

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of

Annual Assessment of the Status of  
Competition in Markets for the  
Delivery of Video Programming

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CS Docket No. 98-102

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REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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## TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY .....	1
I. RCN DOES NOT HAVE A TRUE COMMITMENT TO OPEN VIDEO SYSTEMS, AND HAS DISREGARDED THE BASIC LEGAL REQUIREMENTS FOR FAIR VIDEO COMPETITION .....	2
A. RCN Does Not Have A Bona Fide Commitment To OVS.....	3
B. Legitimate Regulatory Proceedings Involving RCN Are The Result Of RCN's Own Regulatory Gamesmanship. ....	8
1. RCN's Operation Without Lawful Authority. ....	9
2. RCN's Improper Cross-Subsidization by Boston Edison Company .....	10
3. RCN's Partner's Unlawful Pole Rates. ....	13
4. RCN's Unsupported Inside Wiring "Claim.".....	14
5. RCN's Issues with Local Government Are A Function of RCN's Deliberate Ambiguity About Its Regulatory Status. ....	15
C. RCN Has Provided The FCC With Inaccurate Rate Information.....	16
II. GEMSTAR/STARSIGHT'S COMMENTS RAISE BROAD AND COMPLICATED ISSUES BEYOND THE PROPER SCOPE OF THIS PROCEEDING. ....	17
CONCLUSION.....	18

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**REPLY COMMENTS OF CABLEVISION SYSTEMS CORPORATION**

Cablevision Systems Corporation ("Cablevision") submits these reply comments in the Commission's annual assessment of and report to Congress on the state of competition among multichannel video programming distributors ("MVPDs") to respond to two sets of initial comments.

**INTRODUCTION AND SUMMARY**

The bulk of Cablevision's reply addresses comments filed by RCN Telecom Services, Inc. ("RCN"), which misleadingly characterizes itself a competitor to cable that uses the Open Video System ("OVS") model in the manner intended by the 1996 Telecommunications Act. RCN specifically attacks Cablevision, as well as other cable operators, as having attempted to put unfair roadblocks in the way of RCN's efforts to promote video competition. Cablevision's reply comments demonstrate that RCN's actual record to date shows that the OVS process has invited serious abuses by RCN that warrant FCC investigation, oversight and correction.

In addition, Cablevision takes this opportunity to respond to the joint comments of Gemstar and StarSight that raise broad issues concerning the status of electronic program guides as "video programming," as well as the future ability of cable operators to continue to exercise control over the "look and feel" of their own cable service in a digital environment. Gemstar/

StarSight's views would take the FCC far from the original purposes of the FCC's annual report to Congress under Section 628 (g) of the Communications Act.

For the reasons stated below, Cablevision urges the FCC to (1) consider the validity of RCN's attacks on its cable competitors in the broader context of the factual information provided by Cablevision; and (2) make it clear that this proceeding is not the appropriate forum in which to address the complex questions raised by Gemstar/StarSight.

**I. RCN DOES NOT HAVE A TRUE COMMITMENT TO OPEN VIDEO SYSTEMS, AND HAS DISREGARDED THE BASIC LEGAL REQUIREMENTS FOR FAIR VIDEO COMPETITION**

RCN's comments provide little information on the subjects specified in the Commission's inquiry. Instead, RCN submits special pleading for the FCC to tilt the competitive playing field radically in favor of OVS entry, based on RCN's claim to be "one of the leading investors in the open video system ("OVS") concept"<sup>1/</sup> and the victim of "a seemingly unending stream of administrative objections . . . ." Yet RCN's own track record demonstrates that its investment in the OVS "concept" is simply the latest convenient posture in RCN's continuing gaming of regulatory processes. Rather than committing itself to OVS – or any other regulatory status or technology – RCN consistently has adopted whatever label is most expedient at the moment. The "administrative objections" of which RCN complains – often initiated or joined by regulators or public interest advocates rather than Cablevision or other RCN competitors – are the direct result of the way RCN and its affiliates have done business.

It appears to be RCN's position that regulators should simply look the other way in the interest of promoting video competition, and even that its gamesmanship should be rewarded.

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<sup>1/</sup> RCN Comments at i, ii.

Rather than demonstrating that OVS competition is impeded, RCN's history continues to show that, as Cablevision submitted in analogous comments last year,<sup>2/</sup> the OVS process has invited abuses that warrant FCC investigation and supervision.

RCN also overlooks that, under the Noerr-Pennington doctrine,<sup>3/</sup> competitors such as Cablevision, regardless of motivation, have a First Amendment right to petition for government action relating to the industries in which they compete. For the Commission to tilt the competitive playing field based on Cablevision's – or anyone else's – participation in government proceedings would be inconsistent with this right. Thus, the Commission should leave each of the issues or proceedings raised by RCN for resolution on its own merits.

**A. RCN Does Not Have A Bona Fide Commitment To OVS**

RCN's comments tout the premise that RCN is "by far the largest investor in the OVS concept."<sup>4/</sup> If so, this is hardly a ringing endorsement for OVS. Despite its lip service to the OVS "concept," RCN has used OVS simply as a Trojan Horse to gain entry as a cable television operator.

RCN's dominant mode of entry into video competition in the Boston market has been as a cable television operator. Indeed, RCN's management has made clear to local franchising authorities that this is its preferred strategy. On March 24, 1997, the Vice-President of RCN's parent company testified that RCN initially planned to operate as OVS; "however, to the extent

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<sup>2/</sup> Comments of Cablevision Systems Corporation, CS Docket No. 97-141 (filed July 23, 1997).

<sup>3/</sup> United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern RR Presidents Conference v. Noerr, 365 U.S. 127 (1961).

<sup>4/</sup> RCN Comments at 2.

[RCN] is able to quickly obtain a cable television franchise, that is its goal.”<sup>5/</sup> The Vice-President and General Manager testified at a public hearing “quite frankly, we’d rather have a franchise than some of the other alternatives that are possible, at least by virtue of the Telecommunications Act.”<sup>6/</sup> And on July 18, 1997 before the Board of Selectmen for the Town of Sudbury, Massachusetts, RCN’s consultant stated “as we approach communities such as Sudbury, . . . we’ll entertain thoughts, if you wanted us to do an OVS, certainly we’ll listen, but we’re now pushing toward a franchise.” Thus, contrary to the impression given in his comments that RCN’s cable franchise is limited to “a few” municipalities,<sup>7/</sup> RCN has already sought cable television franchises in the majority of communities in Massachusetts in which it is active – not only in Somerville, but also in Barnstable, Boston, Belmont, Brookline, Burlington, Canton, Dedham, Foxborough, Framingham, Hingham, Hudson, Hull, Lexington, Milton, Natick, Needham, Norwood, Quincy, Randolph, Sharon, Stoneham, Wakefield, and Westwood. In addition, it also has expressed interest in cable franchises in Acton, Carlisle, Lynnfield, Peabody, and Sudbury.

Even in the minority of communities where RCN has entered into OVS agreements, these are short-term agreements. In the City of Boston, after operating without a cable franchise or other lawful authority for almost two years,<sup>8/</sup> RCN entered into a one-year “Interim OVS Agreement” with the Mayor of Boston that, by its terms, states that the parties are working

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<sup>5/</sup> Transcript of Public Hearing of Board of Selectmen, Town of Wakefield, Massachusetts, regarding RCN’s proposed franchise presentation at 16, lines 8-12 (March 14, 1997).

<sup>6/</sup> Transcript of Public Hearing, Town of Wakefield, Massachusetts, regarding RCN’s proposed franchise presentation at 16, lines 8-10, Testimony of Scott Burnside (March 24, 1997).

<sup>7/</sup> RCN Comments at n.22.

<sup>8/</sup> See discussion at Section I(B)(1) *infra*.

towards executing a cable television franchise and makes the agreement terminable upon the execution of such a franchise.<sup>9/</sup> In Somerville, RCN had an interim OVS agreement for just five (5) months before entering into a cable franchise. In fact, RCN applied for a cable television license from the City of Somerville two (2) months **before** entering into an OVS Agreement with the City. RCN has simply used its OVS certification as a device to begin construction before it had cable licenses in Boston, Somerville, and Brookline – enabling it to operate unfranchised cable systems. Once it obtained cable franchises in Somerville and Brookline, RCN promptly withdrew its OVS certification in those communities.<sup>10/</sup> No doubt it will continue to do the same in other communities as it achieves its preference for cable franchises, reducing its OVS to nothing.

Consistent with its preference for cable franchises, RCN has operated its video system like a proprietary cable television system, not like the “open” system contemplated by the Telecommunications Act and the Commission’s OVS rules. Despite the requirement that OVS operators make available up to two thirds of their channel capacity to independent programmers,<sup>11/</sup> it is now evident that RCN has not had the capacity or the intent to do so. When RCN first applied for OVS certification, the Cable Services Bureau denied its application because RCN proposed only a 110 channel system, 105 or more of which would be occupied by

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<sup>9/</sup> Interim open video systems agreement between the City of Boston, Massachusetts and RCN-BETG, LLC, June 2 (1997), Section 1.3.

<sup>10/</sup> Public Notice, RCN-BecoCom, LLC Files Open Video System Certification Modification, DA 97-2672 (December 22, 1997); Public Notice, RCN-BecoCom, LLC Files Open Video System Certification Modification, DA 98-991 (May 26, 1998).

<sup>11/</sup> 47 U.S.C. § 573 (B)(1)(B).

its affiliated programmer.<sup>12/</sup> RCN then filed a new application claiming that it would have up to 330 channels of capacity.<sup>13/</sup> What RCN actually built was a 110 channel system which RCN has programmed itself – just as a cable operator would.<sup>14/</sup> As a result, RCN’s Vice President and General Manager testified that RCN cannot make **any** channel capacity available to independent video programmers and, when questioned what RCN would do if a potential programming provider requested 150 channels of capacity on RCN’s “OVS” system, an RCN consultant testified: “we wouldn’t build it. We just wouldn’t do an [open video system] if that was the case, because we wouldn’t be able to compete.”<sup>15/</sup> There lies the explanation for RCN’s preference for cable franchises: although OVS may be a convenient device for constructing cable systems without a franchise and for leverage in negotiating franchises, RCN needs to convert interim OVS agreements to cable franchises before it actually has to make good on its obligations to provide nondiscriminatory access to independent video programmers.

Even if RCN had capacity to accommodate these programmers, it has not made its system open. RCN’s shifting preference for cable television franchises and its short-term, contingent OVS agreements provide little assurance to video programmers that capacity will remain available – what video programmer would pursue carriage that will cease to be available as soon as an “interim” OVS agreement is converted to a cable franchise? And RCN has discriminated

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<sup>12/</sup> Metropolitan Fiber Systems/New York, Inc., d/b/a MFS Telecom of New York Certification to Operate an Open Video System, DA 96-1912 ¶ 13 at 6 (released November 15, 1996).

<sup>13/</sup> RCN-BETG, LLC, Notice of Intent to Establish an Open Video System, DA 97-467 ¶ 3 at 3 (filed February 28, 1997).

<sup>14/</sup> Transcript of public hearing, Town of Sudbury, Massachusetts, regarding RCN’s communications services in partnership with Boston Edison, page 15, (“we’re carrying 110 channels”) (July 18, 1997).

<sup>15/</sup> Id. at 35-36.

against video programmers seeking carriage information; in Time Warner Cable v. RCN-BecoCom, LLC, D.A. 98-798 (released April 28, 1998) (“Time Warner Cable”), the Cable Bureau had to direct RCN to furnish open video system information to Time Warner Cable, which needed that information to consider carriage of the programming on RCN’s system.

In short, RCN has invested in OVS only as a “concept,” not in reality. RCN’s straddle is not what Congress or the Commission intended in establishing the OVS vehicle. Section 651 of the Telecommunications Act of 1996 provides four ways that common carriers can offer video programming – through radio based systems, through common carriage of video programming traffic, through cable systems regulated under Title VI, and through OVS. Carriers that provide video programming through radio based systems or common carriage can also elect to provide OVS service. Section 651(a)(4). But this section conspicuously omits the same election for carriers that provide video as cable operators. When the Commission provided for the transition to the 1996 Act for then-existing video dialtone operators, it provided that video dialtone operators could elect “**one** of four” of the methods of carrying video programming specified in Section 651.<sup>16/</sup> Certainly, as the Cable Services Bureau has recognized, “the open video system framework . . . was not created to be used as a bargaining element in the negotiations between a municipality and a prospective video provider.”<sup>17/</sup> In Time Warner Cable, *supra*, the Cable Services Bureau found that RCN’s behavior left an open question whether its OVS certification should be revoked.<sup>18/</sup>

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<sup>16/</sup> First Order on Reconsideration, Open Video Systems, FCC 96-312 ¶ 8 at 5 (released July 23, 1996) (emphasis added).

<sup>17/</sup> Wedgewood Communications Co., DA 97-2438 ¶ 23 at 9 (released Nov. 20, 1997).

<sup>18/</sup> Time Warner Cable at ¶ 22.

RCN's use of the OVS as an expedient reduces OVS to a "concept" and mocks the intent of Congress and the FCC. Rather than an argument for making OVS operators less accountable, RCN's record is an argument for revisiting the OVS certification process and regulations on preventing abuses.

**B. Legitimate Regulatory Proceedings Involving RCN Are The Result Of RCN's Own Regulatory Gamesmanship.**

The classic definition of "chutzpah" is the example of a child who kills both parents and then, on trial for murder, asks for mercy because of orphanhood. RCN has the similar audacity to claim victimhood because of consequences of its own way of doing business. In its comments, RCN charges that "a seemingly unending stream of administrative objections" stems from "the cable industry's pervasive and constant anticompetitive campaign conducted principally by Time Warner Cable Co. and Cablevision Systems Corp . . . ."<sup>19/</sup> Like RCN's invocation of its commitment to the OVS "concept," these claims are not borne out by actual events.

RCN's description of this "stream of objections" is conspicuously short on detail. What RCN leaves out is that proceedings have been initiated not by Time Warner or Cablevision, but that regulatory agencies, public interest advocates, and others besides competitors have been legitimately concerned about the way that RCN or its affiliates have done business, and that these "administrative objections" have been found meritorious. As demonstrated below, these proceedings are the product of RCN's persistent gaming of the regulatory process that has been characteristic of RCN's entry into the Boston market. RCN appears to believe that, because it provides video competition, any sins should be forgiven. Fair and competitively neutral rules,

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<sup>19/</sup> RCN Comments at ii.

however, require that competing video providers – whether OVS or something else – be held equally accountable.

### 1. RCN's Operation Without Lawful Authority.

RCN first began operations in Boston in October, 1995, without obtaining a cable television franchise from the City of Boston or filing a Section 214 certificate and tariff with the FCC. On its own motion, the Massachusetts Cable Television Commission<sup>20/</sup> – not, as RCN alleges, Cablevision<sup>21/</sup> – initiated a proceeding to show cause why RCN was not operating a cable television system without a license as required by state law and by Section 621(b) of the Cable Communications Policy Act of 1984.<sup>22/</sup> As its sole defense, RCN claimed to be operating a video dialtone system. This claim came before the FCC when RCN sought an extension of the time for video dialtone systems to complete the transition to one of the four forms of video programming carriage by common carriers specified in the 1996 Act.<sup>23/</sup>

The Cable Services Bureau denied the requested extension on the grounds that RCN had never established that it was a video dialtone system.<sup>24/</sup> After RCN moved for reconsideration of this order, the full Commission took up the issue on its own motion. The Commission Order in Metropolitan Fiber Systems/New York, Inc. found that RCN never met any of four indicia of video dialtone status: it had not filed a Section 214 certificate for video operations; it had not filed an explicit video dialtone tariff; it failed to provide capacity to serve multiple video

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<sup>20/</sup> Formerly the Massachusetts Community Antenna Television Commission and now the Cable Television Division of the Massachusetts Department of Telecommunications and Energy.

<sup>21/</sup> RCN Comments at 10-11. Cablevision subsequently intervened in the proceeding.

<sup>22/</sup> 47 U.S.C. § 541(b)(1) provides that “a cable operator may not provide cable service without a cable franchise . . . .”

<sup>23/</sup> See 47 U.S.C. § 571; for a discussion of these forms of carriage, see pp. 277-78, supra.

programming providers other than its own affiliate; and it did not offer its service on a nondiscriminatory basis. In short, RCN failed to provide the Commission or programmers with adequate notice of any video dialtone operations or to provide a common carrier platform.

The FCC's unequivocal and pointed 1997 decision establishes that RCN was not operating under video dialtone authority. In turn, it establishes that RCN began operations in Boston without legal authority, and thus vindicates the Massachusetts Cable Commission's proceeding (as well the arguments that Cablevision asserted as an intervenor in that proceeding).<sup>25/</sup> Despite these two orders from the FCC unequivocally rejecting RCN's claim, RCN has the presumption to represent in its comments that "the RCN activity that was contested in [the Massachusetts Cable Commission] proceeding was a video dialtone service."<sup>26/</sup>

## **2. RCN's Improper Cross-Subsidization by Boston Edison Company.**

Just as RCN entered the Boston market without legal authority, it has cavalierly disregarded legal authority in expanding its business. In September, 1996, RCN announced a partnership with Boston Edison Company ("Boston Edison"), the electric utility that serves the City of Boston and 47 surrounding communities. It is in these communities that this partnership has obtained OVS certification.<sup>27/</sup>

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<sup>24/</sup> Metropolitan Fiber Systems/New York, Inc., FCC 97-169 ¶ 4 at 3 (released May 16, 1997).

<sup>25/</sup> RCN obtained a federal court injunction against the state proceedings on the grounds that RCN claimed a video dialtone system, the FCC's exclusive jurisdiction over video dialtone preempted the proceeding and that "the FCC has asserted exclusive jurisdiction over video dialtone services is not a matter of serious dispute." The Commission subsequently did so deciding against RCN.

<sup>26/</sup> RCN Comments at 11 n. 36.

<sup>27/</sup> RCN-BETG, LLC, Memorandum Opinion and Order, DA 97-454 ¶¶ 1, 11 at 4 (rel. Feb. 27, 1997).

Boston Edison's investment exceeds the company's authority under Massachusetts law. In 1993, the Massachusetts Department of Public Utilities authorized Boston Edison to invest up to \$45 million to engage in three specific and limited businesses, DSM (demand-side management), electric vehicles, and electricity generation services,<sup>28/</sup> through a subsidiary whose articles of incorporation limited the purposes of the corporation to "energy generation, co-generation, utilization or conservation, environmental activities, and electric transportation."<sup>29/</sup> Nowhere did this limited authorization provide for investment in telecommunications or cable television, and Boston Edison explicitly assured the Massachusetts DPU that it would seek approval for investment in any areas not listed in the subsidiary's articles of incorporation.

Nevertheless, Boston Edison entered into its joint venture with RCN without seeking such approval and, as its investment in RCN has contributed an integral fiber optic network and rights of way, as well as cash and guarantees, the total value far exceeds the \$45 million authorized by the state agency.<sup>30/</sup> Although Boston Edison's investment in RCN benefits the company's shareholders rather than its electric ratepayers, the rights of way it has contributed to RCN were obtained or constructed by virtue of Boston Edison's status as a public utility, and its fiber optic facilities and other telecommunications facilities initially were built as electric plant that is counted toward the company's rate base.<sup>31/</sup>

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<sup>28/</sup> Boston Edison Company, Mass. D.P.U. 93-37, Order on Joint Offer for Settlement and Joint Offer for Partial Settlement, June 18, 1993 at page 9.

<sup>29/</sup> Articles of Organization of Boston Energy Technology Group, Inc, dated August 2, 1993. See Response to CSC1-10 of Docket No. DPU 97-95.

<sup>30/</sup> Affidavits of Richard Silkman and Gary Harpster, appended to Motion of Cablevision Systems Corporation to Reopen Record and Stay Decision, Mass. D.P.U./D.T.E. 97-63 (filed Feb. 26, 1998). See summary of these affidavits in Cablevision Press Release, Exhibit A.

<sup>31/</sup> Id.

As a result, the Massachusetts DPU (now Department of Telecommunications and Energy, or "DTE") has initiated an investigation into Boston Edison's compliance with state law and the Department order authorizing Boston Edison's investment in the subsidiary affiliated with RCN, as well as the impact of the relationship between the electric utility and RCN on competition in the cable television and telecommunications industries. Like the Massachusetts Cable Commission's investigation of RCN's unauthorized service in Boston, this investigation was begun on the agency's own motion. The Massachusetts Department of Telecommunications and Energy is no less concerned with promoting competition than is the FCC,<sup>32/</sup> for RCN to imply that its investigation is somehow instigated by Cablevision or anticompetitively motivated does disrespect to the discretion of regulatory agencies.

The DTE's investigation has important implications for the developments of competitive facilities-based telecommunications in Massachusetts, as well as for Boston Edison's captive electric ratepayers. If Boston Edison is able to cross-subsidize its competitive telecommunications affiliate, the resulting market distortion will deter other facilities-based entry into Massachusetts.

Cablevision is a potential facilities-based entrant into the Boston area telecommunications market through its Cablevision Lightpath subsidiary, which currently provides local exchange telecommunications service in New York and Connecticut and is certified as a common carrier in Massachusetts. Because of the importance of the proceeding to

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<sup>32/</sup> The Massachusetts agency has had a strong record of promoting competition. For example, in 1985 it was the first state PUC to authorize intraLATA competition. IntraLATA Competition, Mass. D.P.U. 1751 (1985). More recently, it developed one of the first in the nation energy industry restructuring plans to introduce competition in energy services. Electric Industry Restructuring, D.P.U. 96-100 (1996).

competition in telecommunications as well as in cable, Cablevision exercised its right to intervene in the DTE's investigation (as did RCN).

Notwithstanding RCN's suggestion that Cablevision's intervention is anticompetitive, the concerns Cablevision has expressed before the Massachusetts DTE have been joined by the Massachusetts Attorney General, who represents ratepayers in DTE proceedings, by the Massachusetts Public Interest Research Group, and by would-be energy industry competitors such as NewEnergyVentures.<sup>33/</sup> The Massachusetts DTE and these other parties are reacting to RCN's dealings with Boston Edison, not to Cablevision.

### **3. RCN's Partner's Unlawful Pole Rates.**

Boston Edison also attributes some untoward anticompetitive motives to a complaint before the Massachusetts DTE alleging that pole attachment rates charged by Boston Edison to Cablevision are excessive and in violation of law.<sup>34/</sup> In fact, the DTE has ruled on that complaint, not only finding that the rates – announced by Boston Edison Company at the same time as it announced its partnership with RCN – were excessive, but finding that the maximum lawful rate was even less than Boston Edison Company had been charging under existing pole attachment agreements prior to its announced increase.<sup>35/</sup>

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<sup>33/</sup> See Exhibit B. In its comments, RCN states that Cablevision (joined by the Massachusetts Attorney General), filed a Motion to Reopen Record and Stay Decision in a proceeding “which already been resolved in RCN's favor.” This is incorrect. The proceeding, DPU/DTE Docket Number 97-63, involved an application by Boston Edison Company for approval of a holding company reorganization; on February 22, 1998, the Massachusetts Attorney General and Cablevision moved the DTE to reopen the record and to stay issuing a decision in that case pending the outcome of its pending investigation of Boston Edison. No decision had been issued. A decision was subsequently issued April 17, 1998, that was in Boston Edison's favor, not RCN's.

<sup>34/</sup> RCN Comments at 12.

<sup>35/</sup> Mass. D.P.U./D.T.E. 97-82, Order dated April 15, 1998 at 52.

#### 4. RCN's Unsupported Inside Wiring "Claim."

Just as Cablevision is within its rights in pursuing a pole attachment complaint or intervention in Massachusetts proceedings, it is equally within its rights under the FCC's inside wiring rules. RCN asserts a right to use homerun wiring owned and installed by Cablevision between the point of demarcation of individual residential units and MDUs and Cablevision lockboxes as "cable home wiring" within the meaning of Sections 76.5 and 76.800 of the Commission's rules, 47 C.F.R. §§ 76.5, 76.800 *et seq.* The Commission's Second Report and Order on Inside Wiring, FCC 97-376 (released October 17, 1997), modified the point of demarcation of residential units where that point is "physically inaccessible."<sup>36/</sup> Contrary to RCN's assertions, "physically inaccessible" is not wherever a point of demarcation is covered; rather it "describes a location that would require *significant* modification of, or *significant* damage to, preexisting structural elements and (2) would add *significantly* to the physical difficulty and/or cost of accessing the subscriber's home wiring."<sup>37/</sup> In a note to this definition, the rules give as an example "wiring embedded in brick, metal conduit or cinderblocks with limited or without access openings . . ." Access to wiring enclosed within sheet rock hardly requires the "significant modification of or significant damage" or "adds to physical difficulty and/or cost" in the way that brick, metal conduit or cinderblock do.

In its comments on the rulemaking for this report and order, RCN sought to have the Commission extend the point of demarcation in MDUs to lockboxes in all instances.<sup>38/</sup> The Commission rejected this position. RCN's interpretation is an effort to get through the back door

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<sup>36/</sup> Id. at ¶ 150; see 47 C.F.R. 76.5(mm).

<sup>37/</sup> 47 C.F.R. 76.5(mm)(4).

<sup>38/</sup> Comments of RCN Telecom Services, Inc., Docket No. 95-184 at 2 (September 25, 1997).

what the Commission rejected and to acquire homerun wiring at the rates applicable to subscriber wiring.

It is notable that, although the Commission's rules provide for complaints or denial of access to inside wiring, RCN has not brought any such complaint. Instead, it sent correspondence to Cablevision that was copied to the Cable Services Bureau and all the Commissioners of the Massachusetts DTE; then, after a May 14, 1998 meeting at which Cablevision sought specific information as to areas within MDUs that the parties can agree are "physically inaccessible," it waited until its comments in this proceeding to respond. Evidently, RCN's claims have been aimed more at building debating points than at achieving genuine access to premises.

**5. RCN's Issues with Local Government Are A Function of RCN's Deliberate Ambiguity About Its Regulatory Status.**

RCN's suggestion that local governments seek to charge fees for the use of public rights of way which include the costs of administering such rights of way or the charges for "existing utilities" misstates the law. Although Section 253 of the Telecommunications Act of 1996 limits right of way charges to "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis . . ." OVS providers are under a different regime. Section 653(c)(2)(B) authorizes local governments to require OVS providers to pay fees "on the gross revenues of the operator in the provision of cable service . . . in lieu of the franchise fees permitted under Section 622." These fees are comparable to those imposed on cable operators. Thus, local franchising authorities are entitled to require these and other agreements in support of public access commensurate with those required of cable operators.<sup>39/</sup>

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<sup>39/</sup> 47 U.S.C. § 573c(2)(B); Second Report and Order, FCC 96-249 (released June 3, 1996).

Franchising authority negotiation for franchise fees and other terms comparable to those that they obtain from cable operators is particularly appropriate where RCN has stated a preference for cable franchises and uses its OVS status as a bargaining chip in such negotiations. What RCN appears to be doing is asking the Commission to give it a bigger bargaining chip. While Cablevision is sympathetic to RCN's concerns that the demands of local franchising authorities can be excessive, it can only say welcome to the marketplace. In the end, not only is RCN asking that regulators look the other way at the behavior of RCN and its affiliates for the sake of competition, but it expects competitors to do the same.

**C. RCN Has Provided The FCC With Inaccurate Rate Information.**

Perhaps the only specific question raised in the Commission's NOI that RCN addresses is the pricing of its services. Here, however, RCN supplies misleading information.

Claiming that its entry into the Boston marketplace has succeeded in reducing video programming rates, RCN uses as its Exhibit A rate comparisons for the Towns of Weymouth, Needham, and Hudson. Yet **none** of these are communities where RCN actually has been providing OVS service.

Where RCN has been providing service and has done so the longest – in the City of Boston – its rates are higher than what it submitted to the Commission. The rate for video programming quoted in RCN's Exhibit A is \$24.95 per month. In Boston, however, after providing service for approximately one year at this rate, RCN increased its rate to \$27.95 per month. Its chief executive David McCourt explained: "The original promotion was **below our costs**. Now, we're trying to get up to a competitive level. **Twenty-seven ninety-five was the**

**rate we always intended to charge.**<sup>40/</sup> It is evident, then, that the rates RCN has quoted to the Commission in its comments are not only hypothetical, but are not what it intends to charge – at least not beyond an introductory phase.

## **II. GEMSTAR/STARSIGHT'S COMMENTS RAISE BROAD AND COMPLICATED ISSUES BEYOND THE PROPER SCOPE OF THIS PROCEEDING.**

Gemstar/StarSight's comments raise complex questions regarding the future of digital programming that are outside the scope of this proceeding.<sup>41/</sup> Section 628(g) of the Communications Act, which requires the Commission to inquire into and report annually on the status of competition in markets for the delivery of video programming, focuses specifically on providing a mechanism for competitive MVPDs to obtain video programming from vertically integrated program providers.

Gemstar/StarSight seems to argue that section 628 provides the basis for the FCC to extend to any entity the "right" to reach cable subscribers over a cable system. Numerous and complicated issues would have to be addressed and resolved by the Commission prior to reaching such a sweeping conclusion. Apparently Gemstar/StarSight also seeks to interpose itself between cable operators and their subscribers, which could undermine the statutory framework that affords cable operators editorial discretion.<sup>42/</sup> Finally, implicit in Gemstar/StarSight's Comments is the broader question of control over cable service in general and the continuing ability of cable operators to determine the look and feel of the video program

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<sup>40/</sup> Boston Globe, RCN to Raise Cable Rates by 12% to 25% (Feb., 1998) (emphasis added) (attached as Exhibit C).

<sup>41/</sup> See Comments of Gemstar International Group Limited and StarSight Telecast, Inc., CS Docket No. 98-102 (filed July 31, 1998) ("Gemstar/StarSight Comments").

<sup>42/</sup> See, e.g., 47 U.S.C. § 541(c) (prohibiting regulation of cable systems as public utilities or common carriers).

experience they provide to their subscribers in a digital environment. These issues are only made more complex by the convergence of television, computers, and Internet-based services and the concomitant evolution of program guides that afford access to Internet and video services. This proceeding is not the appropriate setting in which to address such matters.

The fact is, there is no clear basis upon which to conclude that electronic program guides (“EPGs”) are “video programming.”<sup>43/</sup> The inclusion of EPG material in the vertical blanking interval by some cable operators does not alter this conclusion.<sup>44/</sup>

### CONCLUSION

For the reasons above, Cablevision asks the Commission to discount the misleading allegations of anticompetitive behavior on the part of Cablevision and other cable operators leveled by RCN, and instead take this opportunity to examine and adopt necessary changes in the OVS process to counter the abuses of that process by RCN. Cablevision also asks the Commission not to attempt to include any of the complex issues involving electronic program guides in this report to Congress, since that topic is not relevant to the purposes for which Congress enacted Section 628 of the Communications Act.

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<sup>43/</sup> See 47 U.S.C. § 522(20) (defining “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”).

<sup>44/</sup> See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, 9 FCC Rcd 6723, 6733 ¶ 47 n.145 (1994) (expressly declining to find StarSight’s program guide was “program-related material” under section 614(b)(3)(A)).

Respectfully submitted,

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**EXHIBIT A**



**FOR IMMEDIATE RELEASE**

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**UNAUTHORIZED BOSTON EDISON INVESTMENT IN RCN LEADS TO  
OVERCHARGES FOR ELECTRIC CONSUMERS**

*Cablevision asks DTE to complete investigation and  
minimize future risk to Massachusetts electric customers*

BOSTON, MA February 26, 1998 -- New evidence uncovered as part of an ongoing state investigation discloses that Boston Edison improperly diverted approximately \$100 million in valuable assets to finance a telecommunications venture with Residential Communications Network (RCN) in a clear violation of a 1993 Massachusetts Department of Public Utilities order, according to expert evaluations and a motion filed today with the Massachusetts Department of Telecommunications and Energy (DTE).

By undervaluing assets transferred to RCN, the motion asserts, Boston Edison has effectively overcharged captive electric customers contrary to the requirements of the state's new deregulation law. To protect electric customers, the law requires Boston Edison to mitigate its stranded costs to the maximum extent possible.

"Boston Edison (repeatedly) flouted the Department's authority by violating the (1993) order and by evading Department review of its investment in an unauthorized new business area," the motion stated. "These violations are far from inconsequential. The utility has invested up to three times the authorized amount in a line of business -- telecommunications -- completely unrelated to the business activities approved by the Department to the detriment of its customers and the benefit of its shareholders."

The new evidence was filed today with the DTE, formerly the Department of Public Utilities (DPU), as part of a motion by Cablevision Systems Corporation. Three independent experts in utility regulation supported the motion by filing affidavits in the case.

In its motion, Cablevision is asking the DTE to delay action on Edison's application to create a new holding company that would allow Boston Edison to evade public scrutiny of its non-electric investments. Additionally, Cablevision asks the DTE to freeze any further investments until a DTE investigation into the relationship between Boston Edison and RCN is completed. The DTE initiated the investigation of the relationship in October 1997.

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Background

In 1993, Boston Edison sought and received approval from the DPU to invest \$45 million in an unregulated subsidiary, the Boston Energy Technology Group (BETG), for three specific purposes: (1) demand side management, (2) electric vehicles, and (3) energy generation. The Department's 1993 order limits both the scope and size of Boston Edison's investment in its subsidiary.

In 1997, in an apparent violation of the commission's order, Edison entered into a joint venture with RCN to supply non-electric services in Massachusetts. The motion asserts that Edison has transferred cash and non-cash assets, including its new network of fiber optic cable and rights-of-way built to provide service to electric customers, through BETG to RCN.

The motion also recounts on the record testimony before the DPU by Thomas May, Edison's current chief executive officer, stating that Edison would return to the DPU to get approval if BETG planned to invest in any efforts other than the three specific approved energy-related ventures. Contrary to that assertion, Boston Edison has never sought regulatory approval to make these unauthorized investments.

The DTE is currently reviewing Edison's request to create a holding company, a structure that would allow it to invest in other lines of business without having to seek DTE approval. This would effectively exempt its continued investments in the RCN venture from oversight. Cablevision is requesting that the DTE consider fully the results of its investigation before ruling on the holding company petition.

"By investing in unauthorized activities while, at the same time, pushing for approval of its holding company plan, Boston Edison has demonstrated both its intention to avoid Department review of its future business ventures and its disregard for the Department's authority to review its present business ventures," the motion stated. "Approving Boston Edison's proposal before the record of its misconduct is fully developed and dealt with will place a seal of regulatory approval on...abuses that have diverted tens of millions of dollars from Boston's Edison's electric customers to Boston Edison's shareholders."

An affidavit filed in support of the motion by Peter Bradford, former chairman of the New York Public Service Commission, and commissioner and chairman of the Maine Public Utilities Commission, argues that DTE action on the holding company question before the conclusion of the investigation would hurt the credibility of the agency and put ratepayers in jeopardy.

"When a utility abuses this trust, it pollutes the information stream that is an essential ingredient of successful regulation," Mr. Bradford argued.

Motion: Electric Customers Subsidizing Edison-RCN Profits

The record now emerging clearly demonstrates that Boston Edison's customers are subsidizing its joint venture with RCN.

In another affidavit filed in support of today's motion Gary Harpster, Director of Energy Projects for Overland Consulting, a Kansas-based consulting firm, stated: "Based on information available at this time, it is apparent that (Edison) has invested substantially more than \$45 million in BETG and has not accurately represented its investment in testimony to the Department."

According to Edison's own filings, the company has made contributions of cash, assets, and guarantees to BETG of \$85.4 million.

However, this number understates dramatically the value of Edison's fiber optic network and its rights of way. According to affidavits filed by industry experts, these assets are worth considerably more than Edison valued them for the purposes of transferring them to the joint venture. Accounting for the fair market value of the fiber optic network increases the investment to \$140.8 million, rather than the \$85.4 million reflected in Boston Edison documents.

"The assets that make up (Edison's) fiber optic network have been an integral part of (Edison's) rate base, paid for over time by (Edison's) ratepayers," Richard Silkman, a public utility consultant, stated in the third affidavit filed with Cablevision's motion. "By transferring its fiber optic network to the joint venture at far below full market value, (Edison) has shifted a substantial portion of the economic value associated with these assets from its ratepayers to its shareholders." Dr. Silkman has served as director of the Maine State Planning Office, and as president of the board of directors of the Council of Governors' Policy Advisors.

Dr. Silkman estimates the value of the fiber optic network at between \$39.1 and \$67 million, well in excess of Edison's estimate of \$11.3 million. Dr. Silkman stated his estimate is "very conservative" because it does not include the value of the additional rights-of-way that Edison has transferred to RCN for 63 years and the right to use them for 63 years, as stated in the agreement.

Since Boston Edison is not receiving fair market value for transferred assets, the affidavit asserts that Edison is not mitigating stranded costs to the maximum extent possible, as required under the new state law governing deregulation of the electric industry. Assets the electric utility transferred through BETG are far more valuable than Boston Edison has acknowledged, and the electric utility should use this valuation to mitigate stranded costs.

"(Edison) is making its electric customers the victims of a stranded asset shell game," Mr. Bradford stated.