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

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FEDERAL COMMUNICATIONS COMMISSION
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

REPLY COMMENTS OF

RCN CORPORATION

RCN Corporation ("RCN"), by the undersigned counsel, herewith submits its reply to the initial comments filed in the above-captioned matter on September 8, 2000. In its own initial comments RCN provided the Commission with an overview of RCN's progress in developing a competitive alternative to incumbent cable services, and emphasized the difficulties which continue to plague RCN, such as program access issues, access to public rights-of-way, and access to MDUs and to utility poles.[1]

Numerous other commenters emphasized one or more of these issues as well.[2] The NCTA noted in its initial comments that competition continues to grow in the MVPD market place, and that cable's share of the national market continues to decline. NCTA Comments, at 3-4, 8-9. Fox Television Stations Inc. ("Fox") urges the Commission to revisit and revise the

[1] Appendix A to RCN's comments, containing data on RCN's service connections, contained two numerical errors in the column headed "December 31, 1999." A corrected Appendix A is appended hereto.

[2] *See, e.g.*, American Broadband, Inc. comments at 5-10; Bell South Corporation comments at 4-5; DirecTV Comments at 7-9 and 14-15.

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existing ownership caps for broadcast facilities on the basis of the increasing diversity of ownership and distribution media. AT&T contends that competition is thriving and that the viewing public regards cable operators and DBS operators as substitutable. AT&T Comments, at 2-3. RCN does not dispute that the MVPD and broadcast industries face far more competition than they have in the past; what it does contest is that, with an 80% share of the MVPD market, cable is no longer the dominant entity or that program access concerns have been mitigated over time.

On the contrary, program access issues are at least as pervasive as they have ever been, and indeed more so, as the MSO incumbents move toward terrestrial distribution of vertically integrated programming so as to evade the program access provisions of section 628 of the Act.[3] As RCN noted in its initial comments, its own surveys indicate that 40 to 58% of the current subscribers of an incumbent would be unlikely to move to RCN if the latter could not carry the bulk of the local sports programming. RCN Comments at 17. This is not a secret; Comcast and Cablevision both know it, and that is why they have moved to lock up local sports programming in New York City, Philadelphia, and the Washington, D.C. metropolitan areas. The Commission will see more of this anticompetitive maneuver if it allows the early forays to go unchecked.

Fox's argument that broadcast ownership caps are anachronistic is based on the contention that diversity in ownership and distribution media must be examined locally rather than nationally. "[V]iewing is local." Fox Comments, at 67.[4] RCN agrees. It is of little relevance

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[3] 47 U.S.C. sec. 548.

[4] *See also* "A Comparative Analysis of the Broadcast Television National Multiple Ownership Rule and Cable Horizontal Ownership Rules," by Michael L. Katz, attached to Fox's

to the competitive circumstances faced by RCN in any of its individual markets that cable's national market share has declined to approximately 80%.

Far more important to RCN is that the increasing tendency to build clusters couples overwhelming dominance of individual markets by individual MSOs with the practical ability to evade section 628 of the Act by resorting to terrestrial distribution.[5] In Philadelphia, for example, in which RCN has been seeking to negotiate an OVS agreement with the city government for more than a year, Comcast is the dominant MVPD operator, with 90 to 95% of the MVPD market in the City and 80 to 90% of the Philadelphia DMA. For RCN, which at this point has a very limited number of subscribers in one Philadelphia suburban area, the important point is that Comcast has been acquiring cable systems in the Philadelphia area for some time so as to enhance its dominance of the local market. The decline of MSO dominance nationally is as irrelevant as the price of pork belly futures.

Similarly, in the Baltimore-Washington, D.C. area where Starpower, RCN's affiliate, is building a competitive entrant in the District and surrounding jurisdictions and is seeking franchises in Baltimore City and County, Comcast's acquisition of all but a few local cable

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Comments: "As the Commission has long recognized, the single most important fact in analyzing the effects of ownership concentration on viewers and advertisers is that viewing takes place at a local level. This fact implies that the relevant markets for assessing the effects of concentration on viewer choice are local." *Id.*, at 6.

[5] This is not news. In its *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Fourth Annual Report)*, 13 FCC Rcd 1034 (1998), the Commission noted the "vast majority of consumers still subscribe to the service of a single incumbent cable operator. The resulting high level of concentration, together with impediments to entry and product differentiation, mean that the structural conditions of markets for the delivery of video programming are conducive to the exercise of market power by cable operators." *Id.* at 1109.

operators, and its proposed acquisition of Home Team Sports, poses an up-hill battle for Starpower which must be won or lost on the ground in the Baltimore-Washington, D.C. metropolitan area – not across the country. In New York City, RCN faces Time Warner Cable, with some 1.3 million subscribers in the City, and Cablevision with some 1.7 million in the greater metropolitan area. At present, RCN has only some 2% to 3% of the MVPD market, after having competed vigorously for approximately three years. These are relevant market shares for RCN, not the slight and gradual decline of cable's national dominance.

Because the growth of clustering will only accelerate local dominance by the MSOs, clustering makes it more important than ever before that the program access rules be broadened so as to assure that the new entrants like RCN have a fair shot at the programming which is essential to competitive success. That is why RCN urges the Commission not only to preserve the existing program access rules but to broaden them so that they conform to the statute passed by Congress in 1992. NCTA's assertion that Congress limited the scope of section 628 to programming vertically owned by cable companies and to such programming as is satellite-delivered, NCTA Comments at 30, is simply not correct. RCN, of course, is currently contesting the Cable Service Bureau's narrow interpretation of section 628 which restricts that provision to satellite-delivered programming and systematically denies RCN and others the right to test the MSO's evasive intent through discovery.[6]

Moreover, as long ago as 1992 the Commission itself recognized that section 628(b) could be read to encompass programming which was not provided by a vertically integrated

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[6] *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation,* DA99-2094, *rel.* Oct. 7, 1999, *application for review pending.*

programmer. "We, however, observe that subsection 628(b), which addresses unfair practices, could apply more broadly to all 'cable operators' rather than only to those vertically integrated operators that have an attributable programming interest as specified elsewhere in the Section." *Implementation of sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 194, ftnt. 18. This, in fact, is how section 628 should be read. To do so is not to deny or minimize the possibility that, upon careful review as set forth in section 628 (c)(2)(D), particular exclusive contracts might be found appropriate. What is misconceived about the present regime is that the Cable Services Bureau, by its unnecessarily narrow interpretations of the statute, has denied MVPD competitive entrants a fair opportunity even to contend that certain exclusive arrangements are unlawful.

The same rationale applies in respect to Commission action to assure that MVPD competitors have rapid access to public rights-of-way on fair and reasonable terms. When an MSO establishes itself as the only dominant cable operator in a metropolitan area, *i.e.*, successfully establishes a cluster, it is naturally in a very strong position to develop good working relationships with local franchise authorities, both on a personal basis and by contributing, pursuant to, or even beyond its franchise obligations, to the local community's civic or social needs. There is nothing wrong with developing such relationships and activities. Indeed, it is unquestionably desirable both for the operator and for local citizens. But again, it means that for the newcomer– the interloper– the new kid on the block– access to public rights-of-way may be impeded in ways that are subtle, difficult to prove, and very hard to overcome. RCN has found this to be true as a general proposition. To counterbalance the natural tendency of LFA's to be protective of existing relationships even while they welcome competition in the abstract, it is important for the FCC to establish preemptive, firm and readily enforceable rules and policies on which the MVPD entrant can rely in getting rapid and equitable access to public rights-of-way.

The Commission has been observing in its recent annual reports on the status of competition in the MVPD industry and elsewhere that it will monitor program access issues to see if terrestrial distribution of programming, including in particular regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace.[7] From RCN's perspective the problem continues to get worse. The time for monitoring has come and gone. It is time for action.

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By: ______________________

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[7] *See, e.g. Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, ¶ 16 (2000); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp, Transferee*, CS Docket No. 99-251, FCC 00-202, *rel.* June 6, 2000 at ¶ 80; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, ("Program Access Order")*,CS Docket No. 97-248, 12 FCC Rcd 22840 at ¶ 50 (1997).

APPENDIX A

(Corrected)

RCN Service Connections:

Advanced Fiber	December 31, 1999	March 31, 2000
On-Net		
Voice	62,733	68,550
Video	138,577	160,665
Data	21,654	26,698
Subtotal On-Net	222,964	255,913
Off-Net		
Voice	46,986	45,262
Video	153,627	139,383
Data	523,728	500,495
Subtotal Off-Net	724,341	685,140
Total Service Connections	947,305	941,053
Advanced Fiber Homes Passed	713,823	808,023
Marketable Homes	551,006	601,745

CERTIFICATE OF SERVICE

I, Sharon Gantt, hereby certify that on this 28th day of September, 2000, a copy of the foregoing Reply Comments of RCN Corporation was served on the following parties listed below via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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