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

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In the Matter of:		
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 01-290
	)	
Development of Competition and Delivery in Video Programming Distribution Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

INITIAL COMMENTS

OF

RCN TELECOM SERVICES, INC.

William L. Fishman
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 945-6986
Facsimile: (202) 295-8478

Counsel to RCN Telecom Services, Inc.

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SUMMARY

RCN Telecom Services, Inc. ("RCN"), one of the largest nationwide terrestrial cable overbuilders, strongly urges the Commission to retain the ban on exclusivity in vertically-integrated programming currently found in section 628(c)(2)(D). The ban, which precludes vertically-integrated programmers and their cable affiliates from entering into exclusive arrangements for the distribution of cable programming without explicit Commission approval to do so, has proven to be an effective and vital tool in the development of a competitive multi channel video program distribution ("MVPD") marketplace. It has deterred anticompetitive conduct during the 10 years of its effectiveness and will continue to do so for the foreseeable future, given the continuing enormous dominance by cable incumbents of the MVPD marketplace. The Commission should extend the ban as it currently exists for another 10 years.

RCN has constructed its own facilities-based broadband distribution network in seven of the nation's largest urban markets: Boston, New York City, Philadelphia, Washington, D.C., Chicago, San Francisco, and Los Angeles. In these markets RCN offers principally residential subscribers a combination of telephone, ISP and broadband cable services. The viability of this business plan is crucially dependent on each of the tripartite services contributing to the revenue stream. If any of the three is disrupted, RCN's competitive entry would no longer be economically viable. To date RCN has some 781,000 network connections.

The presence of RCN's alternative communications services has proven a boon to the public in each market in which RCN is currently operating. In the MVPD segment of RCN's business, incumbents' prices are either reduced, held steady, or increased more slowly than would be the case where the incumbent had a local monopoly. The variety of programming and

flexibility of tiering arrangements has improved; back-office and service functions have improved. In short, the theory of competition is alive and well, and it works.

Programming is the heart of MVPD competition. Fair access to sports programming, especially local sports events, is virtually essential for any new competitor. If the competitive entrant does not have access to the programming most valued by the local subscriber, the entrant will never be able to secure a foothold in, let alone a viable share of, the local market. Today, the vertical integration of programming with retail cable operations is more intense than ever before, concentration of control in the cable industry has grown dramatically, and the clustering of cable ownership is more widespread than ever before. Clustering, of course, is designed to permit the local incumbent to more thoroughly control the MVPD market within its clustered territory. That is the purpose of clustering, and it has proven very effective. The result is that the most desirable programming is increasingly in the hands of local incumbents. If competitors and potential competitors cannot carry vertically integrated programming, there will be little or no further competitive entry into the MVPD market. Cable's current MVPD market share of some 80% would either remain steady, or perhaps increase somewhat, but cable would undoubtedly remain the most dominant purveyor of MVPD programming.

The MVPD market in recent years has seen the entry of a number of potentially significant competitors using a variety of technologies. Most dramatic is the DBS industry, which today accounts for some 15% of the total market. Next are the terrestrial, generally fiber optic based entrants, which account for some 5%. Among these, RCN is by far the largest. Although there were at one time prospects for significant numbers of microwave and wireless operators, those initial market forays appear to have come to little, and together they account only for a tiny fraction of the market. Significantly, the incumbent local exchange telephone companies which Congress attempted to attract to the MVPD market by easing their entry in the Telecommunications Act of 1996, have simply foregone the opportunity to enter and have no substantial share of the MVPD market today.

There is nothing about the structure and participants in today's MVPD market which would rationally justify allowing the exclusivity prohibition to lapse. While cable's share has declined from virtually 100% to some 80% today, that degree of dominance remains impressive and frightening. Using traditional antitrust doctrine, an 80% share of the relevant market would generally be considered to give the owner market power. Moreover, since the 80% figure is calculated on a national basis, it is of little practical importance in the individual markets in which competition actually occurs. In each of the seven markets in which RCN operates, the incumbent cable operator(s) have far more than 80% of the local market – their percentage market share in most of these seven markets is in the 90 to 95% range, and this is true even after DBS market penetration is accounted for.

During the 10 year life of the program exclusivity provision there has been a proliferation of new programming, so there is no reason for concern that the exclusivity provision chokes creativity or mitigates the economics of program development. To the extent data is available, there is no reason to believe the incumbent cable industry has not continued to prosper, notwithstanding the ban on exclusivity. But RCN would probably not have entered the MVPD market – and therefore would not have been able to enter the CLEC or ISP market – without the prospect of having access to the bulk of the vertically integrated programming which is the heart of incumbents' program offerings. If, on the other hand, the exclusivity provision were allowed to lapse, there can be no doubt that the competitive prospects for entities like RCN would be significantly dimmed. Without access to the programming desired by local audiences, no competitor can succeed, and no investor is likely to be willing to give competitors a chance to succeed.

The remaining provisions of section 628, including those in 628(b), undoubtedly will have a constraining effect on incumbents' abuse of their market power. Unfortunately, a review of the Commission's prior program access adjudications does not suggest that this constraining effect will be sufficient to assure continued competitive entry. The Commission's limiting interpretation of section 628 so as to apply it only to satellite-based cable programming greatly attenuates the value of the remaining provisions. Accordingly, their continued effectiveness will not adequately protect new competitors.

The Commission should therefore extend the applicability of the ban on program exclusivity, and should do so for another 10 years. If, in another 10 years the cable industry's dominance of the MVPD market has declined markedly, the Commission can then consider modifying or eliminating the rule at that time. Indeed, since the Commission's decision to extend the rule is always subject to a petition for rule making, the cable industry could at any juncture seek modification or abolition of the rule, based on the presentation of adequate proof that the rule is no longer appropriate. This status seems to RCN to strike a fair balance going forward: the dominant industry participant faces a constraint on the exercise of its market power, but subject to the filing of a request at any time for modification. The new entrants, including RCN, the DBS operators, and any other subsequent competitor, will have the benefit of the presumption that vertically integrated programming will remain available over the next 10 years – a reasonable planning horizon for the multibillion dollar investments required for competitive entrance into the MVPD industry.

With respect to the scope and shape of the extended exclusivity ban, RCN believes that it would be too difficult and raise serious issues of arbitrariness to limit the operation of the exclusivity ban to one kind of programming, or to one class of competitor. However, if the Commission wishes to curtail the scope of the ban, RCN suggests that the Commission take account of the extent of dominance of an incumbent cable operator on a market-by-market basis. A revised rule might thus provide that the existing ban continues in any local market or franchised area in which the incumbent cable operator has 50% or more of the local subscribership. This limitation would mean that, in an individual market in which the incumbent cable operator does not serve at least half the local subscribers, it should be permitted, in the first instance, to enter into programming exclusivity arrangements with its vertically integrated affiliate. RCN would suggest, however, that any rule revision to this effect should not abolish the ban, but simply provide that, in such circumstances the burden of proof with respect to the acceptability of such a contract would shift from the proponent, leaving an objector with the burden to prove that the arrangement is anticompetitive, taking account of the factors set forth in section 628 of the Act for judging the public interest in granting or denying requests for exclusivity.

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INITIAL COMMENTS
OF
RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, herewith submits its initial comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter.[1] RCN, currently the nation's largest terrestrial overbuilder of combined telecommunications and cable facilities with operations in 7 of the 10 largest urban markets, urges the Commission to retain the existing rule which generally bars vertically integrated programmers from entering exclusive arrangements for distribution of their programming. The existing ban has contributed materially to the development of competition in the multichannel video programming distribution ("MVPD") market, and its continuation is vital to the preservation of that competition and the development of new competition.

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[1] Notice of Proposed Rulemaking, FCC 01-301, *rel.* October 18, 2001.

I. INTRODUCTION

Although the immediate focus of the NPRM to which this filing responds is on the availability of vertically integrated cable programming to competitive providers of cable service, in reality it addresses one of the most important regulatory issues on the Commission's agenda: the development of competitive ubiquitous broadband facilities. As recently articulated by Chairman Powell, "Broadband... has certainly become the central communications policy objective in America." The Chairman noted as well the need to avoid the "one-wire" problem: "If at all possible we should work to keep multiple platforms and routes to the home open and viable in a broadband world."[2] Coupled with the need to develop ubiquitous broadband capability is the need to avoid doing so through monopoly arrangements or government involvement. As articulated some 10 years ago by a prior FCC Chairman, competition is the way to accomplish this goal:

> "As has been demonstrated in communications market after communications market, as competition increases both costs and prices go down. Head to head competition places an exceptionally high premium on cutting costs and putting the customer first. Study after study, in sector after sector, has identified the extraordinary cost and price-cutting pressure that exists in highly competitive markets. Those same studies demonstrate that highly competitive markets also spur product differentiation, innovation, and service quality."[3]

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[2] Remarks of Michael K. Powell At the National Summit on Broadband Deployment, Washington, D.C., October 25, 2001. Remarks, at 1, 6. *See also* Remarks of Commissioner Martin: "I am confident that broadband deployment will lead to a new period of growth, and I believe we need to make broadband deployment a national priority." Remarks, at 1.

[3] *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 1990 Report to Congress, 5 FCC Rcd 4962 (1990), Statement of Chairman Sikes.

What RCN offers to the public is exactly the remedy needed: private sector development of a competitive telecommunications and broadband wire to residential subscribers. What RCN needs to make that remedy commercially feasible is reasonable access to the most popular programming, which is usually produced by vertically integrated cable companies. Accordingly, assuring that entities like RCN have access to that programming substantially contributes to the achievement of the national goal of competitive broadband facilities in American homes.

While a comprehensive history of the Commission's regulation of the cable industry is neither required nor appropriate, it is nevertheless important that the questions raised in the NPRM be set in some historical perspective. This Commission has been trying since 1966 to control the cable industry's abuse of its market dominance in the MVPD marketplace.[4] When the adoption of initial rules by the Commission proved inadequate to achieve that control, Congress passed the Cable Communications Policy Act of 1984.[5] When that legislation proved inadequate, Congress passed the Cable Television Competition Improvement Act of 1992.[6] When that legislation proved inadequate Congress passed legislation as part of the Telecommunications Act of 1996 to encourage local telephone companies to enter the MVPD market.[7]

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[4] *See, e.g. U.S. v Southwestern Cable*, 392 U.S. 157 (1968), affirming the Commission's first cable regulations.

[5] Codified at 47 U.S.C. § § 521 *et. seq.*

[6] Codified at scattered sections of 47 U.S.C.

[7] Section 653 of the Communications Act of 1934, 47 U.S.C. § 573.

The problem of competitive access to programming was identified by the Commission many years ago. As early as 1990 the Commission concluded that vertically integrated cable operators often "have the ability to deny alterative multichannel video providers access to cable programming services in which such cable operators hold ownership interests, and there is considerable anecdotal evidence that some have used this ability in anticompetitive ways."[8] "A major component of the ability to compete with cable systems is the ability to secure programming. Ensuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable."[9]

One of the steps taken in the Cable Act of 1992 was to mandate that cable companies vertically integrated with programmers could not deny MVPD competitors access to such programming without first obtaining FCC authority to do so. Section 628(c)(2)(D) was designed to accomplish this purpose. Recognizing, however, that the communications industry was very dynamic, Congress provided that the ban on exclusivity was to sunset in 10 years unless the FCC determined, based on its assessment of marketplace circumstances just prior to the sunset date, that the exclusivity provision should remain in place to preserve competition and diversity in the distribution of video programming.[10]

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[8] *Report to Congress, supra*, at 4972-3 (1990). In that Report the Commission recommended that Congress promote the emergence of alternative multichannel distributors by prohibiting vertically integrated programming services from unreasonably refusing to deal with any competing multichannel provider in areas served by the multichannel provider. *Id.*, at 4975.

[9] 1990 Report to Congress, *supra,* at ¶ 112.

[10] 47 U.S.C. § 628(c)(5).

There is no question that competition has taken root in the MVPD industry. As the Commission's most recent annual report on the status of that competition notes, the traditional cable industry accounts only for about 80% of the MVPD market. DBS operators serve about 15%, and the remaining 5% is divided among a small number of other competitors employing a variety of technical means to distribute broadband signals to their subscribers including terrestrial cable overbuilders, SMATV, MMDS, and C-Band satellite home delivery systems.[11] The interesting point here is that entities like RCN, *i.e.,* those willing to take on the cable operators using terrestrial technology, are few and far between. While DBS is a powerful technology and its commercial success is to be applauded, it has serious limitations, including high subscriber fees, limitations on carriage of local broadcast signals,[12]use of valuable spectrum, little or no two-way capability, and many instances of unavailability in urban areas due to line-of-sight limitations.

The progress toward competition which has been experienced in recent years is unquestionably a good beginning. But at the same time there is equally no question that cable remains the dominant element in the MVPD industry. In antitrust terms an 80% market share would normally be considered *prima facie* evidence of monopoly power.[13] Moreover the cable

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[11] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, 16 FCC Rcd 6005, *rel.* January 8, 2001, at App. C and Key Findings, contained in a News release dated January 8, 2001.

[12] *See Satellite Broadcasting and Communications Ass. and EchoStar Communications, Inc. v. FCC*, 4th Cir., Case Nos. 01-1151, *et al.*

[13] Market power may be inferred from very large market shares, usually in excess of 70 percent. *See, e.g. Morgenstern v. Wilson*, 29 F.3d 1291, 1296n. 3 (8th Cir., 1994) (80 percent share sufficient), *cert. den.*, 513 U.S. 1150 (1995).

industry is increasingly concentrated, increasingly clustered geographically, and increasingly integrated with program production.[14] If the Commission wants to assure that competitive entry continues it must act to retain the existing limitation on exclusivity arrangements within the cable industry.

What does bear reemphasis, and indeed increasing emphasis as the incumbent cable industry becomes more concentrated and more geographically clustered, is that competing with an existing cable operator in an urban area is not for the faint-hearted or the thinly-capitalized. The new competitor must be able to market its services against an entrenched cable operator who has substantial advantages in the competitive battle: name recognition, an embedded customer base, strong economies of scale, established relationships with local franchise and governmental authorities, a corporate presence in the community, and vertically integrated programming affiliates or established contracts for programming.

The new entrant has no captive subscribers, no initial revenue, and enormous start-up expenses such as securing the local franchise and gaining access to local conduit or utility poles. The latter processes alone generally take six months to a year or even longer. Local franchise

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[14] Notwithstanding the decline in cable's share of the MVPD market to some 80%, the cable industry has grown ever more concentrated, with the 10 largest multiple system owners ("MSOs") now accounting for some 52.5% of the market, and with the vertical integration of cable companies and programming vendors growing increasingly clear. The striking level of concentration is set forth in the Commission's *Seventh Annual Report, supra*, which notes, *inter alia*, that the top four MSOs serve more than 50% of all subscribers: AT&T (19.1%);Time Warner (now AOL Time Warner): (14.9%); DirecTV (10.3%); and Comcast (8.4%). The Report notes also that the top 10 MSOs served 75% of the MVPD universe in 1999 but 84% in 2000. (¶ 169). One or more of the top five MSOs holds ownership interests in each of the 99 vertically integrated services. (¶ 174). Nine of the top 20 video programming networks ranked by subscribership are vertically integrated with a cable MSO. (¶ 175). A "significant amount" of video programming is controlled by only 11 companies, including cable MSOs. (*Id.*).

authorities charge as high a price as possible for granting a franchise and typically require substantial assurances of a franchise applicant's financial and operational experience and capability. Multi-year construction commitments are normally required. Accordingly, the potential competitor must earmark funds, purchase long lead time items, enter into programming commitments, hire hundreds of employees in each market, and, most important, fight for each subscriber because the local residents who want cable service are probably already customers of the incumbent. To use a well-worn metaphor, the low-hanging fruit has been picked. As a result, it has generally been thought that competitive MVPD service based on construction of a second local broadband distribution network is not sustainable financially and there has been relatively little of it, either before passage of the Telecom Act of 1996, or thereafter.[15] Of course, RCN also enjoys certain competitive advantages: its newly designed and installed fiber optic network is among the most advanced in the world, it is able to offer bundled service combining local and long distance telephony, high speed Internet access, and broadband video from day one.

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[15] Typically, it is said that "[o]nce an incumbent system has captured a large share of the viewing public in a particular area, it is quite difficult for a new system to come into the market and offer potential subscribers as favorable pricing and viewing options as those available from the incumbent system." Piraino, A Proposal For the Antitrust Regulation of Professional Sports, 79 B.U.L. Rev. 889 (1999) at n. 387. The concurrent FNPRM in Docket No. 01-263 makes the same point at ftnt 150, indicating that the economic viability of overbuilding is open to question. *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, CS Docket Nos. 98-82 and 96-85, MM Docket Nos. 92-264, 94-150, 92-51 and 87-0154, Further Notice of Proposed Rulemaking*, FCC 01-263, *rel.* Sept. 21, 2001 *(Cable Structure FNPRM). See also* Senate Report 102-92, 102d Cong., 2d Sess. (1992) at 13 noting that there are strong pressures militating against the establishment of competitive cable systems and relatively few existed in 1992.

A. Section 628 of the Act

The NPRM sets out the provisions of section 628 which are most germane to this inquiry: section 628(c)(2)(D) which establishes a general ban on exclusive contracts for cable programming between vertically integrated programming vendors and cable operators, and section 628(c)(5) which provides that the prohibition in section 628(c)(2)(D) sunsets 10 years after enactment of the section, or October 5, 2002, unless the Commission finds that such prohibition continues to be necessary to preserve competition and diversity in the distribution of video programming. However, RCN does not fully agree with the NPRM's description or summary of section 628 insofar as it adopts the Commission's view that section 628(b) applies only to satellite programming.[16] RCN has previously contended, and continues to believe, that section 628 applies both to cable programming delivered by satellite, and to cable programming however delivered where the conduct of the vertically integrated cable company has the purpose or effect of impairing or impeding competitive MVPD entry.[17]

Whatever the proper scope of section 628, its importance to the statutory scheme of Title VI of the Act is worth emphasizing. In 1998 testimony before a Senate Committee, Congressman Tauzin, one of the principal architects of the Cable Act of 1992, which contained what is now section 628 of the Communications Act, observed that:

> In 1992, we awakened to the sad realization that we had forgot one crucial element, and that was that cable controlled programming. And that controlling programming was a way of making sure that there would be no competitors. If a competitor couldn't get the programming, it certainly wasn't going to launch the

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[16] NPRM, at ¶ 3.

[17] *See, e.g., infra,* at 29-34.

> satellite or put up the antenna. Or, in fact, even build another cable system in the same community to compete with the incoming [incumbent] cable company.[18]

These thoughts are as true today as they were in 1998.

B. RCN

1. In General

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."[19] The network incorporates SONET ring architecture and targets high density areas comprising 44% of the U.S. residential communications market spread over only 6% of its geography. RCN seeks to serve principally the residential, rather than the commercial market.

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

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[18] Testimony of Representative Billy Tauzin before the Senate Commerce, Science and Transportation Committee, July 28, 1998, Tr. at 6 (text in bracket added).

[19] 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.

optics and the pro-competitive policies of the Telecommunications Act of 1996, which, by permitting RCN to generate four separate revenue streams, allow it to develop a commercially feasible broadband business through overbuilding.

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, and Chicago, Ill. 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 traditional Title VI franchise agreements in many communities where that mode of entry is preferred by local franchise authorities. 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 is the seventh largest Internet service provider ("ISP") in the country, and the largest regional ISP in the Northeast corridor.[20]

2. RCN's Contributions To A Competitive MVPD Marketplace

No one disputes competition is generally desirable, and the Commission is well aware of this, as set forth in its most recent Annual Report on MVPD competition.[21] Generalities, of course, are easy to allege but do not carry the analysis as far as necessary. Accordingly, RCN offers the Commission, in App. A hereto, some examples of instances in which RCN's presence

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[20] As of the third quarter of 2001, RCN provides 575,926 video network connections, and a total of 780,564 network connections, including voice service. RCN 3rd Quarter 2001 Update, available at http://www.rcn.com.

[21] *Seventh Annual Report, supra*, at ¶ ¶ 39 and 235-238.

in a local market has redounded to the benefit of the viewing public.[22] As shown therein, RCN's presence in a community – in some cases even the mere prospect of such presence – has significantly improved the value or lowered the cost of the incumbent cable provider's service. In addition, as the new entrant, RCN frequently offers more than the incumbent. For example, in suburban Philadelphia communities where RCN competes with Comcast, RCN offers more than 20 channels which are not available on Comcast's systems.[23] Recently, RCN has begun to market and provide its services in the New York City Borough of Brooklyn. There, the incumbent's system has not been upgraded and provides only 78 channels of non-PEG programming. RCN's penetration in this portion of Brooklyn with its 105 channels of non-PEG programming has been very rapid, with MDU sign-ups in the range of 65%.

3. Program Access Difficulties

There is also no dispute that for an MVPD competitor success or failure turns on access to popular programming. Indeed, such programming is so essential to competitive entry that it may be fairly analogized to CLEC access to ILEC network facilities.[24] Since entering the MVPD

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[22] App. A was first submitted to the Commission attached to RCN's Initial Comments in CS Docket No. 01-129, the most recent review of the status of MVPD competition. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 01-191, *rel.* June 25, 2001, 66 Fed. Reg. 35431 (2001), Initial Comments of RCN filed Aug. 3, 2001.

[23] *I.e.*, BET on Jazz, Biography Channel, Bloomberg TV, CMT, Cnn/fn, Cnn Int'l, Do it Yourself Network, Fox Movie Channel, Fox Sports World, History International, International Channel, National Geographic, Oxygen, TBN, Tech TV, ART American - Arabic, CCTV 4-Chinese, RAI- Italian, The Fillipino Channel, TV5 French, TV Asia Hindi, TV Japan, and Zee TV Hindi.

[24] *See* Hearings of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee, July 29, 1997, testimony of William Reddersen, of Bell South: "The real question becomes the inability to duplicate the programming

market in 1996, RCN has experienced a series of problems getting access to vital local programming. The Commission has been made aware of these problems in a variety of ways, including the filing of formal program access complaints and references in other filings to such difficulties.[25] This is not the place to reiterate or even recapitulate these problems; it is sufficient to note that they have existed in three of RCN's major urban markets.[26] The Commission is well aware of the issue.[27]

Nevertheless, RCN emphasizes that access to high-quality programming is the keystone to any successful MVPD offering, and that such programming must include the great bulk of

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libraries of the world that are out there.... [I]n order for there to be competition in the long distance world, there needed to be equal access . . . . It also recognized that in order for there to be competition in the local world, that no one could duplicate the local telephone network, so there had to be fair and open interconnection. We can't duplicate the programming libraries of today overnight. There has to be equivalent equal access to that programming in order for us to get in the business." *Id.*, tr. at 25.

[25] *See, e.g. RCN Telecom Services of New York, Inc., v. Cablevision Systems, et al.*, ____ FCC Rcd ____, 23 CR 1424 (2001); RCN Telecom Services, Inc., Initial Comments filed in CS Docket 01-129, at 8-12 (2001). *See also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 23 CR 157, 2001 FCC LEXIS 432, *rel.* January 22, 2001 at ¶ 287 alluding to the same issue raised by SBC Communications and Digital Access.

[26] In its 2001 Comments in CS Docket 01-129, RCN noted that Comcast, the dominant cable operator in the Philadelphia metropolitan area, had refused to sign a standard multi-year programming contract with RCN for the carriage of SportsNet, a channel containing the bulk of the Philadelphia area's professional sports programming and controlled by Comcast. RCN is happy to report that it has now signed such a contract with Comcast. Undoubtedly the existence of § 628(c)(2)(D) and the Commission's implementing rules had a great deal to do with this favorable outcome.

[27] *See Seventh Annual Assessment, supra*, at ¶ 15 (Commission will monitor terrestrial distribution of regional sports programming for its impact on the ability of alternative MVPDs to compete in the video marketplace).

local sports programming. Such programming is highly desired by subscribers; its absence virtually dooms any MVPD competitor to failure. Broadly speaking the cable industry appears to have adopted ownership or control of local sports programming as a device to capture or assure dominance in local markets.

It has long been recognized that sports programming is crucial to broadband operators.[28] Industry commentators recognize the value of the sports programming monopoly to cable operators:

> [P]rofessional sports leagues have further extended their economic power by allying with other monopolies in related markets. The leagues' relationships with broadcast networks and cable systems have limited competition in local media as well as sports markets. The New York Yankees, for instance, have granted Cablevision the exclusive right to broadcast games in the New York area in exchange for a payment of $486 million over twelve years. Such a relationship, however, does not only increase the Yankees' monopoly profits. By giving Cablevision exclusive control over sports programming critical to any cable system's success, the Yankees have allowed Cablevision to preclude potential competitors from entering the New York cable market.[29]

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[28] *See, e.g., Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration*, Final Report, 9 FCC Rcd 3440 (1994). *See also* Hearings of the Telecommunications, Trade and Consumer Protection Subcommittee, *supra*: "For example, if in my community one of you has all the sports programming that my consumers think they've got to have or they're going to die if they can't have it on their local television, have you become a new monopoly? Has competition really arrived when one of you controls all the programming that I've got to have if I can't buy it from you a la cart and buy my other services from some other company." *Id.*, tr. at 44 (Rep. Tauzin).

[29] Piraino, *supra*, at 891 (footnotes omitted). Cablevision has tied up programming rights to the Mets for 30 years, and the Yankees for 12 years. Possessing the rights for seven of the nine teams in the New York metro area has allowed Cablevision to triple its previous subscribership. *Id.*, at 919. According to Multichannel News, Cablevision's Rainbow Media Holdings Inc. and Fox/Liberty Networks (with which Cablevision has sports affiliations) "either own or are affiliated with more than 20 regional sports networks that have programming deals with most professional teams: 25 of 30 MLB teams, 26 of 29 National Basketball Association teams and 19 of 26 National Hockey League squads." Multichannel News, May 4, 1998, p. 74. The article also comments that such programming is a "gold mine" for the regional sports

Similarly, RCN has emphasized to the Commission that being able to provide a full panoply of local sports programming to subscribers is crucial for a new entrant.[30] It is no accident that entrenched cable operators often seek to control local sports programming. In New York City, where RCN operates as an OVS competing with two entrenched cable operators, Cablevision Systems, Inc., and Time Warner Cable, it has been forced by Cablevision to forego carriage of certain 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.[31] But it is 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

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networks, "[L]ocal events often generate the highest ratings of any cable program... ." *Id.*

[30] "From the viewpoint of marketing, it is not good enough to say we offer 'most' local sports, or 'almost all' local sports. The public does not want to have to analyze what is missing; they want to know they will get it all, and this is especially important in a fiercely competitive environment such as the New York City MVPD market. Stated differently, having, for example, 85% of the local sports programming is not 85% as good as having 100%; it is a significant competitive disadvantage, and this is true whether we have 75% or 85% or even 95%." *RCN Telecom Services of New York Inc. v. Cablevision Systems et al., supra*, Reply of RCN Telecom Services of New York, Ex. A, pp. i-ii, June 28, 1999.

[31] *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 increasingly important to their ability to attract and retain subscribers.

acceptable. The courts[32] and commentators[33] have recognized this uniqueness, and Congress[34]

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[32] *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.

[33] *See* Piraino, *supra,* "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).

[34] Congress' longstanding concern with sports programming can be demonstrated in numerous ways. To provide 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).

and the FCC understand that sports programming is a crucial element in any video provider's lineup.[35] Since 1992, a great many program access complaints involving denial of access to sports programming have been filed at the Commission, yet there have been few instances in which relief was granted.[36] In a report released in June, 1999, the GAO characterized sports programming as "marquee programming" because of its attractiveness to cable viewers.[37] 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.[38]

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[35] *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.

[36] *See, e.g. Cable America Corp. v. Times Mirror Cable Television, Inc.*, 9 FCC Rcd 4886 (1994) (exclusive carriage of local NBA team; settled); *Private Network Cable Systems Co. v. SportsChannel Associates*, 9 FCC Rcd 5326 (1994) (fees charged to SMATV operator exceed vertically integrated competitor's retail rate; settled); *Cellular Vision of New York, L.P. v SportsChannel Associates*, 10 FCC Rcd 9273 (1995), *recon. den.* 11 FCC Rcd 3001 (1996) (vertically integrated programmer cannot refuse to sell programming to one of several competitors because it is a nonprice discrimination or unreasonable refusal to sell in violation of section 628(c)(2)(B)). In *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Programming Holdings, Inc.*, 12 FCC Rcd 15209 (1997), the Bureau concluded that Rainbow had unlawfully discriminated against complainant in price differentials and marketing obligations.

[37] *Impact of Sports Programming Costs on Cable Television Rate*s, GAO/RCED-99-136, at 3.

[38] *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.

Sports programming is also big business.[39] For the seven year period from 1998 to 2005, the NFL alone anticipates national television revenue of at least $17.6 billion.[40]

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.[41] RCN can confirm that the carriage of local 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. Indeed, access to professional sports programming is crucial for broadcasters as well:

> The broadcast rights to the games of the professional sports leagues are so critical to a broadcast distributor's success that they should be deemed a type of essential

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[39] According to one 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.

[40] 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.

[41] *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), ¶ ¶ 157, 230.

> facility that must be made equally available to all broadcast distributors. Without access to live sports programming, a broadcast distributor could find it impossible to compete in a local market.[42]

Recent surveys of cable subscribers conducted for RCN by professional polling organizations fully substantiate these 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.

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. Entrenched competitors, however, equally understand the power of local sports programming and, as is clear from three recent program access complaints at the FCC, [44] have moved local sports programming off satellite distribution

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[42] Piraino, *supra,* at 950.

[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%.

[44] These include *RCN Telecom Services of New York, Inc. v. Cablevision Systems, supra,* n. 25, and 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), *appeal pending sub nom. Echo Star Communications Corp. v. FCC* (D.C. Cir., case no. 01-032).

to fiber optic (terrestrial) distribution channels, thereby evading the fundamental purpose of section 628.[45]

II. THE CABLE INDUSTRY HAS MARKET POWER AND ACCORDINGLY MUST BE SUBJECTED TO REGULATORY CONSTRAINTS

Although the incumbent cable industry's share of the MVPD market has declined to approximately 80%, it remains the dominant force in that market and has market power by any realistic measure. At ¶ ¶ 60-73, the recent cable structure FNPRM considers the use of market power, as compared with market share, to measure anticompetitive potential, and seeks comment on the applicability of market power analysis to the MVPD industry.[46] RCN believes that market power can indeed be a useful way to gauge anticompetitive capabilities and its assessment can be an important tool to control the accretion of anticompetitive capabilities.[47] Reference to antitrust principles is certainly appropriate in assessing the public interest, *Paragon Cable Television v.*

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[45] 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.

[46] FNPRM, FCC 01-263, *supra.* The Commission's interest in refining the meaning of market power in this context is laudable, and its request for the submission of formal studies is entirely appropriate. But it is important not to lose sight of the commonsense reality that when a local market is dominated by one MVPD provider, it can be presumed to possess market power. *See, e.g.*, Conference Report No. 102-862 at 2 observing that, where a cable system faces no local competition, the "result is undue market power for the cable operator as compared to that of consumers and video programmers."

[47] It is worth noting that the Senate Report accompanying the 1992 Cable Act refers repeatedly to the incumbent cable industry's market power. *See* Report 102-92 at 18, 23, 24, and 30.