

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

VERIZON MARYLAND, INC.,

Plaintiff

v.

MONTGOMERY COUNTY, MARYLAND,

Defendant

Civil No. 06-01663-MJG

**DECLARATION OF ALISOUN K. MOORE IN SUPPORT OF DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

I, Alisoun K. Moore, hereby declare:

1. I am the Chief Information Officer, in the Department of Technology Services of Montgomery County Maryland. I direct and manage the County's technology program, which includes the Cable Office.

2. All statements in this Declaration are based upon my personal knowledge.

Verizon Negotiations

3. In 2004, the County became aware that Verizon was interested in applying for franchises in various jurisdictions in the Washington metropolitan area. In a meeting held in August of 2004, representatives of Verizon (William Roberts, Paul Wood and Don Heath) met with the County Executive and described for him their new FTTP system and requested assistance with the County's permitting process to lay their fiber. I was at that meeting. They mentioned that the FTTP would carry

broadband internet (starting at 15 MB per second), voice services, and eventually video. They indicated that they understood they would need a cable franchise at the time they wanted to offer video services in the County. They had also mentioned they were doing the same in Anne Arundel County and Fairfax County. As a result of this meeting the County did assist Verizon in expediting the permitting process. After the August 2004 meeting, however, many months had passed and Verizon still had not approached the County to request a cable franchise. Consequently, in an effort to expedite Verizon's entry into the Montgomery County market, the County contacted Verizon to inquire about the company's plans for cables services in Spring of 2005. Jane Lawton, the Cable Administrator contacted Verizon to invite them in to meet with us that Spring. As a result of this contact, a meeting was held on May 19, 2005, between representatives of Verizon and the County, which I did not attend.

4. It was my understanding that all meetings were considered preliminary negotiations. At no time did Verizon ever file a formal application for a franchise under the County's application procedures, as set out in Chapter 8A of the County Code. All of our discussions presumed we would reach an agreement first, and then they would submit an application. Verizon never expressed any concern about this process in my presence, nor, to my knowledge, did any Verizon representative express any concern about the process at any meeting that I did not attend. William Roberts of Verizon did express his concern over the negotiations with the County Executive on March 24 of 2006 and the impasse the two parties seemed to be at on key issues specifically the regulation of the facility, and the Cable Modem regulations.

5. On or about 2 p.m. on June 16, 2005, representatives of the County, including myself, Jane Lawton, Jerry Pasternak, Clifford Royalty, Amy Wilson, Matthew Ames, and Nicholas Miller, of Miller & Van Eaton, met with representatives of Verizon, including Brian Johnson, Ed Butts, Josh

Dillon, and Don Heath. At the beginning of the meeting, Jerry Pasternak stated that the County would like to get a franchise in place quickly. The County's representatives also stated that the franchise should be fair to everyone -- Verizon, the County's citizens, the County, and incumbent providers. Jerry Pasternak offered to send Verizon a draft agreement based on the County's current cable franchises. Ed Butts responded that Verizon was using a single model agreement everywhere because they needed a "control mechanism." When Jerry Pasternak asked what was wrong with the County's existing franchises, Ed Butts responded that they were developed in a "different paradigm," and that the company was not willing to give the County regulatory authority over its FTTP facilities. Brian Johnson, Verizon's attorney, added that the definition of cable system and the construction standards in the County's existing agreements were "non-starters."

6. At the June 16 meeting, the parties also discussed the status of Verizon's network construction. Ed Butts stated that deployment was "pretty far along," but that they still needed "significant time" before they would be ready to provide service. At the end of the meeting the Verizon representatives asked the County for a proposal for funding to support the County's public, educational and government access activities. The next meeting was scheduled for June 29, 2005, but was later rescheduled at the request of Verizon for July 15; I did not attend the July 15 meeting.

7. I should emphasize that throughout these discussions, both at meetings I attended and at meetings I did not attend, it was always my belief that the two parties were engaged in negotiations, that is to say that they were discussing difficult issues in an effort to find compromises. At times, this process required them to make proposals that were neither "demands" of the other side, nor final statements regarding what the proposing party might accept. I think it was clear to all concerned that we were engaged in business negotiations, which would require give and take and creative thinking on both

sides. I am certain that the Verizon representatives shared this view. For example, in August 2005, the County received a letter from Brian Johnson, Verizon's counsel, regarding Verizon's request for confidential treatment of its draft franchise agreement. In this letter, Mr. Johnson stated, among other things, that "[d]uring negotiations parties must be free to propose terms and conditions which, in the context of the whole agreement and surrounding circumstances, are acceptable to that party but which would not be acceptable in the absence of terms and conditions of the whole agreement or under different surrounding circumstances. Public disclosure of franchise agreement drafts during negotiations with a franchise authority would have a chilling effect on the ability of Verizon to engage in creative negotiations (and conversely the ability of the franchise authority to receive information respecting such efforts), for fear that even discussing such matters conceptually in one community will be improperly raised in another community out of context or under non-comparable circumstances." Letter from Brian Johnson to Clifford Royalty dated August 11, 2005, attached as Exhibit A.

8. At no time during the negotiations did Verizon express any concerns about the County's franchise application procedures, and even the one provision that it did object to – the acceptance fee – was addressed as a negotiation point, rather than a legal dispute. Even in the last meeting, when it is now clear the company was laying the groundwork for this litigation, the company only raised legal objections to one provision, the 10% PEG set-aside.

9. I should also note that throughout these discussions Verizon consistently took a number of positions that raised serious legal concerns for the County. These included: (1) Verizon's insistence on modifying the definition of "cable system" in federal law in a way that would exclude all of their physical facilities located in the County's rights-of-way from regulation by the County; (2) Verizon's refusal to accept language subordinating the terms of the franchise agreement to the County's Cable

Law and the County's exercise of its police powers; (3) Verizon's refusal to be bound by future amendments to the Cable Law; (4) Verizon's insistence on language under which the County would indemnify the company, even though the County's charter prohibits any such indemnification; (5) Verizon's refusal to accept the County's consumer protection authority over broadband services. Although Verizon took a hard line on these and other issues, I assumed that in the end both sides would narrow the range of issues down to the critical ones and we would be able to reach an agreement.

10. Verizon's drafts also contained several apparently nonnegotiable provisions that raised public policy concerns for the County. For example, one provision gave the company the absolute right to stop providing cable service after three years. The County was concerned that after devoting considerable resources to entering into an agreement and promising the benefits of competition to citizens, County officials would later be questioned if the company exercised this right. Another provision gave the company the right to either terminate the agreement, or insist on binding arbitration, if any change in state law should have the effect of altering its rights under the agreement; the County would not have been entitled to the same rights.

11. On or about 2 p.m. on September 7, 2005, representatives of the County, including myself, Jerry Pasternak, Jane Lawton, Clifford Royalty, Amy Wilson, Nicholas Miller, and Matt Ames, met with Verizon representatives Brian Johnson, Ed Butts, and Josh Dillon and continued a detailed review of specific areas of the County's proposed draft agreement, primarily including customer service and reporting provisions. Ed Butts stated that Verizon hoped to prepare a revised draft agreement incorporating provisions from the County's draft agreement that Verizon was willing to accept. Verizon representatives then described their concerns with various provisions and the parties discussed alternatives. Many of the customer service and reporting provisions were apparently acceptable, as

Verizon did not raise specific concerns regarding them. Verizon also commented on the County's proposal for analog public, educational, and governmental ("PEG") access channels and a set-aside for digital channel capacity. Verizon agreed to match the current number of channels being provided by Comcast and RCN, but did not accept the proposal regarding digital capacity, saying that the County would "have to convince them" otherwise. The parties set September 15 as the date of the next negotiating session, to be held in the form of a conference call.

12. The next two meetings were held on September 15, 2005, and November 10, 2005; I did not attend either meeting.

13. At about this time, in September 2005, the Fairfax County, Virginia, Board of Supervisors granted Verizon a cable franchise. I was particularly interested to learn that in that agreement Verizon had agreed to a definition of "cable system" that was identical to that in federal law, and essentially the same as that in the Comcast and RCN franchise agreements. There were other terms of the Fairfax agreement that deviated from the terms that Verizon had proposed to my negotiating team. A copy of the Fairfax County franchise is attached as Exhibit B.

14. On October 18, 2005, the County sent Verizon a letter reminding Verizon that Verizon had agreed on the conference call on September 15, 2005, that it would provide the County a revised draft agreement which the County had not yet received. *See* Letter from Jane Lawton to Edward Butts dated October 17, 2005, attached hereto as Exhibit C. This letter also reiterated that the County remained committed to continuing negotiations and wanted to expeditiously move a cable franchise agreement forward.

15. The County received Verizon's draft agreement on November 3, 2005, which is attached as Exhibit D.

16. On March 3, 2006, not having heard from Verizon regarding a new meeting date, the County contacted Verizon to schedule another meeting.

17. On March 10, 2006, Verizon informed the County of changes in Verizon's negotiating team members, with Lori Edwards replacing Ed Butts as lead, among other changes. Another meeting was scheduled for March 29, 2006.

18. On March 24, 2006, representatives of Verizon, William Roberts and Paul Wood, met with the County Executive. Jerry Pasternak and I attended this meeting. Mr. Roberts asked the County Executive to "renew" the negotiations. I indicated to Mr. Roberts that the County was ready and willing to expedite the franchise but that my phone wasn't exactly ringing off the hook with calls from Verizon. I also said we could probably expedite the process if we could meet more often and that I was encouraged that he had decided to change his negotiating team. At this meeting, William Roberts threatened to sue the County if we made no progress on key issues but gave no particulars. When I asked "On what basis, you haven't filed an application," he responded "I know" but did not elaborate.

19. On March 29, 2006, representatives of the County including myself, Paul Folkers, Assistant Chief Administrative Officer, Jerry Pasternak, Clifford Royalty, Amy Wilson, and Nicholas Miller, met with representatives of Verizon, including Lori Edwards, Maria Silveira, Joan Elliston, Josh Dillon, and Brian Johnson. At this meeting or the next, I reminded Verizon that they were free to submit an application at any time. I clearly indicated that as a large corporation that was a business decision they would have to make. Lori Edwards stated that they would like to discuss the issues they had raised in their meeting with the County Executive, and that they wanted to work from their draft agreement. I responded that we wanted to discuss the issues, and that the County needed to be consistent with its agreements with the current incumbents. Maria Silveira responded that there was no

level playing field requirement. Jerry Pasternak stated that the County did not wish to gain additional jurisdiction over Verizon's Title II telephone facilities, but that the County felt that it had jurisdiction under Title VI. I noted that the County needed to treat Verizon as a cable franchisee, a fact that Verizon's presence also indicated, and the question was how to craft language to get past the facility-related issues, while addressing the build-out and consumer issues. Lori Edwards replied that the company was already regulated and did not want double regulation of its facilities. After much discussion, I offered that perhaps the best way to address the Title II versus Title VI issue was simply to remain silent on which law prevailed and address customer service and specific inspections as an addendum or side letter. With regard to Verizon's definition of cable system I also stated that a "lightwave" must travel on something in order to transmit video service and Verizon's reading of the law didn't make sense. The participants also discussed the County's cable modem customer service regulations, and the question of whether the franchise agreement would take precedence over the County's Cable Law and any amendments to the Cable Law. We did discuss the possibility of changing the Cable Law but Jerry Pasternak indicated that the elected officials would need to do this and it might be a sensitive issue before the upcoming elections. Jerry suggested that this issue should be considered outside of the cable franchise discussions. Jerry Pasternak, Jane Lawton, Clifford Royalty and I explained the franchise process once Verizon officially applied for a franchise.

20. On April 3, 2006, representatives of the County, including myself, Cliff Royalty, Amy Wilson, and Nicholas Miller, met with representatives of Verizon, including Lori Edwards, Joan Elleston, Maria Silveira and Brian Johnson. At that meeting the parties went through a summary of the salient issues as set forth in the side-by-side comparison dated March 13 2006, prepared by Miller & Van Eaton, attached hereto as Exhibit E. In some cases we were able to reach agreement; in other cases,

one party or both parties asked to defer discussion so they could consider a particular proposal in more depth, or offered to draft language for further consideration based on ideas that had been floated during the meeting. For example, in connection with the issue of reports and records, the County agreed to review the terms of the current franchises and offer an alternative. When Verizon objected to the obligation to provide copies of insurance policies, the County agreed to consider merely getting copies of insurance certificates. For its part, Verizon agreed to consider the County's language in a number of areas, such as provisions related to transfers of the franchise, and the enforcement provisions. There was continued discussion of many of the difficult issues that had been discussed previously, such as the definition of "cable system," whether local law would control over the terms of the agreement, and others. Verizon also informed the County of a new policy regarding reimbursement of negotiating expenses. Rather than requesting a cap, the company now refused to pay any of those costs. The next meeting was scheduled for April 21, and the parties agreed to use the Verizon draft of October 2005 as the basis for further discussions.

21. On April 14, 2006, Brian Johnson forwarded to Nicholas Miller a chart of "action items" for each party based on the discussions at the April 3, 2006, meeting. These action items included such things as which party was responsible for drafting proposed language. A copy of that chart is attached hereto as Exhibit F.

22. On April 21, 2006, representatives of the County, including myself, Jane Lawton, Clifford Royalty, Amy Wilson, Nicholas Miller, and Matthew Ames, met with representatives of Verizon, including Lori Edwards, Joan Elleston, Maria Silveira, and Brian Johnson. I began the meeting by stating that, after consultation with some members of the County Council, and to reiterate what Jerry Pasternak had stated at the last meeting, I wanted to let Verizon know that the County Council viewed

the cable modem regulations as an important consumer protection provision, so we would need to discuss that further, and that it would be best to view changes to those regulations through the political process and outside the franchise agreement. Maria Silveira then asked for the County's perspective on four issues: (1) the provision allowing Verizon to terminate service in the County after three years; (2) the digital set-aside; (3) the valuation of in-kind compensation provided by Comcast and RCN; and (4) free cable service to County government sites. Nick Miller responded to these points in order.

Regarding the early termination provision, he said that one remedy for allowing the company to withdraw from the County or the DC metro area might be to forfeit the performance bond. The issue with respect to the digital set-aside was that the County needs to have the full range of capability to provide non-commercial services on the system, so that if traditional cable channels begin to provide new types of content and use new technologies to reach the public the PEG channels should have the same capability. In response to this, Verizon stated they would only agree to provide channels, rather than capacity on their system. Regarding in-kind compensation, Mr. Miller stated that (1) in order to ensure that Verizon subscribers could have access to the PEG channels, the company would need to interconnect with the County at the County Technical Operations Center in the Council building; (2) with respect to free connections to County government sites and schools, the County's proposal was for the company to provide connections to any location in its service area on request; (3) with respect to the "up-stream" connections from the PEG access origination sites to the cable system headend provided by the incumbents, this really related to the interconnection issue; (4) with respect to the institutional network provided by Comcast, the 3% of gross revenue payment proposed by the County would cover that. This left the question of the free Internet service provided by RCN and the 100 free cable modems; I suggested that there might be different ways of reaching equivalence on this – one way might be to

provide free Wi-fi hot spots in the County. The Verizon representatives rejected this suggestion, saying that their system was not designed in a way to accommodate that. With respect to the free connections to government sites, the Verizon representatives asked for a list of locations, and Jane Lawton suggested that one approach might be to tie the number to growth in the market, or to a set number per year.

23. After this initial discussion we turned to a review of Verizon's chart dated April 14, 2006, and proposed language changes prepared by the County, and distributed at the meeting. The latter is attached as Exhibit G. We went all the way through that document, with the parties agreeing to consider various proposals or submit additional changes on many points. Among other things, the County agreed to consider Verizon's latest proposal regarding the definition of "cable system." The County clearly indicated, however, that it could not agree to indemnify Verizon, nor could the County approve a franchise agreement that would supersede the County's police powers or any County law yet to be passed. At the close of the meeting, Maria Silveira stated that (1) they would need to review the County's proposed language on various points; (2) they would continue drafting; (3) that Brian Johnson would be out of town and thus they would not be able to respond to the County for a few weeks; and (4) after they ran the latest discussions up the "corporate ladder" they would get back to the County on a date for the next meeting.


24. The County never heard back from Verizon regarding the scheduling of another meeting. In May or early June 2006, I contacted Lori Edwards via voice mail inquiring as to when we could meet again. Lori Edwards left me a voice mail indicating they were still discussing the matter internally and did not have a date yet. I forwarded the voice mail on to Jerry Pasternak, Jane Lawton and Paul Folkers.

25. The County desires to enter into an agreement with Verizon and is prepared to continue good faith negotiations at any time. Negotiations were never considered complete.

Permitting

26. As stated above, the County took steps to facilitate the granting of permits to Verizon in connection with the construction of the FTTP network well before the franchising process. The County has not rejected any Verizon construction permit requests on the basis that Verizon had not yet obtained a franchise, nor has the County impeded or interfered with the construction of the FTTP network in any way. In fact, during one period of about four to six months, the County was receiving frequent complaints from residents and competing cable companies regarding loss of cable service and other construction-related problems. Rather than deny permits or hold up construction, the County worked with Verizon and the Maryland Public Service Commission to resolve those problems. In one case a resident called me directly to complain that Verizon had left a hazard on his property. I called the Permitting Department and they visited the site and corrected the problem. The resident called me to thank me for the County's quick action and then proceeded to complain about Verizon.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Alisoun K. Moore

Dated: 7/19/6