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December 11, 2017

**Via ECFS**

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

**Re: *Ex Parte* Filing in MB Docket No. 10-56,[1] MB Docket No. 16-41,[2] MB Docket No. 17-214[3]**

Dear Ms. Dortch:

On December 7, 2017, Jim Holanda, John Gdovin, and Jeff Kramp (RCN[4]), Ross Lieberman (American Cable Association), and Thomas Cohen (Kelley Drye & Warren LLP,

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1 *Comcast Corp., Gen. Electric Co. and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) ("*Comcast-NBCU Order*").

2 *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Proposed Rulemaking, 31 FCC Rcd 11352 (2016).

3 *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 17-214, Public Notice, 32 FCC Rcd 6654 (2017).

4 RCN (parent company) oversees operations of RCN's and Grande's systems and will soon oversee Wave's systems when that acquisition closes early in 2018. At that point, RCN will be the 6th largest "cable/broadband" provider, passing approximately 2.7 million homes. RCN operates in Boston, New York, Philadelphia/Lehigh Valley, Chicago, and Washington, DC. Grande operates in Austin/San Marcos, Corpus Christi, Dallas, Midland-Odessa, San Antonio, and Waco. Wave operates in Portland, Sacramento, San Francisco, and Seattle. For all systems, RCN provides a triple-play of services – video, broadband, and voice services – and it can be characterized as an "overbuilder," providing competition to the incumbent telephone and cable providers. RCN also competes in the traditional video market with DirecTV and DISH. RCN purchases national cable programming through the National Cable Television

Counsel to RCN) met in separate meetings with Commissioner Mignon Clyburn and her Chief of Staff, David Grossman, and with the following staff of the Media Bureau: Michelle Carey, MaryBeth Murphy, Martha Heller, Brendan Murray, and Ty Bream. On December 8, 2017, Jim Holanda and Thomas Cohen met in separate meetings with Chairman Ajit Pai and his Wireline Advisor, Jay Schwarz, Commissioner Michael O'Rielly, and Commissioner Brendan Carr and his Policy Advisor, Evan Swarztrauber. The purpose of the meetings was to discuss anticompetitive practices RCN, mid-sized, and smaller multichannel video programming distributors ("MVPDs") have encountered with vertically integrated MVPDs, including Comcast/NBC Universal ("Comcast-NBCU"), and anticompetitive problems that would likely arise should AT&T be permitted to combine with Time Warner.

In each of the meetings, Mr. Holanda led the presentation and made the following points:

1. RCN competes in all its markets with vertically integrated programmers, such as Comcast-NBCU and even the existing AT&T (including DirecTV), which have the ability and incentive to use their upstream video programming assets to disadvantage rival distributors not only in the downstream Pay TV market but in the broadband market as well. RCN is not alone in having this concern. Both the Congress and the Commission – and once again, the Department of Justice – have recognized that vertically integrated MVPDs can engage in anticompetitive acts in local distribution markets and harm consumer welfare. The Department of Justice's just-filed complaint against AT&T and Time Warner succintly describes this harm:

> "First, the merger would result in higher prices for consumers for traditional subscrription television because it would give the merged company the power to raise the prices that competing video distributors pay to it for Time Warner's popular TV networks for no reason other than that those networks would now be owned by AT&T/DirecTV....
>
> Second, the merger would enable the merged company to impede disruptive competition from online video distributors – competition that has allowed consumers greater choices at cheaper prices."[5]

2. Notwithstanding the "arbitration/standstill" conditions the Commission adopted in 2011 to mitigate harms of the Comcast/NBCU combination, RCN, along with other mid-sized and smaller MVPDs, have faced and continue to face anticompetitive conduct from the combined company. Perhaps the most egregious example is the use of extraordinarily stringent "minimum penetration requirements" for carriage of Comcast-NBCU programming that prevent rivals' attempts to broadly sell a broadcast basic tier of service at a low price. This unusual Comcast-

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Cooperative ("NCTC"). It directly negotiates for regional sports programming, retransmission consent for local television stations, and select other programming.

5 *United States v. AT&T Inc., DirecTV Grp. Holdings, LLC, Time Warner Inc.*, 1:17-cv-0511, Complaint, at 3-4, 6 (D.D.C. filed Nov. 20, 2017).

NBCU carriage requirement gives it a competitive advantage over mid-sized and smaller MVPDs and undermines over-the-top competition. The American Cable Association, in a filing just this past week, highlighted the problems with this pratice and called for the Commission to investigate it.[6]

3. RCN has long recognized that the video market is in a period of transformation.[7] That said, today, more than half of RCN customers take Pay TV service, especially in a bundle with broadband service, and the importance of Pay TV will continue for years, even as its market share declines and consumers move over-the-top. Accordingly, access to "must have" ("marquee") programming from Pay TV programmers continues to be essential for RCN if it is to compete successfully.

4. Comcast-NBCU continues to own or control "must have" programming. Whether it is NBC's local television stations, Comcast's regional sports networks, or NBCU's bundle of national programming, consumers want it and rival distributors need to provide this video content.[8] This is most readily demonstrated by the fact that Comcast-NBCU programming networks or individual programs are among the top-ranked on RCN's systems and those of every other MVPD. Thus, the "must have" underpinning of the *Comcast-NBCU Order* remains intact.

5. RCN believes the Commission adopted a valuable, albeit flawed, remedy in the *Comcast-NBCU Order* that gives competing MVPDs or their bargaining agents the right to use baseball-style arbitration to resolve program access disputes with Comcast-NBCU and have "standstill carriage" while disputes are pending. But it is important to understand that these merger conditions were adopted because of fundamental shortcomings in the Commission's program access rules. For instance, NCTC, the bargaining agent for video programming on behalf of RCN and some 800 mid-sized and smaller MVPDs, is not eligible to bring a program access

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6 *Ex Parte* Response of the American Cable Association, MB Docket No. 17-214, at 11 (Dec. 7, 2017) ("*ACA Ex Parte*").

7 For many years, RCN has been a leader in being "video source agnostic," giving its customers set-top boxes with TiVo software that enables them to search among traditional Pay TV and over-the-top services (applications) to find the programming they want.

8 *See ACA Ex Parte* at 5. As ACA noted, "By any reasonable measure, the programming controlled by Comcast is at least as 'must have' as the programming that AT&T would acquire under its proposed merger with Time Warner. The major broadcast networks and RSNs are widely acknowledged to be among the most essential networks that distributors must carry in order to attract subscribers. The bundle of Turner programming that AT&T proposes to purchase contains neither. Thus the concerns that DOJ has expressed over the incentive and ability that a merged AT&T-Time Warner would have to disadvantage rivals apply *a fortiori* to Comcast." *Id.*

complaint.[9] Other flaws include the fact that the program access rules include a "uniform price increases" loophole and do not guarantee interim carriage during the pendancy of a complaint.[10]

6. The Comcast-NBCU "arbitration/standstill" conditions expire in January 2018. Because the rationale supporting harm to competition and consumers in the *Comcast-NBCU Order* continues, an "unleashed" Comcast-NBCU is certain to wreck havoc in the market, undermining rival distributors and harming consumers throughout the country. To avoid these harms, the Commission should quickly consider and adopt stronger program access rules along the lines proposed by RCN and the American Cable Association. Allowing NCTC to utilize the rules, having a "standstill" requirement, and instituting an arbitration process are fundamental and should all be part of these stronger rules.

7. RCN's identification of the threat an "unleashed" Comcast-NBCU poses to the market and its request for the Commission to adopt relief is buttressed by the complaint that the Department of Justice filed against AT&T and Time Warner and by the offer of AT&T and Time Warner to mitigate the harms found by the Department of Justice to all MVPDs by adopting arbitration/standstill provisions similar to those adopted in the *Comcast-NBCU Order*. In doing so, they effectively admit that it is reasonable to constrain the practices of vertically integrated MVPDs in this manner. RCN rejects the specific proposal made by Turner Broadcasting on behalf of AT&T and Time Warner because it is insufficient, including in many of the same ways the Comcast/NBCU conditions were flawed.[11] For instance, it fails to recognize that rival distributors need to have sufficient information about the market prior to making their final offer in the arbitration process – just as happens in the Major League Baseball with arbitration.[12] Moreover, it would not allow buying groups, like NCTC, to utilize the rules, and would not cover all programming owned by the combined company, including HBO, Cinemax, and AT&T's regional sports networks. Nontheless, the Commission should recognize the AT&T and

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9 47 C.F.R. § 76.1003. The rules do not work for smaller MVPDs in other ways as well. For example, the Commission's requirement that a discrimination complaint must compare the deal offered the complainant to that offered a "competing" MVPD, when combined with the permissible "volume discount" defense, severely limits any protection for small and medium-sized MVPDs from unjustified discrimination in rates, terms, and conditions. Moreover, the Commission's rules fail to ensure MVPDs have information available necessary to determine whether a programmer is acting in a discriminatory manner, which is a vital predicate for an MVPD to protect itself effectively. Reply Comments of the American Cable Association, MB Docket No 14-57, at 45-50 (Dec. 23, 2014).

10 *See* 47 C.F.R. § 76.1003(l) (stating complainants must file a petition for temporary standstill).

11 RCN may provide a counteroffer to Time Warner to address these flaws.

12 This problem can be alleviated by giving distributors reasonable access to such information and having the vertically integrated programmer make the first Final Offer.

Time Warner proposed arbitration/standstill remedy to be an admission that vertically integrated MVPDs threaten competition, existing program access rules are insufficient, and addditional protections need to be adopted to address them.

Mr. Holanda concluded the meeting by explaining that RCN wants to work with the Commission to address problems that will stem from current and potential anticompetitive harms caused by vertically integrated MVPDs. The Commission has a real opportunity to get in front of problems that can significantly harm consumer welfare, and it should recognize and take advantage of this opportunity.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.[13]

Sincerely,

Thomas Cohen

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Attachment: RCN, Grande Communications, and Wave Presentation

cc: Chairman Ajit Pai and Jay Schwarz
Commissioner Mignon Clyburn and David Grossman
Commissioner Michael O'Rielly
Commissioner Brendan Carr and Evan Swarztrauber
Michelle Carey
MaryBeth Murphy
Martha Heller
Brendan Murray
Ty Bream

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13 47 C.F.R. § 1.1206.

# Attachment

## RCN, Grande Communications, and Wave Presentation

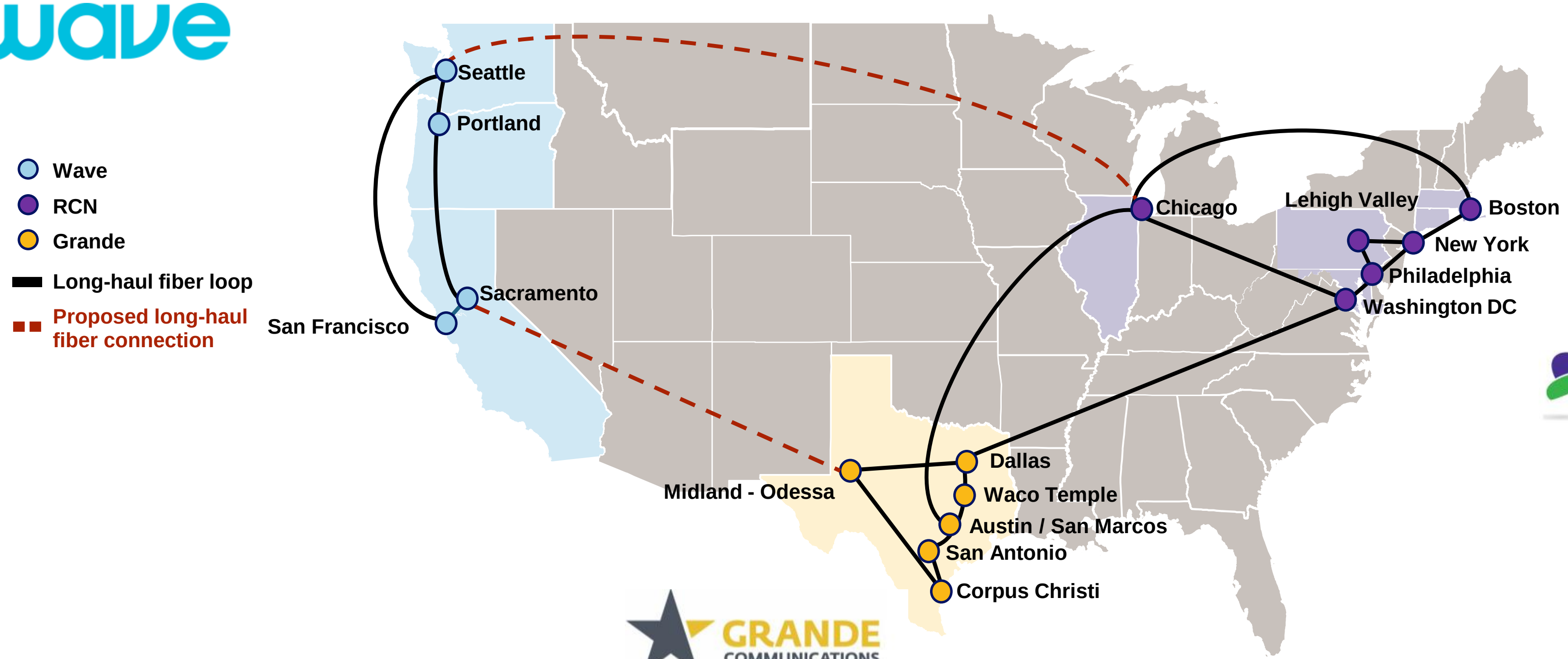
RCN®

GRANDE COMMUNICATIONS®

wave®

December, 2017

# Geographic profile




**Provider of competitive triple play products to residents and businesses across 16 markets**

# Quick facts

**6th**
Largest US HSD Cable provider[(1)]

**~2.7m**
Homes passed

**~940k**
Customers[(2)]

**~1.7m**
Revenue generating units (RGUs)[(2)]

**$1.4b**
LTM 6/30/17 revenue

**3,400**
Employees

**~6%**
LTM 6/30/17 Revenue growth

**~10%**
LTM 6/30/17 EBITDA growth

## Industry awards / accolades

**2017**
Overall Satisfaction

*(Patriot Media)*

*(Independent Cable Operator of the Year)*

**Readers Choice**
3 Years in a Row

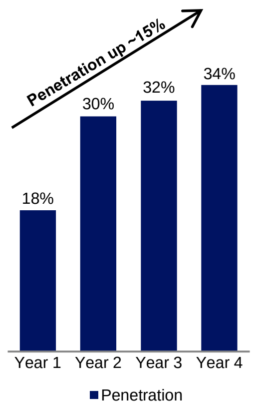
(1) Based on combined HSD subscribers (Cequel and Suddenlink combined with Altice USA).
(2) As of 6/30/17.

# Attractive edge-out strategy

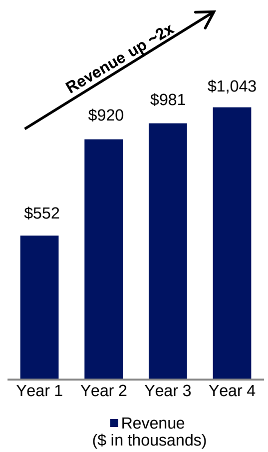
- Illustrative analysis below assumes $1 million capex spent in year 0 and projects ~$520k in gross profit contribution by year 4, based on historical cost to build per home, penetration curves, residential ARPC and steady-state contribution margin
- Based on actual results, RCN Grande has added over 145,000 homes passed via edge-outs since 2015 and achieved customer penetration of 31.9% as of September 2017
  – September 2017 customer penetration of 2015 and 2016 vintages is 38.6% and 34.4%, respectively, exceeding examples outlined below
- Wave has been also pursuing an edge-out strategy, referred to as Wave G, where it has pursued high ROIC projects

**$1 million capex**

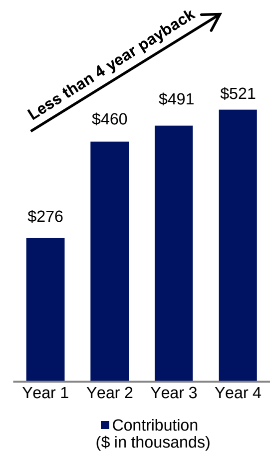
**Pass ~2,200 homes**




**Estimated ~755 customers by year 4**




**Results in ~$1,040k revenue by year 4**




**Results in ~$520k contribution by year 4**

# RCN Grande market overview

### New York

| | 6/30/17A |
|---|---|
| Homes passed | 354,060 |
| **Competitors:** | Charter, verizon |

### Texas

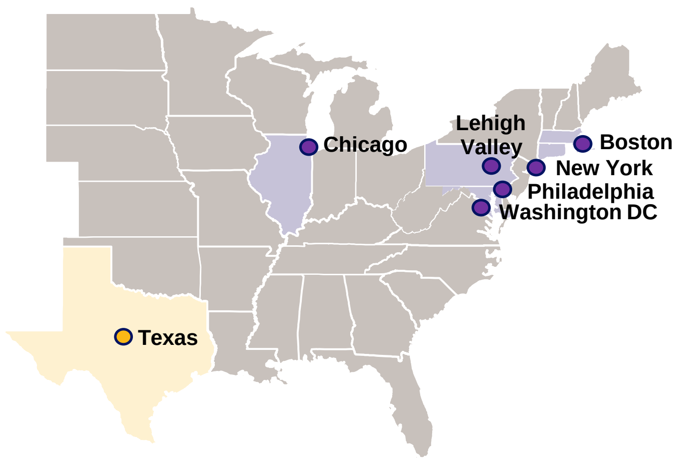
| | 6/30/17A |
|---|---|
| Homes passed | 434,867 |
| **Competitors** | at&t, verizon, Spectrum, CenturyLink, suddenlink, Google fiber, CABLE ONE |

### Boston

| | 6/30/17A |
|---|---|
| Homes passed | 354,129 |
| **Competitors:** | COMCAST, verizon |

### Lehigh Valley

| | 6/30/17A |
|---|---|
| Homes passed | 249,663 |
| **Competitors:** | Service Electric, verizon |




### Philadelphia

| | 6/30/17A |
|---|---|
| Homes passed | 98,195 |
| **Competitors:** | COMCAST, verizon |

### Chicago

| | 6/30/17A |
|---|---|
| Homes passed | 330,861 |
| **Competitors:** | COMCAST, at&t |

### RCN Grande cable total

| | 6/30/17A |
|---|---|
| Homes passed | 2,024,327 |

### Washington DC

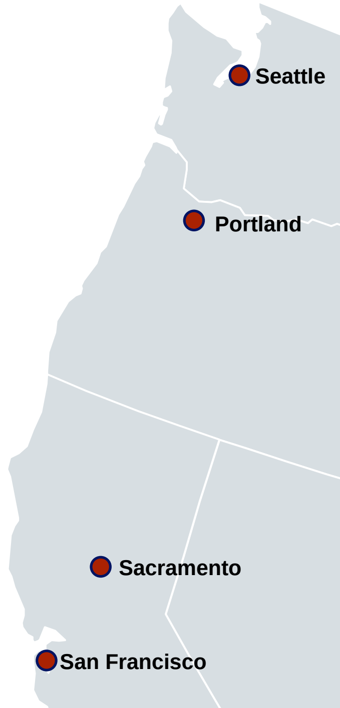
| | 6/30/17A |
|---|---|
| Homes passed | 202,552 |
| **Competitors:** | COMCAST, verizon |

# Wave market overview

### Seattle, WA

| | 6/30/17A |
|---|---|
| Homes passed | 259,168 |

**Competitors:** CenturyLink, Frontier, SandyNet




### Portland, OR

| | 6/30/17A |
|---|---|
| Homes passed | 92,095 |

**Competitors:** CenturyLink, Frontier, SandyNet

### San Francisco, CA

| | 6/30/17A |
|---|---|
| Homes passed | 217,813 |

**Competitors:** Comcast, at&t

### Sacramento, CA

| | 6/30/17A |
|---|---|
| Homes passed | 118,210 |

**Competitors:** at&t, Consolidated Communications

### Wave total

| | 6/30/17A |
|---|---|
| Homes passed | 687,286 |