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March 17, 2006

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex parte meeting by Montgomery County in MB Docket No. 05-311

Dear Ms. Dortch:

On March 17, 2006, Alisoun Moore ("Chief Information Officer") and Amy Wilson ("Acting Cable Manager"), representatives of Montgomery County, Maryland, and their counsel Nicholas Miller and Gerard Lederer met with Commissioner Adelstein and the following FCC staff professionals:

- Rudy Brioche from Commissioner Adelstein's office;
- Heather Dixon from the Chairman's office;
- Jordan Goldstein of Commissioner Copps' office;
- Donna Gregg, Media Bureau Chief and the following members of the Media Bureau: Natalie Roiseman, John Norton, Brendan Murray, Mary Beth Murphy, Rosemary Harold, William Johnson.

The purpose of the meetings was to respond to comments made at the February 10, 2006 FCC Open meeting in Keller, Texas by Marilyn O'Connell, Verizon's Senior Vice President of Video Solutions.

The attached documents were shared with Commissioner Adelstein and the FCC staff in support of the county's assertion that Ms. O'Connell's claims that the County was inhibiting Verizon's roll out of its FIOS services were unfounded, misleading and incomplete and may be violative of Commission rules.

Please direct any questions to the undersigned.

Very truly yours,

MILLER & VAN EATON, P.L.L.C.

By Gerry Lederer

Gerard Lavery Lederer

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Contents

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Background

On February 10, 2006 the Federal Communications Commission held an open meeting in Keller, Texas. Marilyn O'Connell, Verizon's Senior Vice President of Video Solutions cited Montgomery County, as the only community cited by name, as inhibiting Verizon's roll out of its FIOS services in 2006.

A review of the audio recording of the hearing[1] reveals that following a presentation by Commissioner Michael Copps calling upon the record to be factual, with specific allegations of wrong doing by specific parties, Commissioner Adelstein posed the following questions to Verizon's O'Connell [*See* 2:01:10 of the transcript] –

> "…I need to know what it is that the FCC can do…We need to get the kind of information that Commissioner Copps referenced. We need specifics. We are hearing completely different messages on this panel just as we are in Washington… We hear on the one hand … that local franchises are barriers to deployment, then we hear from NATOA that there is (sic) no barriers, that it is in fact a red herring….So my question is, at least first and perhaps Ms O'Connell you could start… [2:01:57] "Are there specific impediments to your rolling out FIOS service in the year 2006? And where specifically are you having problems with local franchising authorities?"
>
> [2:02:18] O'Connell – "I'll give you a few examples [process has taken on average 18 months, best case scenario was in Beaumont, California where it was done in 6 months]…In Montgomery County, Maryland for example, they're asking us, and its just not a matter of assuming the current incumbents' agreement when we have no subscribers, it also a matter of agreeing to allow them to regulate us for broadband and also to regulate our entire fiber build out, Ahh, these are simply conditions that we cannot accept. Another area for example is in Florida, where we are negotiating with an LFA, again with no customers, they asked us not just to match the $6 million dollar [PEG] grant but to actually more than double that in order to have a franchise…."

A press account of the hearing provided the following account of the exchange:

> Commissioner Copps said the agency should act on franchising "if we find hard evidence" of problems, "but this record has to be specific."
>
> Commissioner Adelstein said, "We need the kind of information that Commissioner Copps talked about. We need specifics. Ms. O'Connell cited Montgomery County, Md., whose franchising authorities "want to regulate our entire fiber buildout," she said. She mentioned an unspecified locality in Florida

[1] http://www.fcc.gov/realaudio/mt021006.ram)

that wanted the company to double a grant, whose purpose she did not describe. "We can't accept uneconomic conditions," she said.[2]

A review of Verizon's three filings in the docket to date reveals that not once is Montgomery County referenced by name. However, the company has made the following references:

> For example, one county in Maryland is demanding that Verizon pay its expenses and attorneys fees, and has passed an ordinance to that effect. In the county's view, Verizon first should be required to pay the fees of attorneys retained by the county executive to assist in negotiating the agreement, and then, once the agreement is submitted to the county council for approval, would be required to pay the council's separate attorney fees.

Comments of Verizon on Video Franchising, *In the Matter of: Implementation of Section 621(a) of the Cable Communications Policy Act of 1983 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, filed at 60 (internal citations removed).

> 39. A major Maryland LFA is demanding that Verizon pay its expenses and attorneys fees, and it also has passed an ordinance to that effect. Verizon expects these fees to be excessive, in part because Verizon first would be required to pay the fees of attorneys retained by the county executive to assist in negotiating the agreement, and then, once the agreement is submitted to the county Council for approval, would be required to pay the Council's separate attorney fees.

Id., Attachment 1, at 16 (Declaration of Marilyn O'Connell).

> **Franchise Requirements for Non-Cable Facilities and Services**
> A large county in Maryland is demanding that Verizon obtain a franchise before it will issue any permits for the company to begin upgrading its facilities to fiber.

Verizon Ex Parte, MB Docket No. 05-311, filed March 9, 2006, Attachment 1, page *1.

> **Application and Acceptance Fees.** LFAs frequently demand excessive application or processing fees over and above the 5-percent franchise fees they are authorized to collect.
> **Examples.**

[2] Lynn Stanton, FRANCHISING ISSUES DOMINATE FCC VIDEO COMPETITION HEARING, TR Daily (February 10, 2006)

- Some LFAs have demanded that Verizon pay for the consultants or attorneys hired by the LFA. For example, one county in Maryland is demanding that Verizon pay its expenses and attorneys fees, and has passed an ordinance to that effect. The county would have Verizon pay for different attorney hired at each stage of the franchising process.

Id., Attachment 2, at 6.

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Summary of Meetings with Verizon Concerning a Cable Franchise

Date	Time (approx)	Participants	Summary
5/19/05	10:00 – 11:00 AM	J. Lawton, M. Ames, J. Pasternak, C. Royalty, A. Wilson, H. Dixon, E. Butts, J. Dillon, D. Heath	• Verizon requested initial meeting to discuss cable franchise. • Verizon briefed County on status of FTTP project • Status of construction in City of Rockville • Status of discussions with City of Gaithersburg • Discussed County franchising process • Agreed that Verizon would delay filing an application pending progress in the negotiations. • Verizon to send County copy of agreements used in other jurisdictions (2 weeks)
6/7/06			• Received Verizon's draft agreement
6/16/05	2:00 – 5:00	J. Lawton, M. Ames, J. Pasternak, C. Royalty, A. Wilson, A. Moore, N. Miller, B. Johnson, E. Butts, J. Dillon, D. Heath	• County stated that we would like to get a franchise in place quickly. That we want something fair to Verizon, Citizens, County and incumbent providers. County will send them draft agreement based on our current franchises. • Discussed substantial differences between Verizon's draft agreement- County's current agreements with Comcast and with RCN, what the County would need changed, what Verizon would agree to change.
6/23/05			• County sent County's proposed draft agreement to Verizon
7/15/05	2:00 – 5:00	J. Lawton, M. Ames, J. Pasternak, C. Royalty, A. Wilson, N. Miller, A. Moore, B. Johnson, E. Butts, J. Dillon	• Verizon Reviews specific areas of Franchise Agreement and asks questions of County re o Rate Regulations o Service Area – Initial Area, Density, Business Customers, Highrise Building o Customer Service o System Design Characteristics o Franchise Fees o PEG Channels
8/9/05			County sent Verzion a letter requesting next meeting be scheduled sooner than 9/7/05. Reiterated County's commitment to move expeditiously and with some "fine-tuning" to the County's draft agreement it would be possible to reach a final agreement relatively quickly.

Date	Time (approx)	Participants	Summary
9/7/05	2:00 – 5:00	J. Lawton, M. Ames, C. Royalty, A. Wilson, N. Miller, A. Moore, J. Pasternak, B. Johnson, E. Butts, J. Dillon	• Continued review of specific areas of County's draft agreement o Customer Service o Reports o PEGs
9/15/05	11:00 – 1:00	Conference Call: J. Lawton, M. Ames, C. Royalty, A. Wilson, N. Miller, B. Johnson, E. Butts, J. Dillon	• Continued review of specific areas of draft agreement, including a few possible compromises. o Follow-up to previous discussion on Customer Service o Follow-up to previous discussion on PEGs o Construction/Maintenance o System Facilities, Equipment and Services o Service Dates o Provision of Cable Service o Grant of Authority o Performance Guarantees o Definitions o Employment o Franchise Fees o Insurances • Verizon to provide revised proposal incorporating the areas agreed upon.
10/18/05			County sent Verizon a letter pointing out that at the end of the conference call on 9/15 Verizon stated that they would provide us a revised draft agreement and to-date we have not received it. We reiterated that the County remains committed to continuing negotiations and wants to expeditiously move an agreement forward.
11/3/05			County received Verizon's revised agreement

Date	Time (approx)	Participants	Summary
11/10/05	3:30 – 5:00	J. Lawton, C. Royalty, A. Wilson, N. Miller, M. Frischkorn, B. Johnson, E. Butts, J. Dillon	• Discussed Service Area identified in Exhibit C of Verizon's revised draft agreement • Identified Remaining Areas of Major Issues as o Consumer regulations o Cable Modem Regulations o Testing/Inspections/Safety o Definitions o Transfers o Gross Revenues o No discussion to date by Verizon of PEG or INet support. • Verizon to develop side by side comparison of our draft agreement against their draft agreement
1/12/06			County received side-by-side comparison
3/3/06			County contacted Verizon to schedule meeting
3/10/06			Verizon informed County of changes in negotiating team members. Lori Edwards replaces Ed Butts as lead. Scheduled meeting for 3/29/06.

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Verizon's Standard Franchise Terms: Eight Key Problems

	Issue	Verizon's Typical Franchise Agreement	Normal Montgomery County Provisions
1	Scope of County's Police Power Authority over Verizon's Facilities Under Cable Franchise	Definition of "Cable System": (*After reference to 47 U.S.C. § 522(7)*) "The Cable System shall be **limited to the optical spectrum wavelength(s)**, bandwidth or future technological capacity that is used for the transmission of Cable Services directly to Subscribers within the Franchise/Service Area and shall not include the tangible network facilities of a common carrier subject in whole or in part to Title II of the Communications Act or of an Information Services provider." (§ 1.5*) Requires LFA to agree that its regulatory authority under Title VI does not extend to "construction, installation, maintenance or operation." (§ 2.2)	Basically follows 47 U.S.C. § 522(7). § 1(g). Addresses **construction and maintenance** issues to **protect public safety and the public rights-of-way**. § 5; Code § 8A-17.
2	Three-Year Bailout	"Franchisee shall have the right to **terminate** this Franchise and all obligations hereunder within ninety (90) days after the end of **three (3) years** from the Effective Date of this Franchise, if at the end of such three (3) year period Franchisee does not then *in good faith believe* it has achieved a *commercially reasonable* level of Subscriber penetration on its Cable System." (§ 13.6†)	The franchisee has a continuing obligation to "make Cable Service available" during term of agreement. § 4(a).

	Issue	Verizon's Typical Franchise Agreement	Normal Montgomery County Provisions
3	Franchise Fee: Definition of "Gross Revenues"	**Excludes** (among other things): • charges for two-way cable television • advertising commissions • revenue *attributed by Verizon* to non-cable services • program launch fees • subscriber pass-through of PEG support costs (§ 1.20*)	Excludes bad debt and taxes imposed on subscribers or users. Includes advertising commissions, launch fees, PEG support. § 1(s).
	Franchise Fee: Audit Provision	Recovery of underpayments is limited to three years. (§ 7.3*)	Specific **audit** provisions to verify franchise fee payments. Franchisee pays audit costs if underpayment exceeds 5%. § 8(e); Code § 8A-12.
4	Police Powers	"In the event of a conflict between the Cable Law and this Agreement, this **Agreement shall prevail**." (§ 2.7.1*) Various **exemptions from local law** based on its "cable system" theory. (§ 14.11*, 14.10†) If any exercise of police powers (or any change in state law) materially alters the terms and conditions of the franchise, LFA must **modify the franchise** to "ameliorate the negative effects on the Franchisee"; if they cannot agree, Verizon can **terminate** the contract or demand **binding arbitration**. (§§ 2.8, 2.7.3*)	"All rights and privileges granted herein are subject to the **police powers** of the County and each Participating Municipality and their rights under applicable laws and regulations to exercise their governmental powers to their full extent and to regulate the Franchisee and the construction, operation and maintenance of the Franchisee's Cable System." § 2(f). "A franchisee is subject to and must comply with all applicable local, municipal, County, state and federal laws, ordinances, codes, rules, regulations, and orders including those pertaining to nondiscrimination." "A franchisee is expressly subject to the County's police power under Article 25A, Section 5(S) to the Annotated Code of Maryland." Code § 8A-6(a)-(b).

	Issue	Verizon's Typical Franchise Agreement	Normal Montgomery County Provisions
5	Build-Out	**Five years** for a small city (6.3 sq. mi.) - counting not from the grant of the franchise, but ***from the date Verizon chooses to begin offering service***. (§ 3.1.1*) Density limitation: **30 homes per mile**. (§ 3.1.1.1*) **Exceptions** include force majeure; *claimed* exclusive agreements with developments or buildings; inability of Verizon to gain access "under reasonable terms and conditions after good faith negotiation, *as determined by Franchisee*"; inability to provide service "for technical reasons." (§ 3.1.1)	Starpower's overbuild agreement allowed **four years** from the effective date of the franchise agreement to build out **initial service area**, and forbade redlining based on income. §§ 6(b), 6(h)(1). Density limitation: **15 homes per mile**. § 4(b)(1)(B). General force majeure provision. § 15(d).
6	Customer Service: Police Powers	Specified in agreement; **binding** "unless amended by written consent of the parties," in apparent contradiction to 47 C.F.R. § 76.309(b)(3)-(4). (§ 8)	Allows for **amendment** of "FCC regulations, or other applicable federal, state, or local law or regulation" regarding customer service. § 9(a); *see also* Code § 8A-14.

	Issue	Verizon's Typical Franchise Agreement	Normal Montgomery County Provisions
7	Indemnification	Verizon indemnifies the LFA only against claims arising from the "**installation, construction, operation, or maintenance of the Cable System**." (§ 10.2.1) [Note effect of Verizon's narrow definition of "Cable System" here.]	Indemnifies the County against claims "arising out of the construction, maintenance, or operation of its Cable System; copyright infringements or a failure by the Franchisee to secure consents from the owners, authorized distributors, or Franchisees of programs to be delivered by the Cable System . . .; the conduct of the Franchisee's business in the County; or in any way arising out of the **Franchisee's enjoyment or exercise of the Franchise**." § 13(g)(1); *see also* Code § 8A-10(c).
8	PEG Channel Interconnection	Verizon is not required to carry PEG programming at all if "the cost of interconnection would be unreasonable, interconnection is not technically feasible or would cause an unacceptable increase in Subscriber rates, or if an existing cable operator will not agree to reasonable terms and conditions of interconnection" (§ 6.1.4*)	PEG carriage obligation is not conditioned on interconnection. Franchise provides for connection from access origination sites to headend. § 7(a), (c). Franchisee shall design its system to make interconnection feasible, and immediately initiate negotiations for interconnection upon County's request. § 6(o)(1)-(2).

* Cable Franchise Agreement by and between City of Fairfax, Virginia and Verizon Virginia Inc. (Oct. 31, 2005)
† An Agreement Between the City of Beaumont, California and Verizon California, Inc. (Dec. 2, 2004)
(If neither * nor † is indicated, references are the same in both documents.)
County references are to cable franchise agreement with incumbent (Comcast), except where otherwise indicated.
Italicized passages within quotations indicate emphasis added.