolist of broadband services in any of these geographic areas would not be made unprofitable by consumers switching to other services.

3. Mobile Wireless Telecommunications Services

Mobile wireless telecommunications services allow customers to engage in telephone conversations and to obtain data services using radio transmissions without being confined to a small area during a call or data session, and without requiring an unobstructed line of sight to a radio tower. Mobile wireless telecommunications services include both voice and data services (e.g., texting and Internet access) provided over a radio network and allow customers to maintain

their telephone calls or data sessions wirelessly when travelling. The provision of mobile wireless services ("wireless services") is a relevant product market.

Consumers typically purchase wireless services from providers that offer and market services where they live, work, and travel on a regular basis; hence geographic markets are local. However, the largest and most successful wireless providers have national footprints and offer pricing, plans, and devices that are available nationwide. Therefore, nationwide competition among wireless services providers affects competition across local markets. The relevant geographic markets for wireless services include the local markets throughout the United States where Verizon offers wireless services, and where the Cable Defendants offer wireline services. A small but significant price increase by a hypothetical monopolist of wireless services in any of these geographic areas would not be made unprofitable by consumers switching to other services.

F. The Cable Defendants' Market Power

The Cable Defendants are dominant in many local markets for both video and broadband services, with a reported national market share for incumbent cable companies of greater than 50% for both broadband and video services, although their shares may be higher or lower in any particular local market for any particular service. Each Cable Defendant has market power in numerous local geographic markets for both broadband and video services.

The concentrated nature of both the broadband and video services product markets, and the Cable Defendants' market power, are largely due to historical factors. In most geographic areas, the local cable network was originally constructed pursuant to a local franchise agreement that gave the cable carrier exclusive rights to provide service in that area in exchange for a commitment to build out broad cable coverage. The copper-wire telephone network was the

only other telecommunications infrastructure built out to most households, and it too was subject to an exclusive license. For decades, the telephone companies were not permitted to offer cable services, and vice versa.

The Telecommunications Act of 1996 was intended to foster enhanced competition between the telephone companies and the cable companies. Among other changes to national telecommunications policy, the Act removed regulatory constraints on competition between the telephone and cable companies in each other's markets.

In 2005, Verizon began offering FiOS services over its newly constructed fiber-optic network. 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. As Verizon has expanded FiOS to cover millions of households, it has consistently won significant market share in both broadband and video in the local markets where it offers those services.

Verizon continues to build FiOS infrastructure pursuant to a number of local franchise agreements. Well before entering into the Commercial Agreements, Verizon publicly announced its decision not to invest in further FiOS expansion beyond its obligated builds. Verizon's business plans with respect to future FiOS expansion have not changed significantly since it entered into the Commercial Agreements. Nonetheless, 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.

G. Anticompetitive Effects of the Agreements

The Commercial Agreements, and in particular the following provisions thereof, harm competition in the video, broadband, and wireless markets because they impair the ability and incentives for Verizon and the Cable Defendants to compete aggressively against each other:

a. Verizon is restrained from marketing or selling FiOS in Verizon Wireless stores unless it also sells a Cable Defendant's services on an "equivalent basis." This restriction reduces Verizon's ability and incentives to compete aggressively against the Cable Defendants' products and facilitates anticompetitive coordination among the Defendants.

b. Verizon Wireless is required to sell each Cable Defendant's services in direct competition with FiOS, and Verizon Wireless receives a commission for each such sale. This requirement reduces Verizon's incentives and ability to compete aggressively against the Cable Defendants with FiOS and facilitates anticompetitive coordination among Defendants.

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. 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. The Commercial Agreements

deprive FiOS of the ability to exploit fully a valuable marketing channel and alter Verizon's incentives with respect to pricing, marketing, and innovation. They unreasonably diminish competition between Verizon and the Cable Defendants—competition that is critical to maintaining low prices, high quality, and continued innovation.

The Commercial Agreements also unreasonably diminish future incentives to compete for product and feature development pertaining to the integration of broadband, video, and wireless services. Although the JOE technology joint venture may produce useful innovations that benefit consumers, the JOE has a potentially unlimited duration, and it contains restrictions on its members' abilities to innovate outside of the JOE or to collaborate using JOE technology with any partner that is not also a member of the JOE. These aspects of the JOE unreasonably reduce the incentives and ability of Defendants to compete on product and feature development, and create an enhanced potential for anticompetitive coordination.

The Commercial Agreements also unreasonably restrain the ability of the Cable Defendants to offer wireless services on a resale basis. Although the agreements permit the Cable Defendants eventually to act as wireless competitors using Verizon Wireless's network at least in part, the Cable Defendants are explicitly prohibited from doing so for the first four years of the agreements, and meanwhile they may only offer Verizon Wireless services as sales agents. Whereas most wireless resellers do not serve as a significant competitive constraint on facilities-based providers, the Cable Defendants have extensive network facilities and other commercial advantages that could enhance their relevance as competitors, and they have explored how to leverage those assets to their advantage. A four-year delay in the ability of the Cable Defendants to develop their own wireless offerings, relying in part on Verizon Wireless's network,

diminishes their incentive to invest in potential wireless offerings and inhibits their ability to bring those offerings to market in a timely manner.

The provisions of the Commercial Agreements that make Verizon Wireless the exclusive wireless partner of the Cable Defendants also unreasonably restrain competition in the market for wireless services. Although the exclusivity provisions of the agreements may be reasonably necessary to bind the parties into a cooperative relationship for the next several years, the unlimited duration of the wireless exclusivity is unreasonable and unnecessarily restrains competition in the long term, if the ability to sell wireless services in combination with video or broadband services becomes an important component of wireless competition. Should the ability to offer integrated bundles develop into an important characteristic of competition for wireless services, these agreements would unreasonably prevent wireless carriers from offering those bundles with the most significant providers of video and broadband services.

The Commercial Agreements also 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. Although Verizon's current plans do not contemplate additional FiOS buildout beyond the currently obligated areas—and therefore significant additional buildout is unlikely for at least the next several years—developments in the technology and economics of FiOS deployment and competition in the markets for video and broadband services more broadly, may cause Verizon to re-evaluate the possibility of additional buildout. The requirement and financial incentive for Verizon Wireless to sell the Cable Defendants' services, combined with the unlimited duration of the Commercial Agreements, 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.

The Commercial Agreements also 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.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to remedy the violation alleged in the Complaint while, at the same time, minimizing interference with possible procompetitive benefits of the agreements and maintaining flexibility to account for changing market conditions and technology. In particular, the proposed Final Judgment 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. In a number of instances, the proposed Final Judgment contains a prohibition of certain conduct that goes into effect several years into the future, but allows the Defendants to petition the United States to continue that conduct, thereby allowing the restrictions of the decree to adjust depending on future developments.

The proposed Final Judgment sets forth (1) certain prohibited conduct, (2) certain amendments required to be made to the Commercial Agreements, (3) anti-collusion provisions and compliance training requirements, and (4) reporting requirements to enable the United States to ensure the Defendants' compliance with the proposed Final Judgment.

A. Prohibited Conduct

1. No Sales of Cable Services in the FiOS Footprint

Sections V.A and V.B of the proposed Final Judgment seek 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. These sections 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. This is necessary to ensure that Verizon receives no financial return from sales diverted from FiOS to the Cable Defendants.[2] Specifically, Verizon Wireless is barred by Section V.A from (a) selling Cable Services to residents who live within the FiOS Footprint; and (b) selling Cable Services in Verizon Wireless retail stores located within the FiOS Footprint.

The "FiOS Footprint" is defined to include not only areas that are currently served by FiOS, but those areas for which Verizon has a legal obligation to build FiOS facilities or is authorized to do so.[3] Verizon has publicly stated that it does not presently intend to build FiOS beyond the areas it has committed to local authorities to build. However, the proposed Final Judgment accounts for the possibility that developments in the technology and economics of FiOS deployment may in the future make additional buildouts profitable. It does this in two ways. First, any new areas where Verizon acquires additional authorizations to build FiOS also

[2] The proposed Final Judgment does not bar the Cable Defendants from selling Verizon Wireless services anywhere. The Cable Defendants do not have their own wireless products and do not have any reduced incentive to market their various offerings as a result of these agreements. Therefore, there is no significant competitive concern with the Cable Defendants selling Verizon Wireless and the proposed Final Judgment does not interfere with these sales.

[3] Verizon has legally binding agreements with several local authorities to continue building its FiOS network. Should Verizon build out its network only so far as those agreements require, it will reach over 19 million homes by the end of 2018. The "FiOS Footprint" as defined

are included in the definition of "FiOS Footprint." This ensures that if Verizon does build out FiOS in additional areas, its incentive to aggressively market and sell FiOS will not be blunted by the commissions it receives from the Cable Defendants for selling their competing products. Second, Section V.B extends the prohibition on Verizon Wireless's selling of Cable Services more broadly on the five year anniversary of the agreements. After December 2, 2016,[4] Verizon Wireless is prohibited from selling Cable Services both to residents who live within the "DSL Footprint" and in DSL Footprint Stores. The DSL Footprint consists of territory, other than the FiOS Footprint, where Verizon Telecom provides DSL service to more than a *de minimis* number of customers. Section V.B thus ensures that, as its planned buildout of FiOS is completed, Verizon's decision whether to extend the FiOS network will not be affected by its ability to sell, on a commission basis, Cable Services in lieu of developing its own products.

Verizon Wireless may, at least 120 days before December 2, 2016, petition the United States to allow it to continue to sell Cable Services in the DSL Footprint or some portion thereof. Upon such a request, the United States shall, in good faith, expeditiously examine market conditions in the relevant area to determine whether such sales will adversely impact competition and decide, in its sole discretion, whether to approve such a request.[5] This provision gives the United States important flexibility in administering the proposed Final Judgment to adapt to changes in technology or business models over the next several years. For instance, to the extent that Verizon is reasonably able to expand its ability to compete against the Cable Defendants

---

in the proposed Final Judgment thus includes all areas covered by those commitments.

[4] This date is five years after the signing of several of the Commercial Agreements, and is the initial term set by the agreements, absent a renewal.

[5] The proposed Final Judgment requires the United States to grant or deny petitions under this section, and several others, within sixty (60) days. Should the United States require more time to make a decision due to lack of sufficient information, it may deny the petition without

using its own video and broadband products (with either FiOS or some other technology) within the DSL Footprint or any subset thereof, and would have the incentive to do so in the absence of the Commercial Agreements, the United States may deny any request from Verizon Wireless under this provision. In making this determination, the United States may rely in part on the periodic reports that Verizon is required to submit under Section VI.D, as discussed in more detail below.

The proposed Final Judgment permits Verizon Wireless to engage in certain limited activities that do not adversely affect competition. Section V.C provides that Verizon Wireless may advertise Cable Services in national or regional advertising that may reach residents of the FiOS Footprint or DSL Footprint, as long as it does not specifically target such advertising in local areas where Verizon Wireless is prohibited from selling Cable Services pursuant to Sections V.A and V.B. This provision preserves the ability of Verizon Wireless to engage in advertising to an efficient-sized area while, at the same time, preventing any advertising directed specifically at areas where Verizon Wireless is not permitted to sell Cable Services. To the extent that Verizon Wireless engages in such advertising and, as a result, a customer seeks to acquire Cable Services from a Verizon Wireless store in the FiOS (or DSL) Footprint, Verizon Wireless is permitted to provide factual information about Cable Services, as discussed further below, but may not sell Cable Services in such stores. Rather, Verizon Wireless will promote Verizon's services where available.

Verizon Wireless stores also may provide customers who purchase wireless services through one of the Cable Defendants' sales channels with the actual device that the customer purchased. This provision enables a customer who has already made the decision to purchase

---

prejudice until such information is available.

Verizon Wireless service from a Cable Defendant, and indeed has done so, to have a convenient way of obtaining the purchased device. Because the Cable Defendants do not operate retail stores on a widespread basis, they may rely on Verizon Wireless stores to actually deliver wireless devices to customers who purchase wireline-wireless bundles from them. The consumer benefits from being able to obtain a wireless device from a store; competition is not harmed because the Verizon Wireless store merely acts as a distribution outlet for a device that has already been acquired.

Finally, Verizon Wireless may provide information to potential customers regarding Cable Services in the FiOS (or DSL) Footprint, as long as Verizon Wireless receives no compensation for making such information available. This provision is designed to enable Verizon Wireless to provide limited factual information to a customer who wishes to purchase Cable Services but is confused about a particular Verizon Wireless store's ability to sell those services.

2. Limited Duration, and Other Restrictions, on the JOE

While the JOE technology joint venture has the potential to produce useful innovations that benefit not only the JOE members, but consumers as well, the unlimited term of the JOE agreement threatens to lessen competition among its members. 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.[6] Accordingly, Section V.F requires the Defendants who are members of the JOE to

[6] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for Collaborations Among Competitors* § 3.34(f) (Apr. 2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("The Agencies consider the duration of the collaboration in assessing whether participants retain the ability and incentive to compete against each other and

withdraw from the JOE by December 2, 2016. This provision is designed to allow the JOE time to develop wireline-wireless technologies that could benefit consumers, while ensuring that any procompetitive benefits are not outweighed by possible exclusionary or collusive conduct. Any Defendant that is a member of the JOE may, at least 180 days before December 2, 2016 and prior to 150 days before December 2, 2016, petition the United States for permission to continue its participation in the JOE. Upon such a request, the United States shall, in good faith, expeditiously examine market conditions to determine whether the Defendant's continued participation in the JOE will adversely impact competition. In making this determination, the United States may rely in part on the periodic reports that Verizon Wireless is required to submit under Section VI.D, which will contain information regarding the products and technologies under development by the JOE.

The proposed Final Judgment also ensures that the JOE Agreement does not unreasonably restrict its members from independently developing new services or working with non-JOE members after a member exits the JOE or the JOE is dissolved. Under the JOE Agreement, each JOE member is prohibited from independently developing technologies within the "exclusive field," which consists, *inter alia*, of the integration of wireline and wireless services. As the JOE's primary owners, Verizon Wireless (50% ownership) and Comcast (31.8%) set its product roadmap and development priorities, with input from Time Warner Cable and Bright House Networks. If, for example, Time Warner Cable were to prioritize a particular product or feature as high but Verizon Wireless prioritizes it as low, then the JOE could decide not to develop the feature and leave Time Warner Cable with no path to develop the feature on

---

their collaboration. In general, the shorter the duration, the more likely participants are to compete against each other and their collaboration.").

its own. Section IV.D thus requires the Defendants to amend the JOE Agreement to allow Time Warner Cable and Bright House Networks to independently develop any technology that Time Warner Cable or Bright House Networks has presented to the JOE for potential development but that the joint venture has declined or ceased to pursue.

Section IV.E requires that, upon exiting the JOE, the exiting Defendant will be granted an immediate, irrevocable, perpetual, royalty-free fully paid-up non-exclusive license with immediate rights to sublicense, exploit, and commercialize any intellectual property then owned by the JOE. Section IV.E thus permits the Cable Defendants to license JOE-developed technology to other wireless carriers if they choose to do so upon leaving the JOE.

3. Ban on Wireless Exclusivity

Exclusivity may have procompetitive benefits, such as preserving incentives to invest and preventing free-riding. Under the Commercial Agreements, Verizon Wireless is the exclusive wireless partner of the Cable Defendants. This could, potentially, have procompetitive benefits, particularly in the short term while integrated wireline-wireless offerings are in their infancy and most customers do not buy wireline and wireless services together in a bundle. However, because the Verizon Wireless Agent Agreements can be renewed indefinitely, the exclusivity here is of an unreasonably long—potentially unlimited—duration. Depending on how the marketplace develops, particularly with respect to the success of wireline-wireless bundles (e.g., "quad plays"), the exclusivity could unnecessarily and unreasonably restrict wireless competition in the future by foreclosing other wireless carriers from access to the most valuable wireline partners long-term. This could reduce the number of competing bundles, as well as the ability of various wireless carriers to provide constituent parts of those bundles. Accordingly, Section V.D prohibits Verizon Wireless from enforcing any exclusivity provisions of the Commercial

Agreements that would bar any of the Cable Defendants from selling wireless services on behalf of a carrier other than Verizon Wireless after December 2, 2016.

Verizon Wireless may, at least 120 days before December 2, 2016, petition the United States for permission to continue its exclusive sales agreements with the Cable Defendants. Upon such a request, the United States shall, in good faith, expeditiously examine market conditions to determine, in its sole discretion, whether the Cable Defendants' continued exclusivity to Verizon Wireless will adversely impact competition. In making this determination, the United States may rely in part on the periodic reports that Verizon is required to submit under Section VI.D, as discussed in more detail below. Because competitive conditions may change more than four years hence, this provision allows the United States flexibility to determine at that time whether continued exclusivity would be beneficial or harmful to competition going forward.

4. No New Agreements

To prevent the Defendants from frustrating the purpose of the proposed Final Judgment, Sections V.G and V.H prohibit the Defendants from modifying the Commercial Agreements without prior written approval of the United States in its sole discretion. Section V.G also ensures that the amendments made to satisfy the requirements of the proposed Final Judgment are implemented in a way that satisfies the United States that they achieve the decree's purposes. Sections V.E, V.G, V.H, and V.I prohibit the Defendants from entering new agreements that would serve a similar purpose, or have similar effects, as the Commercial Agreements without prior written approval of the United States in its sole discretion.

B. Required Amendments to the Agreements

As originally written, the Commercial Agreements allowed Verizon Wireless to market

FiOS, but only on an "equivalent basis" with its marketing of Cable Services, and they did not allow Verizon Wireless to market other Verizon wireline products at all. As noted above, these provisions would impede Verizon's ability to market its wireline products in competition with the Cable Defendants by unreasonably depriving it of the unfettered use of an important marketing channel; they also could lead to enhanced coordination. Accordingly, Section IV.B requires the Defendants to amend the Commercial Agreements such that there is unambiguously no restriction or condition on Verizon Wireless's ability to sell Verizon's wireline products, including DSL. Although the proposed Final Judgment already also prohibits Verizon Wireless from selling Cable Services in areas where FiOS operates, or is likely to operate in the future, Section IV.B ensures that the Defendants actually modify the problematic agreements and do not condition Verizon Wireless's ability to sell Verizon's wireline services on Verizon Wireless's efforts or success in selling Cable Services in the areas where it remains able to make such sales.

The Defendants disagree among themselves about the meaning of certain terms in the Commercial Agreements. Because these terms could be interpreted in a way that results in diminished competition, they are potentially unreasonable. Sections IV.A and IV.C require the Defendants to amend the Commercial Agreements to clarify these terms and to do so in a way that enhances rather than restricts competition. As written, the Commercial Agreements could be interpreted to prevent Verizon Wireless from selling wireless services as a residential (as opposed to mobile) service in competition with the Cable Defendants. The Commercial Agreements also arguably prohibit Verizon Telecom from selling Verizon Wireless services along with other video services. The proposed Final Judgment requires the Defendants to resolve these ambiguities in such a way as to make clear that Verizon Wireless is free to engage in these competitive activities. If these provisions were left unchanged, the Cable Defendants

could threaten to enforce the offending provisions in order to prevent Verizon Wireless from taking competitive actions against them.

Under the Commercial Agreements, the Cable Defendants may eventually elect to become resellers of Verizon Wireless's service. As resellers using, at least in part, Verizon Wireless's network,[7] the Cable Defendants could provide additional competition in wireless as well as, potentially, wireline-wireless bundles, but they are unreasonably prohibited from doing so—even if they would otherwise find it commercially feasible and profitable—until March 2016. Meanwhile they may only offer Verizon Wireless services as sales agents.

Section IV.F requires the Defendants to modify the Commercial Agreements so that a Cable Defendant electing to operate as a reseller of Verizon Wireless services shall have the right to make such services commercially available six months after making such election. However, the amended Commercial Agreements may 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. For ease of administration, the original Commercial Agreements gave certain Cable Defendants the right to elect to become resellers of Verizon Wireless Services only after a lead Cable Defendant made such an election, and tied the choice for one Cable Defendant to the choice made by another Cable Defendant. Section IV.F preserves that structure while ensuring that, once a Cable Defendant is authorized to elect to become a reseller and in fact makes such an election, it may begin reselling Verizon Wireless Services soon thereafter.

C. Anti-Collusion Provisions and Compliance Program

The proposed Final Judgment prohibits any form of anticompetitive collusion and

[7] The Cable Defendants could, for example, use their own Wi-Fi assets to supplement their use of Verizon Wireless's network in offering retail wireless services.

contains provisions designed to ensure the Defendants' compliance. This is particularly important because the implementation of the Commercial Agreements, and realization of legitimate business objectives, will require some communication between Verizon Wireless and the Cable Defendants. In order to ensure that such communications are limited to legitimate business purposes and do not extend to anticompetitive collusion, the proposed Final Judgment contains certain safeguards discussed below.

Section V.J prohibits the Defendants from facilitating or reaching any agreement between Verizon's wireline segment and any Cable Defendant relating to the price, terms, availability, expansion, or non-expansion of wireline telecommunications services. This provision makes clear that although Verizon Wireless and the Cable Defendants will work together to deliver bundled wireless and wireline services to consumers, such joint efforts must not include any agreements between Verizon's wireline segment that would lessen competition with the Cable Defendants.

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. To the extent that the Cable Defendants share competitively sensitive information with Verizon Wireless, Verizon Wireless must take precautions to prevent such information from reaching Verizon Telecom. To that end, no employee of Verizon or Verizon Wireless may have access to both competitively sensitive Verizon Telecom information and competitively sensitive information from a Cable Defendant, except in certain limited, specifically enumerated circumstances. First, Section V.K allows the exchange of certain aggregated information pursuant to firewall provisions in the existing Commercial Agreements. Second, employees or

officers of Verizon Wireless who are responsible for implementing or evaluating joint offers between (1) Verizon Wireless and the Cable Defendants, and (2) Verizon Wireless and Verizon Telecom, may have access to nonpublic information regarding both Verizon Telecom and the Cable Defendants, but in no event may these officers and employees share the nonpublic information of any Cable Defendant with Verizon Telecom, or vice versa. These officers and employees will be required to participate in the antitrust compliance and education program, described further below, which will help ensure that they understand their obligations under the proposed Final Judgment.

Section VI.A requires each Defendant to describe to the United States and New York the actions it has taken to comply with the proposed Final Judgment. Section VI.B requires each Verizon Defendant to submit a proposed compliance plan to the United States and New York, which the United States will either approve or reject. Should the United States and a Verizon Defendant be unable to agree on a compliance plan, the Court may be called upon to determine whether the Verizon Defendant's proposed compliance plan is reasonable. These provisions are important to ensure that Defendants take all the steps necessary to adhere to the proposed Final Judgment's substantive requirements, and that the United States is fully aware of these steps.

Section VI.C requires each Defendant to furnish to the United States and New York copies of any amendment to the Agreements along with a narrative explanation of the purposes and effect of such amendment. This provision allows the Plaintiffs to monitor future amendments to ensure they do not violate the decree.

Section VIII sets forth various mandatory procedures to ensure Defendants' compliance with the proposed Final Judgment, including a requirement that the Defendants (a) provide each of its officers, directors, senior executives, and employees whose responsibilities involve

management of the JOE or the implementation of any of the Commercial Agreements with copies of the proposed Final Judgment and this Competitive Impact Statement; and (b) annually furnish to each such person a description and summary of the meaning and requirements of the proposed Final Judgment and the antitrust laws generally.

D. Reporting Requirements

Section VI.D of the proposed Final Judgment requires Verizon and Verizon Wireless to make periodic reports to the U.S. Department of Justice and the Federal Communications Commission to allow those agencies to better monitor the state of competition during the pendency of the decree. Verizon Wireless must submit reports regarding its sales of Cable Services, its sales of FiOS services, and the activities of the JOE. Verizon must submit reports regarding its ongoing FiOS buildout and its sales of DSL service. These reports will enable the United States to monitor the development of competition over the term of the proposed Final Judgment, in order to allow it to determine whether to grant or deny any requests made by a Defendant for relief from any provision in the proposed Final Judgment. The reports will also be useful in alerting the United States to potential violations of the decree that would merit investigation.

Section VII includes standard provisions allowing the United States to obtain information from the Defendants in order to investigate potential violations of the proposed Final Judgment, as well as to determine whether the proposed Final Judgment should be modified or vacated, or to exercise any discretion granted by the proposed Final Judgment. To facilitate the exercise of these compliance inspection and visitorial powers, Sections VI.E and VI.F require the Defendants to collect and maintain all communications relating to the Agreements between a Verizon Defendant on the one hand and a Cable Defendant on the other hand.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States, the State of New York, and the Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent

to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's Internet website, filed with the Court, and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Lawrence M. Frankel
Assistant Chief, Telecommunications & Media Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 7000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against the agreements in their entirety. The United States is satisfied, however, 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.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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 generally 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 mechanism to enforce the final judgment are clear and manageable.").[8]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government'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; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. 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.

[8] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court 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).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[9] In determining whether a proposed settlement is in the public interest, a 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' 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 greater 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

[9] *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'").

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 the APPA 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 this Court recently 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, Congress made clear its intent to preserve the practical benefits of utilizing 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). The language wrote into the statute 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.[10]

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: August 16, 2012

Respectfully submitted,

/s/ Jared A. Hughes
Jared A. Hughes
Trial Attorney

U.S. Department of Justice
Antitrust Division
Telecommunications & Media Section
450 Fifth Street N.W., Suite 7000
Washington, DC 20530
Telephone: (202) 598-2311
Facsimile: (202) 514-6381
Jared.Hughes@usdoj.gov

[10] *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, 93d Cong., 1st Sess., 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.").