MINTZ LEVIN

Paul D. Abbott | 617 210 6858 | pdabbott@mintz.com

One Financial Center
Boston, MA 02111
617-542-6000
617-542-2241 fax
www.mintz.com

July 14, 2006

VIA EMAIL

Ms. Andrea Nixon
Clerk of the Cable Television Division
Department of Telecommunications & Energy
One South Station
Boston, MA 02110

Re: *In re: Petition by Verizon New England Inc. To Commence A Rulemaking Pursuant To 207 C.M.R. § 2.01(1) To Amend 207 C.M.R. § 3.00 et seq.: Licensing,* Docket No. CTV No. 06-1

Dear Ms. Nixon:

In connection with the above-referenced matter, and pursuant to the Cable Television Division's Notice of Public Hearing and Request for Comment dated May 5, 2006, I hereby submit via email to cable.inquiry@state.ma.us this cover letter along with the following documents:

1. Comments of Comcast Cable Communications Holdings, Inc. (*see* filed titled ComcastComments.pdf); and

2. Appendix of Exhibits to Comments of Comcast Cable Communications Holdings, Inc. (*see* file entitled Appendix of Exhibits.pdf).

Please do not hesitate to contact me by email (pabbott@mintz.com) or by phone (617-210-6858) should you have any questions about these items or should you wish paper copies. Thank you for your attention to this matter.

Very truly yours,

Paul Abbott

Paul D. Abbott

Enclosures

cc: Cameron F. Kerry (w/enclosures)

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
BOSTON | WASHINGTON | NEW YORK | STAMFORD | LOS ANGELES | PALO ALTO | SAN DIEGO | LONDON

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
CABLE TELEVISION DIVISION

In re: Petition by Verizon New England Inc. To Commence A Rulemaking Pursuant To 207 C.M.R. § 2.01(1) To Amend 207 C.M.R. § 3.00 *et seq.*: Licensing.	))))))	CTV No. 06-1

COMMENTS OF
COMCAST CABLE COMMUNICATIONS HOLDINGS, INC.

Submitted by:

Cameron F. Kerry
Paul D. Abbott
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO PC
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

July 14, 2006

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
CABLE TELEVISION DIVISION

In re: Petition by Verizon New England Inc. To Commence A Rulemaking Pursuant To 207 C.M.R. § 2.01(1) To Amend 207 C.M.R. § 3.00 *et seq.*: Licensing.	)	CTV No. 06-1

COMMENTS OF
COMCAST CABLE COMMUNICATIONS HOLDINGS, INC. [1]

Although Verizon presents its Proposed Regulation as simply "time limits"[2] and "a limited step that would affect only the timing of local franchise decisions and does not address other aspects of the franchise process,"[3] it reaches much farther. In practice, Verizon's Proposed Regulation is a Trojan Horse for a functional equivalent of statewide licensing through Division regulations that would displace the discretion of issuing authorities with Verizon's unilateral license terms. Nothing in the competitive landscape in Massachusetts justifies this radical change. Massachusetts has wide competition in multichannel programming, Verizon has been able to construct its Fiber-to-the-Premises ("FTTP") network without cable television licenses, and Verizon has obtained cable licenses where it has pursued them. Moreover, such a fundamental change in the roles of the Division and local issuing authorities under G.L. c. 166A is a decision for the Legislature or preemptive federal policy, and not this agency.

[1] Comcast Cable Communications Holdings, Inc. is the holder of all of the entities that have been granted cable television licenses and offer services as Comcast in Massachusetts.
[2] Petition of Verizon New England Inc. for Adoption of Competitive License Regulation at p. 1 (filed Mar. 16, 2006)("*Verizon Petition*").
[3] News Release, "Verizon Proposes Measure to Speed Video Choice for Massachusetts Consumers" (Mar. 16, 2006), < http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93318>.

I. THE REGULATORY LANDSCAPE IN MASSACHUSETTS IS COMPETITIVE AND DOES NOT PRESENT AN OBSTACLE TO VERIZON OBTAINING LICENSES.

Verizon's portrayal of current licensing regulations as a cumbersome and outdated barrier to entry does injustice to the Division's foresight and does not reflect the state of video competition in Massachusetts. Although Verizon suggests that current licensing regulations date to 1971,[4] in fact the Cable Commission revised its regulations following enactment of the Telecommunications Act of 1996.[5] The agency saw a need for "updating" to reflect "an increasingly competitive video services market" and "removed procedural licensing rules which we could no longer defend as being both relevant and sensible as we move into a new telecommunications era we believe will be marked by competition."[6]

The decade that followed in fact has been marked by increasing competition in Massachusetts. Massachusetts was the first state to see entry by RCN, now "the nation's largest overbuilder."[7] Today, RCN has licenses in 16 Massachusetts communities, and passes approximately 350,000 homes. In all of these communities, RCN is a "competitive" licensee as defined by Verizon, as each had an incumbent cable operator. RCN's entry was sufficient that the FCC found "effective competition" for purposes of rate regulation in several major communities including the City of Boston,[8] and more effective competition petitions are

[4] *Verizon Petition* at 3.
[5] *In Re Amendment of 207 CMR 2.00-10.00*, Docket No. R-25, Report and Order (released Dec. 27, 1996).
[6] *Id*. at 1, 2-3.
[7] *In The Matter of Annual Assessment of The Status of Competition in The Market for Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report at p. 47, ¶89 (released Mar. 3, 2006)("*FCC Twelfth Annual Report*").
[8] *In the Matter of Cablevision of Boston, Inc. Petition for Determination of Effective Competition*, CSR 5048-E Memorandum Opinion And Order (Cable Services Bureau, released: July 20, 2001); *In the Matter of MediaOne of Massachusetts Petition for Determination of Effective Competition*, CSR 5395-E, Memorandum Opinion And Order (Cable Services Bureau, released: August 24, 1999); *In the Matter of Time Warner EntertainmentAdvance/Newhouse Partnership d/b/a Time Warner Cable Petition for Determination of Effective Competition*, CSR 5166-E, Memorandum Opinion And Order (Cable Services Bureau, released February 5, 1999).

pending.[9] No wonder, then, that RCN "believes the current regulatory regime has worked and is working, and that there is no justification for the relief that Verizon is seeking."[10]

Verizon already has 11 cable licenses, out of some 47 bedroom communities it has targeted for its video service by filing Form 100 applications.[11] It obtained its first signed license in October, 2005. Another was granted this past January, a third in March, four in May, and four more in June including three on a single night. With over 23% of its applications granted and an accelerating trend, Verizon's entry is proceeding rapidly and soon will surpass RCN's. Clearly Verizon management was not deceiving investors when it assured them franchising is going well.[12]

Verizon recently described the Massachusetts retail telecommunications market to the DTE as "highly competitive."[13] By this measure, the video market in Massachusetts is even more competitive. As of June 30, 2005, competitive local exchange carriers had a 25% share of end-user switched access lines in Massachusetts (both residential and commercial).[14] By comparison, nationwide over a 30 % share of the market in 2005 went to competitive

---

[9] *In re Petition of Comcast of California/Massachusetts/Michigan/Utah, Inc. For Determination of Effective Competition*, FCC File No. CSR-6152-E, Petition filed April 11, 2003 (seeking declaration of effective competition in the Town of Brookline); *In re Petition of Comcast of Massachusetts/New Hampshire/Ohio, Inc. For Determination of Effective Competition*, FCC File No. CSR-6153-E, Supplemental Petition filed April 11, 2003 (same for Wakefield); *In re Petition of Comcast of Massachusetts III, Inc. For Determination of Effective Competition*, FCC File No. CSR-6154-E, Petition filed April 11, 2003 (Framingham) *In re Petition of Comcast of Massachusetts I, Inc. For Determination of Effective Competition*, FCC File No. CSR-6156-E, Petition filed April 11, 2003 (Burlington, Natick, Waltham and Watertown).

[10] Comments of RCN, C.T.V. 06-1 at p. 1 (filed March 22, 2006)("*RCN Comments").*

[11] Verizon has obtained licenses in: Burlington, Hamilton, Lynnfield, North Reading, Reading, Stoneham, Tewksbury, Wakefield, Wenham, Winchester, and Woburn. It has applications pending in: Acton, Andover, Bedford, Belmont, Boxboro, Boxford, Canton, Dedham, Dunstable, Franklin, Georgetown, Holliston, Hopkinton, Ipswich, Lakeville, Lawrence, Lexington, Lincoln, Littleton, Lynn, Marlboro, Middleboro, Nahant, Natick, Needham, Newton, Sherborn, Southboro, Sudbury, Swampscott, Topsfield, Tyngsboro, Wellesley, West Newbury, Westboro, and Westwood.

[12] *See RCN Comments* at p. 2 & Attachments 1, 2.

[13] *Investigation by The DTE on Its Own Motion to Establish Retail Billing and Termination Practices for Telephone Carriers*, D.T.E. 06-8, Comments of Verizon Massachusetts at p. 3 (filed June 6, 2006).

[14] Industry Analysis and Technology Division, FCC Wireline Competition Bureau, *Local Telephone Competition, Status as of June 30, 200*5 at Table 7 (April, 2006).

multichannel programming providers, including satellite providers, overbuilders, and other non-incumbent video providers.[15] Moreover, this nationwide market share under-represents the extent of video competition in Massachusetts because of the extent of overbuild competition here.[16] Hence, cable competitors have an even ***larger*** share of the video programming market than CLECs do in a "highly competitive" market.

This competitive marketplace hardly suggests a structural problem that requires tailoring entry regulations to suit Verizon. Based on the RCN experience, the Division and DTE in 1999 reported to the Legislature that there are "several perceived advantages of the licensing process."[17] And, in contrast to RCN and other new entrants, Verizon already enjoys expedited entry because, as it emphasizes in its Petition,[18] it already has access to the rights of way. Thus, Verizon has not been impeded by the legal requirement that it obtain a final license before

---

[15] *FCC Twelfth Annual Report* at ¶ 8. In its comments in the DTE's billing and termination practices rulemaking, Verizon compares the number of access land lines with mobile lines in Massachusetts as evidence of competition. Verizon Comments, *supra* note [6] at n 2. Verizon Wireless, however, accounts for a large share of these mobile lines, given that nearly one out of every four wireless customers nationwide is a Verizon Wireless customer. *See FCC Tenth Annual Report and Analysis of Competitive Market Services With Respect to Commercial Mobile Services*, WT Docket No. 05-71 (Sept. 30, 2005) at ¶ 161 (estimating 184.7 million mobile telephone subscribers in the United States as of December 2004); Appendix A, Table 4 (estimating number of Verizon Wireless subscribers at 43,816,000). Whereas incumbent local exchange carriers were protected with one of two licenses in their service areas when cellular licenses were first granted, cable operators have been barred from ownership of satellite services within their franchise areas. *See* 47 U.S.C. § 533(a).

[16] A high proportion of RCN's national penetration is concentrated in Greater Boston, one of eight markets where it provides service. *Id.* at ¶ 89.

[17] *Investigation and Study Relative to The Adequacy And Effectiveness of Existing Licensing And Regulation of Cable Television Operations in The Commonwealth of Massachusetts, Report to The Joint Committee on Government Operations* at p. 9 [html version] (Jan. 1999) ("*1999 Legislative Study*"). These advantages were:

> First, there may be added security in the licensing process in that both the operator and the community are bound by federal and state law as to service mandates and procedures to be followed regarding events such as renewal negotiations, license denial, and appellate process. Second, while speed to the market is often a goal of new competitors, the licensing process may allow a prospective competitor the time it requires to schedule construction and implement its sales and marketing strategies. Finally, the licensing process also may provide the prospective competitor and municipality an opportunity to build a relationship based on well-established rules and policy that will serve both parties in future dealings.

[18] *Verizon Petition* at 4.

constructing its system.[19] Instead, Verizon takes the position that its FTTP network is "an upgrade to its existing telecommunications network" and that it already has "the requisite authority to upgrade its enhanced voice and broadband services" without a cable license.[20] Likewise, Verizon has not been held up by the requirement for a provisional license, because this "check"[21] has not been needed where Verizon does not need to plan and finance its system.[22] Because Verizon owns poles and conduits in the public ways, it has no need for pole attachment agreements. Other new entrants, however, must (1) first obtain local authority and grants of location, (2) then apply to Verizon and electric utilities first for pole attachment and conduit agreements and (3) next apply for individual pole attachment and conduit licenses and make-ready; only then can they begin construction in public ways.[23]

Verizon has actively constructed its FTTP network and announced the roll-out of services without waiting to obtain cable licenses.[24] Comcast's monitoring of Verizon's local construction

---

[19] G.L. c. 166A, §3 ("No person shall construct, commence construction, or operate a CATV system in any city or town by means of wires and cables of its own or of any other person without first obtaining as provided herein a written license …"); 207 C.M.R. 3.03(9) ("Actual construction of physical facilities for a cable system may not commence prior to the grant of a final license pursuant to 207 CMR 3.04").

[20] Statement of Legal Authority for FTTP Build Out, attached as Exhibit F to Verizon's Form 100 Application in the Town of Boxford ("*Boxford Exhibit F*"); *see also* Brief of Verizon New York Inc. in Opposition to the Joint Petition of the Town of Babylon, et al. for a Declaratory Ruling Concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc., New York Public Service Commission Cases 05-M-0250 and 05-M-0247, at p. 8 ("Verizon requires a cable franchise for FTTP only when and to the extent it 'is used in the transmission of video programming directly to subscribers'"). Verizon has included a statement identical to the Boxford Exhibit F in each of its Massachusetts Form 100 applications.

[21] *In Re Amendment of 207 CMR 2.00-10.00*, Docket No. R-25, Report and Order at p 16 (released Dec. 27, 1996).

[22] *See* Notice at 9.

[23] *See Complaint of Fiber Technologies Networks, L.L.C., pursuant to G.L. c. 166, § 25A and 220 C.M.R. § 45.00 et seq. regarding access to poles owned or controlled by Shrewsbury's Electric Light Plant*, D.T.E. 01-70, *Order On Fibertech's Motion For Reconsideration And Clarification of Partial Denial Of Motion For Summary Judgment And Final Order* at p. 14 (Aug. 20, 2004)(competitive provider becomes "licensee" entitled to pole attachment "upon obtaining construction authority from the municipality where the company seeks to construct its facilities").

[24] *See, e.g.,* Verizon Press Release, *Verizon Brings Blazing-Fast Computer Connections to Customers in 8 Additional Massachusetts Communities* (Apr. 11, 2005), <<http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=90298&PROACTIVE_ID=cecdc6cacac8c9cec7c5cecfcfcfc5cecdcecacdcec8ccc9ccc5cf>> (announcing rollout of FiOS service to Andover, Bedford, Belmont, Burlington, Hopkinton, Lynnfield, North Reading, and Topsfield).

found that Verizon has deployed or is constructing its FTTP network in some 68 communities in Massachusetts. This widespread deployment of Verizon's FTTP network without first obtaining cable television licenses demonstrates it is simply not true that licensing is "undercutting incentives to invest in and deploy the broadband networks over which competitive services will be delivered." *Verizon Petition* at 4.

Verizon cannot have it both ways. It previously justified its FTTP construction as an upgrade "to offer its customers enhanced voice and broadband data services" [25] that merely enabled video service as a "capability."[26] These prior assertions that FTTP construction was a network upgrade justified for voice and broadband services are at odds with Verizon's contention in this proceeding that video services revenue "is an important component of the business case justifying the significant investment required" for its FTTP network.[27]

Verizon's own extensive FTTP construction, RCN's successful incursion into the marketplace, and the investment by Comcast of more than $625 million in network improvements over the past four years show otherwise. The cable licensing process has not prevented Comcast and other cable operators from taking the risk of investing in broadband networks and competitive services. Innovations by Comcast and its predecessors – cable modem service, telephony, digital video, VOIP service – have led the way in making Massachusetts the state with the highest broadband penetration.

Verizon is hardly a "start-up" in the telecommunications field. It is the thriving offspring of the once-monolithic Ma Bell that now resembles its late parent. Companywide, Verizon had

---

[25] *Boxford Exhibit F*.
[26] Verizon Press Releases, *supra*, note 24.
[27] *Verizon Petition* at 12.

$51.3 billion in operating revenues in 2005 and operating cash flow of $22 billion,[28] compared to $21.2 billion and $8.5 for Comcast.[29] In addition to having its network deployed, Verizon already has relationships with over 3 million customers in Massachusetts compared to just over 1.5 million for Comcast, it has over 15,000 employees in Massachusetts compared to 3,600 for Comcast, and it enjoys other economies of scope and scale. Verizon does not need additional advantages to become competitive in video services.

The Division should treat Verizon's claims that it is being impeded from offering video services with healthy skepticism. Verizon has had several pathways into the video marketplace since the passage of the 1996 Telecommunications Act, [30] but only now has chosen cable franchising under Title VI as the most expeditious path. Yet Verizon's license applications in Massachusetts appear to have been passive placeholders while its priority has been legislation in other states and in Congress. Comcast's local monitoring of the licensing process where these applications have been filed has found that Verizon has filed numerous Form 100 applications without follow-up, but that Verizon has obtained licenses where it has pursued them actively. In addition, the existing regulatory framework provides Verizon ample opportunities to speed up the licensing process. In fact, both Verizon and issuing authorities have already taken advantage of the Division's waiver authority "for good cause shown."[31] Verizon also could avail itself of

[28] "Verizon Communications Reports Strong 4Q 2005 Results, Driven by Continued Growth in Wireless and Broadband," <http://news.vzw.com/news/2006/01/pr2006-01-26.html>.
[29] **"**Comcast Reports Fourth Quarter and Year End 2005 Results," <http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=811814&highlight=>.
[30] *See* 47 U.S.C. §571(a).
[31] 207 CMR 2.04. *See, e.g.* Letter from the Town Manager of the Town of Sudbury to the Division (Aug. 1, 2005) (seeking waiver of the 60-day filing deadline in 207 CMR 3.03(2) because the provision "would cause an unnecessary delay in bringing cable competition to Sudbury").

regional licensing,[32] and could seek to negotiate a single regional license with clusters of interested communities. Finally, Verizon could guarantee a speedy entry into market by adopting essentially the same license as the incumbent[33] – a process Verizon is surely familiar with from CLECs expediting market entry by opting into existing interconnection agreements.

History shows that Verizon has dipped its toe into the waters of video competition before but has shown itself a reluctant competitor. In 1995, on the heels of a failed merger with onetime cable giant TCI, the CEO of Verizon's predecessor Bell Atlantic proclaimed with great fanfare that "Cable Is Dead" and announced that his company would have 50% of cable subscribers by the year 2000.[34] Around the same time, Bell Atlantic, Verizon's other predecessor NYNEX, and a third RBOC, Pacific Telesis, entered into a joint venture with ex-Disney President Michael Ovitz to market "TELE-TV," but this project was abandoned by late 1996.[35] Beginning in 1998, Verizon entered into partnership with DirecTV aimed at packaging video and telecommunications services to individual consumers and announced that this partnership was a precursor to delivery of wired video service.[36] Verizon is playing the same regulatory card in this proceeding it has played many times before: give us what we want, and we will build the network of the future. Let us into long distance markets, and we will build the Information

---

[32] *Cf. In re MediaOne of Massachusetts, Inc., et. al. v. Board of Selectmen of the Town of North Andover, et. al.*, DTE Docket No. CTV 99-2, 99-3, 99-4, 99-5, Order on Motions for Summary Decision/Consolidation, at 1 (May 1, 2000) (noting a regional hearing to consider the transfer of franchises from MediaOne to AT&T).

[33] The State of New York provides an expedited process for a company seeking a competitive franchise whereby the company need only state its willingness to provide cable service on the same terms as an incumbent provider, at which time the municipality must conduct a hearing to determine whether to grant the franchise within 30 days. *See* 16 N.Y.C.R.R. § 894.7(e)(4).

[34] *See* Wired Magazine, cover page (Feb. 1995). Within this same magazine, Bell Atlantic touted its $200 million "digital factory" in Reston, Virginia, and its plan to offer video services over telephone lines. Its CEO, Ray Smith, claimed that the company was going to obtain "15 percent of video market share easily just by putting out our shingle." The cover and article are included in the Appendix of Exhibits accompanying these comments as Exhibit A.

[35] Michael Grebb, "The Romance and Wreck of TELE-TV," Wired Magazine (Dec. 9, 1996). A copy of this article is provided as Exhibit B to the Appendix of Exhibits.

[36] Press Release, Bell Atlantic, DirecTV and USSB Announce Agreements (Mar. 2, 1998), <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=36617>.

Superhighway; give us a deregulatory Telecommunications Act, so we can build integrated networks; free us from UNE-P and line-sharing, so we can build broadband networks. And now let us offer video on our terms, and we will deploy FTTP. Comcast (joined by RCN) embraces competition and says “come on in, the water's fine.” Evidently Verizon does not want to jump until the water suits it just exactly right.

Like the antitrust laws, however, the Division’s role as a regulatory agency is “the protection of competition, not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Even though Verizon is a reluctant competitor, competition in the Massachusetts video marketplace is working and the franchising process does not need to be altered to suit Verizon.

II. VERIZON’S PROPOSED SUBSTANTIVE STANDARD WOULD ELIMINATE LOCAL INPUT INTO VERIZON LICENSES WITHOUT LEGAL BASIS.

Verizon has gone to lengths to suggest that, other than “time limits,” its Proposed Regulation “would not otherwise change the role of local governments in negotiating and awarding franchises to competitive video service providers”[37] and “preserv[es] local control of the outcome.”[38] This is not the case. Close reading of Verizon’s Proposed Regulation reveals how much farther Verizon’s Proposed Regulation goes to tailor the franchising process to suit Verizon.

[37] News Release, “Verizon Proposes Measure to Speed Video Choice for Massachusetts Consumers” (Mar. 16, 2006), << http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=93318>>.

[38] *Verizon Petition* at 5. The form letters submitted in this proceeding by Verizon employees via “votervoice.net” state that Verizon’s proposal “simply establish[es] a shorter but more predictable timeline … .” *See, e.g.*, Comments of Timothy Nixon (Jun. 15, 2006).

The Proposed Regulation would prevent an issuing authority from "denying an application on grounds inconsistent with the Division's regulations."[39] Proposed Regulation 207 C.M.R. 3.10(3) would limit the issuing authority's review only to :

> substantial compliance with each of the following requirements:
> a. the submission requirements contained in the application form prescribed by the Commission, pursuant to M.G.L. c. 166A, § 4; and
> b. the requirements of M.G.L. c. 166A, §§ 3, 4 and 5,

and directs that, upon such substantial compliance, the application "shall be approved" and a license "shall be granted." This is mandatory language[40] that Verizon recognizes is a "substantive standard."[41] The Proposed Regulation thereby eliminates any consideration of community needs and interests or of "specifications for the cable license as [the issuing authority] deems appropriate."[42] In other words, so long as an applicant submits a complete Form 100 and meets bare minimum statutory requirements, Verizon's Proposed Regulation would give an issuing authority no choice but to approve the application regardless of whether it meets community needs and interests or what it provides. In this light, the proposed accelerated timetable taking a licensing decision out of the hands of issuing authorities after 90 days makes sense: Verizon's Proposed Regulation gives the issuing authority almost nothing to decide. *See Verizon Petition* at 6 ("The three-month time limit in the proposed regulation is more than sufficient given the few, narrowly circumscribed issues an issuing authority may consider …").

In turn, the standard of review on appeal to the Division would be limited to these same "narrowly circumscribed issues." While any appeal under G.L. c. 166A, § 14 is a *de novo* appeal

[39] *Verizon Petition.* at 8.
[40] *See School Committee of Newton v. Newton School Custodians Ass'n*, 438 Mass. 739, 750 (2003) ("shall" is "a word of command" and "not one which courts pass over lightly").
[41] *Verizon Petition* at 7-8.
[42] 207 C.M.R. 3.03(3).

in that the Division is required to hold an evidentiary hearing pursuant to G.L. c. 30A, the issue for hearing varies with the substantive law being applied.[43] Under Verizon's proposed regulation, therefore, the Division's hearing would be limited to review of an applicant's "substantial compliance" with "the submission requirements contained in [Form 100]; and the requirements of M.G.L. c. 166A, §§ 3, 4 and 5."

Against the backdrop of such limited review by the issuing authority and on appeal, Verizon would have no reason to engage in any give and take with local issuing authorities and to make any accommodation to local needs and interests, as Comcast and other existing cable operators do. Instead, Verizon could offer its own stripped-down, take-it-or-leave-it license. As Verizon expresses it in its Petition, there is only a "limited set of issues" for the issuing authority to consider.[44]

This new substantive standard would radically alter the respective roles of local government and the Division in cable licensing. Such a change is beyond the Division's authority, because it injects the agency into a substantive role that Chapter 166A reserves for local issuing authorities. In material part, it is not "the Division [that] adopted the current franchising process;"[45] it is the Legislature. Hence, it is a matter for elected lawmakers, not an appointed agency, to make so fundamental a change in the current process.[46]

---

[43] *See* Interlocutory Order on Standard of Review, Administrative Notice, and Partial Summary Decision, *Petition of Comcast of Massachusetts, III, Inc. on Appeal of Decision by Board of Selectmen of the Town of Framingham Denying Franchise Renewal Proposal,* CTV 05-2, at 45-46, 72, 75-76, 86, 94, 99-100, 106-08 (Mar. 22, 2006) (applying 47 U.S.C. § 543 – de novo hearing to be conducted on whether renewal proposal is reasonable to meet certain community needs and interests in light of the cost of meeting such needs and interests); Interlocutory Order on Motions for Summary Decision, *AT&T CSC, Inc., et. al. v. Board of Selectmen of the Town of Westford,* CTV 02-5, at 4-8 (Sep. 18, 2002) (applying G.L. c. 166A, § 17 – de novo hearing to be conducted on whether approval of transfer was arbitrarily or unreasonably withheld)

[44] *Verizon Petition* at 6-7.

[45] *Verizon Petition* at 3.

[46] Perhaps this point is made best by the several Massachusetts lawmakers who have submitted comments in this docket, all opposing Verizon's Proposed Regulation. *See* Comments of Senator Michael W. Morrissey and Representative Brian S. Dempsey (Apr. 12, 2006); Comments of Senator Joan M. Menard and Representative

Under the system of cable television licensing, the issuance of a license involves matters of local concern that touch each community deeply and vary from community to community. One declared purpose of the federal Cable Act[47] is to assure that cable systems are "responsive to the needs and interests of the local community,"[48] and the legislative history of the Cable Act is clear that Congress intended "that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."[49] The Cable Act was influenced by the Massachusetts model[50] and, like federal law, Chapter 166A preserves local licensing as an instrument of cable regulation. Recognizing the primacy of local interests when it comes to the issuance of licenses, "the Cable Division has traditionally executed [its] role conservatively…." *Investigation by the Cable Television Division of the Department of Telecommunications and Energy on its Own Motion to Review the Form 100*, C.T.V. 03-3, Order at 2 (Nov. 30, 2004). In particular,

> [w]e have been extremely cautious so as not to interfere with the negotiations between a cable operator and the Issuing Authority. This approach had been justified not only because it was the clearest way to protect our appellate authority, but also in recognition that the Issuing Authority has a better understanding of its community's needs and interests and, in theory, would be better able to protect those interests.

Id. *Cf*. *In re Amendment of 207 CMR 2.00-10.00*, Cable Television Commission Docket No. R-25, Report and Order at 15 (Dec. 27, 1996) (rejecting proposal to eliminate requirement of a public hearing during initial licensing because such a hearing is "important" for "obtaining

---

Stephen R. Canessa (Apr. 21, 2006); Comments of Representative Karyn Polito on behalf of the Town of Shrewsbury (June 19, 2006); Comments of Senator Brewer and Representative Gobi on behalf of the Town of Spencer (June 22, 2006).

[47] The Cable Franchise Policy and Communications Act of 1984, as amended, codified at 47 U.S.C. § 521, *et. seq.* ("the Cable Act").

[48] 47 U.S.C. § 521 (2).

[49] H. Rep. No. 98-934, 98th Cong., 2d Sess. (1984) at 24.

[50] *See, e.g., id.* at 24 (citing to Massachusetts statute on rate regulation).

valuable input from community members, particularly given the issues raised by an application for an overbuild franchise").

The Division's restraint when it comes to interfering with terms of local licenses is rooted in limits Chapter 166A places on agency authority. The Division has only the authority delegated to it by the Legislature; "it has 'only the powers, duties and obligations expressly conferred upon it by . . . statute . . . or such as are reasonably necessary . . . to carry out the purpose for which it was established.'"[51] In contrast to, for example, the DTE's broad grant of authority over electric utilities in Chapter 164,[52] the Division's rulemaking power is limited to regulations "appropriate to carry out the purpose of [Chapter 166A]."[53] The Division's rulemaking therefore must track the purposes of Chapter 166A. This mandate is clear, and in such a circumstance a court reviewing the Division's rulemaking will do so in a manner that "give[s] effect to the Legislature's intent."[54] Indeed, the Supreme Judicial Court "ha[s] not hesitated to reject administrative interpretations that violated the language and policy of the statute"[55]

Chapter 166A is not a comprehensive regulatory scheme for cable television. The duties "expressly conferred" on the Division are enumerated,[56] and Chapter 166A is very specific with regard to licensing: Sections 3 and 4 spell out specific terms to be included in licenses, and

---

[51] *Saccone v. State Ethics Comm'n*, 395 Mass. 326, 335 (1985) (quoting *Hathaway Bakeries, Inc. v. Labor Relations Comm'n*, 316 Mass. 136 (1944)).
[52] M.G.L. ch. 164, § 76 gives the Department "supervisory authority" over electric companies under its jurisdiction; M.G.L. ch. 164, § 76A gives the Department "supervisory authority" over "every affiliated company".
[53] M.G.L. ch. 166A, § 16.
[54] *Goldberg v. Board of Health of Granby*, 444 Mass. 627, 632-33 (2005).
[55] *Simon v. State Examiners of Electricians*, 395 Mass. 238, 249 (1985).
[56] The Division is empowered to conduct hearings (§ 2A); prescribe forms for license application, transfer, and renewal (§§ 4, 7 and 13); establish and collect forms for financial information (§ 8); receive complaints (§10); revoke a license for cause (§ 11); intervene in court to compel compliance with Chapter 166A (§ 12); hear appeals of local actions or inactions (§14); establish rates (§15); issue standards and regulations (§ 16); examine the records and facilities of cable companies to ascertain compliance with rules and regulations and report non-compliance to issuing authorities, and issue subpoenas and administer oaths (§ 17).

Sections 3, 6, and 14 otherwise vest the decision to issue a cable television license with local issuing authorities; notwithstanding the Cable Division's supervisory authority and appellate jurisdiction over issuing authorities, "no license shall be issued by the division except in ratifications of a prior issuance to the same party by the issuing authority." G.L. c. 166A, § 14.

Under this statutory scheme, with the exception of specifically delegated powers in rate regulation where the Division acts as the issuing authority,[57] the core of regulation is carried out through local issuing authorities. Chapter 166A empowers the Division to regulate and oversee local licensing procedures, but not to regulate the substance of local licenses. As the Division and DTE described in 1999, "[t]he issuance, monitoring, and enforcement of licenses rests primarily with the municipal officials," and the Division's role is "overseeing the licensing ***process***." 1999 Legislative Study at p. 2 (html version) (emphasis added). *See also United Cablevision Funding, L.P. v. Bd. Of Selectmen of the Town of Townsend*, CATV Docket No. A-45, Decision at 6-7 (Nov. 30, 1984) ("The Commission recognizes the paramount role of the issuing authority in making licensing decisions," and the Commission reviews the "integrity of the licensing process"). By limiting the substance of local licenses, Verizon's Proposed Regulation overreaches these boundaries.

Nothing in Section 621(a) of the Cable Act preempts these boundaries under state law. Section 621(a)(1) specifically provides that additional cable franchises may be awarded "in accordance with the provisions of this title." 47 U.S.C. § 541 (a)(1). "This title" is Title VI of the Communications Act, the federal Cable Act, 47 U.S.C. § 521 *et seq*. Thus, Section 621(a)(1) authorizes a local franchise authority to require in a competitive franchise any of the same provisions permitted by Title VI in other franchises, provided only that such requirements do not

[57] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, Report and Order, MM Docket 92-266, released May 3, 1993, ¶ 70.

result in a denial that is unreasonable. In this light, the specific franchise provisions Verizon cites in Section 621 (a)(4) do not serve as a ceiling; rather they provide a safe harbor that establishes denial for failure to comply with these specific local requirements is reasonable as a matter of federal law. If Verizon were convinced that federal law so broadly preempts local franchise requirements, it long ago would have pursued its remedies in federal court rather than pursuing franchises or legislative and regulatory change. Indeed, its recent lawsuit against Montgomery County, Maryland challenging the requirements the county seeks to impose on Verizon in a franchise – in a "unique situation"[58] – alleges only unreasonable delay in violation of Section 621(a) but not the far-reaching interpretation Verizon advances in its Petition.[59]

Similarly, Verizon's invocation of the First Amendment does not compel so broad a revision. In applying the First Amendment to cable television franchising, courts have widely applied the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968), which looks to whether a regulation places an incidental restraint on non-communicative aspects of cable television.[60] Applying this test, the federal courts have found important local interests that support numerous specific franchise requirements, including requirements for universal service, payment of a franchise fee, indemnification of the municipality, customer service requirements, and the requirement that the operator permit inspection of property and records.[61] The mere fact

[58] Telecommunications Reports, TR Daily dated July 10, 2006 (quoting Verizon Communications, Inc.'s executive vice president-public affairs, policy, and communications, Thomas Tauke). A copy of this article is provided as Exhibit C to the Appendix of Exhibits.
[59] Among the allegations set forth in the 85-page, 25-count complaint is a general allegation in Count 18 of the complaint that the defendant County has unreasonably delayed in granting Verizon a franchise and thus violated Section 621(a) of the Cable Act. A copy of relevant portions of this complaint are provided as Exhibit D to the Appendix of Exhibits.
[60] Under the test, government regulation is permissible "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.
[61] *See Telsat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383 (S.D. Fla. 1991); *Preferred Communications, Inc. v. City of Los Angeles*, 1990 U.S. Dist. LEXIS 20205 (C.D. Cal. Jan. 5, 1990); *cf. Turner*

that Verizon raises the First Amendment does not resolve the question whether the Proposed Regulation is necessary. Apart from the interests that underlie any cable license, the assurance of an additional cable license involves important local concerns such as how to integrate PEG access with multiple operators and the impact of the additional license on existing "level playing field" provisions. Meanwhile, abrogating level playing field provisions by regulation in turn would raise questions under the Contract Clause Article I, §10 of the United States Constitution, which restrains state impairment of contracts.[62]

Verizon has not demonstrated that the Division's authority under Chapter 166A reaches far enough to adopt the Proposed Regulation. Because the statutory scheme is so explicit about the "paramount role" of local communities in the substance of cable licenses, Comcast respectfully submits the fundamental change Verizon seeks is beyond that authority.

III. VERIZON'S PROPOSED REGULATION WOULD CREATE TOO GREAT A DISPARITY BETWEEN VERIZON AND EXISTING OPERATORS.

By limiting the effect of its proposed regulation to applications for new cable licenses by those seeking to compete with an incumbent cable provider, Verizon seeks to tip the competitive playing field in its own favor. On the one hand, Verizon would be entitled to force accelerated acceptance of 15-year licenses without consideration of community needs and interests or of "specifications … [the issuing authority] deems appropriate." On the other hand, Comcast, RCN, municipal cable operators, and other existing licensees would remain subject to the existing framework for cable licenses, in which a license renewal takes two-and-a-half to three

Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (upholding validity of FCC's "must-carry" rules against First Amendment challenge).

[62] *See Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978); *Mayor of Salem v. Warner-Amex Cable Communications, Inc.*, 392 Mass. 963 (1984)(cable license is a contract).

years to complete,[63] and which involves extensive consideration of community cable-related needs and interests[64] and give-and-take.[65] Even the transfer process takes 120 days to complete[66] despite a much narrower scope of review than issuance of a new cable license should require (although Verizon's Proposed Regulation strips initial license review to no greater scope).[67] The existing system produces numerous license requirements with which existing operators must comply, including PEG access channels, capital, and support payments, and mechanisms such as performance reviews and security for monitoring and enforcement of compliance with license terms. The Division is familiar from its renewal and transfer proceedings with the scope of license demands that issuing authorities can make under this system.[68] The Division is also aware from its rate regulation that resulting license provisions produce "franchise related costs" that can be passed through to subscribers outside rate formulas.[69] Under Verizon's proposal, existing operators would bear costs as a competitive disadvantage that Verizon would avoid.

Comcast is the first to acknowledge that, under the existing licensing system, issuing authorities sometimes demand more than they are entitled to ask. Even as to legitimate needs and interests, Comcast often would rather respond by its own choice than by license requirement. Whatever the flaws of the existing licensing system, however, the remedy is not to create a dual

---

[63] 47 U.S.C. § 546(a).
[64] *Id.*
[65] 47 U.S.C. §§ 546(b) -(h).
[66] *See* 47 U.S.C. § 537 and 207 C.M.R. § 4.02
[67] *See generally* 207 C.M.R. 4.04(1) (limiting issuing authority's consideration of a transfer petition only to consideration of the transfee's: (a) management experience, (b) technical expertise, (c) financial capability, and (d) legal ability to operate a cable system under the existing license.)
[68] *See, e.g.,*; *Petition of Comcast of Massachusetts, III, Inc. on appeal of decision by Board of Selectmen of the Town of Framingham denying franchise renewal proposal,* DTE Docket No. CTV 05-2, Interlocutory Order on Standard of Review, Administrative Notice, and Partial Summary Decision, at 43-111 (Mar. 22, 2006); *In re AT&T CSC, Inc., et al. v. Board of Selectmen of the Town of Westford*, DTE Docket No. CTV 02-5, Order on at 12-13 (Sept. 18, 2002); *In re MediaOne of Massachusetts, Inc., et. al. v. Board of Selectmen of the Town of North Andover, et. al.*, DTE Docket No. CTV 99-2, 99-3, 99-4, 99-5, Order on Motions for Summary Decision/Consolidation, at 14 (May 1, 2000).
[69] *See* 207 CMR 6.01, which incorporate by reference, *inter alia*, 47 C.F.R. § 76.925.

system – one for Verizon and one for everybody else who must carry the existing system as a handicap. The remedy is to create a single regulatory structure that is fair to all players.

IV. THE DIVISION SHOULD AWAIT GUIDANCE FROM CONGRESS AND THE FCC SINCE BOTH ENTITIES ARE CONSIDERING SWEEPING CHANGES TO THE CABLE FRANCHISING PROCESS.

Even if by some stretch G.L. c. 166A could be construed to authorize Verizon's audacious proposal, it would not be prudent for the Division to exercise such authority. The Division should not step in to do Verizon's bidding where the Massachusetts legislative process has shown no appetite for the one-size-fits-all regime Verizon proposes. Moreover, congressional and/or FCC processes may moot or preempt all or part of any action the Division takes in this proceeding.

The House of Representatives passed H.R. 5252, titled the "Communications Opportunity, Promotion, and Enhancement Act of 2006." This legislation, among other things, would create a national franchise process overseen by the FCC as an alternative to local franchising and preempt local authority over items historically left to individual franchising authorities, such as PEG access programming, and customer service standards. The Senate is considering a different bill, S. 2686 (as introduced), commonly referred to as the "Stevens Bill," which would not eliminate local franchising but would federalize the franchising process by creating FCC forms for operators to submit and setting time deadlines for local franchising authorities to act.

Even these preemptive changes would leave issuing authorities with more discretion and room for discussion of license terms than Verizon's Proposed Regulation does. The Senate bill would allow standard franchise applications to vary franchise fees, numbers of PEG access channels and levels of PEG access support, and franchise term, among other things.[70] The House bill would leave determination of the amount of franchise fees and the decision to audit franchise fee payments to local franchising authorities.[71] Even if ultimately federal legislation does not preempt any regulations the Division might adopt in this proceeding, such regulations would add a layer of complexity that would have to be reconciled with federal legislation.

The very fact that the federal legislation is pending reflects that so fundamental a change in statutory policies belongs in a legislative body, not an administrative agency. Rather than adopt piecemeal regulations under the current legal framework governing cable television franchising, it is more appropriate for the Division to await guidance from Congress as to what the future regulatory environment for cable television franchising will be. This is particularly true where, at least in Massachusetts, the regulatory and legal climate is permitting healthy competition in the video marketplace.[72]

Notwithstanding Comcast's view that any major overhaul of cable franchising is more appropriate for a legislative body, it bears mentioning that the FCC issued a rulemaking notice last November [73] to consider how best to implement Section 621(a)(1) of the Cable Act[74] to the extent this provision provides that local franchising authorities may not "unreasonably refuse to award an additional competitive franchise." In this notice, the FCC seeks comments on a range of topics related to the ability of competitors to obtain cable franchises, including whether the

---

[70] *See* H.R. 5252, 109th Cong. § 312 (Staff Working Draft dated June 22, 2006). The Senate has changed the bill number from S. 2686 to H.R. 5252 to match the number of the bill passed by the House of Representatives.
[71] *See* H.R. 5252, 109th Cong. § 101 (as passed by the House of Representatives on June 8, 2006).
[72] *See* p. 2-9, *supra*.
[73] In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, Notice of Proposed Rulemaking (Nov. 3, 2005) ("FCC Notice of Proposed Rulemaking").
[74] 47 U.S.C. § 541(a)(1).

FCC has authority to adopt regulations to implement Section 621(a)(1) and,[75] if so, what steps the FCC should take to ensure competitors are not unreasonably refused franchises.[76]

Thus, the issues presented in the Proposed Regulation (and more) are before bodies with greater authority than the Division, yet Verizon's Proposed Regulation for the Division would have more sweeping effect. The Division should exercise due restraint and not try to beat congressional or FCC action or create regulations that could conflict with federal policies.

CONCLUSION

For the foregoing reasons, the Division should decline to adopt Verizon's radical Proposed Regulation and should defer to state and federal legislative policymaking.

Respectfully Submitted,

Cameron F. Kerry (BBO# 269660)
Paul D. Abbott (BBO# 652233)
MINTZ LEVIN COHN FERRIS
GLOVSKY AND POPEO PC
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

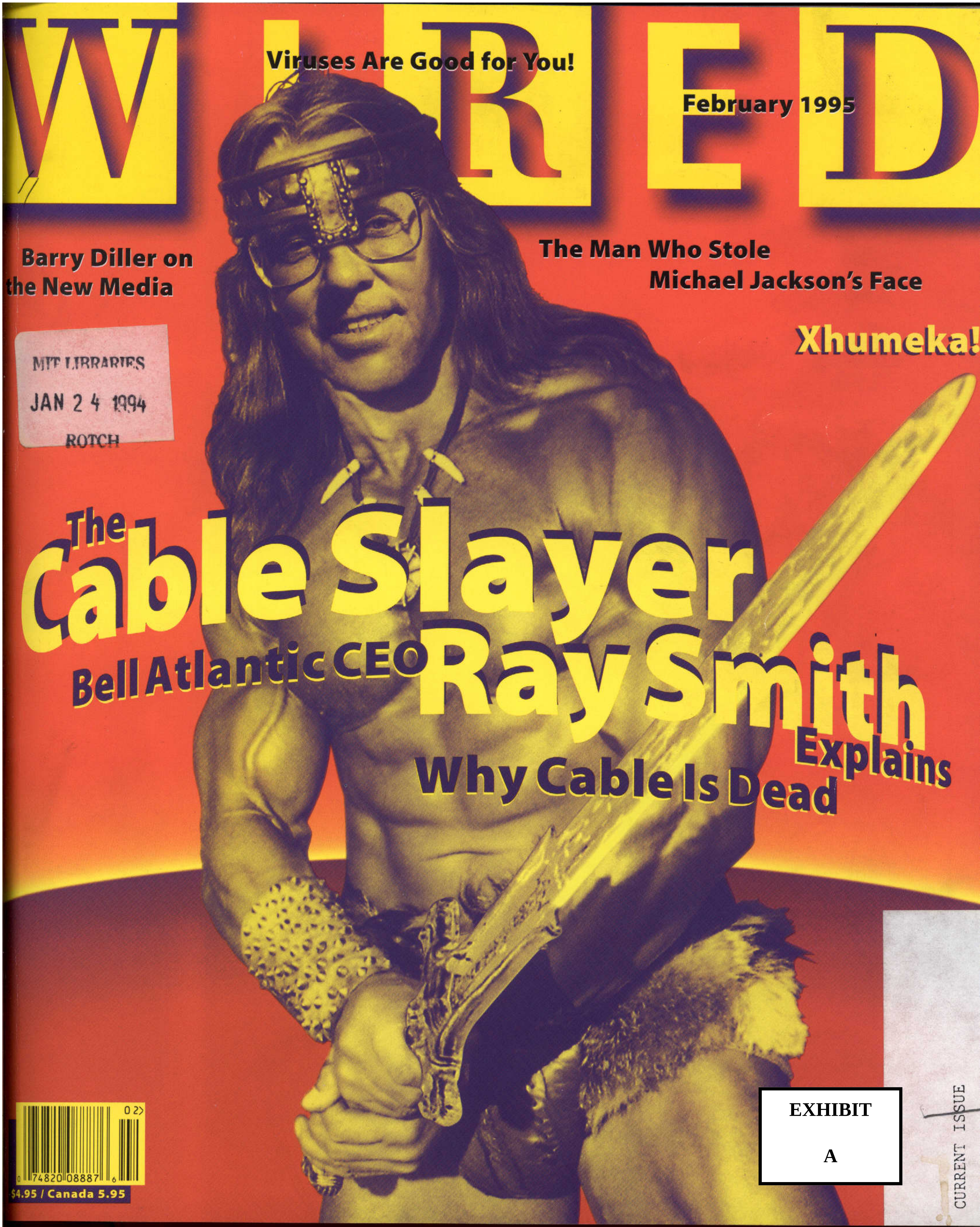
LIT 1578526v.4

[75] *Id.* at 9.
[76] *Id.* at 10-12.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS & ENERGY
CABLE TELEVISION DIVISION

In re: Petition by Verizon New England Inc. To Commence A Rulemaking Pursuant To 207 C.M.R. § 2.01(1) To Amend 207 C.M.R. § 3.00 *et seq.*: Licensing.	))))))	CTV No. 06-1

APPENDIX OF EXHIBITS TO COMMENTS OF
COMCAST CABLE COMMUNICASTIONS HOLDINGS, INC.


WIRED
Viruses Are Good for You!
February 1995
Barry Diller on the New Media
The Man Who Stole Michael Jackson's Face
Xhumeka!
The Cable Slayer
Bell Atlantic CEO Ray Smith Explains Why Cable Is Dead
0 74820 08887 6 02
$4.95 / Canada 5.95

EXHIBIT

A

print version

Wired News

Search:
Wired News Search

[Ho [Techno [Cult [Busin [Politi [an error occurred while processing this directive][an error occurred while processing this directive][an error occurred while processing this directive] [Wired [Animat

Issue 3.02 - Feb 1995

Align and Conquer

The smartest telco CEO, Bell Atlantic's Ray Smith, reveals what really torpedoed his merger with John Malone's TCI, why the telcos are going to kick cable's butts, and precisely how the I-way is going to reach your home.

By David Kline

Point! Last year, *Wired*'s David Kline snatched an amazing interview with the cowboy of cable, TCI chief John Malone. The mogul's uncensored revelations about the collapse of his US$33 billion merger with Bell Atlantic Corporation - not to mention his audacious jest about shooting the chair of the Federal Communications Commission - ignited controversy (*Wired* 2.07, page 86).

Counterpoint! Now *Wired* has returned Kline to the gladiator arena, this time to the opposing corner - that of Ray Smith, CEO of Bell Atlantic. Clearly the most enterprising and farsighted of the telco leaders, Smith was the first to start construction on a broadband network, the first to win federal approval to offer commercial video dial-tone service, the first to win court permission to develop the company's own video content, and the first to begin shifting his once-stodgy utility to a more entrepreneurial footing.

Smith enjoys poking fun at his old monopolist image as much as anyone. On the white board in his office he wrote: "1) Buy AT&T 2) Sell Pennsylvania 3) Retire 4) Work for IBM (depose Gerstner) 5) Cancel subscriptions to all magazines and newspapers."

Here, then, is what Ray Smith, the titan of telephony, has to say about John Malone, the telecom wars, Jane Seymour (yes, Jane Seymour), and what the broadband network in

your future is going to look like.

Wired: So, what's the plan? Are you going to buy AT&T, or sell Pennsylvania?

Smith:

No, don't use that. I put that up just to amuse you. All we need is to have a rumor going around that we're going to sell Pennsylvania.

I can imagine. Even John Malone said that you telco guys are the real monopolists.

Yeah, in my career I've come to know a number of humble, one-shoe-over-the-other billionaires.

So you're not a monopolist, and you have no near-term plans to sell Pennsylvania?

Absolutely not.

I see.

We're gonna sell West Virginia.

[Laughs.] Well, now that we've got that settled, can we talk about Bell Atlantic's aborted merger with TCI? People still want to know what really happened the day the biggest deal in American history crashed and burned.

You know what amazes me? There were only four people in the room that day, but there are at least twenty different versions of what happened. It's like the movie *Rashomon*.

Well, Malone said the merger was aborted because you couldn't get your board of directors to go along with the deal - they were skittish about changing from a regulated utility into a high-growth company.

No, that's absolutely not true. The entire board was in favor of it. There wasn't a single voice against it. Let me tell you what *is* true. There was a struggle in the shareholder base. We have a million shareholders, and they are high-yield-oriented. We froze the dividend, and it frightened the life out of our shareholders. And our stock, which leaped for a while on the promise of the merger, dropped as the yield-oriented shareholders pealed away.

So, the struggle was really in the investment community. It was not a debate on our board about whether to change into a high-growth company versus a low-growth company. My cash-flow growth is faster than John's!

I'm not trying to say we didn't have cultural differences in terms of TCI being more entrepreneurial. But the issue was, how do we get the cash out of our company to complete the deal without scaring off our shareholders? If you cut the dividend too much, the shareholders leave, and the stock drops so low you can no longer do the deal.

But you knew you faced that problem going in.

I knew it going in. I knew it'd be a struggle that we'd have to handle with some sensitivity. Unfortunately, it became public. At one point, John was quoted as saying we'd have to cut the dividend in the future, and the stock dropped five points.

Why'd he say that?

[Shrugs.] He thought that was what we had to do. John was just being honest. But to say it like that is like lighting a match in a gas-filled room. Not that you aren't going to tell shareholders the truth. You are. It's just that we were trying to find less onerous ways of making the deal work financially. Why announce something like that before you know for sure?

You see, John's approach to this issue was like his regulatory approach. He didn't say, "Shoot the shareholders" - don't quote me on that - but he was saying, Let's just go cut the dividend. John, being the road warrior you pictured him on the cover of *Wired*, just wanted to get it over with. But that's not how you deal with regulation, and it's not how you deal with a large shareholder base.

I'm more of a builder. An architect. I like to do things one brick at a time. My view is, Align and conquer.

So what finally killed the deal?

John's cash flow went down. Remember, when we set the deal, John's cash flow was at $200 a subscriber and we agreed to pay him about 11.75 times cash flow. But there was a cash-flow test. If his cash flow were to go down, as it did after the FCC cable-rate rollbacks of February 1994, then I would give him fewer shares of my stock, which had a fixed price of $64 in the deal.

Now, by February 1994, because of the declining cash flow, the value of TCI stock was by then dropping close to $20 or $21. I was willing to pay something like $25 per share. But John still had it in his head that it was a $35 stock. That's just too big a difference.

In the final meeting, we kept trying to figure out some way to make it work. John said, "If I take this reduced number of shares, I'll never get my major shareholders to accept it. And there's no way you can give me the number of shares I need. You'd be paying 14 times cash flow." And I said, "You're right."

Finally, he said, "Well, we can't just sit around here forever." And I said, "Yeah, let's look at the press release and get this over with."

What's your strongest memory of that last meeting?

[Pause.] I guess it's the last words he said as we separated. He said, "Nice try, my friend."

You guys really like each other.

We do. We're both old techies, and we get along very well. John and I were just on a Networked Economy Conference panel together, and we were standing at the urinals talking about things, and Barry Diller comes in and stands between us. And Barry says, "C'mon, you seem like such good friends. Just split the difference."

[Laughs.] What does the failure of the merger tell us about the strategic-planning capabilities of big companies like yours? One day you're spinning together these huge deals, and the next day you're taking them apart and going about your business.

Actually, I think it's positive. It shows that although we had a good strategic idea in trying to merge with TCI, when the conditions changed, as they did, we were willing to pull back. You don't just stick to a deal out of sheer, cussed egotism when it's no longer good for the shareholders. Cutting mergers is a hard thing to do.

And you know what? If I could get the same deal today that I agreed to a year ago, I'd sign it right now. Right this minute.

What if Malone reads this in *Wired* and calls you up and says, "OK, Ray, you're on!"

I'd take it. Exactly as I signed it a year ago.

Gee, as a finder's fee I'd get something like $50 million! Of course, *Wired* would want a piece of that, no doubt. In any event, many now say the collapse of the merger shows that the info highway is way overhyped. What do you think?

There was a lot of hype before the merger. The media was full of it. But for all the hype, there was also a lot of naysaying.

Still, I do think the merger announcement moved things forward. The moment it hit, there was no way that anyone could say that it all was just hype, or that the whole notion of the info highway was silly. The naysayers were just swept away.

You mean, the naysayers in your company?

Not so much in our company. Remember, we were the first of the regional Bell companies to see it coming. We very consciously set out to prepare for it in 1990 when we filed the court case to change the Cable Act of 1984, which barred telephone companies from owning the video programming they delivered.

And you know, when we launched that court case, we offered it to all of the other telephone companies, including GTE. None of them saw any need to get into the video industry.

And the merger changed that?

It really began to change when we won the court case in 1993. Before that, there was not one single procurement by the other Bell companies concerning video. There was no support of ADSL [asymmetric digital subscriber line, a way to send data down a phone line]. There were no hybrid fiber-coax discussions whatsoever among the other phone companies.

Now, I happen to know there were battles within at least four of the seven Bell companies over whether video was practical. A lot of discussion along the lines of, We'll never be able to make it pay, We can't do it, that type of thing. They were in the "Yes, but" phase. Once the court case was won, that was the end of "Yes, but." They all called and said, We want to get into this. Even then, there wasn't critical mass in most of the telephone industry to move forward on video.

But the day after the TCI merger announcement, there was. Suddenly, video became a necessity. The top decks of all the Bell companies knew that, at the very least, they'd have to get into the video business because cable was going to get into the telephone business.

There was no argument any more. It wasn't whether we should do it, but *how* we should do it. The announcement changed the picture so much that the merger became less necessary for us. Because one of the motivations for the merger was to get enough scale to bring equipment costs down. But when all these other companies suddenly jumped in after the TCI deal with their own infrastructure investments, costs were going to come down anyway.

So while many debunkers, especially in the media, point to the collapse of the merger as proof that all this is hype, the evidence shows it moved things forward. It was like a demonstration atomic bomb. Of course, then it became not only conventional wisdom, but conventional wisdom times two. We were in hyperspace, and we were all going to have talking television sets by the end of 1994.

And Time Warner's Full Service network in Orlando was going to be up and running in early '94, remember?

Yeah, they were saying they had solved all the technical problems. Well, sure, they solved the technical problems. But the set-top was $11,000! So now it's $3,000. Big deal. I mean, the issue is, can you do it at a price that people can afford, so it can be deployed in the real world?

Anyway, the merger announcement served its purpose. It moved things forward.

And its abandonment four months later kick-started the war between the cable and phone industries that we see today. What do you think about the conventional wisdom that says the telcos will probably lose 30 percent of their market share to cable-provided telephony services, while cable could lose 30 percent of its video business to the telcos? I mean, cable executives say that's fine with them, because their 30 percent is going to look a lot sweeter than your 30 percent.

Oh, for Christ's sake! This notion that cable companies are going to get 30 percent of the $100 billion telephone business, whereas we'll get only 30 percent of cable's $20 billion business - that's ridiculous. Bell Atlantic is not one business but 13 different businesses, most of them not subject to any real competition from the cable industry.

RBOCs get a billion dollars of our revenues from the federal government. You're saying cable's going to take our 25-year contract with the Pentagon? Nonsense! Cable companies aren't going to touch that. Or look at the Yellow Pages. If the cable companies offer local telephone services, is that going to affect our Yellow Pages business? And are they going to compete for our life-line services?

Oh, I'm sure they're dying to get their hands on that!

Right, we're quivering in our boots waiting to see a cable company come into New Jersey and offer local phone service for $6.50. So the more you look at it, the more the percentage of our revenues that are really subject to cable competition keeps shrinking. Of our $13 billion in total revenues, only $4 billion of that - the consumer business - is subject to competition from cable companies.

Now, the cable companies in our territory also have about $4 billion in revenues. But while we cover 100 percent of their customers, they cover only 60 to 70 percent of our customers (the telephone-using homes that subscribe to cable TV service). So there is only about $3 billion they can try to get their hands on.

But how successful are they likely to be? Consider that Philadelphia, for example, is served by maybe 10 or 11 cable companies. Even inside the city there are four different cable companies. Four!

Now you're telling me a consumer is going to subscribe with a cable-phone service that serves only one section of the city? That's going to be a pretty hard sale. And what about power? Remember, when the power's out so's your cable phone!

So, this 30 percent versus 30 percent.

It's wrong. It won't be dollar-for-dollar. It'll be 10-to-1 in our favor. I would say that by 2000, we'll have 50 percent of the cable TV business - no doubt about it, which is why some cable companies are in a panic. Meanwhile, the cable companies won't have even 3 percent of telephony revenues in their best market. Not in their best market. It's just not going to happen.

But isn't your real concern here not so much that cable companies will take a big chunk of your total revenues, but that they'll cherry-pick your most profitable businesses, like your $3 billion-plus local access services?

We've already got competition there. No, cable is not where our real competition will come from. The competition's going to come from AT&T and from wireless, not from cable companies reequipping their ancient and crappy systems.

But now TCI and two other cable firms have hooked up with Sprint Corp. to bid on wireless personal communication services spectrum.

Bidding is one thing. Building a truly robust and competitive service is another.

Well, *your* wireless business has certainly gotten more robust lately. By combining with Nynex, AirTouch Communications, and U S West, you've now got the biggest wireless footprint in the country. But what about the failure of your talks with MCI? Doesn't that leave you without the sort of national brand name you'll need to compete with AT&T, or even Sprint-TCI?

For us, the most important thing is the footprint, not the brand name. We estimate we need a footprint that covers somewhere around 150 million potential customers to give us the scale to compete with AT&T.

As for the brand, we can create it. It'll cost money, and it won't be as quick as if we had MCI with us. But we can create a national brand that's up in the 60 percent range within a year in terms of recognition, maybe up to 85 percent in two years.

So have you given up on MCI?

MCI needs a wireless strategy. They have to be connected with a company that has a wireless presence. As for what may or may not happen, that certainly isn't going to be talked about today.

You've laid out some of your competitive advantages over the cable industry. But you also have some disadvantages, don't you? For instance, whereas cable firms have already laid their coax - 80 percent of the cost of building the network - don't you still have this massive construction job in front of you?

We've been equipping our network for years now.

But I'm talking about laying coax, especially that "last mile" to the home. Look what happened to Pacific Telesis in Milpitas, California. When city officials there saw that PacTel planned to dig up 60 miles of city streets and disrupt businesses for months - just to lay coax to 1,000 homes - they refused to grant construction permits unless PacTel forked over $1 million in remuneration. And that's just one city. So how easy is it going to be for the phone companies to go into thousands of towns and cities nationwide and get similar permits?

Well, I think Milpitas was an anomaly. We know how to build so you hardly know we're there. We have a construction permit for Dover [the township in New Jersey that is the site of Bell Atlantic's first commercial interactive video service]. If you polled the people in Dover and asked, "What cataclysmic thing is going on here?" they wouldn't know what it was.

Maybe what happened in Milpitas was an overreaction by the city council or something. In any case, we know how to build in a way that would satisfy any community. It can be done with care, delicacy, and with a little bit of explanation. In Morris County, New Jersey, it's like the Persian Gulf War or something, and everyone's waving Bell Atlantic flags saying, "Please come! Please come!"

Cheering, no less?

Sure, because they see us as finally bringing decent cable TV service. We've had people calling us, asking how soon they can sign up for our cable service.

I mean, look. I'm in Montgomery County, Maryland. Just this week, my cable TV service has been out for three days. Fortunately it wasn't out on Monday when the Steelers were on, but it went out Tuesday, and today's Friday! We get terrible cable service, really lousy service. And everybody says so.

But what's going to happen to your service as you make Bell Atlantic leaner and meaner and more competitive? Look what's happening with U S West. It's been reengineering, laying off workers, and cutting costs to become more competitive with the cable companies. And guess what? Colorado regulators have now charged them with major violations of state service guidelines because their customer service has gone down the tubes.

Well, they may have gone over some line, but.... Look, just because U S West has a couple of problems, that doesn't compare to every cable company in the country being the worst service provider in the community. I mean, I don't remember my telephone ever going out of service.

We have good service and I don't see that changing. We have such a competitive advantage over cable because of our service reputation that we'll get 15 percent of video market share easily just by putting out our shingle.

You know, all this downsizing raises an interesting point: people say the info highway will create jobs, yet to compete in building it, the telcos have become the biggest job destroyers in America. In fact, collectively, the Bells have announced more than 80,000 layoffs in the past year. [Protesting Bell Atlantic workers were sent home without pay one day last November for wearing T-shirts describing themselves as roadkill on the info highway.]

Like you said, it has to do with competition, which is coming into our business. We've already streamlined, but we still have a way to go - and so do the other RBOCs - to meet the ultimate competition. So that's what you're talking about. That's the downward pressure on the work force.

But we think that after these downsizings are done - and when the market begins to develop fully in 1996 - you're going to see a lot of hiring going on. The building of the superhighway will act as an upward pressure on the work force. There'll be a great expansion to build all these new interactive services.

So we see a short-term need to get our costs down. Long term, in 10 years, we're going to be a much bigger company.

Well, you certainly sound like you're ready and willing to take on all competitors. So why do you think Senator Fritz Hollings, Representative Ed Markey, the Consumer Federation of America, and even Vice President Al Gore put the blame for killing the 1994 telecom bill - which would have opened communications markets to greater competition - squarely on the regional phone companies?

I don't think that's fair at all. I think the Senate just ran out of time.

But wasn't that because some of the telcos - notably Bell South - just wouldn't compromise on certain of the bill's provisions regarding the opening of their markets to competition? Whereas your company and other Bells were much more willing to work out a compromise?

I think that's pretty accurate. We certainly were more willing to move forward with that bill and negotiate some of our differences in conference. Some of the other telephone companies felt it was too dangerous to do.

Ultimately, does it matter whether there's a telecom law in 1995? I mean, you seem to be moving forward anyway to build out your network, develop programming.

It does matter. We've got to get these barriers down. We've got to get into full competition in our business and in long distance. We obviously are already in the cable business (because of the 1993 federal court ruling allowing Bell Atlantic to offer video dial tone).

So that side of it isn't important to us. But we have to open everything up to expand the market. This Balkanization we have now is causing dislocations in pricing and so on that are unnecessary. The market won't expand the way we want unless we have full and open competition in all areas.

Let's talk about what precisely this network is going to look like. You mentioned earlier that you saw yourself as a builder, an architect, rather than a John Malone-style road warrior. So sketch it out for me. What's your grand plan? What's the blueprint for your network?

It's going to be built differently in every town. That's the part that hasn't been captured yet, the unspoken story. The way it's been reported to date is that we are all going to put out hybrid fiber-coax and connect it to a so-and-so with a micronet. Like there's a grand plan.

Of course, that's ridiculous. It's that old manufacturing model, like you create one automobile design and then make 100 million cars that all look the same. But that's never how things of this sort are deployed. It's going to be quite different from some great, grand plan.

Here's how it's going to be built: There are five different technologies that we'll use to provide video services in competition with cable companies. The first will be the fiber to the curb, which is the approach taken by companies like BroadBand Technologies. This is what we're going to do in Dover.

Your original ballpark estimate of the cost per home was $1,200. Is that still your figure?

It's probably about $900, including the drops into the home, but not including the cost of the servers and set-tops. And once that kind of technology gets ordered in larger volumes, we'll get down well below that number.

For fiber all the way?

Fiber all the way to curbside, with two lines then going out to between 20 and 30 homes. One line will be coax and carry video, the other is twisted pair for voice. Clearly, that's the preferred architecture. It's switched, digital, fully interactive, and you get a tremendous reduction in maintenance expense and an improvement in service. So that's one way.

Number two is hybrid-fiber coax, where we run fiber to a neighborhood hub and then coax from there to a few hundred homes. In some locations, this will be the preferred solution, especially where the interactivity is not expected to be as robust, or where the demographics of certain areas demand lower costs.

Today's price for that?

Maybe a couple hundred less than for fiber to the curb, but we're *Wired*'s readers know that these estimates are based on certain caveats and assumptions about early roll-out volumes, rather than full-blown nationwide deployment.

The third approach is ADSL. When you see what we're doing with it, you'll see that it's not an interim technology - at least not in the sense that it's second-best or doesn't work well. It has excellent quality. You can do the virtual VCR over it. You can fast forward and back, and you can have a whole batch of channels. It's server-based. It's digital.

But it is interim in the sense of being a transition technology, right?

Yeah, transition. That's a much better way to say it. It's a market entry kind of thing. It doesn't require conditioning the whole plant. It doesn't require big switchers or anything like that. It's modular. You go in house by house, and if people want it, you just stick in a circuit pack. When you get enough people in the neighborhood who want interactive services, then you bring fiber to them. Pull out the ADSL circuit packs and bring them out to a more remote area. They're reusable hundreds of times, so it's an interim technology that will be with us for 40 years.

Then what's limiting about it compared to fiber?

The cost is higher per house.

The cost of ADSL?

It's higher, yes, for each house. But remember when you cover a whole batch of houses, not every one of them takes cable television. When you do ADSL, each house costs more, but you do it only after the sale is made.

But isn't the level of interactivity different?

There's a big difference between that and full fiber to the home. A big, big difference. It doesn't give you infinite channels and infinite interactivity, but it does give you video-on-demand and home shopping. And it gives you excellent picture quality and good production values and our Stargazer user interface.

What about live broadcasts, live sports?

Well, as currently deployed, no. It's 1.5 Mbits per second. But future versions of ADSL will carry 6 Mbits a second. That gives you live broadcasts. It'll give you everything except the gee-whiz levels of interactivity.

Then the fourth approach is wireless cable. Twenty-eight GHz is working, and it's great. And remember you're talking about antennas that are small enough to be pasted on a window. You paste it on and put in your telephone jack, and you now have video. Of course, it's not applicable to every location and every terrain.

Direct broadcast satellite is the fifth approach. And these will all be integrated, so if you're the customer, you can say, "Yes, I'd like your telephone service and your wireless cable TV service." Or you can say, "Give me ADSL service," or whatever. It'll depend on your location, how far the engineering and construction of the network in your area has developed.

Do you think eventually there'll be one common architecture?

There will be. But I can't predict whether it'll be fiber-to-the-curb or fiber-to-the-node plus coax. But probably those two will be the most common.

But who knows? Remember, the capacity of wireless cable is 28 GHz. That's huge. It's gigantic. If you can get that to work well - and be interactive, too, which we have high hopes for - then it has the capacity for as many channels as you want. If that develops, we won't have to build out all the other things.

But by whatever combination of means, we will deliver broadband services to all of our customers within the next 10 years. We'll deploy it in each location and each market differently, depending on the economics. But we will deliver it to all of our customers.

Why deliver it through the TV? Many would argue that the PC is a better vehicle for these services, and some even predict that by 2000 the PC will be the dominant interactive appliance in the home.

That's not going to be the case. I think they're missing the whole point, because you're going to have intelligence in the home. The intelligence, of course, could be a set-top box or a personal computer. In fact, the PCs that will come out in the next few years will be able to act as a set-top, once they figure out what the interactive set-top will look like. And all it will take is a wire from the one to the other to make that intelligence energize the tube. But you're not going to watch television on a little monitor. You're going to watch it on a big set. That's what you'll use when you want entertainment, and you'll use the PC and keyboard when text is more important.

So you're going to have both in many houses. But even in 2000, you'll still have 75 percent or more of the population that doesn't have a sufficiently intelligent PC to handle the kind of interactive services that we'll be able to offer over television sets.

The other thing to keep in mind is, the real diffusion rate of PCs into the home is not progressing the way people say it is. They talk about the number of PCs shipped each year, and there are a lot of them. But many of them are seconds and replacements. What percentage of the homes in Pittsburgh today, for instance, do you think have have a 486 PC in their residence?

Based on the best estimates I've seen, which put total PC penetration at somewhere around 25 percent of American homes, I don't know - 4 to 5 percent maybe?

That might be my guess, too. Don't forget, when they call and ask, "Do you have a PC?" many people will say yes. But what they've got is some old Amiga or 286 or something. There's no doubt that the number of more powerful computers is going to grow, but there's a stupendous amount of churn in those figures about PC usage in the home.

And remember, it's also a demand question. More people want entertainment. You've got to start with entertainment - entertainment-on-demand, time-shifted sports and time-shifted news. And people will be able to get all that without having to put a $2,000 PC in the house.

So it's the Willie Sutton factor? You know, the bank robber who, when asked why he robbed banks, answered, "Because that's where the money is."

Exactly. Why TV? Because that's where the people are.

Ameritech recently announced it expects to see 20 percent of its revenues coming from video. Do you have similar goals for your joint programming venture with Nynex, PacTel, and The Creative Artists Agency in Hollywood?

How can I answer that? I mean, everything's up in the air. There'll be new competitors in every field. So there's no way I can answer that question.

Will video transport turn voice transport into something that's too cheap to meter? What will happen when someone wants to receive a data service via your video network at the transport cost of video?

As a theoretical question, I see your point. And I can imagine at some point we'll need to provide cost breakdowns to our regulators. But right now I couldn't tell you what video transport versus voice transport will cost, say, five years from now. But I can envision one day offering various packages of services. And one of them might be a package of video and interactive services in which the customer also gets phone service for another two or three bucks.

All right, before we end, could I conduct a little free-association thing with you? Kind of a Rorschach test, you might say. You game?

OK.

All right, here's the first one: Bill Gates?

Jane Seymour.

Pardon me?

Jane Seymour.

I'm sorry, I don't -

I saw a movie last night with Jane Seymour in it. She's been on my mind. She's intelligent and beautiful-

[Laughs.] OK, I get it. Now, everything's not going to come up Jane Seymour is it?

No, sorry. Go ahead.

OK ... Bill Gates?

Many more billions to make.

The Internet?

Unruly wave of the future.

Electronic Frontier Foundation?

[Pauses.] One of many.

Government regulation?

Barriers coming down.

Your worst business nightmare?

Government regulation.

Equal access?

All for it.

That's interesting. Because you and the other Bells have been accused of red-lining - of concentrating your roll-out efforts on more upscale and whiter communities.

You know, that's an absolute red herring. Lord knows where it comes from. Have you looked at our demographics?

Yes, and truthfully, the demographics in your proposed service areas show not only higher minority representation than in your region as a whole, but higher than the country as a whole, too.

That's right. So the only thing I can think of is that because the first location that we requested was in New Jersey, somebody may have looked at that one town and said, "Aha! Red-lining!"

Has the coalition - you know, the Center for Media Education and the Consumer Federation of America - since retracted its charge?

Retracted? Of course not. Never in the history of any coalition has *that* happened!

OK, one last question: How do you expect the provision of video content and interactive services to change your company? Is Bell Atlantic really prepared to shed its old monopolistic ways to compete in this new world?

I'm not sure anyone is able to fully appreciate how powerfully the openness of these new networks is going to affect our lives. All I can say is we'll do our best to meet the challenges as they come.

Oh, I know what they say about the old Bellhead mentality - and it's absolutely true! I remember the old days in the '60s when we had a rule for everything, including the correct way to hold a pencil. We even had a written rule that said, "Before you go to a meeting, always go the bathroom, even if you don't have to."

Well, those days are gone, at least here at Bell Atlantic. It's become clear that all the old givens - like "monopolies are forever" - no longer apply. Which is why we've been working very, very hard for more than five years now to transform ourselves.

The world's changing, and we intend to manage that change in a powerful way. It's really that simple.

Ray Smith: The I-way, My Way

By Evan Schwartz

The typical American family has the tube turned on nearly every minute someone is home and semiconscious. The average adult watches between four and five hours a day. These statistics don't change from year to year and likely never will. In other words, no company is going to make money trying to get people to spend more time in front of the set. "Television is probably a zero-sum game," says Michael Lasky, director of digital production for Bell Atlantic Video Services Company.

So why has Bell Atlantic built a US$200 million "digital factory" in the edge city of Reston, Virginia? Why is the mid-Atlantic telephone monopoly declaring war on cable companies and parachuting into the supposedly zero-growth business of gluing people to the TV? When you visit this video supercenter, you begin to see the answer. This is ground zero for a much larger plan.

Bell Atlantic doesn't call this place a digital factory for nothing. It's an industrial-age metaphor for the most ambitious of information-age endeavors. On the crisp November day of my visit, the factory is still a work in progress. Wet-paint signs are everywhere, but the show is ready to begin. An analog source tape of a That Girl episode is cued up in a wall-sized bank of input decks - digital beta cams, VCRs, 1-inch reels and other media-eating machines. The raw material is refined into a clear stream of ones and zeros and piped into one of about a dozen production suites - small rooms packed with PCs as well as waveform monitors, audioscopes, vectorscopes, and other gear that looks like radar equipment. In these rooms, encoding engineers flip the bits until they are normalized, synchronized, aligned, and color-coordinated. Marlo Thomas has now been digitally enhanced for your viewing pleasure.

This is only the start of the assembly line of bits, for which your brain is the ultimate destination. Next stop is the squad of Silicon Graphics-armed digital artists who are breeding the new interactive viewing "environment," including onscreen venus, logos, and promos.

Then Marlo, the viewing environment, and all the other content piped in from around the world are compressed and channeled through thousands of black cables that snake under the floor, across the hall, and into a basketball court-sized data center. Sporting a white, raised floor with air conditioning vents, this room houses a network control center befitting a small airport. But most importantly, it holds a big, black nCube supercomputer fitted with 256 microprocessors as well as Oracle's multimedia database software and enough Gbytes of storage capacity to warehouse all the video that will be requested by tens of thousands of households in the Washington, DC, region.

For a viewer who has used a personal computer or played a videogame during the past five years, selecting something to watch from the Bell Atlantic system seems rather mundane. The user interface for the Northern Virginia market test of 1,000 households that was slated to begin late this winter or early this fall consists of five onscreen icons that customers can choose with their remote controls. In the center of the TV screen is a shiny, happy sun face, welcoming viewers to Stargazer, Bell Atlantic's brand name for interactive TV. The sun face smiles and winks as customers make their selections. The other four icons allow viewers to choose a) movies, b) shopping services, c) children's programming, or d) "lifestyle" programs such as documentaries and how-to shows.

For now, the programming on this network travels at the relatively modest speed of 1.5 Mbits per second over ordinary copper telephone wires, using a digital-routing scheme known as ADSL. The data rate means that the picture is no sharper than today's cable reception, says Lasky. The set-top box for this test, made by IBM and a consortium led by DiviCom, gets plugged into an ordinary telephone wall jack. It will cost about $300, based on a projected production of 1 million, and customers will pay for it in small monthly rental installments. While watching TV, customers can still use their phone lines as before, even while pausing, rewinding, and fast-forwarding through movies, which will cost $3 or $4 per viewing.

If all this doesn't sound as revolutionary or alluring as the info highway hype you've been hearing, it isn't meant to be. Bell Atlantic has relatively modest but concrete aims. A recent poll of 500 customers throughout its six-state service region found that 46 percent of cable subscribers said they would dump their cable company if a similar service were offered by their phone company. If a store-sized library of videos-on-demand were thrown in, 56 percent said they would switch. And a full 61 percent said they would buy in if the combined cable and video service were 10 percent cheaper than they are now. Over the next few years, Bell Atlantic wants to take these customers at their word and win over all that business. Or at least as much as they can before their local telephone monopoly starts to erode.

Then the real gambit kicks in. "It's a Trojan Horse," says Larry Plumb, director of communications for Bell Atlantic Video Services. By becoming the first company to supply both telephone and entertainment service to tens of thousands, perhaps millions, of customers, Bell Atlantic is aiming for a scale no one in the nation is able to match. The company is investing $11 billion over the next five years to make sure a full-blown, blazingly fast, fiber-optic network is in place by the time demand for more advanced interactive services kicks in.

But what worries many cable executives is that phone companies like Bell Atlantic won't be offering these things, or anything else really new, for many years - just spending billions to cut into an existing market. "There is another potential monkey wrench. The movie studios typically don't release their biggest hit films to pay-per-view cable until those movies have been in video stores for 30 to 90 days. If Bell Atlantic cannot negotiate a contract to get those movies sooner, people will continue to flock to their local Blockbuster and other video stores for the most popular new releases.

That's one reason why Bell Atlantic showed up at the Hollywood doorstep of Michael Ovitz last fall. The head of Creative Artists Agency will use the buying clout not only of Bell Atlantic but also of Nynex and Pacific Telesis Group. These companies have serious cash, and Ovitz doesn't mind getting a percentage of all deals.

The goal is not only to buy rights to movies, but also to buy minority stakes in programming networks, much like Nynex's investment in Viacom. The result would be a new content empire akin to Liberty Media, the programming arm of TCI.

The Reston supercenter is already equipped to handle whatever magic Ovitz can conjure up. Gleaming but vacant new video-production studios stand ready so new programming can be created on premises, or pumped in over high-speed lines for 30 million households in six of the top seven media markets in the nation: New York, Boston, Philadelphia, San Francisco, Los Angeles, and Washington, DC.

The Bell Atlantic executives call the whole process "virtual creation" because they expect creative people all over the planet to work together zapping new movies, TV dramas, videogames, sporting events, and educational programming to the factory.

Perhaps the biggest question is: Who ends up paying for all of this? Bell Atlantic executives realize that all the costs cannot be shifted to subscribers. Indeed, research by Hewlett-Packard Company and others getting into this business shows that consumers are willing to pay only $5 to $10 per month for all the new interactive services anyone can think of. That's why Bell Atlantic is working on advertising schemes to generate revenue.

In part, these ideas center on taking micromarketing to absurd levels. For instance, if Ace Ventura: Pet Detective is exceedingly popular in a certain zip code or even just in a certain household, the viewers might be targeted with personalized ads for pet food. Or when you watch an Indiana Jones movie, it could include ads for the type of clothing he is wearing.

Other ideas involve the video mall concept. The company has already signed deals with three giant retailers: Lands' End, Nordstrom, and J. C. Penney. Bell Atlantic would receive transaction fees every time a customer purchases something. For now, the user interface for interactive shopping is fairly crude. The company is at work developing more compelling ways to present merchandise.

What's clear is this is not so much an info highway, but an entertainment highway. "It's predominantly entertainment," says Lasky. But, he says, that's what the people want. They want to watch what they want, when they want. And they want the convenience of ordering everything from pizzas to power tools from their sofas.

Of course, Bell Atlantic could be wrong. It's possible there isn't enough demand for interactive television services to justify the costs. Presumably, we'll know either way by the summer of 2001, when Bell Atlantic's lease for the digital factory building in Reston is up for renewal.

David Kline (dkline@aol.com) *and Daniel Burstein have written* The Living Room Wars*, to be published this fall by Dutton-Signet.*

The Romance and Wreck of TELE-TV

by Michael Grebb Michael Grebb | Also by this reporter
1996-12-09 20:00:00.0

The apparent collapse of a US$500 million bet on the future of TV has once again thrown into question whether we'll experience anything resembling facilities-based video competition before the next millennium. Reports last week that Bell Atlantic Corp., NYNEX Corp., and Pacific Telesis Group are finally bagging their resilient yet somewhat scatter-brained TELE-TV venture didn't shock anyone as much as it confirmed a prevalent theory: The Bells have put video on the back burner.
The three Bell companies released an ambiguous statement late Friday, saying only that they're formulating TELE-TV's 1997 business plan and are "continuing to discuss a more efficient way to manage the work activity." They have not denied reports that they're folding the operation.

Long distance, of course, is more familiar territory, and most of all, it's simple. Video, on the other hand, is not. Entrenched cable TV operators lurk under every rock. Direct broadcast satellite is adding millions to its rolls. And when you start talking about interactive services, you're drifting way over the heads of most Bell company execs.

And so reports of the death of TELE-TV - a venture that began with much fanfare and lured high-profile executives from Hollywood, Wall Street, and the telecommunications giants - seem grounded in a sturdy logic; more solid, in hindsight at least, than the logic behind the venture's inception.

EXHIBIT

B

In the early '90s, Michael Ovitz was just about the hottest agent prancing around Hollywood from his throne at Creative Artists

Agency. Not surprisingly, executives from Bell Atlantic, NYNEX, and Pacific Telesis were gaga when he started selling them on a video-programming enterprise that could combine the production smarts of Hollywood with the distribution savvy of the Bells.

Ovitz began wooing away entertainment executives to take the helm. Howard Stringer left CBS to head the venture. Sandy Grushow dumped his gig as head honcho at Fox Entertainment Group for a senior spot. Others followed. It seemed as if the venture that would later be called TELE-TV could do no wrong.

As it turned out, Ovitz may have unwittingly sold the Bells - and perhaps his friend Stringer - down the river. Ovitz reportedly said the venture would cost $50 million to get off the ground; as of last week, analysts were estimating its cost at $500 million. Ovitz said he could line up all kinds of content deals; then before any of them built any steam, he bolted from CAA to take the Number Two spot at Disney.

The Bells were left holding a bag of promises and a bunch of bored executives holed up in the venture's Reston, Virginia, headquarters. And here's the best part: Disney just happens to be a partner in the Americast programming venture - a mirror image of TELE-TV run by most of the other Bells.

But observers who follow the entertainment biz are not floored by these developments. "This is not surprising," says Phillip Sirlin, an analyst at Schroeder Wertheim & Co. in New York. Noting the inaction of TELE-TV over the past couple of years, he says the Bell companies "never really had any commitment to this."

The ripple effect of TELE-TV's demise could be significant for some. Thomson Consumer Electronics, for example, just signed a $1 billion equipment deal with TELE-TV that could now dry up. Silicon Graphics may have to write off a deal for digital media servers that was expected to be worth at least $5 million. And a bunch of smaller companies like DiviCom and Avnet also must give up some juicy contracts they've signed with TELE-TV over the past few months.

Another big loser could be CAI Wireless Systems, a struggling wireless cable operator that was buoyed to new heights last year when Bell Atlantic and NYNEX poured $100 million into its coffers. CAI's stock then traded for nearly $20 per share. But in recent months it had sunk to $3, and after Friday's developments, plummeted to about a buck fifty. CAI was planning to use TELE-TV programming to launch its new digital video offerings.

Amid such romance and wreckage, you're sure to find a conspiracy theory sprouting here and there. Like, for instance, the contention many are making that the Bells started TELE-TV, Americast, and all this talk of video grandeur simply to create uncertainty and make it harder for cable companies to borrow money from banks. With no money, they can't upgrade their networks to compete. Of course the theory, though pretty clever, is unsubstantiated. Nevertheless, the dog-eat-dog world of entertainment is nothing if not intriguing.

Telecommunications Reports presents....

TRDaily
July 10, 2006

For a Web version of today's TRDaily, go to
http://www.tr.com/online/trd/2006/td071006/index.htm

Table Of Contents

EXHIBIT

C

****

LEGISLATION

****

DeWINE CONSIDERING CALEA-TYPE BILL FOR INTERNET

Sen. Mike DeWine (R., Ohio) is in discussions with representatives of the Justice Department, state and local law enforcement, the communications industry, and privacy groups over the possibility of drafting legislation to codify wiretapping-capability obligations of Internet service providers, the senator's communications director told TRDaily today.

"We don't want new technologies to be safe havens for criminals and terrorists," Communications Director Mike Dawson said. He emphasized that consideration of the issue is in the early stages yet, and that no decision has been made yet regarding possible legislation.

The FCC last year adopted an order declaring that facilities-based broadband Internet access and voice-over-Internet-protocol (VoIP) providers are subject to the 1994 Communications Assistance for Law Enforcement Act (CALEA) mandate for telecommunications common carriers to ensure they have the technical capability to comply with subpoenas for electronic surveillance (TRDaily, Aug. 5, 2005). Although a federal appeals court recently upheld the FCC's order against challenges that the agency had misinterpreted CALEA (TRDaily, June 9), a recent CNET News.com report implied that the FBI is seeking to secure the Internet wiretap capabilities against possible adverse court rulings on the FCC order. Justice officials did not respond to TRDaily's request for comment, and industry representatives contacted were unable to provide additional information. - Lynn Stanton, lynn.stanton@wolterskluwer.com

****

VERIZON'S TAUKE PREDICTS CONTINUED CHANGE
IN CONGRESSIONAL NET NEUTRALITY LANGUAGE

The net neutrality language in the version of major telecom legislation (HR 5252) approved by the Senate Commerce, Science, and Transportation Committee is "more carefully drafted" and therefore preferable to the net neutrality language in the bill as it was passed by the House, Tom Tauke, Verizon Communications, Inc.'s executive vice president-public affairs, policy, and communications, said this morning, adding that he expected "this is all going to continue to change as the measure moves through the process."

Regarding the streamlining of the video franchising process, Mr. Tauke said both chambers' bills "do a pretty good job of making video choice a reality." The lawsuit that Verizon brought against Montgomery County, Md., last week (TRDaily, July 5) regarding its cable TV franchising ordinance stems from a "fairly unique" situation in which the company views the ordinance as violating federal law, Mr. Tauke said, "so I don't think that suggests a pattern for the future" in dealing with other localities, he added.

"We're hopeful that in coming weeks that we can work with the Senate to keep the focus on the needs of consumers and move the video choice legislation to a vote by the full Senate this year," Mr. Tauke said. He was speaking at the Minority Media and Telecommunications Council's Access to Capital and Telecommunications Policy Conference in Washington.

Another speaker, Preston Padden, EVP-government relations at The Walt Disney Co., said public policy-makers should "remove any government roadblocks to the deployment of multiple and competitive distribution pathways to the consumer. For example, Disney supports the pending legislation to ease local franchising hurdles for telephone entry into video distribution while also ensuring a level playing field for incumbent cable operators."

He added that public policy-makers "should resist the temptation to try to micro-manage the relationship between content owners and distribution platforms and the manner in which content is offered to the public. The competitive forces now at work in the marketplace will do a far better job of meeting consumer demand than would any government regulation. That is why Disney does not favor proposed government intervention such as net neutrality or a la carte regulation. Government-mandated a la carte is a particularly bad idea." - Lynn Stanton, lynn.stanton@wolterskluwer.com

****
WITNESSES NAMED FOR DOPA HEARING

The House Energy and Commerce telecommunications and the Internet subcommittee has announced the witnesses for tomorrow's hearing on the pending Deleting Online Predators Act (HR 5319). They include Texas Attorney General Greg Abbott and representatives of law enforcement, public schools, libraries, the Internet social networking site Facebook, and Internet safety organizations. The hearing will begin at 10 a.m. in Room 2123 of the Rayburn House Office Building.

****
TELECOM REGULATION
****
GABELLI ENTITIES FILE APPLICATIONS
TO PARTICIPATE IN AWS AUCTION

A dozen subsidiaries of Lynch Interactive Corp., which along with its chairman, Mario Gabelli, has agreed to settle civil litigation charging it with defrauding the FCC's "designated entity" (DE) program, are among those that filed short form applications for the Aug. 9 advanced wireless services (AWS) auction. However, none of the firms is seeking bidding credits as a DE.

The FCC's Wireless Telecommunications Bureau Friday released the names of 252 entities that filed short forms for the auction, 166 of which claimed DE status. The agency said that 81 applications were accepted for filing and 171 were incomplete and must be refiled, including the Lynch Interactive subsidiaries. Upfront payments are due July 17, and entities with incomplete applications must file them by July 18. While the names of the firms were released Friday, their ownership information was not immediately available that day.

According to the ownership information listed for the Lynch Interactive subsidiaries, the Rye, N.Y.-based holding company controls 100% of the common stock of the companies, most of which are rural local exchange carriers. In addition to being chairman of Lynch Interactive, Mr. Gabelli is the general partner of a family trust that owns 26% of the common stock of the holding company.

Robert Dolan, Lynch Interactive's chief executive officer, did not respond to TRDaily's requests for comment today.

As previously reported, Mr. Gabelli and defendants affiliated with him, including Lynch Interactive, reached a settlement with the federal government and a private plaintiff over litigation that alleges they defrauded the DE program. The litigation alleges that Mr. Gabelli and entities he controlled recruited individuals to serve as fronts for a dozen "sham corporations" that claimed DE eligibility in eight FCC auctions. In some cases, the defendants "flipped" the licenses for a profit, according to the government lawsuit.

Details of the settlement are expected to be filed in the U.S. District Court for the Southern District of New York this week, attorneys told a judge during a hearing Friday. A "Wall Street Journal" report said the settlement is expected to exceed $100 million. In a news release Friday, Lynch Interactive said its share of the settlement is $34 million.

A review of the ownership information of other AWS auction applicants reveals a few other interesting details

For example, NextWave Wireless LLC is behind one of the entities, AWS Wireless, Inc., whose application has been accepted. Allen Salmasi, who headed NextWave Telecom, Inc., and is chairman, president, and CEO of the new firm, owns nearly 29% of the bidding entity.

Also, while some analysts had speculated that non-traditional tech and Internet giants such as Microsoft Corp., Google, Inc., and Yahoo, Inc., might file for the auction, none did.

However, as expected, cable service providers did file applications.

Sprint Nextel Corp. filed an incomplete application to participate in the sale as part of a consortium, SpectrumCo LLC, with four other cable TV providers. In addition, a family holding company controlled by Charles Dolan, chairman of Cablevision Systems Corp., also filed. Also Cable One, Inc., which is owned by the Washington Post Co., also filed a short form application, although it must be refiled.. Microsoft cofounder Paul Allen also is backing one auction applicant. He has a 17% stake in Bend Cable Communications LLC, an independent Oregon-based operator. Its application, however, also was deemed incomplete.

Wireless DBS LLC, backed by EchoStar Communications Corps., filed an application that also was judged incomplete. Also filing an application is Space Data Spectrum Holdings LLC and Space Data Research LLC. An affiliate of the companies participated in the recent air-to-ground auction but failed to win a 1 megahertz license. Those applications, however, haven't been accepted yet. Governmental entities also are interested in getting into the AWS mix. For example, the city of Ketchikan, Alaska, filed a short form application through its public utilities agency.

Among major wireless carriers, Verizon Wireless, T-Mobile USA, Inc., and Cingular Wireless LLC filed individually to participate in the sale, although Cingular's application must be refiled. Alltel Corp. did not file.

Smaller wireless carriers that filed applications include Leap Wireless International, Inc., American Cellular Corp., and MetroPCS, Inc. However, the applications of the first two carriers must be refiled. Also, Telephone and Data Systems, which owns 82% of U.S. Cellular Corp., controls 45% of Volcano Internet Provider (whose application also must be refiled).

Rudy Baca, a partner with the Washington law firm of Rini Coran PC, which represents some rural wireless providers that filed for the auction, said he's surprised by the number of rural entities that want to participate given the FCC's new DE rules, which many small entities had complained would make it difficult to secure capital for licenses. He said many of those that filed are likely to be able to self-finance their purchases.

Mr. Baca said the rural companies clearly believe they can get spectrum at reasonable prices, and he added that the total revenues for the sale could be closer to $8 billion than a higher estimate of $15 billion. He also said the auction seems to be more attractive for building out service in rural areas rather than attracting "new entrants into the market."

Under new rules adopted in April, the FCC will withhold key information on bidders and the licenses they bid on in the auction until after the sale unless a competitive threshold is met. That threshold is calculated based on the upfront payments.

Last week, the U.S. Court of Appeals for the Third Circuit (Philadelphia) rejected a request by three entities to stay the auction pending judicial review of the FCC's new DE rules. - Paul Kirby, paul.kirby@wolterskluwer.com

****

AT&T, FCC COME TO TERMS
OVER CPNI OPT-OUT RULES

AT&T, Inc., and the FCC have entered into a consent decree that has the carrier paying $550,000 and agreeing to new consumer proprietary network information (CPNI) rules in exchange for the Commission dropping its investigation of the company and terminating a notice of apparent liability (NAL) for forfeiture against it.

The deal, announced by the FCC today, means AT&T will voluntarily make the payment to the federal government and revamp its managerial oversight of its CPNI opt-out notification process, as well as its distribution of CPNI opt-out notices, employee training, enforcement, and compliance review. Federal regulators, in turn, will halt a probe and drop a January NAL that alleged the incumbent provider violated section 222 of the 1934 Communications Act.

Commissioner Jonathan S. Adelstein hailed the decision, saying it sends a message to carriers that privacy is at the top of the Commission's agenda and that it will be keep a close eye on the matter. "AT&T has commendably self-reported some of its failures in its compliance mechanisms and has agreed to adopt a compliance plan so that consumers are appropriately notified about the Commission's privacy rules," he said. "I support this order because consistent enforcement is essential to promote compliance with our consumer privacy rules."

AT&T, for its part, said its own discovery of the CPNI problems shows the company was on top of the problem. "Our internal procedures discovered the errors, and we restricted the customer's accounts from being added to our own internal marketing lists," it said in a statement. "We then removed the affected customers from all previously generated internal marketing lists and sent them opt-out notices. Additionally, we reported the incident to the FCC and took steps to ensure that the errors do not happen again. No customer information was sold to any third parties for sales, marketing or other purposes."

As part of the decree, AT&T will designates employees responsible for managing and overseeing implementation of the carrier's CPNI opt-out processes. They will then notify other organizations within the company involved in the distribution of the notices at least annually that the form and content of the notices must be approved in writing prior to being sent out. Written instructions will also be given to external contractors responsible for doling out CPNI notices.

In addition, AT&T will provide annual CPNI training to employees responsible for managing the development of CPNI opt-out notices, the overall implementation of CPNI process changes, and the electronic distribution of such notices informing them of the requirements.

The carrier also said it would designate an internal complaint group to monitor customer complaints to identify potential violations of the FCC's CPNI opt-out rules. Employees found violating the rules could face dismissal, it said. - Ted Gotsch, ted.gotsch@wolterskluwer.com

****

TELECOM SOCIAL POLICY REGULATIONS
NEED TO BE RETHOUGHT, PFF REPORT SAYS

Expanding the reach of such telecom-related social policies as universal service, "911" service, and access for the disabled should be viewed with a wary eye by policymakers because it could help discourage investment, slow innovation, or favor incumbents over competitors, a new report released by the Progress & Freedom Foundation today states.

The paper, authored by Kyle Dixon, a senior fellow and director of the Federal Institute for Regulatory Law and Economics at PFF, said the FCC should be directed "to evaluate and eliminate social obligations to the extent they can no longer be justified" by using its forbearance and biennial review authority to shape policy.

Telecom legislation now being considered by Congress contains no language to guide regulators, Mr. Dixon wrote, which could hinder the process. "By leaving many of the objectives and interrelationships of social regulation inchoate, legislators make the reform process needlessly uncertain, while sacrificing the benefit of focused input on these issues by academics and other technical experts," he said. "And this, in turn, makes its harder for thoughtful policymakers to ensure that proposed social obligations do more good than harm."

To that end, Mr. Dixon sets forth several principles in the report that he said would make it easier for the Commission to monitor and evaluate social regulation policies. He said regulators should revisit interpretations of the underlying goals of social regulation every two years so they can be refocused and reviewed. The FCC, he also said, should identify trade-offs among policy goals to ensure balance between competing items, and should reconsider whether mandates are necessary.

In addition, the FCC would be helped by formulating specific actions to eliminate unnecessary rules and thus ensure that actions do not undermine competing objectives, and by having Congress look into whether the Commission should be involved with such things as approving corporate mergers, he said. Taken together, the principles would bolster the FCC's forbearance and biennial review process and would permit flexibility and promote efficiency in social regulation, Mr. Dixon stated. - Ted Gotsch, ted.gotsch@wolterskluwer.com

****
USER REGISTRATION PROPOSED
FOR INTERNET RELAY, VRS

In order to combat misuse of the telecommunications relay service (TRS) without violating a statutory prohibition on communications assistants' disclosing or intentionally altering the content of a call, the FCC should establish a mandatory registration system for Internet relay and video relay service (VRS) users, Hamilton Relay, Inc., proposed in a July 6 filing with the FCC.

Users would register a user ID with a competitively neutral third party, providing "uniquely identifiable information" such as name, address, and telephone number, the TRS provider explained in its Consumer and Government Affairs docket 03-123 filing. The neutral third party would verify the information through commercially available means and would release it "only to authorized law enforcement with a valid subpoena," Hamilton added. TRS providers would only have access to the user ID.

Regarding the question of whether VRS is being misused to obtain interpretation services among persons in the same physical location, Hamilton said the 1934 Communications Act, as amended, does allow communications assistants to refuse to handle such a call because it is not a legitimate relay call.

The FCC is considering issues related to VRS and Internet relay abuse in a pending further notice of proposed rulemaking (TRDaily, May 3). - Lynn Stanton, lynn.stanton@wolterkluwer.com

****
COMMISSION GRANTS 'E911' EXTENSIONS

The FCC's Wireless Telecommunications Bureau is giving four Tier III wireless carriers additional time to comply with the agency's mandate that 95% of handsets be Phase II location-enabled. In an order released today in Common Carrier docket 94-102, the bureau gave Sagebrush Cellular, Inc., Nemont Communications, Inc., and Triangle Communication System, Inc., a one-year extension from their current June 30 deadline to comply with the handset-penetration mandate. The carriers, which serve rural Montana, had earlier been given a six-month extension of the Dec. 31, 2005, deadline. In a separate order, the bureau gave ACS Wireless, Inc., until Jan. 31, 2007, to comply with the mandate for its Anchorage and Fairbanks, Alaska, markets. The carrier previously had been given until that date to comply with the rules for its other markets, but the bureau had given it until June 30 for Anchorage and Fairbanks.

****
COURT UPHOLDS STATE REGULATOR
IN INTERCARRIER COMPENSATION CASE

The U.S. Court of Appeals for the 2nd Circuit (New York City) has denied a request by Global NAPS, Inc., to overturn two Vermont Public Service Board rulings that ordered the carrier to cease virtual NXX operations in the state and pay access charges to Verizon Vermont, Inc., for long distance calls, ruling that the board did not violate the federal Telecommunications Act of

1996 with its 2002 decisions. In affirming a district court ruling, Judge Richard Cudahy said the PSB's determination that intercarrier compensation shall continue to be based on the local calling areas as established in previous board proceedings does not violate the Act. He pointed to the FCC's voluminous Local Competition Order, which "explicitly" declined to address the issue of carrier-determined local calling areas but noted that "state commissions have the authority to determine what geographic areas should be considered 'local areas' for the purpose of applying reciprocal compensation."

****
FCC SEEKS COMMENTS ON Alltel-Cingular DEAL

The FCC is seeking comments on license transfers related to the proposed acquisition of Alltel Communications, Inc., assets by Cingular Wireless LLC in southern Minnesota. In a public notice released today, the FCC said that the companies have said that the transaction "responds to competitive concerns that have been raised in response to ALLTEL's proposed acquisition of Midwest Wireless Holdings LLC." Petitions to deny are due Aug. 9, oppositions are due Aug. 21, and replies are due Aug. 28 in Wireless Telecommunications docket 06-131.

****
TELECOM BUSINESS
****
ITC LOOKING INTO QUALCOMM-NOKIA DISPUTE

San Diego-based wireless technologies developer Qualcomm, Inc., said today that the International Trade Commission has started an investigation into whether Nokia Corp. has engaged in unfair trade practices by selling wireless phones and other devices that infringe on patents held by Qualcomm. News of the ITC investigation follows Qualcomm's filing of a complaint with the commission last month seeking an order barring Nokia from importing into the U.S. any products that infringe on its patents. Qualcomm, which has sued Nokia for alleged patent violations in the U.S. and the U.K, said it expects the ITC to render an initial determination in the matter during the first half of 2007. Nokia commented last month that it was involved in active negotiations with Qualcomm to extend or replace a patent license agreement between them that is set to expire next year, and that Qualcomm's "repetitive legal actions" reflected Qualcomm's concerns over 3G UMTS (universal mobile telecom sy
stem) patent negotiations. Qualcomm common stock lost 20 cents per share today, to finish at $37.80, while Nokia shares declined 14 cents each, to close at $19.40.

****
PATH 1 NETWORK EXPLORING SALE

Path 1 Network Technologies, Inc., a San Diego-based developer of video networking equipment, said today that its board of directors had authorized management to "actively pursue all strategic alternatives that may preserve the long-term viability of the company," including through a sale of the company, efforts to raise new capital, or by pursuing a reverse stock split. The company, which reported an operating loss of $1.4 million on revenues of

$614,000 for the first quarter of 2006, gave no timetable for those efforts. Path 1 common stock lost 23 cents today, to a quote of $0.40 per share.

****

VONAGE INVOLVED IN MORE VoIP PATENT DISPUTES

A company that holds about two-dozen patents covering voice-over-Internet-protocol (VoIP) voice mail technology announced today that it is brining a patent infringement suit against VoIP service provider Vonage Holdings, which was already facing VoIP technology patent infringement claims by two Verizon Communications, Inc., subsidiaries (TRDaily, June 19). Klausner Technologies, Inc., said today it recently granted a license to Time Warner, Inc.'s America Online unit to use the same patent that it is suing Vonage over. Klausner had previously sued AOL for patent infringement. Vonage, meanwhile, announced today that it had acquired ownership of three VoIP compression technology patents from Digital Packet Licensing, Inc., which puts Vonage "in control of pending litigation against Sprint Communications L.P. and Verizon Communications [Inc.], among others, in federal court for infringement of one of these patents."

****

CAPITAL MARKETS

****

S&P: VERIZON RATINGS UNSWAYED BY SPIN-OFF

Credit ratings agency Standard & Poor's Ratings Services said today that plans announced by Verizon Communications, Inc., to pursue a possible spin-off or sale of the company's directories operations won't impact the agency's "single-A" corporate credit rating on Verizon. Completion of such a transaction, S&P said, could modestly reduce Verizon's debt-to-earnings ratios. But, it added, increasing competition to Verizon from cable service providers and Verizon's stated interest in purchasing Vodafone Group PLC's 45% stake in Verizon Wireless offer potentially countervailing risks to a strengthening of credit quality that might result from a directories operation spin-off or sale.

****

CoreOptics WRAPS UP $28M FUNDING PACKAGE

CoreOptics, Inc., a Nuremberg, Germany-based developer of optical networking subsystems, said today it had completed a $28 million venture capital financing round, boosting its total raised since inception in 2001 to $68 million. The company indicated that proceeds will be used to ramp up volume manufacturing capabilities.

****

CacheLogic GETS $20M OF VENTURE FINANCING

CacheLogic, a Cambridge, England-based developer of network traffic technologies for telecom and Internet services providers, has closed on a $20 million venture capital financing round with investors including Amadeus Capital Partners, 3i, Pentech Ventures, and Cambridge Gateway Fund. The company will use proceeds to fund expanded sales and product development efforts.

****

PERSONNEL

****

SIPEX GENERAL COUNSEL

Sipex Corp., a Milpitas, Calif.-based developer of semiconductors for communications and networking infrastructure applications, has named Stuart Schneck general counsel. He became a consultant with the company in 2005 and before that was a corporate counsel for Microsoft Corp.'s WebTV unit.

****

MOTOROLA DIRECTOR

Schaumberg, Ill.-based Motorola, Inc., has announced the election of David Dorman to the company's board of directors. He was chief executive officer at the former AT&T Corp.

****

RADCOM FINANCE CHIEF

Radcom Ltd., an Israel-based provider of network test and monitoring equipment for service providers, has appointed Jonathan Burgin chief financial officer. He was CFO at XTL Biopharmaceuticals Ltd.

****

INSIGNIA SOLUTIONS CFO

Insignia Solutions, Inc., a Fremont, Calif.-based provider of mobile device management services, has named George Monk chief financial officer. He was CFO at Macrovision Corp.

****

TR DAILY (ISSN 1082-9350) is published weekdays, except for holidays, by:
Telecommunications Reports International, Inc., a division of Aspen Publishers, Inc.
1015 15th St., N.W., 10th Floor
Washington, DC 20005
Visit us on the World Wide Web at http://www.tr.com.

To contact the editorial department, call (202) 842-7373, fax (202)

289-7042, or e-mail jcurran@tr.com. To subscribe, call (800) 638-8437. For questions about a current subscription, call Customer Care at (800) 234-1660, fax (800) 901-9075, or e-mail customer.service@aspenpubl.com

If you are interested in having this publication sent to colleagues at your company, additional authorized recipients may be added to your subscription for a fee. Call Joseph Rohaly at (646) 728-3062,
or send an e-mail to jrohaly@aspenpublishers.com for more details. If you prefer not to receive TR DAILY, please reply to customer.service@aspenpubl.com.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

VERIZON MARYLAND INC., 1 East Pratt Street Baltimore, MD 21202 Baltimore City Plaintiff, vs. MONTGOMERY COUNTY, MARYLAND, Executive Office Building 101 Monroe Street Rockville, MD 20850 Montgomery County Defendant.	Civil No.:________________________

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Verizon Maryland Inc. ("Verizon") brings this action to challenge Defendant Montgomery County's (the "County") unlawful scheme governing applications to provide cable television service. The County's cable ordinance and regulations, on their face, violate the First Amendment to the United States Constitution, the federal Communications Act, and Maryland law. The County's application of its cable laws to Verizon's request for a cable franchise likewise is illegal under federal and state law. Verizon seeks relief to protect its

EXHIBIT D

constitutional right to free expression and to enjoin the further application of the County's invalid and preempted cable requirements.

2. As part of a national initiative begun in 2004, Verizon has launched a campaign to upgrade its communications facilities in Maryland by extending fiber-optic cables to customers' premises ("Fiber-to-the-Premises" or "FTTP"). This effort will permit the delivery of both higher-speed Internet services and cable television programming over the same physical network used to provide telephone service to local consumers. Verizon's upgraded network is known as "FiOS."

3. Verizon's cable television offering—known as "FiOS TV"—is a sorely needed new alternative to the traditional cable television services offered in the County, which suffer from steeply rising prices and poor service due to the lack of competition. Verizon's FiOS TV offering promises lower prices, a far richer array of programming choices, and better service than is offered by incumbent cable operators. In those localities where a Verizon affiliate has been permitted to provide cable service, customers have flocked to the FiOS service, and incumbent cable operators have been forced to slash prices by 28-42 percent. Consumers in Montgomery County stand to reap similar benefits from Verizon's entry into the local cable market.

4. Although state and federal law authorize Verizon to construct and upgrade its fiber-optic telecommunications network in Montgomery County, a local cable ordinance requires Verizon to obtain a cable franchise from the County—an authorization identical to a permit or license—before making FiOS TV available to local consumers. In May 2005, Verizon approached Montgomery County and asked local officials to grant it such a franchise. Over one year later, the County still has failed to approve Verizon's request to provide cable service. Instead of welcoming Verizon's desire to provide FiOS TV as a boon to local consumers,

Montgomery County has used its power to withhold a necessary franchise to force Verizon to accede to the County's demands for payments, in-kind contributions, and burdensome local regulatory authority—all of which are illegal under federal law. County officials have made clear that unless Verizon agrees to the County's unlawful terms—and then waives its right to challenge the illegality of many of them—the County will indefinitely delay further consideration of Verizon's request for a franchise. The County's position is made possible by a county cable ordinance that vests local officials with boundless authority over whether and on what terms to award cable franchises.

5. Montgomery County's recalcitrance in preventing Verizon from competing with the incumbent cable operator stands in sharp contrast to the actions of other local governments. To date, Verizon affiliates have obtained cable franchises to offer FiOS TV service in roughly 100 jurisdictions throughout the country. In the Washington, D.C. metropolitan area, Verizon affiliates have obtained or are obtaining a franchise everywhere they have sought one, with the sole exception of Montgomery County. In Maryland, Howard County, Bowie, and Laurel have all granted Verizon a franchise; Anne Arundel County is expected to grant a franchise in the next few weeks. Negotiations with Prince George's County are proceeding well. In northern Virginia, a Verizon affiliate has obtained franchises from Arlington County, Loudoun County, Fairfax County, Herndon, the City of Fairfax, Falls Church, the Marine Corps Base at Quantico, and Prince William County. The company expects to receive a franchise from the remaining community, Leesburg, in the next few weeks.

6. Montgomery County's cable franchise system is illegal in many respects. First, the County's cable ordinance, on its face, violates the First Amendment. By adding cable television to its menu of communications services, Verizon seeks to engage in a form of speech

protected by the First Amendment. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994); *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986). Montgomery County's cable ordinance operates as a prior restraint on this speech because it obligates entities like Verizon to obtain government approval before engaging in protected expression. The ordinance violates the First Amendment because it delegates to local authorities unbridled discretion to approve or withhold franchises at will, to charge any application-related fees they wish, to condition franchises on any demands they see fit, and to render franchise decisions on any timeline they choose.

7. Second, the County's cable ordinance, together with its binding regulations, on their face subject Verizon's telecommunications facilities and its telecommunications and Internet access services—not just its *cable* services—to the jurisdiction of County authorities, including the obligation to pay to the County a fee of 5% of the revenues derived from such services. These obligations directly violate federal and state laws.

8. Third, in applying its cable ordinance to Verizon, the County has violated federal law. The County has unreasonably delayed Verizon's ability to engage in protected speech and has unlawfully required Verizon to agree to provide a host of services and fees, and to submit to a thicket of regulations, as a condition of granting it a franchise.

9. Fourth, the County's actions violate the federal antitrust laws. The County has entered into an agreement with the incumbent cable monopolist, Comcast, that ensures that the County will impose on any new cable entrant the same onerous terms and conditions to which Comcast has agreed. Because the costs of such terms are an unreasonable barrier to entry for a new competitor that has not yet signed up a single customer, the County's agreement with Comcast is an unlawful agreement in restraint of trade.

protected by the First Amendment. *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 636 (1994); *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986). Montgomery County's cable ordinance operates as a prior restraint on this speech because it obligates entities like Verizon to obtain government approval before engaging in protected expression. The ordinance violates the First Amendment because it delegates to local authorities unbridled discretion to approve or withhold franchises at will, to charge any application-related fees they wish, to condition franchises on any demands they see fit, and to render franchise decisions on any timeline they choose.

7. Second, the County's cable ordinance, together with its binding regulations, on their face subject Verizon's telecommunications facilities and its telecommunications and Internet access services—not just its *cable* services—to the jurisdiction of County authorities, including the obligation to pay to the County a fee of 5% of the revenues derived from such services. These obligations directly violate federal and state laws.

8. Third, in applying its cable ordinance to Verizon, the County has violated federal law. The County has unreasonably delayed Verizon's ability to engage in protected speech and has unlawfully required Verizon to agree to provide a host of services and fees, and to submit to a thicket of regulations, as a condition of granting it a franchise.

9. Fourth, the County's actions violate the federal antitrust laws. The County has entered into an agreement with the incumbent cable monopolist, Comcast, that ensures that the County will impose on any new cable entrant the same onerous terms and conditions to which Comcast has agreed. Because the costs of such terms are an unreasonable barrier to entry for a new competitor that has not yet signed up a single customer, the County's agreement with Comcast is an unlawful agreement in restraint of trade.

10. Although this action does not challenge the County's authority to require Verizon to obtain a franchise before providing cable service, Verizon seeks relief from the County's laws and actions implementing that franchise requirement. In particular, to protect its rights under the First Amendment, federal statute, and Maryland law, Verizon seeks a declaration that the County's cable laws are illegal on their face and an order directing the parties to engage in good-faith negotiations over the terms of a franchise agreement, with the objective of reaching agreement within sixty days, or to return to the Court for further relief in the event no agreement is reached.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the parties and subject matter at issue in this complaint.

12. Verizon's federal claims arise under the Constitution and laws of the United States, including the Supremacy Clause, the First Amendment, the Fourteenth Amendment, the federal Communications Act (47 U.S.C. §§ 151 *et seq.*), the federal Sherman Act (15 U.S.C. §§ 1 *et seq.*), and 42 U.S.C. § 1983. Jurisdiction is proper under 28 U.S.C. § 1331, 28 U.S.C. § 1337, 28 U.S.C. § 1343, and 47 U.S.C. § 555. This Court may enter declaratory relief under 28 U.S.C. §§ 2201-02. This Court has supplemental jurisdiction over Verizon's state law claims pursuant to 28 U.S.C. § 1367(a).

13. Venue in this district is proper under 28 U.S.C. § 1391(b) because the defendant resides here and because a substantial part of the events giving rise to Verizon's claims arose in this judicial district. Venue in this district is also proper under 47 U.S.C. § 555(a)(1).

COUNT TWENTY-TWO
(As-Applied Challenge under Maryland Law to Requirement that Verizon Submit its Telecommunications Facilities to Regulation)

248. Verizon realleges and incorporates herein by reference all previous paragraphs.

249. Maryland law grants the state PSC exclusive jurisdiction to regulate the facilities used to provide telecommunications services, with a limited exception for local regulation of public rights-of-way.

250. The County's requirement that Verizon agree to subject its telecommunications facilities to regulation by the County violates and is preempted by state law because such regulation goes beyond the County's limited authority over its rights-of-way.

251. Verizon is entitled to a declaration stating that the County's requirement that Verizon agree to subject its telecommunications facilities to regulation by the County violates and is preempted by state law, as well as an injunction precluding the County from seeking to apply that requirement.

COUNT TWENTY-THREE
(As-applied Challenge to the County's Refusal to Award a Franchise, under 47 U.S.C. § 541(a)(1))

252. Verizon realleges and incorporates herein by reference all previous paragraphs.

253. The Cable Act provides that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1).

254. The County's actions violate and are preempted by federal law because the conditions that it has imposed on Verizon constitute an unreasonable refusal to award an additional competitive franchise.

255. Verizon is entitled to a declaration stating that the County's refusal to award a cable franchise to Verizon violates and is preempted by 47 U.S.C. § 541(a)(1) and an injunction precluding the County from continuing to refuse to award a franchise to Verizon.

COUNT TWENTY-FOUR
(Challenge to the County's Contract in Restraint of Trade, under 15 U.S.C. § 1)

256. Verizon realleges and incorporates herein by reference all previous paragraphs.

257. The Sherman Act prohibits certain "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies], in restraint of trade or commerce." 15 U.S.C. § 1.

258. Comcast and the County have combined to create an agreement that is embodied in Comcast's franchise agreement, including its "most favored nations" provision.

259. As interpreted and enforced by the County, the agreement sets an exorbitant minimum payment for obtaining a franchise to provide cable service to County residents.

260. The "most favored nations" provision has the purpose and effect of unreasonably restraining competition and imposing unreasonable barriers to entry in the relevant market.

261. The "most favored nations" provision has a substantial impact on interstate commerce in cable television programming, advertising, and other non-video communications services.

262. As a consequence of the County's interpretation and enforcement of the "most favored nations" provision in its agreement with Comcast, Comcast is able to charge supracompetitive prices for cable service, harming consumers.

263. As a consequence of the County's interpretation and enforcement of the "most favored nations" provision in its agreement with Comcast, Verizon has been prevented from

Y. A declaration that the County's agreement with Comcast unreasonably restrains competition and constitutes a conspiracy to maintain Comcast's monopoly in violation of 15 U.S.C. §§ 1 and 2;

Z. A preliminary and permanent injunction directing the parties to engage in good-faith negotiations over the terms of a franchise agreement, with the objective of reaching agreement within sixty days, and further providing that if the parties fail to reach agreement, Verizon is entitled to such additional relief as may be necessary at that time, up to and including an order directing the County to grant Verizon a franchise subject only to the minimum requirements of the federal Cable Act as determined by this Court.

AA. Costs and reasonable attorneys' fees as permitted by law; and

BB. Such other and further relief as the Court may find necessary and appropriate.

Respectfully submitted,

DATED: June 29, 2006

MILES & STOCKBRIDGE P.C.
JAMES P. GARLAND (#00182)
E-mail: jgarland@milesstockbridge.com
SCOTT R. HAIBER (#25947)
E-mail: shaiber@milesstockbridge.com
KIRSTEN M. ERIKSSON (#26884)
E-mail: keriksson@milesstockbridge.com
10 Light Street
Baltimore, MD 21202-1487
Telephone: (410) 385-3755
Facsimile: (410) 385-3700

By:__________/s/__________________________
JAMES P. GARLAND

VERIZON SERVICES GROUP INC.
JOHN P. FRANTZ
E-mail: john.frantz@verizon.com
One Verizon Way
VC 54N067
Basking Ridge, NJ 07929
Telephone: (908) 559-5731
Facsimile: (908) 204-3258

JOHN THORNE
E-mail: john.thorne@verizon.com
1515 North Courthouse Road
Suite 500
Arlington, VA 22201
Telephone: (703) 351-3900
Facsimile: (703) 351-3670

MUNGER, TOLLES & OLSON LLP
HENRY WEISSMANN
E-mail: Henry.Weissmann@mto.com
AIMEE FEINBERG
E-mail: Aimee.Feinberg@mto.com
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

Attorneys for Plaintiff Verizon Maryland Inc.