

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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

CS Docket No. 98-102

**REPLY COMMENTS OF  
RCN TELECOM SERVICES, INC.**

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August 31, 1998

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## SUMMARY

The initial comments in response to the Commission's Notice of Inquiry clearly demonstrate the urgent need for the Commission to play a more active and creative role in fostering facilities-based competition in video markets. The incumbent cable industry attempts to convince the Commission that video competition is burgeoning to such a degree that any further Commission effort to promote competition is unnecessary, while seeking on the other hand to impede challenges to their monopoly. Alternative MVPDs demonstrate that, despite the Commission's herculean efforts to foster competition, the entrenched cable industry continues to control more than 85% of the market.

As set forth below, RCN urges the Commission to focus its energies in a few particular areas. First, the Commission must continue and intensify its efforts to open the MDU market to competition. This market is vital to many competitors since MDUs often are the sub-market where competitors first gain a foothold. Second, the Commission must act to facilitate the deployment of open video systems ("OVS"), as both the statutory provisions and certain of the Commission's OVS rules impede the economic implementation of OVS systems. Finally, RCN urges the Commission to closely examine the cable industry's own competitive data. Cable operators' rates continue to increase at an unreasonable pace, despite the substantial programming discounts cable operators enjoy.

RCN commends the Commission for its efforts to monitor competition in video markets, but urges the Commission to take further steps by initiating additional proceedings designed to mitigate the incumbent cable industry's ability to impede challenges to its monopoly.

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RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, hereby respectfully submits its Reply Comments to the Comments filed in response to the Federal Communications Commission's ("Commission") Notice of Inquiry ("NOI") in the above-captioned matter.<sup>1</sup> As set forth below, the initial comments demonstrate the urgent responsibility of the Commission to more actively and creatively assure that alternative multiple video programming distributors ("MVPDs"), and in particular, open video system ("OVS") operators, are not denied fair and reasonable opportunities to compete in the video programming marketplace.

**I. INTRODUCTION**

As the leading proponent of the Congressionally-created OVS model, RCN's initial comments in this proceeding urged the Commission to take a more active and supporting role in fostering the development of competition in the video marketplace, especially competition from OVS operators. RCN noted that, notwithstanding some progress in the development of other

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<sup>1</sup> *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 98-102, FCC 98-137, *rel.* June 26, 1998.

segments of the market (i.e., cable overbuilders, DBS), the incumbent cable operators remain overwhelmingly dominant and have gone to substantial lengths to try to choke off deployment of OVS systems at their inception. As in their comments for prior Commission video competition assessments, the entrenched cable multiple system operators ("MSOs") asserted that competition is strong and growing ever-stronger and thus urged the Commission not to interfere in the present structure of the industry. These comments demonstrate that, left to its own devices, the incumbent cable monopoly will continue to dominate the MVPD marketplace and attempt to foreclose consumers' interests in choosing from among a wide variety of video program distributors. On the other hand, the comments of cable overbuilders, MMDS and SMATV operators, and other alternative MVPDs, show that competition is viable but only if the regulatory climate is carefully designed to assure that competition has a fair opportunity to flourish. Many of these parties proposed remedial steps which the Commission should take to foster competition.

Considered in their entirety, the comments clearly support RCN's suggestion that the Commission must play a more active role in promoting competition in the MVPD marketplace. Given the vast economic resources of the incumbent cable industry, its dominance in the market and its continuing flights toward greater horizontal and vertical concentrations of subscribers and product, respectively, it is imperative that the Commission do more than merely express its abstract support for OVS, DBS, MMDS or SMATV; rather, the Commission must actively and creatively use its broad powers under the Communications Act to ensure that alternative MVPDs enjoy a fair opportunity to compete.

## II. REPLY COMMENTS

In its initial Comments, RCN described its extensive efforts to enter the MVPD market as an OVS operator. RCN apparently is the only entity which is even attempting to deploy OVS on a meaningful scale. It currently holds Commission certifications to operate OVS systems in the Boston area, New York City, northern New Jersey, Philadelphia, the Washington, D.C. region, and the San Francisco Bay area.<sup>2</sup> RCN has installed approximately 88 sheath miles of fiber optic cable, initiated OVS service in Boston and Manhattan and currently serves about 15,600 OVS subscribers. RCN already has expanded its OVS plant into several Boston suburbs and expects to extend service to portions of the outer boroughs of New York in the coming months. RCN, through its affiliate Starpower Communications, Inc., will commence offering OVS service in portions of Washington, D.C. and surrounding suburbs by the end of this year.

In its two current OVS markets, Boston and New York, RCN competes with some of the largest cable MSOs in the country: Time Warner Cable Co. ("Time Warner"), Cablevision Systems Corp. ("Cablevision"), and MediaOne Group, Inc. ("MediaOne").<sup>3</sup> Of these, Time Warner and Cablevision have adopted as a matter of corporate policy an anticompetitive and orchestrated crusade against RCN, including the filing of numerous pleadings at the Commission and the Massachusetts DTE, attempting to unlawfully deny RCN access to video programming,

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<sup>2</sup> RCN Comments at pp. 4-6.

<sup>3</sup> In New York City, for example, RCN has 40,000 subscribers versus Time Warner's 1,138,000 and Cablevision's 2,617,000. *See* Time Warner homepage: <http://www.pathfinder.com/corp/fbook/fcable.html>; Cablevision homepage: <http://www.cablevision.com/cvhome/cvabout/finance.html>. In round numbers, RCN thus serves only about one percent of the New York market served by Time Warner and Cablevision.

and unlawfully refusing to cooperate with RCN's offering of service to customers in multiple dwelling unit buildings ("MDUs").

The Commission must be aware that OVS, as an incipient market entrant, may not survive as a competitor to the incumbent cable monopoly if the Commission does not act decisively to temper the cable industry's anticompetitive efforts. As discussed below, RCN agrees with certain suggestions of other competitive entrants, but urges the Commission to seize the initiative and to launch a rulemaking proceeding to consider various remedial steps designed to assure that video competition has a fair opportunity to flourish. If the Commission is not prepared to encourage the development of OVS through the pro-competitive interpretation of its rules, by the adoption of new rules, or through the initiation of appropriate investigations of cable industry conduct, the future of OVS will be put at risk.

**A. The Commission Must Do More To Assure A Fair Competitive Opportunity in the MDU Segment of the MVPD Market**

The NOI sought comment on the status of video delivery competition in MDUs.<sup>4</sup> RCN, the Wireless Communications Association International, Inc. ("WCAI") and Ameritech New Media, Inc. ("Ameritech") all emphasized the importance of the MDU market.<sup>5</sup> Each noted that the MDU population is very large<sup>6</sup> and presented its own special competitive problems. RCN

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<sup>4</sup> NOI at ¶ 26.

<sup>5</sup> RCN Comments at pp. 13-15; WCAI Comments at pp. 5 and 12-16; Ameritech Comments at pp. 48-9.

<sup>6</sup> The National Rural Telecommunications Cooperative ("NRTC"), relying on data provided to the Commission by DirecTV in another proceeding, estimates that 27% of the American public lives in MDU's. NRTC Comments at p. 18.

stressed that, notwithstanding great effort, it has been unable to develop a reasonable *modus operandi* with Cablevision, the dominant incumbent cable operator in Boston, for the smooth and uninterrupted transition of Cablevision's MDU subscribers to RCN (and back again should RCN's subscribers so desire). Although the Commission developed a specific set of rules for resolving inside wiring issues in MDUs, and those rules require incumbent cable operators to cooperate with competitive entrants,<sup>7</sup> Cablevision has refused to do so. In effect, Cablevision has informed RCN that it has no interest in developing a set of reasonable working rules for service hand-offs or to allow RCN access to the existing wiring within MDUs currently served by Cablevision. As a result, RCN is unable to offer service to customers in numerous MDUs even though RCN already has connected these structures to its fiber optic distribution system or will do so shortly.

WCAI states that, although the Commission's inside wiring rules are a good beginning, much more is required "since resolution of inside wiring issues is absolutely necessary if MDU owners and alternative MVPDs are to have any kind of certainty as to the 'rules of the road' when a building owner or an individual tenant wishes to switch service providers."<sup>8</sup> WCAI urges the Commission to expand its inside wiring rules to enhance the competitive opportunities for non-cable operators, to preempt conflicting state laws known generally as "mandatory access" laws, and even to seek additional authority from Congress, if the Commission believes it is necessary, to address more completely the issues posed by disposition of incumbents' home run

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<sup>7</sup> 47 C.F.R. § 76.804(b)(5).

<sup>8</sup> WCAI Comments at p. 12.

wiring.<sup>9</sup> RCN endorses WCAI's view that the Commission must do more to assure that competitors have fair access to existing home run wiring. WCAI also notes that "structural limitations, fear of property damage, and related aesthetic considerations often discourage an MDU property owner from allowing multiple providers onto his or her property unless existing wiring can be re-used."<sup>10</sup> As described in RCN's initial comments, this is exactly the situation RCN faces. Cablevision has refused to allow RCN access to the existing home run wiring by insisting that the demarcation point for such wiring is located at or about 12 inches outside of each individual MDU unit, even though accessing the wiring at such points would require RCN to drill holes through sheet rock against the wishes of the various MDU owners.<sup>11</sup>

Ameritech recites similar problems in its comments: "Despite the release by the Commission of its Home Run Wiring rules for MDUs, which were intended to foster competition in the MDU market, there has been little progress in sparking competition in MDUs."<sup>12</sup>

Ameritech notes that the Commission's inside wiring regulations provide that the incumbent MVPD must not own the inside wiring nor have a legally enforceable right to remain on the premises in order to be required to cooperate with an entrant regarding use of the inside wiring.<sup>13</sup>

Ameritech states that, given this rule, competition is effectively blocked in MDUs because only "very rarely" does a cable operator unambiguously lose its legal right to remain on the premises

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<sup>9</sup> *Id.*

<sup>10</sup> WCAI Comments at p. 13.

<sup>11</sup> RCN Comments at pp. 15-16.

<sup>12</sup> Ameritech Comments at pp. 48-9.

<sup>13</sup> *See, e.g.*, 47 C.F.R. § 76.804(a).

and MDUs "often do not want duplicative wiring or are subject to exclusive agreements, effectively foreclosing the [new entrant] from competing in that MDU."<sup>14</sup> Ameritech similarly concludes that "[m]ore must be done by the Commission to foster competition for the millions of consumers who reside in MDUs."<sup>15</sup>

RCN endorses Ameritech's arguments that the MDU problem is very serious and requires more active Commission participation. Indeed, the MDU access problems RCN faces are becoming more acute each month. While Massachusetts is a so-called "mandatory access" state,<sup>16</sup> RCN is unaware of any Massachusetts judicial precedent granting Cablevision an infeasible right to remain in an MDU and to refuse competitors' reasonable access to the existing inside wiring. Nevertheless, Cablevision contends that it can proceed in exactly that fashion. If RCN cannot gain access to these potential subscribers because it cannot use existing wiring and building management will not allow the installation of overbuild wiring or moldings encasing wiring -- and this is exactly the situation faced by RCN in Boston -- a substantial and vital portion of the marketplace will be unavailable to RCN. As a matter of simple economics, Cablevision's actions to stall RCN's competition disserves the immediate interests of those Cablevision subscribers who have indicated to RCN that they would like to switch service providers, and more fundamentally, gravely weakens the commercial prospects for the success of OVS as an alternative MVPD model. Cablevision apparently has reached the same conclusion in

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<sup>14</sup> Ameritech Comments at p. 49.

<sup>15</sup> *Id.*

<sup>16</sup> 166 M.G.A. § 22.

New York and is proceeding as any rational monopolist would. The Commission must intercede in this blatant effort to impede competition if it hopes to allow a fair competitive opportunity for OVS.

Section 624(i) of the Communications Act requires "the Commission . . . [to] prescribe rules concerning the disposition . . . of any cable installed by the cable operator *within the premises of such subscriber.*"<sup>17</sup> The Commission defined "cable home wiring" as the "internal wiring contained within the premises of a subscriber which begins at the demarcation point,"<sup>18</sup> and set the demarcation point in MDUs at or about "12 inches outside of where the cable enters the subscriber's dwelling unit."<sup>19</sup> All of the Commission's subsequent inside wiring rules and policies are grounded in these definitions. In fashioning these definitions in 1993, the Commission failed to heed the prescient suggestions of alternative MVPDs urging the Commission to define cable home wiring to include all of the wiring dedicated to serving individual subscribers.<sup>20</sup> As experience has shown, these parties correctly predicted that the Commission's position would not allow competition to develop in MDUs. The time has come for the Commission to modify its regulations to reflect the realities of competition within MDUs since, despite the Commission's best efforts over the past six and one-half years, RCN and other alternative MVPDs still cannot offer competitive services to customers in many MDUs.

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<sup>17</sup> 47 U.S.C. § 544(i)(emphasis added).

<sup>18</sup> 47 C.F.R. § 76.5(l).

<sup>19</sup> *Id.*, § 76.5(mm).

<sup>20</sup> *Report and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 8 FCC Rcd 1435, 1437 (1993).

Accordingly, RCN urges the Commission to review and amend its rules to foster such competition. An important first step is to interpret Section 624(i) so that the "subscriber" is the MDU owner or manager for purposes of implementing the inside wiring rules in MDUs. Under this approach, MDU owners or managers would be able to rely on the rules as intended by the Commission; that is, they could allow alternative MVPDs to offer competitive services by using the existing home run wiring, including inaccessible wiring behind sheet rock and other obstacles. More broadly, a revision of the Commission's rules is necessary to facilitate which is available but not yet operational.

**B. The Regulatory Design of Open Video Systems Requires Further Commission Scrutiny**

BellSouth states in its comments that it has elected not to enter the MVPD market through the OVS model but to pursue instead the franchised approach. BellSouth reports that it has concluded that the OVS route is commercially impractical and that BellSouth has "little incentive to abandon franchised cable service in favor of the OVS model... ." <sup>21</sup> BellSouth makes this determination due principally to the statutory requirement that an OVS operator make up to two-thirds of its channel capacity available to unaffiliated programmers. <sup>22</sup>

RCN agrees that the statutory requirement to allocate up to two-thirds of its system capacity to unaffiliated video programming providers ("VPPs") is burdensome. The provision effectively requires a substantial investment in the deployment of facilities that, in turn, requires an OVS operator to charge VPPs very high rates for access. To RCN's dismay, interest in

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<sup>21</sup> BellSouth Comments at p. 21.

<sup>22</sup> BellSouth Comments at pp. 20-21, citing 47 U.S.C. § 653(b)(1)(B).

RCN's various OVS systems has been modest so far. In Boston, for example, two of the three inquiries RCN received came from its regional facilities-based competitors, Time Warner and Cablevision.<sup>23</sup> Similarly, RCN found relatively little interest from qualified prospective VPPs for carriage on its OVS systems in New York and Washington D.C. Further, those prospective VPPs that did respond found the commercial prospects unenticing since the cost of installing fiber optic cable in the ground or on poles is very high.<sup>24</sup>

As it has in the past, RCN intends to continue to adhere strictly to the statutory and regulatory requirements which are applicable to OVS operators. Based on RCN's experience and the decisions of Ameritech and BellSouth to eschew the OVS model, however, it is difficult to avoid the conclusion that the present OVS regulatory scheme may not provide a commercially viable model for competitive entrants. RCN thus would endorse BellSouth's call for the Commission to recommend amending the statutory provisions governing OVS to eliminate the requirement that OVS operators make the bulk of their capacity available to independent programmers if carriage demand exceeds the system's channel capacity.

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<sup>23</sup> RCN concluded, however, that under the applicable Commission rules it had no obligation to provide the data sought by these in-region competitive cable companies. This matter is currently being litigated before the Cable Services Bureau. *See, e.g., Memorandum Opinion and Order, In the Matter of Time Warner Cable v. RCN-BeCoCom, LLC, Open Video System Complaint, rel. April 28, 1998, recon. pending.*

<sup>24</sup> The Commission's OVS rules address costing issues and require that the rates be just and reasonable. See 47 C.F.R. § 76.1504. RCN has engaged an outside accounting firm to do its costing and, together with these outside consultants, has developed costs and rates which comply with applicable Commission rules. However, the costs of purchasing and installing fiber optic cable, including fair overhead allocations, are unavoidably high.

Pursuing the OVS model has proven difficult in one other respect. As RCN has noted in its responses to OVS complaints filed by Time Warner and Cablevision regarding RCN's fledgling Boston OVS system, many local municipalities seem to prefer that a new MVPD competitor constitute itself in the Title VI franchise mode rather than in the OVS format. Local cable advisory committees apparently believe they this enables them to negotiate better terms for the local citizens.<sup>25</sup> In their complaints seeking access to RCN's proprietary system data, both Time Warner and Cablevision accuse RCN of misusing the OVS model to secure franchise agreements.<sup>26</sup> In fact, as RCN has repeatedly advised the Commission,<sup>27</sup> it is the local cable officials who prefer the franchise mode and as a practical matter, RCN must respect these preferences. In many instances, RCN cannot proceed in the OVS mode simply because local officials are more comfortable and familiar with the franchise approach. Either mode, of course, produces competition for the entrenched cable company.

However, it is RCN's experience in the Boston suburban communities in which it has sought to initiate OVS services that negotiating a traditional franchise agreement is time consuming, involving, as it does, commitments from both the town and the operator over an extended period of years. Clearly the franchise mode has its advantages. Among these is that it

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<sup>25</sup> RCN does not necessarily believe this inclination is correct but its negotiations with many suburban towns in the Boston metropolitan area clearly indicate that local negotiators believe it to be true.

<sup>26</sup> *See, e.g.*, Time Warner Complaint at p.25; Cablevision Petition at 4.

<sup>27</sup> *See, e.g.*, Statement of Scott Burnside, attached as Exhibit A to RCN-BeCoCom Answer to Time Warner OVS, at 3-4.

obviates the necessity for RCN to open its corporate and system planning to its competitors.<sup>28</sup>

Nevertheless, RCN's fundamental expectation is that it will continue to pursue the OVS mode at every opportunity, subject to the practical necessity to secure the requisite local authority to construct and initiate service and subject to developments in the regulatory climate.

**C. The Cable Industry's Comments Merely Repeat Prior Unconvincing Arguments Concerning Costs of Service and Competition**

With only minor variations, the cable industry's somewhat limited comments repeat prior views. For example, the National Cable Television Association ("NCTA") clings to its view that competition in the MVPD marketplace is strong, while simultaneously admitting that franchised operators serve more than 85% of the market.<sup>29</sup> Without cluttering this record with elaborate antitrust analysis, it is clear to any student of competitive markets that an 85% share is overwhelming dominance. Similarly, the cable industry reargues that cable price hikes are not their fault but rather result from increases in programming costs.<sup>30</sup> Of course, these operators neglect to note that cable MSOs either control or own substantial interests in the majority of the

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<sup>28</sup> RCN is currently seeking reconsideration of a Cable Services Bureau order compelling RCN to disclose to Time Warner, a competing, in-region competitor, proprietary data concerning RCN's construction plans for its OVS system in the Boston area. RCN contends that the Bureau erred in construing section 76.1503(c)(2) of the Commission's rules to require such disclosure under the circumstances presented in Time Warner's complaint. On July 24, 1998 Time Warner filed a similar complaint with respect to RCN's OVS in New York. In this complaint, Time Warner argues that, even though both Time Warner and RCN operate in New York City, RCN is obligated to disclose its commercially sensitive corporate and system planning to Time Warner. RCN filed an answer to the complaint on August 24, 1998 asserting that it has no such obligation under the rules.

<sup>29</sup> NCTA Comments at pp. 5-6.

<sup>30</sup> *Id.*, at p. 43.

most valuable and popular programming. As in prior years, the cable industry advises the Commission that cable rates increases are necessitated by rising costs for programming,<sup>31</sup> and that the fact that the increase is dramatically higher than inflation is really meaningless because the CPI is only an average and some producers' price increases must be higher than average as a simple matter of mathematics.<sup>32</sup> The Commission may be forgiven if it finds these arguments at best unhelpful and at worst arrogant.

RCN's comments included a table demonstrating that its services are both superior to, and less expensive than, the incumbent's.<sup>33</sup> NCTA, however, notes that RCN has raised its rates in certain communities and has indicated to the press that some of its early pricing was below cost.<sup>34</sup> Notwithstanding certain selective increases, RCN's video rates in the Boston area remain significantly below those of its competitors. RCN has lowered rates below costs in certain situations to build market share. This does not, however, change the fact that franchised cable operators charge excessive and monopolistic rates that contain some element of economic rents. Other commenters have dealt at length with the issue of programming costs and the movement of dollars from one corporate pocket to another by the vertically integrated cable companies.<sup>35</sup> To avoid cluttering the record with repetitious argument, and to put the matter simply, RCN

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<sup>31</sup> *Id.*, at p. 43.

<sup>32</sup> ABC Comments at p.10.

<sup>33</sup> RCN Comments at Exhibit A.

<sup>34</sup> NCTA Comments at pp. 45-6.

<sup>35</sup> *See, e.g.*, Ameritech Comments at 27.

challenges either Time Warner or Cablevision to provide the Commission with data reflecting their return on investment in their New York or Boston area cable systems over the last decade.<sup>36</sup>

NCTA notes in its comments that cable companies have responded to competition<sup>37</sup> and proudly points to a 300% increase in the number of non-cable MVPD subscribers, *i.e.*, from 3 million in 1985 to 12 million today.<sup>38</sup> Although these figures are dramatic, they seriously distort the true competitive picture. According to NCTA, cable's share of the MVPD market declined two percentage points from 1996 to 1997 and two and one-half points from 1997 to 1998.<sup>39</sup> Since this decrease occurred during the time frame when cable's major competitor, DBS, developed and has probably peaked, these figures should not be viewed as very encouraging. In fact, even if competition continues to increase at the same rate, it would take about 17 years before non-cable MVPDs could capture only half of the MVPD market. Of course, such progress is not likely. MMDS, which has been providing wireless cable for many years, has secured only about 2% of the market, and incumbent LECs, through cable franchise overbuilds and OVS, have captured less than 4/10ths of one percent of the market.<sup>40</sup> RCN would urge the Commission to read NCTA's flowing and cheerful recitation about burgeoning competition with

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<sup>36</sup> The data, of course, would have to properly reflect the profits attributable to the production and distribution of programming based on defensible allocations to individual cable systems. Return on investment may or may not be an appropriate measure for setting the rates that cable operators may charge. It is, however, a useful indicium of the extent to which these companies are earning supra-competitive profits or profits which reflect monopoly rents.

<sup>37</sup> NCTA Comments at pp. 35-45

<sup>38</sup> *Id.*, at p.1.

<sup>39</sup> *Id.*, at 6.

<sup>40</sup> *Id.*

scepticism and see it for what it truly is: carefully crafted rhetoric and manipulation of numbers designed to paint a picture of competition that does not really exist for the average consumer. While competition is appearing, and RCN is doing everything it can to develop a larger OVS competitive presence, the reality is that the vast majority of subscribers will remain captive to franchised cable operators for the foreseeable future.

### **III. Conclusion**

RCN commends the Commission for the substantial effort it has devoted in its prior annual assessments of the MVPD market. This undertaking, however, should not be merely to satisfy a statutory obligation, as important as that is. Rather, the concerns set forth by the emerging competitors should be catalysts for further Commission action to promote competition, *e.g.*, with respect to service to MDU's and the OVS rules. In this light, RCN urges the Commission to proactively respond to the concerns expressed by the fledgling competitors so as to encourage a more rapid increase in the competitiveness of the market.

Respectfully submitted,



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