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

DEFENDANT'S MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. PRELIMINARY STATEMENT

In May 2005, Verizon Maryland, Inc. ("Verizon"), entered into preliminary discussions with Montgomery County, Maryland (the "County"), over the terms of a cable television franchise. Verizon voluntarily elected to defer filing the application required by Chapter 8A of the Montgomery County Code (the "Cable Law"), and to this date has not actually applied for a franchise.

Verizon had earlier requested the County's cooperation in the construction of its new fiber-to-the-premises ("FTTP") network, which was designed to provide voice, broadband internet, and cable service. The County provided the requested assistance, yet Verizon did not approach the County for a cable franchise until prodded by the County, nine months later. Once talks got underway, the County made significant concessions, even though Verizon insisted on franchise terms that conflicted with federal law and failed to address many of the County's policy concerns. After intermittent discussions, in which the County repeatedly pushed for more frequent and productive talks, the company promised on April 21, 2006, to consider a number of new County proposals and to later contact the County to suggest a date for the next meeting. Verizon never returned to the table.

Verizon now requests a preliminary injunction against enforcement of selected provisions of sections 8A-8 through 8A-11 of the County's Cable Law, which regulates the franchising of cable television services in accordance with, and under the authority of, Title VI of the federal Communications Act, 47 U.S.C. §521, *et seq.* *See* Exhibit 1, attached, (highlighting the provisions that the Court is asked to declare unenforceable). The challenged provisions require any entity seeking a cable franchise to file a formal application, and include specific standards, steps, and deadlines for the review and processing of applications. Other challenged provisions (i) establish requirements for a

minimum of 54 video channels (although in its complaint Verizon promises over 400 channels), a minimum of 6 channels for public, educational and governmental ("PEG") use (although Verizon has agreed to provide more than six channels in other agreements, including in Fairfax County, Virginia), and free service to public buildings (also agreed to by Verizon elsewhere); (ii) authorize the County to require more than the minimum numbers of channels; and (iii) address the terms of insurance policies and performance bonds.

Verizon offers no argument at all that any of these provisions are invalid, except inasmuch as they allegedly infringe the company's free speech rights by affording the County "unfettered discretion." Nor does Verizon ever acknowledge that the real issue in the case has nothing to do with free speech, and everything to do with the company's refusal to acknowledge the County's rights to protect County consumers under federal law.

Moreover, Verizon's motion for a preliminary injunction does not simply seek that the County's Cable Law be stripped of its core franchising provisions pending final resolution of the issues raised in Verizon's complaint. To the contrary, Verizon actually asks the Court to take the extraordinary and immediate steps of rewriting the County's Cable Law to Verizon's liking, without regard to the requirements of the federal Cable Act, and ordering the County to participate in a 60-day court-supervised franchise negotiation. And, according to Verizon's rewritten version of the Cable Law, if the mediated negotiations should fail, the Court should then draft a franchise for Verizon and order the County to issue it. Such sweeping and extraordinary judicial action is not only unprecedented and unwarranted but would itself violate federal law.

The Court should deny the company's motion for the following reasons:

- Verizon's First Amendment claims are not ripe for adjudication, because Verizon never filed a formal application for a franchise under the Cable Law. Had Verizon filed an application when it first sought the County's help in expediting construction of the FTTP network, in August 2004, it would long ago have received a final decision, whether in the form of a franchise or a denial of its application.
- Insofar as the First Amendment applies, the County has not violated Verizon's First Amendment rights. Verizon has the lawful right to provide video service in the County on a common carrier basis.
- The four standards for a preliminary injunction are not met. First, Verizon will not succeed on the merits, because it relies on a novel and incorrect legal theory, and completely ignores the long-established analytical framework for cable television cases. The Courts of Appeals for the Second, Seventh and Ninth Circuits have all rejected requests for preliminary injunctions in connection with First Amendment challenges to franchise application requirements. Second, Verizon does not face irreparable harm, because it already has the right to provide video services without a cable franchise. Furthermore, the County has offered the company a franchise on the same terms as the two cable operators currently serving the County. Third, granting the requested relief would harm the County, because it would alter the *status quo* by forcing the County to grant a franchise without first determining whether the County's procedures and other requirements are lawful. Verizon seeks to use the power of the Court to reward its own intransigence. Fourth, the public interest weighs against the requested relief because (i) the public interest is broader than the financial benefits Verizon speculates would flow from an immediate grant of a franchise,

and (ii) the County's analysis has identified serious flaws with the analysis underlying Verizon's claimed benefits.

The relief requested by Verizon is unwarranted, contrary to law, and at best premature. This case presents complex legal and factual issues that cannot be fairly assessed on the record now before the Court. The County respectfully urges the Court to deny the motion.

II. STATEMENT OF FACTS

A. The Cable Act Both Presumes and Fetters the Exercise of Discretion by Local Franchising Authorities.

In the Cable Communications Policy Act of 1984, P.L. No. 98-549, 98 Stat. 2779 ("Cable Act"), Congress established the parameters for the regulation of the cable television industry. Rather than start from scratch, however, Congress built on the existing system of local franchising. The new regulatory scheme restricted local discretion by setting certain limits and standards, but also preserved local discretion within the scope of the new limitations. For example, the Cable Act caps the amount of the franchise fee paid by the cable operator at 5% of gross revenues, but allows the community to agree to a lower figure. 47 U.S.C. § 542. A franchise may require a cable operator to provide channels for public, educational or governmental ("PEG") use, but does not specify the number of channels. 47 U.S.C. § 531(a). The Cable Act specifically contemplates that local governments will review the financial, technical and legal qualifications of cable operators, as a condition of initial entry and renewal. 47 U.S.C. § 541(a)(4)(C), 47 U.S.C. § 546(c)(1)(C). Indeed, the Act permits, and the practice in the cable industry has been, for local governments to enter into bilateral negotiations with cable operators over these and many other subjects in order to reach agreements that balance the cable-related needs of the community with the needs of the operator. H.R. Rep. No. 98-934, *reprinted in* 1984 U.S.C.C.A.N.

4655, 4661 (1984) ("It is the Committee's intent 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."); *id.* at 4709 (noting “franchising authority may negotiate the renewal of a franchise”).

The Cable Act specifically requires franchising authorities to prevent economic redlining, 47 U.S.C. § 541(a)(3); directly authorizes establishment of build-out requirements, 47 U.S.C. §§ 552(a)(2), 544(b); and then provides that the requirements that are established must be “reasonable,” 47 U.S.C. § 541(a)(4), a provision that itself requires communities to exercise judgment in light of the circumstances. The Cable Act also establishes a three-year renewal process that directs the local government to determine the community’s cable-related needs and interests. 47 U.S.C. § 546.

In 1992 the Cable Act was amended to, among other things, encourage entry by competitive operators.[1] But even then Congress preserved and cabined local discretion, stating that a franchising authority may not “*unreasonably* refuse to award an additional competitive franchise.” 47 U.S.C. § 541(a)(1). Thus, while competitive franchises are favored, they are not mandated.

In short, the Act ties franchise requirements to local needs, and allows local governments “to require the cable operator[ ] to tailor the cable system to meet those needs.” 1984 U.S.C.C.A.N. 4655, 4661. The process by its terms involves judgment and discretion, limited by requirements for reasonableness.

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[1] Cable Television Consumer Protection and Competition Act of 1992, P.L. No. 102-385, 106 Stat. 1460 (1992).

B. Congress Specified Four Methods Through Which Common Carriers May Enter the Market to Provide Video Services.

In 1996, Congress rewrote the nation's telecommunications laws in order to "promote competition and reduce regulation." Preamble to P.L. No. 104-104, 110 Stat. 56 (1996) ("1996 Telecommunications Act"). Prior to the rewrite, federal law had generally drawn a bright line between Title VI cable systems (47 U.S.C. § 521, *et seq*.) and traditional Title II telephone systems (47 U.S.C. § 201, *et seq.*). Both use public rights-of-way and public property extensively. The former, however, are proprietary networks where most of the content is controlled and selected by the owner of the system. With respect to cable television networks, Congress thought it important to provide mechanisms that ensured that the owner of facilities using publicly-owned property could not essentially convert that public property solely to its own for-profit use. H.R. Rep. No. 98-934, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 (1984) (noting Congress' desire to "continue[ ] reliance on the local franchise process as the primary means of cable television regulation…" in order to "assure that cable systems are responsive to the needs and interests of the local communities they service").

Title II common carrier systems were regulated differently. These networks were designed as transportation networks, where the user essentially was in control of the communication; the network owner by definition had no authority to alter the content or (with certain limitations related to obscenity) even select the content of communications via the network.[2] Common carrier telephone networks have traditionally been protected from competition in the local exchange markets, and essentially were provided specified rates of return in exchange for providing nondiscriminatory carriage. *See National*

[2] The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(43).

Assoc. of Regulatory Util Comm'rs v. F.C.C., 533 F.2d 601, 608-610 (D.C. Cir. 1976) (discussing common carriage generally).

When Congress rewrote the communications laws in 1996 to address the coming convergence of communications technologies, it was forced to directly consider when and under what circumstances a common carrier like Verizon would be permitted to provide cable services to the public. Congress established that Verizon (and other incumbent local exchange carriers) could enter the market in one of four ways:

(a) via a radio-based system, in which case the company would not be subject to local franchising. 47 U.S.C. § 571(a)(1).

(b) by providing transmission of video programming on a common carrier basis, which also would not require the company to obtain a local franchise. 47 U.S.C. § 571(a)(2).

(c) by establishing an "open video system" (OVS), which would be subject to some, but not all, of the regulations and franchise obligations to which a cable operator is subject.[3]

(d) by electing to operate as a traditional cable operator, in which case the company would be subject to all of the federal requirements that apply to cable systems, and would be subject to the local franchising process.

See H. Conf. Rep. No. 104-458 at 171-72 (1996); *see also 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 Act of 1992*, 20 F.C.C.R. 18581 at ¶ 2 (Nov. 18, 2005). The common thread of these provisions is to provide well-defined options for entering the market, each of which would be subject to regulations that could protect local communities: the first via the rules governing use of broadcast spectrum, the second via Title II rules that prevent common carriers from abusing control over conduits, the third and fourth via a combination of federal and locally-established requirements.

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[3] As an OVS operator, Verizon could control the programming on up to 1/3 of the capacity of its system, but it would be required to make up to 2/3 of capacity available to third parties. In return, the law and the associated FCC regulations relieved OVS operators of certain obligations that apply to cable operators. However, OVS operators are required to match PEG channel and PEG support obligations of an incumbent operator. 47 U.S.C. § 573.

C. The County Welcomes Competition and Took Steps To Assist Verizon.

Montgomery County has a strong tradition of promoting competition in the delivery of cable television services and advanced communications services to residents of the County. The County is one of the few jurisdictions in the country served by two competing cable operators. In 1998, the County renewed the cable television franchise then held by a subsidiary of SBC Communications and now held by Comcast (the "Comcast Franchise"). This renewal process had commenced in May 1996, pursuant to federal law, which establishes a three-year window for franchise renewal proceedings. 47 U.S.C. § 546(a)(1). The renewal negotiations themselves lasted about six months, beginning in late 1997. Declaration of Jane Lawton in Support of the County's Opposition to Motion for Preliminary Injunction ("Lawton Decl."), attached hereto as Exhibit 2, at ¶ 5.

In May 1998, the County initiated discussions with Starpower Communications, LLC ("Starpower"), for a competitive cable franchise. The County Executive reached an agreement with Starpower in May 1999, and in August of that year the County Council approved the franchise. *Id.* at ¶6.

The franchise agreement negotiated with Starpower is very similar to the Comcast Franchise, although a number of changes were made to accommodate the different circumstances of the franchisee and changes in the County's needs. This franchise is now held by RCN Corp. ("RCN") and is referred to as the "RCN Franchise." Lawton Decl. at ¶ 8.

Both the Comcast Franchise and the RCN Franchise are expressly subject to the terms of Chapter 8A of the County Code (the "Cable Law") and the County's police powers, including any changes in local law enacted after the effective date of the agreements. See RCN Franchise, §§ 2(f), (g), (l)

(attached to Declaration of Edward Butts as Exhibit C;[4]) Comcast Franchise, §§ 2(a)(1), 2(b), 2(f), 2(h)(1)(attached to Declaration of Edward Butts as Exhibit B[5]). This is necessary to allow the County the flexibility to adapt the regulatory provisions of the Cable Law over the long, 15-year terms of the two franchises. It also accords with Maryland law, which provides that the County cannot contract away its police powers. *Attman/Glazer P.B. Co. v. Mayor and Aldermen of Annapolis*, 314 Md. 675, 684 (1989); *Chesapeake Outdoor Enterprises v. Mayor and City Council of Baltimore*, 89 Md. App. 54, 63 (Md. Ct. Spec. App. 1991).

In mid-2004, the County staff learned that Verizon had decided to construct a new fiber-to-the premises ("FTTP") network and was applying for cable franchises in the Washington area. Lawton Decl. at ¶ 11. Declaration of Alisoun K. Moore in Support of County's Opposition to Motion for Preliminary Injunction ("Moore Decl.") at ¶ 3. Verizon representatives met with the County Executive to request the County's cooperation in constructing the FTTP network in the County, but did not ask to start cable franchise negotiations. Moore Decl. at ¶ 3. The County agreed to help expedite Verizon's construction. Months later Verizon still had not requested a franchise, so the County contacted Verizon. Lawton Decl. at ¶ 13; Moore Decl. at ¶ 3. The parties finally met on May 19, 2005, to discuss a cable franchise.

D. The County's Cable Law Complies With the Federal Cable Act.

The County has adopted a comprehensive franchise application procedure designed to conform to the requirements of 47 U.S.C. § 541 and the other provisions of the Cable Act. Sections 8A-8 and 9

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[4]Also available at http://www.montgomerycountymd.gov/mcgtmpl.asp?url=/content/cableOffice/starpower_ccapprv080399_franchise.asp)

[5]Also available at http://www.montgomerycountymd.gov/mcgtmpl.asp?url=/content/cableOffice/June98franchise.asp)

of the County's Cable Law establish a clear process and standards for considering franchise applications. If the County rejects an application in accordance with these procedures, an applicant has the right to relief in state or federal court. 47 U.S.C. §§ 541(a)(1), 555.

Section 8A-8(c) of the County Code provides that a person seeking a cable television franchise may initiate the franchising process by filing an application. Within 10 business days of receiving the application, the County Executive must determine whether to accept or reject the application. If the application is rejected, the County Executive must specify the additional information that is required. Once an application is accepted, the Executive must make the application available to the public, and forward it to the County's Cable Communications Advisory Committee for review and comment. County Code § 8A-8(i).

The County Executive must conduct a public hearing on an application for a new franchise within 90 days after the Executive accepts the complete application for filing. County Code § 8A-9(d). The Executive must consider the application, the written and oral testimony and other material presented at the hearing, and any other information relevant to the application. County Code § 8A-9(g). Within 120 days of accepting an application for a new overbuild franchise, the County Executive must propose to grant or deny the franchise application and must notify the applicant of the proposed action. County Code § 8A-9(g). Sections 8A-9(e) and (f) of the County Code set out the criteria that the County must consider in evaluating an application for an overbuild franchise. The County must consider: (1) the applicant's character; (2) the applicant's technical, financial, and legal qualifications to construct and operate the proposed system; (3) the nature of the proposed facilities, equipment, and services; (4) the applicant's record of cable performance in other communities, if any; (5) whether the proposal will serve the public interest; (6) the beneficial effects of competition, including any reduced rates to consumers,

higher technical standards, or more varied programming offerings; and (7) the effect of the overbuild on the public.

If the County Executive proposes to grant a franchise application, the County Executive and the applicant must agree on the terms of a franchise agreement within 60 days after the applicant receives the notice of the proposed grant. The Executive and the applicant may agree to extend the initial negotiating period for up to 60 more days. If the parties do not reach agreement by the end of the negotiating period, including any extension, the notice of proposed grant is void. County Code § 8A-9(h).

If the County Executive and the applicant agree on a proposed overbuild franchise agreement, the County Executive must first advertise the terms of the agreement in accordance with State law, and must then submit the proposed agreement to the Council for approval within 10 days after the end of the advertising period. County Code § 8A-9(i), (j).

When the Executive submits a proposed franchise agreement to the Council for approval, the Council may: (A) grant the franchise; (B) grant the franchise with conditions; (C) remand the franchise agreement to the Executive with specific recommendations to renegotiate any provision of the proposed franchise agreement and submit a revised agreement to the Council for approval; or (D) deny the application for a franchise. County Code § 8A-9(k)(1).

If the Executive proposes to deny the franchise application or cannot reach agreement with the applicant on the terms of an agreement within the time specified in Section 8A-9(h), the Executive immediately must recommend to the Council that the Council deny the application and explain the reasons for the recommendation. County Code § 8A-9(k)(2). The Council must then (A) deny the application; (B) remand the franchise application to the Executive with recommendations or instructions

for further action; or (C) grant the franchise with any conditions that the Council determines are necessary to protect and promote the public interest. County Code § 8A-(9)(k)(2). If the County Council does not act within 60 days, the franchise will be deemed approved, although the Council may extend the deadline for a "new franchise for an overbuild" for up to, but no more than, an additional 60 days. County Code § 8A-29(d).

Although this application process protects the interests of both the applicant and the public, it has the drawback of setting relatively tight time frames, given the number and complexity of the issues typically addressed in the negotiations. It also presumes the public release of application materials and the conduct of a public hearing early in the process, which may heighten the expectations of the public prematurely. Consequently, at the County's initial meeting with Verizon the parties agreed, after a brief discussion, that Verizon would not file a formal application until they had agreed on the terms of a franchise agreement. The parties assumed that they would reach an agreement. At no time during that meeting or subsequently did the County direct Verizon not to file a formal application, nor did the company object to this procedure. In fact, in March or April of 2006, the County reminded Verizon that it could file an application at any time. To this date, Verizon has not filed an application in accordance with the Cable Law. Moore Decl. at ¶ 4.

E. The County Entered Into Good Faith Negotiations with Verizon, Only To Find that Verizon Was Unwilling To Compromise on Key Issues, and Insisted on Franchise Terms that Are Contrary to Federal Law.

Because there are already two cable operators in the County, operating under largely identical agreements, the County began discussions with the hope of quickly reaching agreement based on the existing franchises. It quickly became apparent that this was a vain hope. On June 7, 2006, Verizon submitted a draft agreement based on an entirely different model, and at the June 16, 2005, meeting the

Verizon representatives insisted on using that model as the basis for negotiations. At that meeting, Verizon's counsel also stated that the definition of "cable system" in the existing agreements (which is substantially identical to that in federal law) and the construction standards in the existing agreements were "non-starters." Moore Decl. at ¶ 5. In an effort to present Verizon with an alternative more acceptable to the County, on June 23, 2005, the County's counsel sent Verizon a proposed agreement based on the existing franchises. Lawton Decl. at ¶ 16. Verizon representatives responded to some of the key substantive issues raised by that draft at a meeting on July 15, 2005, but they never seriously entertained using any document but their own. At the September 7, 2005, meeting, Ed Butts stated that Verizon hoped to prepare a revised draft accepting what they could from the County's draft. Moore Decl. at ¶ 11. Verizon submitted a somewhat revised document, dated October 31, 2005, on November 3, 2005 (the "October 2005 Draft"). Moore Decl. at ¶ 15. Eventually, on April 3, 2006, the County agreed to use Verizon's draft as a basis for further discussions. Moore Decl. at ¶ 20. This was a major concession by the County, since it all but ensured that there would be significant differences between any Verizon agreement and the existing franchises.

The two Verizon drafts contained a number of provisions that the County found extremely objectionable as one-sided and contrary to law. Verizon was determined to prevent the County from asserting any control over the company's physical facilities used to transport cable television services, even though the facilities were located on County property. Not only did the company object to any provisions dealing with construction standards or inspection of cable system facilities, but the company's definition of "cable system" deviated from federal law so substantially that it raised

questions about the County's authority to issue a franchise. In addition to language based on the federal definition,[6] Verizon's definition contained the following sentence:

> 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 Service provider.[7]

This language would appear to limit the scope of any County franchise to certain optical spectrum, rather than to physical facilities, and thus would conflict with applicable laws. Verizon refused to remove this unlawful language, even though in its agreement with Fairfax County, Virginia, it had done so. *See* Moore Decl. at ¶ 13.

One of the County's key concerns was the company's schedule for constructing its new network throughout the County. The County has an obligation under federal law to ensure that "access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3). In addition, the County

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[6] [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include

> (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations;
> (B) a facility that serves subscribers without using any public right-of-way;
> (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541 (c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;
> (D) an open video system that complies with section 573 of this title; or
> (E) any facilities of any electric utility used solely for operating its electric utility system;

47 U.S.C. § 522 (7).

[7] Verizon June 7, 2005, draft, Section 1.6, attached to Lawton Decl. as Exhibit B. The October 2005 Draft modified this language slightly.

has the authority to require a construction schedule, and desired to ensure that all residents of the County would have access to the new network. 47 U.S.C. § 552(a)(2). As far as Verizon was concerned, however, this issue was non-negotiable – the County would have to take whatever the company offered, and even this was uncertain. The company presented several proposals, as late as the final negotiating session, but the County never received a definitive proposal.[8] It was clear, however, that the company was not prepared to agree to serve the entire County; according to the October 2005 Draft the company would only agree to serve about 80% of the physical area of the County, and that would take up to 10 years. *See* Exhibit C to October 2005 Draft, attached as Exhibit D to Moore Decl.

Verizon consistently took a number of other positions that raised serious legal concerns for the County. These included: (1) Verizon's refusal to accept language subordinating the terms of the franchise agreement to the County's Cable Law, and the exercise of the County's police powers, thus rendering large portions of the Cable Law unenforceable against the company; (2) Verizon's refusal to be bound by future amendments to the Cable Law; (3) Verizon's insistence on language under which the County would indemnify the company, even though the County's charter prohibits any such indemnification; and (4) Verizon's desire to modify the County's cable customer service requirements.

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. October 2005 Draft, § 13.6. 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.

[8] The County has no record of that final plan, because Verizon distributed a confidential map at the last meeting, which it then took back.

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. October 2005 Draft, § 2.7.3.

F. The County Has Repeatedly Expressed Its Desire To Reach an Agreement, and To Continue Negotiations; Any Delays in the Process Are Primarily the Responsibility of Verizon.

Not only did the County initiate contacts with Verizon, but County staff repeatedly pressed Verizon to meet. After the initial series of meetings in the summer of 2005, Verizon was to contact the County to schedule another meeting, and after some delay proposed a date over a month away. The County sent Verizon a letter suggesting that the parties pick an earlier date, adding "[w]e do not want to lose momentum and believe that we must meet more frequently to reach an agreement in a timely manner." Letter from Jane Lawton to Edward Butts, dated August 9, 2005, attached to Lawton Decl. as Exhibit D.

The parties then met twice in September, and waited until November while Verizon prepared a new draft. While this draft made some changes, it did not make any significant concessions to the County's principal concerns. After November, the parties did not meet again until March 29, 2006; this meeting was only scheduled after the County contacted Verizon to request a meeting earlier that month. During the last three meetings, March 29, April 3, and April 21, the County made significant concessions regarding many of the secondary issues. The County staff was under the impression that although the hardest issues remained to be addressed, progress was being made. At the final meeting on April 21, a Verizon attorney, Maria Silveira, stated that (1) Verizon was not willing to commit to any particular franchise terms; (2) Verizon would need to review the County's proposed language on various points; (3) Verizon would continue drafting; and (4) Verizon would get back to the County on a date for

the next meeting. When this did not occur, representatives from the County subsequently called Lori Edwards to request responses and to schedule the next meeting date, and were told that Verizon was still discussing the matter internally. Moore Decl. at ¶ 24; Lawton Decl. at ¶ 29.

The next communication that the County received from Verizon was service of the Complaint.

III. THIS CASE IS ABOUT VERIZON'S REFUSAL TO COMPROMISE, NOT THE FIRST AMENDMENT.

Verizon requests a preliminary injunction that would have the Court enjoin enforcement of selected provisions of sections 8A-8 through 8A-11 of the Cable Law, on the theory that those provisions violate the First Amendment. This case, however, has nothing to do with Verizon's free speech rights, and everything to do with its refusal to compromise on the terms of a franchise. The central issue in the negotiations was always the company's refusal to accept any provision, either in a franchise agreement or the Cable Law, under which the County might have exercised any authority over the company's FTTP network facilities, notwithstanding the County's well-established authority over the facilities of cable operators. Verizon's intransigence on this key issue made it very difficult for the parties to make any progress, and the County believes that it is ultimately the true reason for this lawsuit.

At no time during the negotiations did Verizon express any concerns about the County's franchise application procedures, other than the acceptance fee, and even those provisions to which it did object were addressed as negotiation points, rather than legal disputes. 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 capacity set-aside, which is not at issue in this motion.

Consequently, the County believes this motion to be no more than a sham, designed to enlist the power of the Court in aid of Verizon's unreasonable demands. This belief is reinforced by the obvious weakness of Verizon's First Amendment claims, which we address below.

IV. VERIZON IS NOT BEING PREVENTED FROM SPEAKING; IT IS SEEKING TO AVOID FEDERAL LAWS IT DOES NOT CHALLENGE.

A. Verizon Is Not Being Prevented from Speaking.

Nothing in the Cable Law prevents Verizon from speaking. Congress has provided two specific methods by which Verizon may enter the market without obtaining a local franchise. 47 U.S.C. § 571(a)(1), (2). From the allegations in the Complaint, which ask this court to treat the FTTP network as simply an upgrade of the company's common carrier telephone network, it is clear that the company is in a position to enter the market via the second option. The company has already done extensive construction to install the FTTP network in the County, and 47 U.S.C. § 571(a)(2) provides:

> COMMON CARRIAGE OF VIDEO TRAFFIC -- To the extent that a common carrier is providing transmission of video programming on a common carrier basis, such carrier shall be subject to the requirements of Title II of this chapter and section 572 of this title, but shall not otherwise be subject to the requirements of this subchapter. This paragraph shall not affect the treatment under section 522(7)(C) of this title of a facility of a common carrier as a cable system.

Thus, Verizon can speak, freely and immediately, without any concerns about the exercise of discretion or regulatory intrusions by the County. Were Verizon to offer video service under 47 U.S.C. § 571(a)(2), the company would only be subject to Title II of the Communications Act and the traditional rules of common carriage. The company would have to afford third parties the right to transmit video programming to customers on nondiscriminatory terms and conditions, but it would also be free to offer video programming itself. Verizon could sell its customers the same video programming services it desires to offer to County residents under the authority of a franchise, and the County would have no basis to object. Presumably Verizon would need to publish a tariff setting the terms on which third parties would be permitted to transmit their programming, but this would not involve the County in any way.

In sum, the County's exercise of its cable franchising authority under federal and state law does not stop Verizon from speaking. The predicate for the preliminary injunction motion is thus missing - *Verizon can enter the market whenever it chooses.*

B. Verizon Cannot Use the First Amendment To Upset the Careful Balance Struck by Congress.

Verizon is not seeking the right to speak, but rather the right to convert its common carrier network into a proprietary cable network, without being subject to the protections and processes Congress established to protect against abuses of market power through Title VI and the local franchising process. Verizon has a choice of business models and regulatory schemes for providing video service: it need only make the choice, but it must choose. Instead, Verizon seeks to evade the law – if Verizon is granted the relief it requests, it will have been given the benefits of providing video service through a proprietary network without submitting to the framework Congress established.

Verizon challenges numerous provisions of the Cable Law that directly reflect Congressional policy. As discussed above, however, the Cable Act specifically contemplates that local governments will review the financial, technical and legal qualifications of cable operators, 47 U.S.C. § 541(a)(4)(B), 47 U.S.C. § 546(c)(1)(C); establish PEG channel requirements, 47 U.S.C. § 541(a)(4)(B); and establish build-out requirements, 47 U.S.C. § 541(a)(3), 47 U.S.C. §§ 552(a)(2), 544(b), among others. Thus Verizon objects to the County's exercise of discretion with respect to matters that Congress specifically left to the County's discretion. The franchise process by its terms involves judgment and discretion, limited by requirements for reasonableness. Montgomery County acknowledges that limit on its discretion, and believes the limit is clear when its local Code is read (as it must be) in conjunction with the Cable Act. By contrast, Verizon seeks to establish, through its vaguely worded preliminary injunction order, a process in which the County has and may exercise no discretion.

However, unless the Cable Act itself is unconstitutional (which Verizon does not contend), it cannot be a violation of the First Amendment for the County to retain discretion *consistent with* the Cable Act. In the Complaint, of course, Verizon argues that the County is acting inconsistent with the Cable Act. The County strongly disagrees, but for purposes of this motion, the debate is academic: the preliminary injunction motion is not based on alleged violations of the Cable Act. For purposes of this motion, the Court must assume that the County's ordinance *is* consistent with the Act. That is enough to defeat the challenge. Any other result, far from preserving the *status quo*, would effectively require this Court to rewrite the Cable Act and the 1996 Telecommunications Act, and upset the careful balance struck by the four entry methods prescribed by Congress.

V. VERIZON FAILS TO SATISFY THE STANDARDS FOR A PRELIMINARY INJUNCTION.

A. Verizon Will Not Succeed on the Merits.

Perhaps the most remarkable thing about Verizon's motion for preliminary injunction is the company's near-total failure to cite – much less distinguish - the numerous and clearly relevant cases dealing with First Amendment challenges to cable franchising procedures and requirements, as well as decisions from three courts of appeals upholding district court decisions that had refused to grant preliminary injunctions challenging local franchising procedures on First Amendment grounds. Verizon's case rests almost entirely on *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). According to Verizon, *Lakewood* stands for the proposition that any "licensing scheme" may be challenged by an entity that has never applied for a license, if the scheme confers "unfettered discretion" on the community. *Lakewood* is critical to Verizon's position because, under normal Article III rules, Verizon could not bring a facial challenge to the County's ordinance; its claim would not be ripe because it has never applied for a franchise in Montgomery County.

The cable television cases, however, adopt an entirely different standard. They also illustrate why *Lakewood* does not apply in cases involving cable franchising, and cannot be used as a vehicle to attack any reservation of discretion outside of an as-applied challenge. Furthermore, Verizon's claims of "unfettered discretion" ignore the actual terms and the context of the County's franchising ordinance, which is designed to conform to the unchallenged standards for franchising established by the Cable Act.

1. Courts Have Consistently Refused To Preliminarily Enjoin Cable Franchise Ordinances.

In *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), the Seventh Circuit affirmed a district court decision refusing to grant a preliminary injunction based on a facial challenge to a cable franchising process similar to the process at issue here.[9] *Id*. at 129. Like Verizon, the cable operator did not file an application, and alleged that the application process violated the First Amendment on its face. The court noted that, although the First Amendment does apply to the medium of cable television, “the nature and degree of protection . . . depends on the medium’s individual characteristics.” *Id.*, 536 F.Supp. at 379. Based on the characteristics of the cable medium (and the rights sought through the franchise process), the court concluded that a preliminary injunction was not justified, even though it recognized that the city’s application process provided the sort of discretion that would raise constitutional questions in the context of permits to use a public park. Judge Posner wrote:

[9] The actual ordinance in that case is appended to the District Court’s opinion, 536 F.Supp. 371, 380 (S.D. Ind. 1982). It provided for filing of an application, public hearings, evaluation by the Board of Public Works, acceptance or rejection of applications by the Board, and final action on proposed agreements by the City Council. The application process is thus similar in structure to the County's. In other respects, the County’s Cable Law is less objectionable than the *Omega* ordinance; the Cable Law contains more definite standards for reviewing applications.

> it is not obvious that the award of cable television franchises can be managed with the precision and simplicity appropriate to granting access to public parks for speechmaking. Maybe chapter 8½ is the best-possible – or at least a constitutionally adequate – accommodation between regulatory feasibility and the policy of the First Amendment. That is a matter to be explored at trial.

Id. at 128-129.

The Second Circuit and the Ninth Circuit also have upheld district court decisions refusing to grant preliminary injunctions involving First Amendment challenges to local franchising procedures. *Liberty Cable Co. v. City of New York*, 60 F.3d 961 (2d Cir. 1995); *Pacific West Cable Co. v. City of Sacramento*, 798 F.2d 353 (9th Cir. 1986).

In *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), the Supreme Court specifically recognized that cable is different from other media, and stated that it was "unwilling to decide the legal questions posed by the parties [including a First Amendment claim] without a more thoroughly developed record of proceedings . . . ." *Id.* at 494. On remand, the Ninth Circuit refused to adjudicate the First Amendment challenges to the City's franchising requirements until the City had been given the opportunity to follow its procedures. *Preferred Comm'ns v. City of Los Angeles*, 13 F.3d. 1327, 1332-33 (9th Cir. 1994).

Contrary to Verizon, then, this is an area where the courts have recognized that the mere maintenance of discretion is not fatal. Verizon's "likelihood of success" depends on precisely the opposite - it requires this court to reject the Posner analysis and find that any maintenance of discretion is unlawful.[10]

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[10] Courts have consistently recognized that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 386 (1969). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("[e]ach medium of expression…must be assessed for First Amendment purposes by standards suited to it…"); *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1448 (D.C. Cir. 1985) (it is a "truism" that

2. Courts Properly Dismiss Facial Challenges to Cable Franchise Ordinances on Ripeness Grounds.

Verizon is not likely to prevail on its complaint because courts have consistently dismissed facial First Amendment challenges to franchising requirements on ripeness grounds in the absence of a franchise application. Verizon's claims are not ripe because Verizon has not filed an application.

While it is "true that our review of a suit's ripeness is at its most permissive in cases concerning putative violations of the First Amendment … that requirement may not be ignored." *National Advertising Co. v. City of Miami*, 402 F.3d. 1335, 1339 (11th Cir. 2005). That is particularly so here, where the facts show that the process itself -- which is all that Verizon is challenging -- does not present a bar to Verizon speaking, much less present a risk of a chilling effect. As noted above, Verizon could offer service on a common carrier basis. The facts also show that Verizon, through negotiations, was offered a franchise on the same terms and conditions as its cable competitors. In these circumstances, there is no reason to entertain a facial challenge to the process as opposed to an as-applied challenge based upon the County's application of that process. Article III cautions against hearing the complaint as a general matter:

> As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field.

United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89 (1947). *See also Renne v. Geary*, 501 U.S. 312, 324 (1991); *Woodall v. Reno*, 47 F.3d 656, 658 (4th Cir. 1995) (action should be

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different media require different First Amendment analysis). Ignoring this principle, Verizon relies entirely on cases dealing with forms of communication other than cable television, citing only cases that involved First Amendment challenges to assembly and parade ordinances (*Cox; Forsyth County; Shuttlesworth*), an adult bookstore zoning ordinance (11126 Baltimore), and a permitting ordinance to place newsracks on public property (*Lakewood,* discussed *infra*).

deferred until a “clean-cut and concrete” controversy exists); *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 198 (4th Cir. 1997) (dismissing First Amendment challenge because "no actual or threatened harm exists").

In the context of cable franchising, where operators seek long-term rights to occupy public property to the exclusion of others, this caution has special force. The Cable Act recognizes the governmental interest in establishing terms and conditions that ensure a cable system is responsive to the needs and interests of the community. *See, e.g.,* 47 U.S.C. § 546(c)(1)(D). Courts have recognized that the complexities of the process require a carefully defined challenge to specific franchise requirements, something missing here, in light of Verizon's decision not to seek a franchise.

Beach Communications, Inc. v. Federal Communications Commission, 959 F.2d 975 (D.C. Cir. 1992), is instructive. In that case, the Court of Appeals dismissed on ripeness grounds a First Amendment challenge to an FCC rule that defined the term "cable system" in a way that required entities that did not occupy public rights-of-way to obtain local franchises to provide video service to certain apartment buildings. The court found that any challenge to the franchising requirement should be on an "as applied" basis, *id*. at 985. The court acknowledged that the franchise requirement “put [petitioner] to the choice between incurring substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for non-compliance,” but held that “[s]ince the First Amendment issue is wholly unfit for judicial decision, petitioners’ hardship is not so substantial as to require immediate decision. On balance, their First Amendment challenge is unripe.” *Id*.

Similarly, in *City Communications, Inc. v. City of Detroit*, 685 F.Supp. 160 (E.D.Mich. 1988), the unsuccessful bidder for a cable franchise filed a complaint based on the City’s failure to grant a second franchise, including a claim under the First Amendment. The Court refused to “consider the

merits of the First Amendment argument" because "a 'ripe' justiciable controversy does not exist, or, in the alternative, . . . presently lacks standing." *Id*. at 163. The court in *City Communications* found the ripeness requirement, not in 47 U.S.C. § 541(a)(1), but in the Supreme Court's First Amendment jurisprudence, relying in particular upon the *Preferred* decision, discussed above.

These First Amendment decisions requiring as-applied challenges are consistent with the Cable Act itself. The 25 counts of Verizon's complaint can actually be reduced to 24 allegations in support of the claim set forth as Count Twenty-Three -- that the County has violated 47 U.S.C. §541(a)(1). Section 541(a)(1) provides that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." However, Section 541 goes on to provide that court challenges to local franchising decisions should occur only after an application has been filed and a decision made on the application:

> Any applicant whose application for a second franchise has been denied by a *final decision* of the franchising authority may appeal such *final decision* pursuant to the provisions of section 555 of this title for failure to comply with this subsection.

47 U.S.C. §541(a)(1) (emphasis added). Under the Cable Act, then, a complaint is not ripe until an application is submitted and denied. *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 10 (1st Cir. 2002); *see also I-Star Communications Corp. v. City of East Cleveland*, 885 F.Supp. 1035, 1042 (N.D. Ohio 1995).

Verizon cannot seek to avail itself of the protections afforded by the Cable Act through an untimely lawsuit, and the First Amendment does not tip the balance otherwise. Indeed, there is particular reason for caution here. Verizon does not allege that the County has actually applied its ordinance in a manner unlawful under the Cable Act. Verizon could well apply for and obtain a franchise. Conversely, Verizon has not actually stated that it would accept a franchise with conditions

that the County could lawfully impose under the Cable Act. It asks this Court to conduct a franchising process, at the end of which, presumably, Verizon will decide whether or not the franchise conditions are acceptable. It is precisely this sort of indefinite and indeterminate litigation that is at the heart of Article III ripeness and standing, and precisely why the complaint and the relief requested are defective.

3. *Lakewood* Has No Bearing on This Case.

In any event, Verizon cannot prevail by citing to *Lakewood* (or to other cases governing parade permits, and the like). *Lakewood* involved an ordinance governing the placement of newspaper boxes on street corners, corner by corner. The permit granted no contractual rights to the newspaper, and a newspaper box is not a permanent placement in any respect. The City's permitting process was defined solely by local laws, limited occupancy of a particular location to one year, and left the decision to grant or to deny a permit solely to the Mayor, uncabined by any other laws, or by practical interpretation. Most importantly, the process was designed in such a way that it would be relatively simple for the Mayor to decide whether to grant or deny a franchise based upon the *viewpoint* of the speaker.

The facts of *Lakewood* are thus entirely different from those of this case. Verizon is not seeking a permit, it is seeking a franchise -- a bilateral contract between it and the County. *See* 12 McQuillin, Municipal Corporations, § 34.5 (3rd ed. 2006) ("Franchise defined -- Franchise as contract"); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F.Supp. 383, 409 (S.D. Fla. 1991). The franchise would grant it the right to place facilities pervasively on public *and private* property throughout the County. 47 U.S.C. § 541(a)(2)(franchise authorizes construction of a cable system over public rights-of-way, and through easements…dedicated for compatible purposes). Verizon seeks not a one-year term, but a 15-year term. For over a century, the Supreme Court has recognized that this type of use is a special use,

not comparable to the sorts of activities which are the subject of the permits at issue in *Lakewood* or the other cases cited by Verizon:

> The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting, and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and its use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public, and it is a use open equally to citizens of other states with those of the state in which the street is situate. But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground.

St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 98-99 (1893); *Loretto v. TelePrompTer Manhattan*, 458 U.S. 419, 428 (1982) (applying principle to cable systems). Moreover, rather than being unfettered or governed solely by local laws, the County's authority and discretion are cabined by the Cable Act itself, which defines grounds on which a franchise may be granted or denied, 47 U.S.C. §§ 541(a), 546(a)-(g).

In addition, because franchises are contractual, long-term and for large franchise areas, there is not a risk that the County's process would allow the County to use the discretion it has to effectively consider *viewpoint* in any manner. [11] The Cable Law is not aimed at conduct normally associated with expression, but at placement of the facilities throughout the community, in order to ensure that public property is not converted to solely private use. A franchise is much more akin to a construction permit than to a restraint on speech. Finally, the ultimate decision to grant or deny is not left with an

[11] This assumes, of course, that one can rationally speak of a cable system carrying 400 channels as having a "viewpoint." It is hard to imagine how the County could monitor or respond to that viewpoint in the franchising process.

administrative official, but with the governing body for the County, and is specifically subject to court review. In short, *Lakewood* is nothing like this case.

The discussion of *Lakewood* would not be complete without noting two points. First, there is a substantial disconnect between Verizon's reliance on *Lakewood* and the relief it is actually seeking. Under *Lakewood,* one would expect permits to be substantially similar to one another for placement of boxes in particular locations. Yet, Verizon has rejected a franchise that would have been essentially identical to the franchises held by its competitors. Verizon is effectively asking this Court to create a franchise not on the basis of uniform standards, but on the basis of Verizon-specified standards.

Second, much of Verizon's case depends on taking portions of the County Code out of context and then claiming that any discretion provided for is unfettered. As noted above, the Cable Act itself confines County discretion, but setting that aside, any discretion is exercised in the context of a complex franchising process that may (as Verizon's own brief suggests) raise issues of technology and technology changes that are difficult to specify in the sort of detail with which one might expect a community to specify requirements for a parade. That was the point of Judge Posner's opinion in *Omega,* and why the discretion here is both necessary and appropriate. It is certainly not forbidden by *Lakewood,* which goes out of its way to emphasize that the opinion does not mean "that any law involving discretion" is unlawful. *Lakewood*, 486 U.S. at 759.

Verizon characterizes as "unrestrained discretion," for example, the County's authority to require "any other information necessary to demonstrate compliance with this Chapter, *and any other information that the County requests from the applicant*," § 8A-8(d)(15), and to require with respect to overbuild franchises, *"other information necessary for the County to make its determination under section 8A-9(e),"* § 8A-8(d)(13). Verizon Mem., 12. Except for the italicized words, the information

requirements are express and specific. The two clauses are not uncabined, but must be read in context as related to the exercise of the cable franchising authority under the Cable Act and under the County's Charter. There is no indication that the County has ever interpreted them otherwise. Even if the two italicized clauses were objectionable, Verizon offers no suggestion of any ground for enjoining the requirement of every single item of information in their entirety required by subsection 8A-8(d), much less the application requirement itself.

Similarly, Verizon would have the Court void *all of the criteria* the County Executive is required to consider in evaluating a franchise application, including the applicant's "financial, technical, or legal qualifications" as expressly authorized by 47 U.S.C. § 541(a)(4)(C), although its stated objections are limited to the consideration of "the applicant's character," Cable Law, § 8A-9(e)(1), and "whether the proposal will serve the public interest," Cable Law, § 8A-9(e)(5). Verizon Mem., 13. Far from being an indefinite grant of authority, the term "public interest" simply allows the County to make determinations within the bounds of its authority, *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976) ("public interest" standard does not authorize FPC to implement affirmative action); *F.C.C. v. RCA Comms.*, 346 U.S. 86, 91 (1953).[12]

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[12] There is bare irony in Verizon's claim that the "public interest" is an impermissible consideration in the grant of a cable franchise while it operates as a common carrier under State regulatory authority to "ensure [its] operation in the *interest of the public*," Md. Public Util. Comp. § 2-113; under federal regulations deemed "necessary or desirable in the *public interest*," 47 U.S.C. § 201(a); and petitions this Court for relief based on the Court's discretion to determine the "public interest" under the four-part test for the grant of a preliminary injunction. "Public interest" determinations are the province of public authorities, and so long as there is a rational basis, the County's regulatory authority, as much as federal and state regulatory authority, and at least presumptively as much as judicial authority, is entitled to the "deference owed its *public interest* decisions." *City of Dallas v. F.C.C.*, 165 F.3d 341, 356 (5th Cir. 1999). Although the County's public interest decisions must have "a rational basis," *id.*, the Court cannot evaluate the County's public interest decisions before the County has reached a decision.

The County's process is further constrained by key deadlines, including a requirement that the Executive make a decision to accept or reject a franchise within ten days. Cable Law § 8A-8(i). Of course, if the County should depart from the scope of its ordinance and request information *ad infinitum*, or fail to act within specified time frames, an applicant can claim the process violates its rights as applied in that case. But the County's "unfettered discretion" exists only in Verizon's imagination, not at law.

4. Applying the Proper Legal Standard, The Discretion Contained in the Cable Law Is Clearly Appropriate and Consistent with the First Amendment.

The foregoing -- and particularly the ripeness problems with Verizon's claims, which become insurmountable once one recognizes this is not a *Lakewood* case -- should be sufficient to dispose of Verizon's request for a preliminary injunction. Nevertheless, it is important to describe the proper legal standard, which has been consistently applied to franchise challenges under applicable cable law where a content-neutral regulation directly affects speech. This is the standard set out in *United States v. O'Brien,* 391 U.S. 367, 377 (1968). In *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) (*Preferred I*), *aff'd on narrower grounds*, 476 U.S. 488 (1986), the Ninth Circuit overturned a lower court decision that had dismissed the plaintiff's challenges to the City of Los Angeles's franchising ordinance, including the plaintiff's First Amendment claim. After considering the unique characteristics of cable television, the court adopted the *O'Brien* test as the appropriate standard for judging the reasonableness of certain content-neutral cable television regulations affecting speech. Under *O'Brien*:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and 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.

The *O'Brien* test has been widely adopted by other courts in the context of cable television franchising. *See, e.g., Turner Broadcasting System v. F.C.C.*, 520 U.S. 180, 189 (1997); *Turner Broadcasting System v. F.C.C.*, 512 U.S. 622, 662 (1994); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d. 1540, 1548 (7th Cir. 1989) ("As other courts have held, *O'Brien* is an appropriate standard-bearer for dealing with questions of local regulation of cable television."); *Comcast of California II, L.L.C. v. City of San Jose*, 286 F.Supp.2d 1241, 1252 (N.D.Cal. 2003) (recognizing that "past precedent has determined the standard under which this constitutional claim [to a City's request for a proposal as part of its cable franchise renewal] must be analyzed."); *Telesat Cablevision v. City of Riviera Beach*, 773 F. Supp. 383, 394 (S.D. Fla. 1991); *Erie Telecommunications v. City of Erie*, 659 F. Supp. 580, 599-601 (W.D. Pa. 1987) (finding access requirements are "justifiable in light of the regulatory interest held by franchising authorities."); *Pacific West Cable Co. v. City of Sacramento*, 672 F.Supp. 1322, 1331 (E.D.Cal. 1987); *Century Federal v. Palo Alto*, 648 F. Supp. 1465, 1475 (N.D. Cal. 1986); *Carlson v. Village of Union City*, 601 F. Supp. 801, 810 (W.D. Mich. 1985).

Applying *O'Brien*, the courts have consistently rejected facial challenges of the sort raised by Verizon here to franchising requirements that affect speech. Under the relevant standard, Verizon must show that "no set of circumstances exists under which the [challenged provisions] would be valid." *Time Warner Entertainment Co., LP., v. FCC*, 93 F.3d 957, 972 (D.C. Cir. 1996), quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Pacific Bell Telephone Co. v. City of Walnut Creek*, 428 F. Supp. 2d 1037, 1051-1052 (N.D. Cal. 2006); *West Virginia v. U.S. Dept. of Health and Human Serv.*, 289 F.3d 281, 292 (4th Cir. 2002). It has not done so, of course, except to cite *Lakewood.*

Time Warner Entertainment Co., LP., v. FCC, 93 F.3d 957, 972 (D.C. Cir. 1996), is particularly instructive here. The court found that some requirements did not implicate First Amendment rights in any respect, and therefore were not even subject to analysis under any First Amendment test. *Id*. at 971. In this case, the provisions on which Verizon focuses most attention seem completely unrelated to speech. One would ordinarily *expect* insurance and indemnity requirements to be imposed on a person using another's property, and they would seem to bear no relation to speech in any way. Verizon claims that the County is insisting on regulating the placement of facilities used to provide cable service in the right-of-way, but does not explain how this translates into a restriction on speech. The *Time Warner* court went on to apply *O'Brien* to provisions of the Cable Act that did implicate speech interests, including 47 U.S.C. § 531(b), which provides local governments the flexibility to determine how much channel capacity on a system should be dedicated to public, educational and government access channels. A facial challenge to those provisions, and to that local discretion, was rejected. *Id*. at 973.

Here, Verizon objects to the bulk of the County's cable franchising process, including: 1) the need to provide the County with information about an applicant; 2) the criteria the County considers in evaluating an applicant; 3) the conditions the County may attach to a franchise, including those "necessary to protect and promote the public interest;" 4) the County's ability to address certain issues, including bonds and insurance, minimum channel capacity on the system, a minimum number of PEG channels, and service to public buildings; 5) the County's ability to exceed minimum standards; and 6) reimbursement of the County's costs. It is unnecessary to evaluate each challenged provision -- point-by-point -- under *O'Brien* and it is far from obvious that these challenges have anything to do with speech. However, the following overview suffices to show that Verizon's challenge to the County's franchising process is unlikely to prevail on the merits.

a. The Franchising Process Is Within the Constitutional Power of the County.

Under MD Code, Art. 25A, § 5 Express Powers (B), Montgomery County may "grant one or more exclusive or nonexclusive franchises for a community antenna system or other cable television system that utilize any public right-of-way…." All of the provisions Verizon challenges are within the County's police powers and its power to franchise, particularly in light of the fact that the FTTP network occupies the County's rights-of-way. Many of the regulations are expressly or implicitly permitted by the Cable Act as an incident of the franchising authority. *See, e.g.*, 47 U.S.C. §§ 531 (PEG channels); 541(a)(1) (presumes application process); 541(a)(4)(C) (financial, legal and technical qualifications) 542(g)(2)(D) (costs of bonds, insurance, *etc*.).

b. The County's Franchising Process Meets Important or Substantial Government Interests.

The County's franchising process serves many important interests, discussed at length in the cases cited above and in the Cable Act's legislative history. The insurance requirements, for example, protect the County and its citizens against risks, and risks change over time, and may vary with applicants. Information requests permit the County to assess whether an operator is in fact proposing a system that will meet the cable-related needs and interests of the community, and plan for the impacts on the rights-of-way, among other things. Maintaining the right to seek additional information necessary to action on an application is critical, as applications may be more or less specific, and may raise issues that had not been anticipated. In some cases (particularly where new technologies are involved) greater investigation may be required than with known technologies, having known risks. For similar reasons, the County's consideration of an applicant's character and the public interest, among other factors, is

absolutely essential. Because the franchise is a long-term bilateral contract, the County has a significant interest in assuring itself that an applicant can be relied upon to perform as promised.

The County has a substantial interest in maintaining the flexibility to respond to changes in technology and local needs and interests over time, an interest that is also advanced by a public interest standard (and by provisions that make it clear that the County can require more than ordinance minimums based on the facts at the time an application is received). In addition, the County's requirement that an applicant reimburse the County for its costs serves the important interest of ensuring that County taxpayers do not bear the burden of Verizon's application.

c. The County's Interests Are Unrelated to the Suppression of Free Expression.

The County's interests in cable franchising are clearly unrelated to the suppression of free expression. In fact, as it has demonstrated repeatedly, the County *welcomes* Verizon's FIOS service (*i.e.*, its "speech"). However, the County's desire to obtain Verizon's service does not trump its duties to protect its residents and to manage public property. Congress could have selected a process that granted cable providers immediate access to subscribers, but instead Congress chose a process that sacrifices immediacy in favor of consumer protection and local property management. In carefully evaluating and negotiating a franchise application, the County seeks to serve these critically important interests, not to suppress a form of speech that the County anxiously seeks to share with its residents.

d. The Restrictions on Verizon's First Amendment Rights Are No Greater than Essential To Meet the County's Interests.

The discretion provided for in the Cable Law is no greater than what is essential to meet the County's needs. The County cannot ensure that "cable-related needs and interests" of the community are served unless it has the flexibility to review those needs and interests and establish appropriate

requirements at the time an application is received, and in light of the type of system being proposed. Verizon attempts to argue that it should be treated differently from other cable systems because of the nature of its system. Yet at the same time, it seeks to deprive the County of the discretion necessary to evaluate Verizon's claims, and to make a rational determination as to the appropriate franchising response. Even from a First Amendment perspective, discretion is important. As *Time Warner* suggests, imposing a requirement for six channels on a 54-channel cable system has a far different impact than imposing a six-channel requirement on a system (like Verizon's) with virtually unlimited capacity. 93 F.3d at 973. In determining what access channel requirements should be imposed, the County may be obligated to consider not only community needs, but the effect on applicants in light of technology. The County's legitimate interests are advanced by retaining discretion to tailor requirements at the time an application is received, and that is enough to pass the fourth prong of *O'Brien.*[13]

The process to which Verizon so vigorously objects is designed to allow the County to resolve franchise issues in a rational way that balances the interests of the operator and the public. The application procedures are only comprehensive enough to anticipate a broad range of potential harms to the County that might arise from granting a franchise. They allow for participation by the public, with sufficient time for the County Executive to evaluate the relevant information, make an initial determination and negotiate an agreement. In fact, the application process is quite restrictive. For example, the County Executive has only 10 days in which to decide whether to accept or reject an

[13]Similarly, the bonding and insurance requirements that Verizon complains of are designed to give both parties flexibility – the Cable Law allows the County Attorney to approve different forms of insurance because specifying the form of an insurance policy in the Cable Law might actually represent an obstacle to a particular applicant. The minimum channel requirements are actually quite modest, especially when compared to the County's existing franchises, which were established after conducting an assessment of the County's needs.

application for filing. County Code § 8A-8(i). And 60 days is in practice a very short time to reach an agreement, given the complexity of the issues. County Code § 8A-9(h). The County Council must have the time to review a proposed agreement, while also dealing with other business on its legislative calendar, some of which – such as the adoption of a budget – may be quite pressing. It is possible to construct a different process, but the County's process clearly advances its interests in rationally resolving the complex issues that arise during franchising. There is no real alternative.

Verizon seems to suggest at points that it may be entitled to a different franchising process, or that it is subject to a different analysis because it claims to have a pre-existing (statewide) franchise to occupy rights-of-way in Montgomery County to provide telephone service. The company is mistaken. We begin by noting that the company asserts, but does not prove, that it has a statewide franchise. It is far from obvious that Verizon has a statewide franchise that would apply to Montgomery County, and it is far from obvious what the extent of that franchise might be, and what facilities it would reach. What is clear is that the County was empowered by the Maryland General Assembly in 1910 to exercise "general control and supervision" of "all matters pertaining to and affecting the public highways . . . of the [County]," including the "power to make all such rules and regulations with reference to the use of the roads, streets, avenues, lanes, alleys, and bridges of the County, by telephone . . . companies" and other utilities and transportation companies, a power that expressly includes franchising authority. [14] Verizon does not contend that it has a franchise from the County, and at this point has failed to show

[14] Laws of Maryland 1910, ch. 484, sections 177H, 177V, 177W, approved April 11, 1910. Reflecting the County's subsequent charter, these sections have been codified in Chapter 49 of the County's Code. *See also* Md. Code Ann., Pub. Utilities, §5-210(b)(2) (a public service company may not exercise a franchise unless it files with the Commission…a statement by its president and secretary signed under oath, that the appropriate local authorities have provided the required consent for the exercise of the franchise.)

that it holds a franchise from the state that it claims. Indeed, in part because Verizon has not compensated the County for its continuing occupation of the right-of-way, that occupation may be illegal.

Moreover, even if one assumes Verizon holds a statewide franchise, that franchise would have been granted to Verizon in its role as a common carrier, and is subject to compliance with the regulations governing its operations. Those regulations include (as noted at the outset) a requirement that Verizon go through the cable franchising process which applies to other cable operators should it seek to provide cable service without being subject to rules applicable to common carrier systems or to open video systems. Verizon cannot simultaneously rely on the existence of a statewide franchise, and at the same time effectively challenge one of the limitations on its exercise.

B. Verizon Is Not Suffering Irreparable Harm, and Any Harm that It May Suffer Is the Result of Its Failure To Abide By the Law.

Verizon alleges that it is suffering irreparable harm because the Cable Law prevents it from speaking, and because of the lost business opportunities resulting from not being able to offer cable service and the so-called “triple play” that its competitors are providing. Both are unconvincing.

First, and most obvious, Verizon ignores that it is capable of speaking by offering a cable service on a common carrier basis *immediately* without any franchise from the County. *See* discussion in IV above.

Second, by its own admission, Verizon began constructing its "upgrade" to its network some time in 2004, and chose to delay efforts to obtain a franchise for a year. It engaged in intermittent negotiations, at its own choice, and never applied for a franchise, at its own choice (the franchise process would be over had Verizon filed an application when it began to construct its network). Hence,

Verizon's claim of irreparable harm is belied by its own delay and inaction.[15] Moreover, Verizon admits that it is not now capable of providing cable service and will not be prepared to do so for at least 30-90 days *after* it obtains a franchise under its proposed procedures. *See* Declaration of Marilyn O'Connell at ¶ 2. There is no immediate impact on speech by any standard. As the Seventh Circuit observed in an analogous case, the denial of a preliminary injunction will not harm Verizon, "beyond depriving it of a strategic weapon to use in bargaining with the City." *Omega,* 694 F.2d at 124.

Third, the County has not denied Verizon a franchise either in the franchising process, or in negotiations. In negotiations, Verizon was offered a franchise essentially identical to the terms under which RCN and Comcast are already operating in the County, but rejected it. The County later offered to accept terms similar to those that Verizon had agreed to in Fairfax County, and Verizon rejected that option. Instead, for almost a year, Verizon insisted that it would not take a franchise unless the County agreed to a contractual interpretation of the term "cable system" different from the definition in the Cable Act. Verizon has insisted that the County agree that the franchise trumps the application of its police powers -- something that the County has not done for other providers. Verizon does not show that either of the proposed franchises was unreasonable, and hence its claim of "irreparable harm" is traceable not to the County's actions, but to Verizon's chosen negotiating tactics.

Finally, the veracity of Verizon's claim of irreparable harm has not been fully tested at this stage. The Court will not have an adequate record to support such a claim until the County has had an opportunity to conduct discovery regarding the company's actual business plans in the County. This is

[15] It is obvious that if Verizon has a facial challenge now, it also had one when it began to construct its system. Verizon's delay in bringing a challenge to an ordinance it claims to find so offensive is inexplicable, and certainly that delay cannot justify the relief sought.

one of the reasons that other courts faced with this question have denied requests for injunctions. *See, e.g., Omega,* 694 F.2d at 124.

C. Forcing the County To Negotiate Under Court Supervision Will Harm the County.

Granting the requested relief would cause harm to the County. First, it would deprive the County and its citizens of the benefits of the franchising process, in favor of a court-mandated process that provides no opportunity for public input. That benefit, specifically contemplated by federal law, is not preserved by restricted negotiations. Second, the specific restrictions imposed through the court-mandated process are designed to resolve all open issues in favor of Verizon's position -- including its insistence on a definition of cable system that is different from the federal law definition. That does not maintain the *status quo*; it resolves the issues that must be resolved as part of the final disposition of the complaint.

A related problem was pointed out by Brian Johnson, Verizon's counsel, in his letter to Clifford Royalty:

> [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.

See Letter from Brian Johnson to Clifford Royalty, attached to Moore Decl. as Exhibit A.

Under Verizon's proposed relief, Verizon would remain free to propose "creative" solutions while the County would be unable to respond, or to propose solutions of its own for fear that they would

later be used against the County in the litigation. *Cf. Liberty Cable Company v. City of New York*, 893 F.Supp. 191, 205 (S.D.N.Y. 1995) (court found a substantial hardship to regulator because its proceedings on the very issue brought before the court would be interfered with and this hardship must be "weighed heavily").

Indeed, under the Verizon proposal, the County may not even be able to satisfy interests it is obligated to satisfy under federal law, much less ensure that needs and interests of the community are adequately protected as provided by the Cable Act. For example, the County has an affirmative obligation under federal law to "assure that access to cable service is not denied to any group of potential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3). The County also has the right to establish build-out requirements. 47 U.S.C. § 552(a)(2). Verizon acknowledges that it has not completed construction of the FTTP network in the County – it currently only passes 40% of homes in the County, and the company has stated that it plans to pass no more than 52% of homes by the end of 2006.[16] Verizon has said little or nothing about its plans beyond that time frame. It is also not clear that Verizon has developed an effective technical solution for serving apartment buildings. Lawton Decl. at ¶23. Verizon has sought an exception for such buildings, even though that could bear on the issue of compliance with the federal law. October Draft, §3.1.1. The County will be harmed if Verizon begins to offer cable service without respecting the County's statutory rights, or if the County is left open to a claim under the Cable Act that it has failed to ensure access to residents of the unserved areas on the basis of their income. The County has the right and duty to address these issues under federal law and it is simply wrong to claim that the County's

[16] *See* Declaration of Marilyn O'Connell at ¶ 7.

authority will not be affected if Verizon is given the right to provide service, or permitted to avoid a franchise process that would allow the County to address these issues.

D. The Public Interest Weighs in Favor of Requiring Verizon To Follow the Same Process Its Competitors Have Followed, Rather than Seeking Special Treatment.

The public interest does not weigh in favor of granting the requested injunction. In fact, it does just the opposite. Verizon's analysis overstates the benefits that would be achieved by immediate implementation of the company's cable plans. Moreover, Verizon's analysis fails to take into account the benefits that would be lost if Verizon's plea were granted.

1. Verizon Overstates the Alleged Benefits of an Immediate Franchise Grant.

Verizon's claims regarding reduced rates for consumers are based on the analysis set forth in the Hazlett Declaration, but the factual underpinnings of that declaration are apparently incorrect, as discussed in the Ashpaugh Declaration. *See* Declaration of Garth Ashpaugh in Support of County's Opposition to Preliminary Injunction ("Ashpaugh Decl.") at ¶ 13 attached hereto as Exhibit 4. For example, Dr. Hazlett relied on the statements in the O'Connell Declaration regarding the rates charged by Verizon's competitors in various jurisdictions. From these figures Dr. Hazlett concluded that Montgomery County customers could expect immediate price cuts upon the grant of a franchise to Verizon. But there are several problems with Dr. Hazlett's conclusions.

First, it appears that the actual rates charged by Verizon's competitors in at least two of the three communities cited by Dr. Hazlett and Ms. O'Connell are much higher than Verizon claims. *See* Ashpaugh Decl. at ¶ 13. Dr. Hazlett presumes that the rate in Temple Terrace, Florida, was reduced to \$36.33/month after Verizon's entry; but the cable operator's published rate list indicates that the real rate is \$47.49. *Compare* Hazlett Decl. at ¶ 6 *with* BrightHouse rate list attached as Exhibit 5. Ms.

O'Connell also cites a rate of $30.00 from incumbent Cox in Herndon, Virginia (an example not mentioned by Dr. Hazlett); but Cox's published rate is actually $43.99. *Compare* O'Connell Decl. at ¶ 6 *with* Cox rate list attached as Exhibit 6.[17]

Second, even assuming that the news reports on which Verizon rests its case were reporting genuine, permanent competitive price reductions, it would still be true that only some subscribers in the County would get any benefit from such reductions, and others might well see the incumbent cable operators' prices rise instead. Once Verizon enters the market, Comcast will be free to raise its rates in any areas of the County that are not served by Verizon. Under the Cable Act and FCC rules, once a cable operator is subject to effective competition, it is no longer required to maintain a uniform rate structure within the franchise area.[18] Thus, Comcast would be able to lower its rates in the areas where Verizon offers service, but maintain rates at their earlier levels in the 50-60% of the County that Verizon admits it will not serve. In fact, if Comcast does reduce rates within Verizon's service area, Comcast would have an incentive to *increase* rates *outside* Verizon's service area to make up for the revenue loss. Dr. Hazlett's analysis ignores this countervailing harm to the majority of County subscribers.

Other problems with Dr. Hazlett's methodology are apparent from his declaration. Dr. Hazlett's attempt to produce an actual number for the anticipated benefits of price competition is based on *national* averages for the effect of competition on prices (¶¶ 5, 11) and *national* Comcast data regarding

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[17] The County is reviewing whether any decrease in Charter's published rates in Keller, Texas, Verizon's third example, actually occurred as a result of Verizon's system activation. The National Cable & Telecommunications Association states that Charter reduced its rates in Keller a year before Verizon launched its service. *See* http://www.ncta.com/DocumentBinary.aspx?id=284 at 6. In addition, it is possible that the low rates mentioned in the news reports on which Dr. Hazlett and Ms. O'Connell base their position were actually referring to short-term temporary "price breaks" offered by the cable operators in an attempt to fend off their new competitors – what the cable industry refers to as "win-back" prices. *See* Ashpaugh Decl. at ¶ 14.

[18] *See* 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.984(c)(1). Ashpaugh Decl. at ¶ 11.

what subscribers currently pay (n.23). The analysis does not show that these effects would occur in the County, which is demographically far from the national average. *See, e.g.,* Declaration of Mark Cooper in Support of County's Opposition to Motion for Preliminary Injunction ("Cooper Decl."), attached hereto as Exhibit 7 at ¶¶ 4, 18-19. A more detailed examination of Dr. Hazlett's sources and assumptions may reveal other problems with the benefits Verizon alleges would be achieved.[19]

Thus, Verizon's claims regarding the savings consumers might obtain appear to be incorrect. If there are any savings to consumers, they would be lower than Verizon claims. In fact, Mark Cooper concludes that Verizon has overestimated the consumer benefits by a factor of three to four. Cooper Decl. at ¶ 36. The County believes that further discovery would be required in order to fully assess all of Dr. Hazlett and Ms. O'Connell's claims, but even in the absence of any discovery it is apparent that there are flaws in their analysis. The County does expect some long-term price benefits from the extension of competition throughout the County. Yet Verizon's claim of instantaneous, radical savings is not supported by the evidence.

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[19] Without discovery it is impossible to analyze Dr. Hazlett's assumptions completely. For example, his declaration refers to materials not submitted with the pleading (*see, e.g.*, his notes 16 and 22). It should also be noted that Dr. Hazlett's affidavit contains a number of statements that are in fact not part of his expert opinion, but which merely restate Verizon's false allegations in its complaint. *See, e.g.*, ¶ 3 ("the County's decision to impose . . . various barriers"); ¶ 4, second bullet (factual error regarding the County's franchise fees); ¶ 5 ("Requirements such as these, which diminish," assuming that the County and not Verizon is at fault for the company's failure to reach agreement on franchise terms); ¶ 10 ("The facts alleged in Verizon's Complaint . . . describe a cable TV franchising process that unreasonably imposes barriers to entry"). To the extent that the inclusion of such statements in Dr. Hazlett's affidavit may suggest that they are part of Dr. Hazlett's expert opinion, the reader must keep in mind that these judgments are outside the scope of the expertise for which Verizon has hired him. These statements do provide reason to consider, pending detailed discovery on the matter, that Dr. Hazlett's analysis may have been affected by Verizon's mischaracterizations of the facts in this matter.

2. Verizon Ignores the Harms to the Public That Would Be Caused By Its Desired Relief.

On the other side of the public-interest equation, it is necessary to take into account the harms that would result from Verizon's desired relief. The County's franchising process is designed to address not just certain short-term benefits touted by Verizon, but also the broader long-term public interest.[20] Verizon has requested a 15-year agreement, but Verizon's analysis considers only the benefits it claims would arise in the short term from immediate entry.

Dr. Hazlett's analysis ignores the longer-term costs to County residents of Verizon's entry on terms chosen by the company. *See* Cooper Decl. at ¶¶ 27, 37. ("Verizon would take from the residents of Montgomery County at least five times and perhaps ten times as much in the value of social obligation as the introduction of competition will return to consumers in the County"). In particular, the County currently regulates Comcast's rates for basic cable service and equipment, in accordance with federal law. This rate regulation has resulted in substantial savings to County cable subscribers. The chart attached to the Ashpaugh Decl. as Exhibit A indicates that from 1999 through 2005, the County has saved subscribers approximately $14 million in potential overcharges on these rates – about $166,237 per month. For example, in the 2004-2005 rate review, the County required Comcast to refund $2.50 per subscriber. Ashpaugh Decl. at ¶ 8. Comcast's rates for converters and remote control units have been held to levels that are among the lowest in the country. Ashpaugh Decl. at ¶ 9.

Once Verizon enters the cable market in the County, however, under federal law Comcast will no longer be subject to rate regulation. 47 U.S.C. §§ 542(a)(2), (l)(1)(D). Thus, Comcast will be free to raise its rates for basic service and equipment. As noted above, no competitive pressure will prevent

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[20] *See, e.g.,* Cooper Decl. at ¶¶ 3, 13. *See also* Declaration of Andrew Afflerbach, attached as Exhibit 8 at ¶ 31, discussing County's role in oversight of cable facilities and services.

Comcast from doing so in the majority of the County where Verizon and RCN will not serve. Nor can the County necessarily assume that Verizon's entry will automatically ensure that Comcast does not raise its rates even in other areas. Ashpaugh Decl. at ¶ 11. As noted in the Cooper Declaration, a duopoly need not result in price competition; two competitors may tacitly agree not to wage a price war.[21]

Verizon's entry will also relieve Comcast of the obligations of the federal anti-buy-through law. This law prevents Comcast from forcing a subscriber to buy extra tiers of service (above the basic tier) in order to get premium or pay-per-view programming, such as HBO or ESPN, and thus reducing consumer choice. *See* Ashpaugh Decl. at ¶ 12. Once Verizon enters the County, however, the anti-buy-through law will no longer apply to Comcast. *See* 47 C.F.R. § 76.921(a). But it is certain that subscribers in the majority of the County where Verizon does not choose to compete will suffer a disadvantage with respect to Comcast's ability to control their choice of programming.

The above factors emphasize that Verizon has never given the County a definite timetable for extending the new network throughout the County. If the County were to grant Verizon a franchise today, on Verizon's terms, Verizon says it could be as long as 90 days before only 40% of the County could get the increased programming choices; that is the *best*-case scenario (since Verizon nowhere says that it *will* in fact activate all of that area in that time frame). However, the County can address exactly this issue in franchise negotiations with Verizon. If Verizon would negotiate with the County in good faith, the parties could agree on a mechanism in which a larger portion of the County would be served,

[21]Cooper Decl. at ¶¶ 28-29. Indeed, one of Verizon's fellow Bell companies has stated quite clearly that it does not expect vigorous price competition: At a recent Wall Street conference, AT&T Chairman Ed Whitacre said that the company's entry into the video market would not lead to significant price cuts: "'I don't think there's going to be a price war'…" David Lazerus, *Video plan may not be cheap*, San Francisco Chronicle (July 2, 2006).

thus extending rate benefits and programming choices to more residents. On the other hand, if Verizon gets authority to provide cable service in the County under a preliminary injunction, Verizon will have no incentive to negotiate at all.

As Congress intended, the best way to serve the public interest is to ensure that the County and Verizon have a fair opportunity to negotiate build-out conditions and other benefits, so as to minimize the negative effects and maximize the positive, based on the County's unique knowledge of its citizens' needs and interests. The franchise Verizon would like this court to grant would be a stripped-down skeleton of a cable franchise, denuded of the benefits recognized by Congress in the Cable Act so as to track Verizon's eccentric theories of what a "minimum" cable franchise ought to be. *See* Cooper Decl. at ¶¶ 27, 37.

Finally, Verizon understates the other harmful effects of its activities on the County and the public. As discussed in the Afflerbach Decl. at ¶¶ 9-11, installation of the FTTP network is a massive construction undertaking that has already caused significant disruption to the public, and will continue to do so. Furthermore, the FTTP network is not, as Verizon claims, merely an "upgrade" to its telephone network. It is an entirely new facility, which would be designed and built in a different fashion were it not intended to deliver cable services. *Id.* at 16.

Thus, on balance, the public interest weighs in favor of requiring Verizon to follow the normal franchise process, rather than short-circuiting that process to give Verizon special treatment.

VI. THE RELIEF REQUESTED BY VERIZON IS INAPPROPRIATE, UNNECESSARY, AND BEYOND THE COURT'S POWER TO ORDER.

A. Verizon Inappropriately Seeks A "Preliminary" Injunction In Order To Permanently Upset the *Status Quo*, Not To Preserve the *Status Quo*.

Verizon's request for relief goes well beyond maintaining the *status quo*, as it asks this Court to order both prohibitory relief (enjoining enforcement of certain sections of the Cable Law) and mandatory relief. The mandatory relief includes ordering the County to: (i) "engage in good-faith negotiations [with Verizon] over the terms of a franchise agreement;" (ii) "engage a mediator" with Verizon; and (iii) if negotiations fail, "issue a franchise to Verizon upon terms to be determined by this Court." Hence, Verizon seeks a preliminary injunction to upset the County's entire franchising process and replace it with a new one that the County is compelled to follow.

A preliminary injunction is extraordinary relief, the purpose of which is to protect the *status quo*, so that the court can render a meaningful judgment on the merits. *In re Microsoft Antitrust Litigation*, 333 F.3d 517, 525 (4th Cir. 2003). In ordering mandatory relief, the court's authority "should be sparingly exercised" and should be granted only "when the exigencies of the situation demand such relief." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980). The detailed discussion earlier in this memorandum establishes beyond doubt that this is not an exigent circumstance: Verizon does not need a franchise to speak, and it has not sought fit to apply for one. The situation is in no way "deteriorating," *In re Microsoft*, 333 F.3d at 526, and denying the injunction will not prevent the Court from rendering relief on the merits.

Mandatory injunctions are typically issued to require the performance of discrete acts such as removing an encroachment or reinstating a wrongfully terminated employee. Here, Verizon seeks a mandatory injunction for the performance of a series of acts by two branches of County government.

Those acts are anything but ministerial. An injunction would require substantial court oversight and raise separation of powers issues. The single case Verizon relies on in support for such relief, *Lippoldt v. City of Wichita*, 2001 WL 849526 (D. Kan. July 16, 2001), involved a city's refusal to respond to an application and issue a simple parade permit. The court issued a temporary restraining order allowing the parades to go ahead, and left a single outstanding issue for the parties to resolve: what time the parades should start. Even Verizon must admit that such an issue is hardly comparable to the plethora of issues that the County and Verizon would need to negotiate, or the Court to decide.[22]

B. The Court May Not Order the Mandatory Relief Verizon Seeks.

Even if Verizon could demonstrate the need for a mandatory injunction, the Court cannot issue one. A mandatory injunction ordering a government official to perform an official act is tantamount to an action for mandamus. *Updegraff v. Talbott*, 221 F.2d 342, 345 (4th Cir. 1955) (noting "district courts are without power to grant writs of mandamus or, in cases such as this, mandatory injunctions, which in such cases are in effect writs of mandamus"); *Branham v. Langley*, 139 F.2d 115, 116 (4th Cir. 1943) (finding "mandatory injunction with respect to official action by members of the Board is in effect a prayer for a writ of mandamus; and the District Court is without power to grant such writ."). *Cf. Panama Canal Co. v. Grace Line*, 356 U.S. 309, 318 (1958). This Court lacks jurisdiction to grant such relief. In the Judiciary Act of 1789, Congress did not confer on the federal courts the power to issue writs of mandamus. *Kendall v. Stokes*, 37 U.S. 524, 614, 620-21, 625-26 (1838); *Smith v. Bourbon County*, 127 U.S. 105 (1888). While Congress sought to eliminate "this historical accident" as applied

[22] As the Seventh Circuit has pointed out, "…it is not obvious that the award of cable television franchises can be managed with the precision and simplicity appropriate to granting access to public parks for speechmaking." *Omega Satellite Products Company v. City of Indianapolis,* 694 F.2d 119, 128-9 (7th Cir. 1982). Certainly that statement should be beyond dispute.

to federal officers or employees in the Mandamus and Venue Act of 1962, 76 Stat. 744, 28 U.S.C. §§ 1361 and 1391(e),[23] it has not extended federal mandamus jurisdiction to officers of the states, a fact the Fourth Circuit has recognized. *AT&T Wireless PCS v. Winston-Salem*, 172 F.3d 307, 312 n.3 (4th Cir. 1999); *Petersburg Cellular Partnership v. Bd. of Sup'rs of Nottoway County*, 205 F.3d 688, 710 n.3 (4th Cir. 2000).

C. If Verizon Wants To Negotiate, It Does Not Need the Court's Help.

On a practical level, Verizon's request for relief really makes no sense. The County's application procedure provides for sixty days of negotiations with the applicant and the eventual grant of a franchise. Instead of that process, Verizon requests sixty days of negotiations supervised by a mediator, followed by either an automatic grant of a franchise, or further litigation. If Verizon wants negotiations, it can have them – the Court does not need to intervene. The problem is not the County or the Cable Law, but Verizon's unwillingness to compromise.

The County has made significant concessions, and in April believed that discussions were moving forward. Verizon has demonstrated that it is capable of reaching agreement in a comparable jurisdiction, Fairfax County, Virginia, in a matter of seven weeks, through weekly and bi-weekly meetings.[24] The County was and is prepared to do the same, and indeed long ago requested more frequent and intense talks. Moore Decl. at ¶ 13.

In addition, the request for court-ordered mediation borders on being disingenuous. If both parties are not prepared to compromise, mediation will not solve anything. Verizon has not

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[23] S. Rpt. No. 1992 to accompany H.R. 1960, 87th Cong., 2d Sess. (1962) *reprinted in* 1962 U.S.C.C.A.N. at 2785.

[24] Comments of Fairfax County, Virginia, *Implementation of § 621(a)(1) of the Cable Communications Policy Act of 1984*, MB Docket No. 05-311, at 6 (filed February 13, 2006).

demonstrated that it is really willing to bridge the gaps between the parties. All of the compromises on fundamental issues were to be made by the County: the County was prepared to discuss Verizon's concerns with "dual regulation," but Verizon would not address the County's concerns with preserving its police powers. It was Verizon that declared, right at the outset, that the definition of cable system and the provisions dealing with construction standards were "non-starters." Moore Decl. at ¶ 5. Having failed to set a deal on its own terms, Verizon now seeks to enlist the power of the Court on its side.

If Verizon is truly prepared to work on reaching agreement, the County stands ready and willing to resume talks at any time. But the company should not be rewarded for walking away from the table.

VIII. CONCLUSION

The relief requested by Verizon is unwarranted, contrary to law, and at best premature. This case presents complex legal and factual issues that cannot be fairly assessed on the record now before the Court. The County respectfully urges the Court to deny the motion.

Respectfully submitted,

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