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Before the
Federal Communications Commission
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

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

CS Docket No. 00-132

COMMENTS OF RCN CORPORATION

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SUMMARY

RCN Corporation, which is developing a significant competitive role in the MVPD marketplace, submits these Initial Comments in the Commission's annual assessment of the state of competition in the MVPD industry. RCN, an entity which owes its very existence to the opportunities created by the procompetitive provisions of the Telecommunications Act of 1996, is committed to a unique business plan. It plans to provide four related services: local exchange and long distance telephony, high speed Internet access, and broadband video distribution. It will do so by bundling these services and providing them over one of the most modern fiber optic networks being built anywhere or by any telecommunications or cable entity. RCN plans to concentrate primarily on residential subscribers located in densely populated and demographically desirable areas of the country. RCN currently provides MVPD service in the Boston, New York, Philadelphia, Chicago, San Francisco and Washington D.C. metropolitan markets, and in Pennsylvania and New Jersey. It is actively planning for or constructing additional facilities in northern New Jersey, and in the Baltimore, MD, Los Angeles, Portland OR, Seattle, WA, south Florida, and Phoenix, AZ metropolitan areas.

RCN's preferred mode of entry into the MVPD market is as an open video system ("OVS") operator and it operates in this format in many areas. RCN is currently the largest OVS operator in the country by a wide margin, and indeed the only one of any significant scale. At the same time, RCN also operates numerous franchised cable systems. Whether to function in any given area as an OVS or as a franchised cable operator is primarily a question of the preferences of the local governments and the relative speed to market.

RCN is building a state-of-the-art fiber optic network, capable of carrying up to 860 MHz and optimized for all of its services. RCN has raised billions of dollars and spent hundreds of millions of dollars to establish its business and to construct the first segments of its network.

Substantially more investment and capital expenditures will be made in the coming 12 months. It currently has almost one million service connections. RCN is making good progress in developing the markets it wishes to serve. In the last year it has won numerous franchises and OVS agreements and its subscribership is growing constantly.

The Notice of Inquiry inquires about barriers to the introduction of MVPD competition. RCN welcomes this opportunity to make the Commission aware of the difficulties with which RCN must contend, even though most of these issues already have been brought to the Commission's attention through various prior filings at the Cable Services Bureau. The following matters constitute significant barriers to entry or significant impediments to the successful development of a competitive MVPD business:

- Incumbents' efforts to chill or undermine MVPD competitive entry;
- Denial of access to essential programming;
- Inability to gain access to MDU inside wiring;
- Delays and excessive costs in pole and conduit access
- Difficulty in accessing local rights-of-way on fair and reasonable terms; and
- Adverse or delayed FCC decisions.

In the markets in which RCN is operating as a new entrant, incumbents have responded to competitive pressures by improving their services, lowering or foregoing rate increases, offering bulk discounts to MDUs, or otherwise providing better service or lower-cost service to their subscribers. RCN has no quarrel with such competitive responses. Unfortunately, the incumbents have also responded in certain anti-competitive ways, such as: (1) using the Commission's OVS rules to seek to pry from RCN competitively sensitive data on its OVS system; (2) making access to local pole and conduit facilities very expensive and difficult to

secure on a timely basis; (3) declining to permit RCN to use existing inside cable wiring in MDUs; and (4) denying RCN access to essential programming.

Without adequate programming, no investment and no technology provides public benefits. In a pending matter, RCN seeks a ruling from the Commission that Cablevision is required by section 628 of the Communications Act and the program access rules to make certain sports programming available to RCN in New York City, even though the programming is, in part, transmitted by terrestrial means. RCN's inability to access the programming in dispute puts at risk both its enormous investment in wiring Manhattan and its plans to expand its service into the other boroughs of the city. Cablevision argues that it has no program access obligations where the programming in issue is being transmitted terrestrially rather than by satellite. RCN has challenged this position, arguing that section 628 is not limited to cable programming which is transmitted by satellite and that the Commission has ample authority under the Act to compel Cablevision to make critical sports programming available to its local competitor, especially where the programming has been moved from satellite to terrestrial distribution to evade a program access obligation. The matter is currently before the Commission.

Recently, RCN has experienced similar difficulties securing access to programming vital for its entry into the Philadelphia area market. Both in New York City and in the Philadelphia area, the disputed programming consists of local sports, one of the most crucial elements of any MVPD operator's programming line up. The availability of vast quantities of professional and college-level sports programming on home television screens has become such a staple of American life that it can fairly be characterized as an important element of our culture. Yet Comcast, the dominant MVPD in the Philadelphia area, with some 90% of the market, has declined to make available SportsNet, which carries the great bulk of local professional sports

programming to RCN, on commercially reasonable terms. Without such access, RCN's entry into the market is difficult to justify commercially. According to surveys taken by RCN, between 40% and 58% of the public would be unlikely to subscribe to any cable system which lacked the bulk of major local sports programming. More broadly, the Commission must act to inhibit the cable industry's plan to massively migrate programming to terrestrial distribution in the hope of evading its program access obligations.

As RCN noted in its MVPD Comments in last year's inquiry, securing commercially reasonable agreements for the use of public rights-of-way also has proven to be a very substantial problem for RCN. The visibility given new investment in, and the growing importance of, the telecommunications industry has apparently created an expectation in local franchising authorities that entities such as RCN (and many others equally) may be asked to bear unreasonable or unfair financial or service burdens to reach agreement for the use of local public rights-of-way. This problem is growing ever more acute and RCN urges the Commission to expand its recently initiated inquiry in Docket No. 99-217 on rights-of-way issues for telecommunications services to encompass MVPD providers as well. In such a proceeding the Commission should set forth clearly and succinctly the limitations which various provisions of the Communications Act, primarily section 253, impose on local public rights-of-way managers. Doing so will accelerate competitive entry both in MVPD and in CLEC and Internet services. The Commission should also be aware of the substantial anticompetitive impact on OVS operators of the last year's ruling of the 5th Circuit Court of Appeals, *City of Dallas, v. FCC*,^{1/} in which the court invalidated the Commission's rule preempting the right of local authorities to franchise OVS operations.

^{1/} 165 F.3d 341 (1999), *recon. den.* May 28, 1999.

Although no local franchising authority has yet required RCN to sign an OVS franchise, numerous such bodies' processes have been substantially slowed while consideration is given to such a requirement. The result is to slow entry, an effect which contradicts directly the intent of section 653.

As it did last year, RCN notes that long-delays in resolving regulatory issues -- in one case almost two years -- is anticompetitive. RCN urges the Commission to assign a higher priority to the resolution of MVPD matters raising competitive issues.

The Notice asks for comments on the necessity for the Commission, pursuant to section 628(c)(5), to consider extending the exclusivity provisions of section 628 beyond 2002. There is no question but that the Commission must do so. The continued dominance of the MVPD market by the large incumbent and vertically integrated MSOs makes it absolutely vital that the anticompetitive practices for the curtailment of which section 628 was initially passed continue to be subject to the procompetitive provisions of section 628.

In sum, RCN is making significant progress in providing high quality alternative MVPD services in numerous urban and suburban markets. It is doing so in spite of certain significant barriers, and if those barriers were removed the Company could undoubtedly increase its rate of growth and the degree of its penetration. It continues to be necessary for the Commission to take a more proactive role in respect to MVPD competition, both by acting promptly on requests for regulatory intervention in aid of competitive entry and by boldly using its existing statutory authority to advance the cause of competition. As RCN noted in last year's filing, if the Commission believes that it lacks sufficient authority to remedy inside wiring and program access issues (or any other issue addressed herein), it should so advise the Congress and make a concerted effort to secure the additional legislative authority which it believes it needs.

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COMMENTS OF RCN CORPORATION

RCN Corporation ("RCN" or "Company"), one of the nation's newest and most innovative participants in the multichannel video programming distribution ("MVPD") industry, hereby submits its Comments in response to the Commission's Notice of Inquiry ("Notice") in the above-captioned proceeding.^{1/} Pursuant to Section 628(g) of the Communications Act,^{2/} the Notice seeks information and views from participants in the MVPD industry concerning the state of competition in the delivery of such services. RCN is pleased to offer its unique perspective on this issue of continuing importance to the nation. While RCN is making excellent progress both as an open video system ("OVS") operator and as a traditional Title VI franchised cable operator in building its state-of-the-art broadband fiber plant, and is constantly adding to its subscriber base, the MVPD industry remains overwhelmingly dominated by franchised incumbent cable operators. These incumbents continuously demonstrate their commitment to burdening RCN's entry into the market in every conceivable way, including locking RCN out of numerous multiple dwelling unit buildings ("MDUs"), denying RCN access to vital programming, and filing

^{1/}FCC 00-270, *rel.* Aug. 1, 2000.

^{2/} 47 U.S.C. § 548(g).

numerous unmeritorious complaints at the Commission seeking competitively sensitive data regarding RCN's OVS systems. In prior annual comments, RCN has emphasized the importance of active FCC involvement in the development of the competitive MVPD industry. Such active and thoughtful involvement remains a vital element in the growth of the MVPD industry. Indeed, although the statistics set forth below demonstrate that RCN is progressing well, there is a continued -- even an enhanced -- need for regulatory involvement. To assure the continued expansion of competition in the MVPD market, the Commission must become more actively involved by taking regulatory steps to foster competition and protect nascent entrants from the overwhelming and costly burdens wrought by the incumbents.

I. INTRODUCTION

RCN, together with its subsidiaries and affiliates, is unique among new competitors in the telecommunications marketplace in a number of respects. RCN is building its own network based on state-of-the-art fiber optic facilities, a network which has been described by one outside source as "one of the most advanced in the world."^{3/} RCN's advanced fiber network is referred to as Megaband™ and is the most technologically advanced network being installed by any telecommunications company in the U.S. Only about 15% of the throughput capability of the network is required for services currently offered by the company. The remaining 85% is available for growth products and can even be further expanded by enhancing the electronics further. The network incorporates SONET ring architecture and targets high density areas

^{3/} Morgan Stanley Dean Witter Report, March 31, 1999. RCN has been rated # 2 out of 100 of the most innovative telecommunications companies in America. *See* Forbes ASAP Dynamic 100 List, April 5, 1999.

comprising 44% of the U.S. residential communications market spread over only 6% of its geography. The network is designed to serve only 150 homes per node, as compared to the 5,000 homes per node on older cable systems and the 500 per node on the so-called "upgraded" networks. In most cases its fiber is 900 feet or less from homes. Similarly, the RCN network delivers 45 mb of bandwidth, as compared with 1 mb for older cable plant and 11 mb for the newer cable upgrades.^{4/} RCN expects to spend \$20.1 billion to bring the Megaband™ network within reach of 15 million homes at a cost of \$1,340 per home.^{5/} With respect to all its services, RCN seeks to serve principally the residential, rather than the commercial market.

The Notice inquires, at ¶¶ 33 and 49, about the bundling of services. RCN's business strategy is critically dependent on the bundled provision of four categories of service, rather than just one or two: RCN seeks to provide video distribution services, high-speed Internet access, local exchange telephone and long distance telephone services to its subscribers. It is essential to the success of RCN's business plan that each of these services produce a revenue stream. Historically, it has been assumed that cable overbuilding is not commercially feasible because of the very high costs to establish a competitive infrastructure and to induce customers to terminate existing relationships. It is only the advent of modern fiber optics and the pro-competitive policies of the Telecommunications Act of 1996, which, by permitting RCN to generate four

^{4/} Cable systems generally provide service over coaxial cable with a bandwidth of 550 MHz or less. RCN's network is also superior to traditional coaxial cable networks because it contains switching architecture for telephony, fewer electronic components, and is more easily maintained, scaled to local demand, and more reliable.

^{5/} An interesting contrast is that, on an industry-wide basis, purchases of existing cable networks in the last two years have been at a cost averaging \$4,000 per home. RCN 1999 Annual Report, at 23.

separate revenue streams, allow it to develop a commercially feasible business through overbuilding. RCN's bundled service is called ResilinkSM and offers subscribers substantial discounts for subscribing to more than one service. On an a la carte basis, revenue per customer averages \$88. per month. The full bundle, however, generates an average of \$125 per month, and leads to a substantial increase in penetration.^{6/} By year-end 2000 RCN expects to roll out Resilink to at least 300,000 homes. The third unique element in RCN's planning is that it has limited its entry to relatively densely populated regions in the Boston to Washington, D.C. corridor and southern Florida on the east coast, the San Francisco to San Diego corridor and Pacific Northwest on the west coast, and recently to the Chicago, IL area.

In its MVPD mode, RCN has chosen to operate wherever possible as an open video system ("OVS") operator, and has been so certified by the FCC for operation in the metropolitan areas of Boston, New York, Northern New Jersey, Philadelphia, Washington, D.C., San Francisco, CA , Los Angeles, CA, Chicago, IL, Portland OR, Seattle, WA, south Florida and Phoenix, AZ. RCN operates OVS facilities in a number of Boston's suburban communities, in New York City, and in Washington, D.C. and Gaithersburg, MD. It offers OVS service in South San Francisco and is negotiating OVS agreements with local franchising authorities in numerous suburban communities clustered around these major urban areas and in the Philadelphia urban area. RCN, together with its affiliates, has now received federal OVS approval for over 13 million homes, and 4.6 million homes with local OVS approval. RCN has also entered into

^{6/} In a six month service penetration test of Resilink, telephone penetration increased from 6% to 33%; cable penetration increased from 16% to 26%, and high speed internet service increased from 2% to 9.5%. *See RCN 1999 Annual Report, at 10.*

traditional Title VI franchise agreements in many communities. In each case, while RCN prefers to initiate service in the OVS mode because that is generally the quickest way to enter a local market, it generally seeks to accommodate the preferences of local franchising authorities, many of which prefer the traditional franchise approach because they are familiar with it.

RCN also provides local exchange and long distance telephone service. As its fiber plant is constructed, RCN has withdrawn from the resale of incumbent local exchange carriers or ILEC services and provides telephone service as a facilities-based CLEC. In addition, RCN provides Internet services and is the seventh largest Internet service provider ("ISP") in the country, and the largest regional ISP in the Northeast corridor. Including all of its service connections, those provided on its own fiber network and those leased from ILECs, RCN had a total of more than 947,000 service connections as of December 31, 1999, of which more than 292,000 represent video service connections. At year end 1999 RCN passed 713,800 homes as compared with only 304,500 a year earlier. Marketable homes, or homes ready for immediate use of all RCN's services, increased to 551,000. At year end RCN had 49 separate markets under construction and by the fourth quarter of 2000 expects to have networked more than 100 communities. By the end of the first quarter of 2000, RCN passed 808,000 homes, with marketable homes, or those ready for immediate sale of all RCN's services, standing at 601,700. On-net connections increased by almost 33,000 in the first quarter. Thirteen new communities were added in the first quarter of 2000, along with 1,000 route miles of fiber. *See App. A.*

In 1999, RCN's sales amounted to \$275.9 million as compared with \$245.1 million in 1998. In the quarter ending March 31, 2000, Pro Forma Total RCN revenues were \$88.1

million.⁷ The Company is constantly expanding its MVPD service area and initiated video services in the Philadelphia and San Francisco metropolitan areas in early 2000. Later in the year the company anticipates the initiation of service in the Los Angeles, Seattle WA, and Portland, OR areas. It is the Company's practice not to initiate construction in any area unless it has adequate funds on hand to complete the projected construction. RCN anticipates that its funding needs through year end 2001 will be \$3.6 billion. In early 2000 Vulcan Ventures, an investment organization controlled by Paul G. Allen, invested \$1.65 billion in RCN. Ninety cents of every dollar of capital raised has been invested in the network. RCN's joint activities with BecoCom in the Boston area and with Pepco Communications, LLC in the Starpower region, continue. In southern California RCN has entered into a strategic alliance with Southern California Edison.

II. RCN IS BUILDING A COMPETITIVE PRESENCE IN NUMEROUS MVPD MARKETS

Although RCN is a new entrant in the MVPD marketplace, it is by now well known to the Commission. Prior video competition reports to Congress have described RCN's activities through the period ending June 30, 1999.⁸ Accordingly, these comments will concentrate on recent developments in RCN's competitive activities in the MVPD markets and recent competitive concerns.

⁷ First quarter net loss to common shareholders was \$153.6 million, compared to a loss of \$67.7 million in the previous quarter.

⁸ See *Fourth Annual Report, Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998), at ¶¶ 131-132; *Fifth Annual Report*, 13 FCC Rcd 24284 at ¶¶ 121 and 136-137, and *Sixth Annual Report*, 15 FCC Rcd 978 at ¶¶ 129-133.

A. Boston Metropolitan Area

RCN's total MVPD subscribership in the Boston metropolitan area grew substantially in the year ended as of June 30, 2000. Additional OVS and franchise agreements have been signed in the Boston area since RCN's 1999 Comments were submitted. The bulk of these have been franchise agreements because this is the form preferred by local municipal governments. Expansion of RCN's fiber-optic plant in the Boston area is dependent partially on its ability to use existing underground facilities in Boston owned by Boston Edison, and partially on the pace at which Bell Atlantic-Massachusetts makes conduit and pole space available. Both forms of construction have proven to be far slower than anticipated because RCN's competitors have sought to slow its penetration into their respective monopoly markets.^{2/} Further details on RCN's plant expansion difficulties involving pole access are set forth in section IV(3), *infra*.

B. New York City Metropolitan Area

RCN's New York City system consists of fiber-based OVS service and, pending further construction of the fiber plant, use of microwave-based service. The great bulk of RCN's MVPD subscribers in New York City are clustered in Manhattan. Construction of RCN's fiber optic network in Manhattan is entirely dependent on the cooperation on Verizon - New York, and is progressing far more slowly than RCN anticipated. RCN has protested the slow rate of progress and has raised the matter as a competitive concern with the New York State Public Service

^{2/} In regard to the underground conduit in Boston, Cablevision Systems of Boston instituted a lawsuit in an effort to block further expansion of RCN-BecoCom's use of Boston Edison conduit. In *Cablevision of Boston v. Public Improvement Commission*, 184 F.3d 88 (1st Cir. 1999), the District Court's denial of a preliminary injunction was sustained and Cablevision subsequently dismissed its suit.

Commission.^{10/} RCN currently offers service as well to MDUs in the Bronx and Queens.

Construction in Queens was moving ahead rapidly in the early months of 2000, although since April RCN has encountered substantial construction delays attributable to difficulties securing access to public rights-of-way. *See* section IV.2, *infra*. In Manhattan RCN competes with Time Warner Cable, which also serves Queens and a portion of Brooklyn.

C. Washington, D.C. Metropolitan Area

In the Washington, D.C. area RCN provides service through its Starpower affiliate in which an unregulated subsidiary of Potomac Electric Power Company holds a 50% interest. OVS service began in the District in late 1998. Starpower is currently offering service as well in Gaithersburg and Silver Spring, Maryland and was recently awarded a franchise in Arlington, Virginia and another in Falls Church, Virginia. It expects to receive a cable franchise in Prince George's County and in Baltimore County, Maryland shortly. Starpower currently has approximately 250,000 service connections, most of which are in MDUs. It offers a 94 channel system for a monthly fee of \$31.95. Its District competitor, District Cablevision, provides 55 channels at a cost of \$36.95.^{11/} Starpower has been welcomed as a potential second source of video and telephony in Washington, D.C. and every surrounding jurisdiction in which it has initiated discussions. Construction and active construction planning is underway in all these and other suburban Washington areas.

^{10/} Letter of RCN filed on March 3, 1999 in Docket No. 97C0271.

^{11/} AT&T, which has acquired the Washington, D.C. cable system, has agreed to sell it to Comcast.

D. Other Metropolitan Areas

RCN has been certificated by the Commission to operate an OVS system in the Boston area, New York City, Northern New Jersey and in the Philadelphia, Cook County, San Francisco, Los Angeles, Portland Oregon, Seattle Washington, Washington, D.C., South Florida, and Phoenix, metropolitan areas. Active negotiations and system planning for these areas are underway. In the Philadelphia region RCN expects to shortly receive an interim OVS agreement in the city itself. It has signed numerous franchise agreements and OVS agreements in suburban communities and is currently operating franchised systems in some of these communities. In California RCN has right-of-way construction agreements in five Bay area cities. It has been granted a cable franchise in San Francisco, San Daly City, San Mateo, Burlingame, San Carlos, and Redwood City and anticipates franchise approvals before the end of 2000 in Millbrae and Los Angeles. Service has commenced in South San Francisco, San Mateo, and Daly City and is expected to commence in most of the remaining markets in 2000. The Company has signed OVS agreements in a number of northern New Jersey locations. RCN also operates a number of franchised cable systems in Pennsylvania and New Jersey and expects to continue to do so. It is actively negotiating franchise agreements with a number of communities in Broward, Dade, and Palm Beach counties, Florida. The Company has signed franchise agreements with the Mt. Hood Cable Regulatory Commission and the Metropolitan area Communications Commission in the Portland, Oregon Metropolitan area, and is actively negotiating franchises with the City of Seattle and surrounding areas in Washington state.

III. THE OVS MODEL

In its initial comments filed for the Sixth Annual MVPD Report, RCN described the status of the OVS model.^{12/} RCN indicated to the Commission that its preference was for the OVS model because, in principle, that mode of entry would allow it to enter the market sooner, but that it would necessarily be governed, in its choice of OVS or traditional cable operation, by the preferences of local franchise authorities. In the intervening year RCN has encountered a greater preference on the part of local franchising authorities for the traditional franchise approach, as compared with the OVS model. To a very great degree RCN believes this is attributable to the uncertainties created by the decision in *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), *recon. den.*, May 28, 1999.

A number of communities have appeared to be uncertain about the scope of their authority to franchise OVS operators, or, alternatively, were reluctant to devote the resources to develop a distinct OVS franchise. These hesitations arise directly from the court's reading of the Commission's OVS rules. While that decision held that the Commission erred in adopting a rule barring local franchise authorities from franchising OVS, RCN has taken the position in discussions with such authorities that any OVS franchising activity undertaken by them must nevertheless comply with the language and intent of section 653 of the Act^{13/} and accordingly cannot simply be a cable franchise agreement with a different name. The need to blend local franchising procedures and prerogatives with the limits imposed by federal law on the regulatory

^{12/} See RCN 1999 Comments, at 9-10.

^{13/} 47 U.S.C. § 573.

powers of local franchising authorities in respect to OVS operators has created uncertainty as to what the contents of an OVS franchise might be.

To date and to RCN's knowledge no local franchise authority has sought to impose an OVS franchise on RCN or any other OVS certificate holder. However, a number of municipal governments appear to be considering what such a document might contain. This tends to slow down the processing of RCN's request for access to local rights-of-way, and hence RCN's entry into a new market. Because the OVS model was intended to speed market entry, the effects of the court's *City of Dallas* decision have proven to be adverse to the OVS model.

IV. BARRIERS TO ENTRY

The Notice emphasizes, as have prior Notices, the Commission's interest in the identification of barriers to entry. In prior submissions for the Commission's annual MVPD reports, RCN has identified a variety of barriers to entry, including anticompetitive activity by incumbent cable companies, Cable Service Bureau decisions which inhibit the development of the OVS mode of competitive entry, difficulty and delay in securing access to local rights-of-way, and in securing entry to MDUs.^{14/} There have been no fundamental changes in this aspect of the MVPD landscape, and accordingly, RCN will not simply reiterate the concerns it has expressed in prior years. Instead, RCN will update matters or concerns which have previously been set forth.

The major barriers as RCN currently sees them, are the following:

- Anticompetitive tactics of incumbent cable companies;
- Delay in gaining access to local rights-of-way;

^{14/} See, e.g. RCN 1999 Comments, at 11-29.

- Pole attachment delays and excessive rates;
- Adverse or delayed Commission decisions; and
- Inability to gain access to MDU inside wiring.

Each is briefly summarized below.

1. Anticompetitive tactics of incumbent cable companies

Not surprisingly, incumbent cable companies were no more eager to see competitive entry in calendar 1999 than in prior years and certain MSOs continued their campaign to seek sensitive OVS system data from RCN and to deny RCN access to vital local programming. Time Warner Cable's request to see RCN's sensitive New York City and Boston-area system data was denied in part and sustained in part by the full Commission^{15/} and RCN has filed a notice of appeal in the U.S. Court of Appeals for the D.C. Circuit.^{16/} Time Warner has asked the Commission to reconsider its decision. The question whether a local cable competitor may force disclosure of its competitor's OVS data, or if so under what terms and conditions, is therefore not finally resolved.

In the Boston area Time Warner renewed its request for competitively sensitive OVS system data from RCN, as it had done earlier in both the Boston and New York markets. Time Warner's latest effort to secure access to a competitor's internal data arose out of Time Warner's sale of its Boston-area cable properties to MediaOne, a sale which, Time Warner, contended, entitled it to RCN's OVS data on the theory that Time Warner was no longer an in-region cable

^{15/} *Time Warner Cable v. RCN Telecom Services of New York, Inc; Time Warner Cable v. RCN-BecoCom, L.L.C.*, Memorandum Opinion and Order, 15 FCC 1124 (2000).

^{16/} *RCN Telecom Services of New York, Inc., and RCN-BecoCom, L.L.C. v. FCC*, D.C. Cir. Case No. 00-1043, filed Feb. 9, 2000. This proceeding was stayed by the Court pending the Commission's reconsideration of its decision.

operator and therefore no longer subject to the provisions of section 76.1503(c)(2)(v)^{17/} which bar such operators from access to local OVS data.^{18/} RCN has opposed Time Warner's request and the matter is currently before the Cable Services Bureau. Time Warner has also sought to impair RCN's access to subscribers in New York City in three separate ways: by declining to carry RCN advertising on the Time Warner cable system in Manhattan, by delaying for many months the grant of pole attachment rights to RCN in the borough of Queens, and by delaying RCN's access to inside cable wiring in certain MDUs in Manhattan.

The Notice seeks information on so-called "marquee" programming, program issues in general, and the adequacy of the existing program access rules. Notice, ¶¶ 11, 38, 41. It will come as no surprise to the Commission to hear that RCN believes program access issues are among the most important barriers to faster and more effective MVPD entry. A number of incumbents have sought to exclude RCN from the market or to substantially weaken its competitive posture by denying RCN access to essential local sports programming. Such programming is one of the most crucial elements of any cable system's programming. Sports programming would be a very important element of any broadcaster's or cable operator's program line-up even if it were only one of many primary branches of the programming tree.^{19/} But it is

^{17/} 47 C.F.R. § 76.1503(c)(2)(v).

^{18/} See the disingenuously captioned Emergency Petition To Enforce Commission Order And Impose Forfeiture, filed by Time Warner on March 14, 2000.

^{19/} See *The Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, 720 F. 2d 1295, 1304 (1983) cert. den. 475 U.S. 1035 (1986), noting that in its *Notice of Final Determination*, 47 Fed. Reg. 9879, at 9892, the Copyright Royalty Tribunal in 1982 concluded on the basis of the evidence presented to it that cable operators consider sports programming as
(continued...)

even more important than that, because sports -- and particularly local sports -- are unique. For the fan who wishes to see, for example, a Washington Redskins game, the substitution of a local NBA or NHL game, or even a distant NFL contest, is simply not acceptable. The courts^{20/} and commentators^{21/} have recognized this uniqueness, and Congress^{22/} and the FCC understand that

^{19/}(...continued)

increasingly important to their ability to attract and retain subscribers.

^{20/} See, e.g., *International Boxing Club of New York, Inc. v. U.S.*, 358 U.S. 242 (1959) (championship boxing is a distinct product market); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa, 1972) (relevant product market is major league professional hockey). In *NCAA v. Board of Regents*, 468 U.S. 85 (1984), the Court approved a lower court's finding that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. These findings amply support its conclusion that the NCAA possesses market power. Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics is vivid evidence of the uniqueness of this product." *Id.*, at 111-112 (footnotes omitted). The Court also noted that from the standpoint of the consumer, whose interests the Sherman Act was designed to serve, "there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute... . Thus, we agree... that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers." *Id.*, at 111, n. 49.

^{21/} See Piraino, A Proposal For the Antitrust Regulation of Professional Sports, 79 B.U.L. Rev. 889, 895 (1999). "The games of each of the professional sports [teams] provide a unique experience for viewers that cannot be duplicated... . There is simply no other type of programming comparable in popularity and demographic pull to live sporting events." *Id.*, at 951. See also B. Wilson, *Sports and Leisure* (1990): "People take pleasure in watching football [spectator sports] because it presents a spectacle of conflict, drama, excitement and eventual resolution. They achieve social cohesion by belonging to a community of fans and by participating in the rituals of supporting a team through its wins and losses. For many supporters, their teams lend them an identity, almost tribal in its more extreme manifestations, which is an existential commitment to their football team and which sustains them through vicissitudes of their daily lives and work." *Id.* at 27-39, quoted in Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events*, 7 Marq. Sports L.J. 77 at 83 (1996).

^{22/} Congress's concern with sports can be demonstrated in numerous ways. To provide
(continued...)

sports programming is a crucial element in any video provider's lineup.^{23/} In a report released in June, 1999, the GAO characterized sports programming as "marquee programming" because of its attractiveness to cable viewers.^{24/} The GAO concluded, after studying the issue of programming costs and cable subscription increases, that sports programming accounts, on average, for about 29% of total programming costs.^{25/}

Sports programming is also big business. According to data made available by FoxSports, the cost of sports broadcast rights over the next decade is in the billions.^{26/} For the seven year

^{22/}(...continued)

only a few illustrations, following passage of the Sports Broadcasting Act of 1961, 15 U.S.C. §§ 1291-1295 (1994) and its amendment, numerous follow-up hearings were held addressing antitrust and sports broadcasting issues. In the Cable Act of 1992, Congress directed the FCC to study the issue of sports programming migration from free television to other distribution media, and to report to Congress. See P.L. 102-385, § 26 (a) and (b) directing the FCC to study the trends in the migration of sports programming from "free" television to cable systems on a sport-by-sport basis, "including the economic causes and the economic and social consequences of such trends." The Commission concluded in these studies that major migration had not occurred, and promised to take appropriate regulatory action or recommend legislation to Congress if it subsequently found a change in the marketplace. See *Interim Sports Inquiry*, 8 FCC Rcd 4875 at 4891 (1993).

^{23/} See, e.g., "Sports programming...warrants special mention because of its widespread appeal and strategic significance for MVPDs." *Fifth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24374 (1998) at ¶ 171. See also ¶ 12, in which the Commission indicated its recognition that the distribution of regional sports programming could have a substantial impact on competition.

^{24/} *Impact of Sports Programming Costs on Cable Television Rates*, GAO/RCED-99-136, at 3.

^{25/} *Id.* at 5-6. The GAO report notes that sports programming costs account for about 6.8% of all costs, but that these data probably understate the importance of sports program costs on cable rates because they are confined to sports networks, whereas other networks also carry some sports. *Id.* at 5-7.

^{26/} See <<http://www.foxsports.com/business/resources/broadcast/>>. According to one
(continued...)

period from 1998 to 2005, the NFL alone anticipates national television revenue of at least \$17.6 billion.^{27/} NBA contracts for a four year period amount to \$2.65 billion; MLB contracts for four years will produce almost \$1.6 billion. NHL games will produce \$600 million over a five year period and PGA broadcasts will produce \$650 million over four years. Broadcasting rights for the Olympics will cost \$4 billion through 2008 and NCAA basketball will generate \$6 billion over 11 years.^{28/}

In its annual reports to the Congress on the status of competition in the MVPD industry, the Commission has repeatedly indicated that a deliberate cable industry initiative to move programming from satellite to terrestrial distribution or otherwise decrease its rivals' access to needed programming would raise troubling issues.^{29/} RCN can confirm that the carriage of local

^{26/}(...continued)

commentator writing in 1996, "television contracts and expanded media coverage account for much of the revenue growth [in sports marketing] over the past decade. On a typical weekend day in 1980, viewers could select from an average of 20.5 hours of sports programming. From 1980 to 1990 television networks and cable went from an average of 4,600 to 7,500 hours of sports broadcasting. By 1990 ESPN alone accounted for 4,500 hours of sports broadcasts. Today, ESPN carries sports programs to 160 countries and 600 million households worldwide." Wall, Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events, 7 Marq. Sports L.J. 77, 87 (1996) (footnotes omitted). The importance of broadcasting to the NCAA is equally clear. In 1991 and 1992 television contracts accounted for 73.9% of NCAA's operating budget. *Id.* at 88.

^{27/} Hall, Doctoral dissertation submitted to Florida State University, Factors That Influence Administrators' Decisions in Negotiating Television Contracts and Differences in Attitude Between Intercollegiate Administrators and Television Network Administrators, Fall, 1999, p. 35.

^{28/} Foxsports, *supra*, n.26.

^{29/} See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442 (1994 Report), ¶¶ 181-2; *Annual Assessment*, 11 FCC Rcd 2060 (1995 Report), ¶ 207; *Annual Assessment*, 13 FCC Rcd 1034 (1997 Report), ¶ (continued...)

sports programming is essential to a start-up MVPD competitor. Given the unique nature of all local sports, and its great appeal to local audiences, an overbuilder must have access to such programming if it is to successfully establish a competitive alternative in any particular market. Recent surveys of cable subscribers conducted for RCN by professional polling organizations fully substantiate RCN's own observations. The polling data show that some 40-58% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming, and in one of the surveys an additional 12% said they were not sure. Entrenched competitors, however, equally understand the power of local sports programming and, as clear from the three pending program access proceedings at the FCC, ^{30/} have moved local sports programming off satellite distribution to fiber optic (terrestrial) distribution channels, thereby evading the fundamental purpose of section 628.^{31/}

In October of 1999 the Cable Services Bureau denied RCN's program access complaint against Cablevision Systems, Inc. concerning Cablevision's denial to RCN of access to so-called

^{29/}(...continued)
¶ 157, 230.

^{30/} These include, in addition to RCN's appeal of the Cable Service Bureau's denial of RCN's program access complaint, the two DBS appeals of Comcast's refusal to allow DBS distribution of SportsNet. See *Direct TV v. Comcast Corp.*, 13 FCC Rcd 21822 (1998) and *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (1999).

^{31/} MVPD competitors have warned the Bureau of the potential for such abuse since 1994: "[U]nless corrected, the problem will grow in the future because vertically integrated programming vendors will have the incentive to modify the distribution of their programming, using fiber optics or other nonsatellite means, in order to evade application of the program access requirements." *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7531 quoting Comments of Liberty Cable Co. ("1994 Competition Report"). The issue has since been raised in every video competition report to date.

"overflow" sports programming in New York City.^{32/} RCN has filed an application for review by the full Commission, a request to consolidate that appeal with two other program access complaints pending before the Commission, and most recently a Motion for Expedited Consideration of RCN's appeal to the full Commission. These matters are all pending before the Commission. RCN's response, therefore, to the question in the Notice at ¶ 43 whether the existing program access rules are adequate is a resounding no: the Commission should interpret section 628, together with its ancillary authority under sections 4(i) and 303 (r)^{33/} to encompass exclusive arrangements or unfair practices even when the programming is distributed terrestrially.

RCN has experienced program access difficulties as well in the Philadelphia market, in which Comcast is the dominant cable incumbent with approximately 1.9 million subscribers, or 90% of total area MVPD subscribers.^{34/} Through subsidiaries, Comcast owns a controlling interest in the Philadelphia Flyers National Hockey Team, the 76ers National Basketball team and two area arenas. It also holds a controlling interest in SportsNet which controls the great bulk of the professional area sports programming in the Philadelphia DMA. SportsNet carries approximately 66% of the games of the Philadelphia Flyers (NHL) and 73% of the Philadelphia 76ers (NBA) regular season games as well as 49% of the Phillies' games (MLB).^{35/} This

^{32/} *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation*, DA 99-2094, *rel.* Oct. 7, 1999.

^{33/} 47 U.S.C. 154(i) and 303(r), respectively.

^{34/} In the specific areas in which RCN competes with Comcast the latter has approximately 95% of MVPD subscribers with the DBS industry having about 4% and RCN serving about 1%.

^{35/} Comcast also owns exclusive rights to broadcast games of the Philadelphia Phantoms
(continued...)

programming is distributed terrestrially to 2.7 million subscribers in the Philadelphia DMA. Comcast itself touts the strategic importance of SportsNet: "SportsNet provides a significant marketing advantage against satellite TV and other competitors."^{36/}

In October of 1997, when RCN operated a cable company in Allentown, Pennsylvania. RCN and Comcast entered into an Affiliation Agreement by which RCN acquired the right to carry SportsNet on its Allentown and any after-acquired systems. Comcast did not operate in Allentown. In mid-1999, when RCN was about to initiate new cable systems in the Philadelphia suburbs which would compete directly with Comcast it sought to exercise its contractual rights to carry SportsNet on the new Philadelphia-area system, only to learn that Comcast was unwilling to provide the programming. After a protracted period of negotiations, Comcast finally agreed to make SportsNet available through the remaining life of the Affiliation Agreement, or until October 3, 2000, but not thereafter, and only for one specified cable system. Comcast also began offering in the town where the two companies compete, but only there, an 18 month contract with a rate lock. It shadowed RCN's sales staff to advise potential RCN customers that RCN would not have SportsNet after October of 2000 and otherwise sought to discourage potential RCN subscribers.

^{35/}(...continued)

(American Hockey League), Philadelphia Wings (National Lacrosse League), and Philadelphia Kixx (National Professional Soccer League), as well as numerous football and basketball games of regional colleges and universities.

^{36/} Comcast 1999 Summary Annual Report, accessible at http://www.comcast.com/investor_relations/annual_reports99/content2.asp.

Comcast subsequently formally notified RCN that it would not renew the Affiliation Agreement beyond its scheduled October 2000 expiration. Following another period of negotiation and, no doubt not coincidentally, the public announcement of Comcast's agreement to acquire control of Home Team Sports, the Washington, DC area equivalent of SportsNet, Comcast proposed a six month extension, but not more than that. Programming contracts are generally written for multiyear periods to provide stability to both vendor and cable operator. A six month commitment, which would expire shortly before the NHL and NBA playoffs begin, offers RCN an inadequate basis to assure its existing and potential customers that they will be able to view SportsNet on RCN's system. As RCN has had occasion to emphasize to this Commission in connection with its pending program access complaint against Cablevision in New York City, the loss of local sports programming is a very serious competitive injury. Because the bulk of the local professional sports programming in the Philadelphia area is controlled by SportsNet, if RCN is unable to carry that programming on reasonable terms and conditions its ability to succeed in the Philadelphia area MVPD market as an overbuilder would be severely impaired.^{37/}

^{37/} The Commission should note that Comcast's actions amount to a breach of a commitment it made to the Cable Services Bureau in connection with two prior Bureau decisions in which Comcast's refusal to make SportsNet available to DirecTV and EchoStar became the subject of formal complaints. In those cases the Bureau sustained Comcast's refusal on the ground that the programming was being distributed terrestrially and hence fell outside the ambit of § 628 as interpreted by the Bureau. See *DirecTV v. Comcast Corp.*, 13 FCC Rcd 21822 (1998), *review pending*, and *Echostar Communications Corp.*, 14 FCC Rcd 2089 (1999), *review pending*. In denying both DirecTV and EchoStar the relief they requested, the Bureau's decisions rely specifically on Comcast's representation to the Bureau that SportsNet would be made available to a wide variety of MVPDs in the Greater Philadelphia market. As stated in the *DirecTV* decision:

(continued...)

Nor is Comcast's inclination to withhold local sports programming confined to the Philadelphia market. As noted above, it was recently announced that Comcast has agreed to acquire control of Home Team Sports, the entity which provides the bulk of the Washington D.C. area and Baltimore area professional sports programming.^{38/} Comcast recently won approval to acquire the incumbent cable system in Arlington, VA. In connection with that acquisition the Arlington County Board asked Comcast to agree to make its vertically integrated programming (including Home Team Sports) available on competitively neutral, nondiscriminatory, and reasonable commercial terms to any competitive cable system in Arlington County.^{39/} (On

^{37/}(...continued)

Although acknowledging that DIRECTV and other DBS providers will not have access to SportsNet, Defendants stress that other competing MVPDs in the Greater Philadelphia market will have access to SportsNet. These competing MVPDs include MMDS, OVS providers, SMATV, as well as *all* local cable systems.

DirecTV at ¶ 19; *See also EchoStar* at ¶ 17. It is apparent that, in rejecting the *DirecTV* and *EchoStar* complaints, the Bureau relied on Comcast's assurance that SportsNet programming would be made available to a multitude of other MVPDs, including OVS systems and "all local cable systems." Accordingly, these decisions establish an expectation that Comcast would, in good faith, distribute its SportsNet programming to competitive MVPDs such as RCN on normal commercial terms.

^{38/} HTS has long term contracts for exclusive carriage of 53% of the Baltimore Orioles' baseball games, 64% of the Washington Wizards' basketball games, and 57% of the Washington Capitals' hockey games, plus a number of other local professional and college teams. Recent surveys conducted for Starpower indicated that up to some 58% of respondents selected at random would be less likely to subscribe to cable service which did not include events carried exclusively on HTS.

^{39/} Home Team sports is presently distributed by satellite and is accordingly covered by the Cable Services Bureau's current interpretation of section 628 of the Act. However, if Home Team Sports were to be moved to fiber distribution, as Comcast has done for SportsNet in the Philadelphia area, RCN would lose the benefit of the program access requirements of section 628
(continued...)

August 5, 2000, RCN was awarded a competitive cable franchise for Arlington County). Comcast would not agree to any such affirmative obligation.^{40/} Comcast has also vigorously contested the proposition that the Arlington County Board has legal authority under federal and state law to impose a program access condition on Comcast.^{41/} In all these instances -- New York, Philadelphia, and potentially in the Washington D.C. area, the incumbent cable company has established a strong local cluster and is (or apparently expects in the case of Comcast in the Washington D.C. market) to use its dominant local position to capture local sports programming and then to bludgeon regional competitors by denying them access.^{42/}

Accordingly, while clustering may be sensible for incumbent cable operators, RCN responds to the Notice's questions about clustering in ¶¶ 15-16, by noting that the effectiveness of

^{39/}(...continued)
and the Commission's implementing regulations.

^{40/}" Mr. Zimmerman [Member of the Board]:

....
I am wondering whether Comcast would agree to a condition that would say that they wouldn't, you know, take HTS off without approval of the Board.

....
Mr. Roberts [Comcast counsel]:... The answer is no. The Board does not have that authority."
Transcript of Meeting of Arlington County Board held on July 22, 2000. (RCN will make such transcript available on request).

^{41/} *Id.*, at 116-120.

^{42/} Comcast's plans to establish a dominant cluster in the Washington, D.C. metropolitan area are outlined in a feature story in the *Washington Post* for August 28, 2000. *Washington Post*, Business Section, at 16-19. It has already obtained cable franchises in Montgomery County, MD, Arlington and Falls Church in VA, and preliminary approval in Baltimore County, MD. It expects to acquire the cable system in the District of Columbia in early 2001. It is actively acquiring cable properties in Baltimore, Howard County, Prince George's County, MD and Alexandria and Prince William Counties, VA. At the present time it has approximately 1.5 million subscribers in Delaware, Maryland and Virginia, before the acquisition of the Washington, D.C. cable system.

clustering may lie at least in part in its ability to permit a clustered incumbent to evade section 628 by relying on fiber distribution of local sports programming. Clustering also has the effect of creating an overwhelming incumbent dominance in a local market. In the Philadelphia DMA, for example, Comcast serves approximately 80% of the MVPD market and an even higher percentage of the cable market.

RCN's business plan anticipates a penetration rate of about 30% of the homes it passes in each market it builds out. As the surveys it has taken indicate, approximately 40-58 % of any local market would essentially be impenetrable to an overbuilder if it lacked access to the bulk of local sports programming. The result would be a penetration rate of about 15%,^{43/} a rate so low that no entrepreneur would be willing to risk the hundreds of millions of dollars required to overbuild an urban area with modern fiber optic plant. In essence, this is the plan of the entrenched MSOs. The Commission must act to thwart that goal.

Finally, RCN has also experienced elsewhere, and at the hands of another major MSO, the tactic of trying to sell reduced-price long term contracts, or contract extensions with special subscriber inducements, in specific areas where RCN is initiating service. Because the grant of local franchises and the fact of right-of-way or pole/conduit construction is impossible to conceal, the imminent arrival of RCN as a competitor is easy for incumbents to determine. Of course, many such competitive responses are lawful and indeed are the public policy objective in the authorization of new MVPD competition. RCN does not object to fair competitive responses. It does suggest, however, that the Commission needs to monitor such responses carefully to assure

^{43/} Derived by assuming a loss on average, of 49% of passed homes due to absence of local sports programming, and a 30% penetration rate for the remaining 51%.

itself that they do not go beyond the border of legality and become unlawful under the Communications Act or various antitrust statutes.

2. Delay In Gaining Access to Public Rights-of-Way

In its Comments filed last August RCN emphasized that it was encountering substantial financial demands and delays in negotiating local rights-of-way access.^{44/} RCN noted also that the issue had been raised by the Commission in other proceedings.^{45/} Very little has changed in the intervening year and there continues to be an opportunity for a strong guiding hand to take steps to get the all-important public rights-of-way fully open to the public. RCN has suggested that the Commission should declare a broad federal policy to preclude local rules or practices which inhibit or delay the emplacement of facilities for the use of competitive entrants:

Like a great many other CLECs and competitive providers of video distribution services, RCN has experienced a wide variety of difficulties in seeking access to local PROW [public rights-of-way] facilities. These difficulties have ranged from excessive delays, to the attempt to extract excessive use fees, to refusals to treat incumbents in the same fashion as proposed for RCN, to local efforts to regulate interstate telecommunications, and, not least, to wide variation in local policy and practice. These factors have materially slowed RCN in the build-out of its state-of-the-art fiber optic plant, added substantially to its overhead and construction expenses, and impaired the design and construction of integrated or unified systems in multi-jurisdictional settings such as that in the Washington, D.C. metropolitan area.

The PROW Access Policy Statement should set forth certain basic principles, including the right of every certified competitor to fair use of PROW, rapid action on applications for PROW access, equality of terms and conditions with other users, and fees based strictly on a reasonable allocation of incremental costs incurred for the consideration of a PROW access application and a fair share of the cost of the administration of local PROW facilities.

^{44/} RCN 1999 Comments, at 23-26.

^{45/} *See, e.g.*, WT Docket No. 99-217 and CC 96-98.

The Policy Statement should also preempt all conflicting or inconsistent state or local law, policy, regulations or practices. Federal preemption is eminently appropriate for a national policy concerning access to local PROW since the fundamental federal policies embodied in the Telecommunications Act of 1996 are imperiled by the existing patchwork of local rules and practices.^{46/}

In a large number of major urban markets, RCN has encountered within the last year local officials who seem intent on burdening RCN with ever-increasing financial and service obligations. Delays follow delays while municipal officials creatively search for new ways to extract goods, services or payments from RCN. In addition, several municipalities are delaying RCN's attempts to obtain telecommunications right-of-way agreements and/or cable franchises until RCN agrees to a franchise on its Internet services, a requirement to which other Internet service providers are not subject. RCN has been negotiating in a number of west coast markets for eight to nine months without yet seeing a definite end to the process. In one major market, without benefit of any legal process whatsoever and without warning, local authorities simply curtailed almost to the vanishing point what had been the routine grant of conduit construction permits. RCN was advised that it would be expected to build three spare conduits for the use of its competitors along with one to meet its own needs if it wished to have permission to continue installing underground conduit along major arteries.^{47/} Although RCN has informally protested this policy, which has existed now for almost six months, little or no progress has been made with the result that in one of its largest growth markets RCN has essentially had to suspend major

^{46/} See Comments of RCN in Docket Nos. CC 96-98 and WT 99-217, at i-ii.

^{47/} After many months of a near-total moratorium on underground construction, local officials have finally permitted RCN to construct underground entrance facilities for a limited number of MDUs.

underground construction and has been unable to fulfill its buildout schedule commitments. This will delay the institution of competitive cable, high speed internet access, and telephone service to the local residents by a comparable period.

Section 253 ^{48/} of the Act contemplates a decisive federal role in opening up rights-of-way to competitive entry. Evidence is mounting constantly that local authorities are more concerned about raising revenue than about facilitating competition. RCN renews its recent suggestion here. Indeed, in light of the extreme delays being encountered by RCN, it strongly urges the Commission to take action promptly on this matter.

3. Pole attachment delays and excessive rates

Another major barrier to competitive entry is discriminatory access to certain pole attachment procedures, undue delay and excessive cost in obtaining access to poles and conduits. RCN's experience is that many utilities owning poles and conduits, particularly those that compete or seek to compete with RCN as ILECs or CLECs, do everything in their power, up to and including overt violations of law, to inhibit competitive access to such facilities.^{49/} RCN has experienced this difficulty in many markets. Although the details differ from instance to instance, the common thread is that ILECs or incumbent cable operators who own poles seek to delay RCN's access to poles and conduits, charge excessive prices, or establish requirements that

^{48/} 47 U.S.C. § 253.

^{49/} The Cable Services Bureau's recent ruling in *Cavalier Telephone Company, L.L.C. Virginia Electric and Power Co.*, DA 00-1250, *rel.* June 7, 2000, vividly illustrates the sort of difficulties faced by competitive entrants. RCN notes that the procompetitive rulings in the *Cavalier* case should be of material assistance to new entrants to both the MVPD and CLEC markets.

are burdensome and unreasonable. A few examples will suffice to illustrate the kinds of problems RCN has encountered.

In Massachusetts as a whole, RCN estimates that it needs to attach to 60,000 poles.^{50/} In Quincy, MA, in which RCN-BecoCom has been awarded a competitive cable franchise, and seeks to offer CLEC services competitive with those of the incumbent Verizon-MA, RCN must attach to some 9500 poles to provide the required scope of service. The great majority of these poles are owned by Verizon-MA and Massachusetts Electric jointly. Verizon-MA has established an arbitrary 2000 pole limit per application,^{51/} and has declined to permit RCN to box poles^{52/} which would significantly accelerate the process, even though 20% of the poles in Quincy are already boxed.^{53/} In numerous other respects, in particular by establishing arbitrary policies concerning pole attachment methods, by unlawfully reserving space on the poles for

^{50/} This discussion is based on the public record being compiled before the Massachusetts Department of Telecommunications and Energy ("MDTE") in connection with Verizon-MA's application to the MDTE for a recommendation of approval of Verizon-MA's compliance with § 271 of the Communications Act (MDTE Docket No. 99-271).

^{51/} After RCN objected to the arbitrary 2000 pole limit, Verizon-MA agreed to remove it as an absolute bar to the processing of more than 2000 poles in any one district, but insisted on retaining the discretion to impose it on a case-by-case basis, in its sole judgment. The rationale offered by Verizon-MA for this limitation is that it does not wish to permit one potential attacher to monopolize its poles or the time of its employees who administer the pole attachment program. But it is not Verizon-MA's mandate to equalize CLEC or cable attachers' access to poles, and if Verizon-MA lacks adequate staff to process the pole attachment program, it should have enhanced its internal resources, particularly since RCN has been seeking access to poles in Quincy since last November.

^{52/} Pole boxing refers to the practice of attaching cables to both sides of a pole, rather than restricting attachments to one side only.

^{53/} Verizon-MA admits that pole boxing creates no safety hazards and violates no applicable industry codes. It appears to have agreed that on poles it has already boxed, it would permit RCN to do so, but not otherwise. MDTE, Docket No. 99-271, Tr. at 4140-47.

itself,^{54/} and by overcharging RCN for make-ready work, Verizon-MA has sought arbitrarily to delay the initiation of RCN's CLEC/MVPD service. It is noteworthy that the poles' co-owner, Mass Electric, has evinced a far more forthcoming attitude in respect to flexible arrangements for accommodating RCN's wiring on the jointly owned poles than has Verizon-MA. RCN estimates that proceeding in the lackadaisical fashion imposed by Verizon-MA, it will take 4 years for RCN to attach its fiber optic cable to the requisite poles in Quincy.^{55/}

The prospect of a significant delay in the initiation of competitive service in Quincy prompted the City's mayor to convene a meeting of RCN and the joint pole owners. Attached hereto as App. B are copies of letters sent by Verizon-MA (then Bell Atlantic) and Mass Electric to the mayor of Quincy in which Verizon-MA's hostile and uncooperative attitude toward pole attachers is abundantly clear and contrasts dramatically with that of Mass Electric. RCN's response to the two letters is included as well.

In Pennsylvania RCN was presented with a pole attachment bill from PECO which proposed to charge approximately 5 times as much for telecommunications attachments as for pure cable attachments, even though both section 224 of the Act^{56/} and the Commission's implementing rules and decisions^{57/} recognize that higher fees for telecommunications or mixed

^{54/} MDTE Docket No. 99-271, Supplemental Statement of Patrick Musseau for RCN, at 3-4.

^{55/} MDTE Docket No. 99-271, Response of RCN-BecoCom, L.L.C., to Supplemental Comments of Bell Atlantic-Massachusetts (now Verizon-MA), at 6; Supplemental Statement of Patrick Musseau for RCN, at 4.

^{56/} 47 U.S.C. §§ 224(d)(e) and (e)(4).

^{57/} See 47 C.F.R. § 1.1409(f).

cable and telecommunications attachments cannot be implemented until February of 2001. In New York City it required approximately six months to get Time Warner Cable, the owner of certain poles in Queens, to agree to allow RCN to attach its fiber to Time Warner's poles and even then the terms were one-sided and commercially unreasonable.

4. Inability to gain access to MDU inside wiring.

At ¶ 56 the Notice seeks information on the competitive situation in MDUs. As in prior years, RCN continues to experience difficulties in gaining access to cable inside wiring. RCN calls to the Commission's attention that in August the Massachusetts Department of Telecommunications and Energy ("MDTE") adopted new pole attachment rules which not only establish at the state level nondiscriminatory pole, conduit, duct, and right-of-way access rights, but also apply the state's pole and conduit rules to wiring and rights-of-way inside MDUs and commercial buildings. In the same decision the MDTE also created a rebuttable presumption that exclusivity arrangements within MDUs or commercial buildings are contrary to the public interest.^{58/} RCN believes this initiative will significantly enhance its competitive opportunities in Massachusetts and urges the Commission to follow this precedent. Opening up inside wiring to competitive MVPD providers would go a long way to reduce the barriers currently faced by competitors seeking to serve the large portion of the MVPD subscribers who live in MDUs.

^{58/} See MDTE Order Establishing Complaint and Enforcement Procedures to Ensure That Telecommunications Carriers and Cable System Operators Have Non-Discriminatory Access to Utility Poles, Ducts, Conduits, and Rights-Of-Way and to Enhance Consumer Access to Telecommunications Services, adopted July 26, 2000, available at <http://www.magnet.state.ma.us/dpu/telecom/98-36/final.htm>. The revised rules can be accessed at <http://www.magnet.state.ma.us/dpu/telecom/98-36/regs.htm>.

5. Adverse or delayed Commission decisions

In its initial Comments last year RCN described a number of Commission decisions as constituting barriers to entry.^{59/} In the subsequent year the Cable Services Bureau has ruled against RCN in its formal complaint about the loss of vital sports programming in New York City. Although RCN has indicated that local sports programming is particularly crucial to the establishment of a viable competitor, RCN's appeal of the Bureau's ruling, filed in November of 1999, has gone unaddressed since then. Similarly, RCN's request for an interpretation of the inside wiring rules which would permit RCN to have access to existing inside cable wiring at a junction box when it is not otherwise practical to access the wiring at or near individual units, has gone unaddressed for approximately two years.^{60/} These kinds of delays create barriers to entry whose importance cannot be overstated. In a dynamic environment like that of modern telecommunications, regulatory inaction over periods of almost two years, or even close to one year, are not compatible with a climate that encourages competitive entry. As it has done in the past, RCN urges the Commission to address these pending matters and to do so promptly.

6. Retention of the Ban on Programming Exclusivity

The Notice of Inquiry at ¶ 7 makes reference to section 628(c)(5)^{61/} of the Act, which sunsets the prohibition on cable exclusivity in section 628(c)(2)(D) on October 5, 2002, unless the Commission determines that continuing that provision beyond the termination date is

^{59/} RCN 1999 Comments at 14-15.

^{60/} Petition for Special Relief, CSR 5311, filed September 23, 1998.

^{61/} 47 U.S.C. § 548(c)(5).

necessary to preserve and protect competition and diversity in the distribution of video programming.^{62/} The Commission seeks comments on the standards and the process to be employed in any such review. RCN urges the Commission to conduct a thorough review of program access issues in connection with the upcoming review of the need for continuing the exclusivity provisions of section 628. Failure to extend those provisions would be a disaster for new entrants like RCN. Moreover, RCN urges the Commission to take a more dynamic and interventionist approach to that which generally prevails in notice and comment rulemaking proceedings.

As RCN has said on many prior occasions,^{63/} programming is the heart of competitive MVPD entry. Without adequate programming competitive entry will wither and ultimately fail.

^{62/} By way of background, subsection 548(c)(2)(C), with respect to persons in areas not served by a cable operator as of the date of enactment of section 628, prohibits practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming between a cable operator and a satellite cable programming vendor, that prevent an MVPD from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest; subsection 548(c)(2)(D), with respect to distribution to persons in areas served by a cable operator, prohibits exclusive contracts for satellite cable programming between a cable operator and a satellite cable programming vendor in which the cable operators has an attributable interest, unless the Commission determines that such contract is in the public interest according to criteria set forth in section 548(c)(4). Subsection (c)(5) provides that the prohibition required by subsection (c)(2)(D) terminates ten years after the effective date of section 548 unless the FCC determines that continuation of such prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming. *See also* 47 C.F.R. § 76.1002.

^{63/} *See, e.g.*, in addition to RCN's prior comments in the Commission's annual assessment of the status of competition in the MVPD industry, RCN's Petition to Condition the AOL/Time Warner merger, Docket No. 00-30, filed April 26, 2000, RCN's Reply Comments filed May 11, 2000, RCN's Response to Ex Parte Filings filed August 11, 2000, and RCN's Reply Comments in the Commission's *Implementation of the Satellite Home Viewer's Improvement Act*, Docket 99-363 (Part IV), filed Jan. 21, 2000.

RCN continues to experience difficulty in securing vital programming. While the Commission has acknowledged that certain MVPD competitors have alluded to these difficulties, it has done little more than recite such acknowledgments. The necessity to consider the extension of the exclusivity provisions in section 628 is an excellent opportunity for the Commission to take a closer look at this issue, either by propounding specific written questions to vertically integrated program vendors, or by permitting MVPD competitors to propound their own questions, by holding oral argument on the question of programming availability, or by conducting industry forums in an on-the-record format in which MVPD competitors and vertically integrated programming vendors can exchange views under the auspices and with the participation of, staff personnel.^{64/} What RCN considers essential is not the particular method of proceeding, but that the Commission devise some procedure through which the interested parties and Commission staff can engage in an active face-to-face discussion of program access issues, rather than merely to rely on the passive notice-and-comment rulemaking which is typical of Commission inquiries.

7. Availability of programming

Section II B of the Notice, especially at ¶¶ 38 and 41, inquires about the availability of certain programming, particularly sports programming. As RCN has already indicated above in

^{64/} RCN made a somewhat similar suggestion to the Commission in its December, 1999 Motion for Consolidation and for Oral Argument in Docket Nos. 99 CSR-5404P and 5415P. In that filing RCN noted that three separate regional sports programming access complaints were pending before the Commission on appeal from adverse Cable Services Bureau orders and emphasized that the Commission has an obligation to come to grips with the programming issues, especially the withholding by incumbent vertically integrated cable operators of regional sports programming. While RCN continues to support such a consolidation of pending adjudicatory matters, the suggestion set forth above in these Comments is more broadly based, *i.e.* encompasses the more general issue of programming availability.

these Comments at IV.1, the availability of sports programming is absolutely crucial to RCN's commercial prospects and RCN continues to experience difficulties and uncertainties regarding the availability of such programming in two of its major urban markets, New York and Philadelphia, a potential problem looms in the Washington, D.C. metropolitan area.

RCN reiterates yet again the crucial importance of local sports programming.^{65/} No MVPD competitor can prosper in an urban market without access to local sports programming. It hardly needs to be emphasized, especially after the enormous public outcry last year when the incumbent cable operator in Fairfax County, Virginia clashed with Fox Sports over the carriage of National Football League programming, that the public would be exceedingly unhappy to be deprived of such programming.

V. CONCLUSION

Competition remains the best antidote to high cable rates and other abuses endemic to the entrenched and still-dominant cable operators. As Chairman Kennard recently reaffirmed in Congressional testimony, competition is the ultimate answer.^{66/} Because it is well funded and has a unique business plan, RCN continues to move ahead as an MVPD competitor. However,

^{65/} RCN emphasized this point in its prior Comments in the Commission's annual review of the status of competition in MVPD markets, in its formal program access complaint against Cablevision, in its appeal to the full Commission of the Cable Service Bureau's denial of that complaint, in RCN's Motion for Consolidation and for Oral Argument, and in its July, 2000 Motion for Expedited Consideration.

^{66/} Hearings Before the House Judiciary Committee on July 18, 2000, Tr. at 18. *See also* the Commission's Second Report in CC Docket No. 98-146, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, FCC 00-290, *rel.* Aug. 21, 2000 at ¶¶ 132-133 and App. C, Part II which dramatically demonstrates the advantages for advanced services brought about by active competition.

as set forth above it faces substantial barriers to entry, many of which could be eliminated or, at the least, significantly reduced, if the Commission itself would adopt a more procompetitive posture. Both by proactively addressing access to MDUs, pole attachment problems, and right-of-way access, but also by acting promptly on requests for regulatory intervention in aid of competitive entry. Such action is essential if consumers are to ever realize the full benefits of competition and if the pro-competitive market envisioned by Congress with the passage of the 1996 Act is to come to fruition.

As RCN noted in last year's filing, if the Commission believes that it lacks sufficient authority to remedy inside wiring and program access issues (or any other issue addressed herein), it should so advise the Congress and make a concerted effort to secure the additional legislative authority which it believes it needs.

Respectfully submitted,

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