COMMENTS REGARDING THE PROPOSED FINAL JUDGMENT

IN

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

Submitted on behalf of

RCN Telecom Services, LLC.

I. INTRODUCTION AND SUMMARY

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

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

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

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

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

RCN's principal concerns are as follows:

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

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

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

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

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

II. TUNNEY ACT STANDARD

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

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

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[3] 15 U.S.C. § 16(e)(1).

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

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

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

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

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

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

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6 15 U.S.C. § 16(e)(1).

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

8 15 U.S.C. § 16(e)(2), (f).

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

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

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

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

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

IV. PROPOSED FINAL JUDGMENT CONDITIONS

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

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

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

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

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

V. PERSISTENT COMPETITIVE HARMS

A. FiOS Footprint Is Too Narrowly Defined

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

[16] CIS at 14.

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

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

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17 *CIS* at 13.

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

19 *CIS* at 17.

20 *Id*.

21 *Id*.

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

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

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

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

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

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

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

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[24] *CIS* at 13.

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

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

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

B. Regional Marketing Exceptions Subsume Prohibitions

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

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

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

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

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

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

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

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

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

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

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

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

29 *See Verizon 8-K Filing*.

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

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

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

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

C. Ubiquitous Provision of Cable Companies' Information

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

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

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

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

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

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

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32 *PFJ*, V.C.ii.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

39 *Id*. at p. 29.

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

41 *See id.*

42 *See id.*

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

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

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

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

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

43 *Id.*

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

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

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

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

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

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

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

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

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

46 *PFJ*, § II.M(iii).

VI. NECESSARY MODIFICATIONS TO PROPOSED FINAL JUDGMENT

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

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

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

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

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

Respectfully submitted

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