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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	CS Docket No. 98-82
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	CS Docket No. 96-85
The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules	MM Docket No. 92-264
Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests	MM Docket No. 94-150
Review of the Commission's Regulations and the Policies Affecting Investment In the Broadcast Industry	MM Docket No. 92-51
Reexamination of the Commission's Cross-Interest Policy	MM Docket No. 87-154

INITIAL COMMENTS
OF
RCN TELECOM SERVICES, INC.

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January 4, 2002

SUMMARY

RCN, the largest OVS operator in the country, with subscribers in 7 of the 10 largest markets in the U.S., urges the Commission to retain its existing limits on the extent to which cable entities can dominate horizontal and vertical MVPD markets. As the MVPD industry becomes ever more concentrated, and the largest MSOs dominate more and more completely the production and distribution of the most important programming, the need for ownership limits under section 613 of the Act grows more urgent, rather than less so. Recent proposed mergers in the MVPD market only underscore the need for limitations on the extent of concentration if new MVPD entry is to appear attractive to investors.

RCN therefore sees no justification for the Commission to raise the limits it has imposed by regulation on horizontal ownership or carriage of vertical programming. However, more important to RCN as a competitive entrant than national limits is the imposition of procompetitive obligations on the cable industry in a market-by-market context. While national ownership limitations can contribute to a more robustly competitive market, the real competitive challenges are local ones. It is in individual local markets that cable incumbents seek to impede competitive entry, to impose unreasonable franchise terms on new entrants, to withhold vital local programming, and in many other ways to inhibit, delay, or foreclose competitive entry.

The Commission has ample authority under section 613 of the Act and under its ancillary authority to impose rules both for the purpose of encouraging competition in the MVPD market and to stimulate conditions likely to produce diversity. Lacking such limits, the serious injury to the MVPD market which is evident in its present highly concentrated state can only grow worse. Recent history demonstrates that there is a clear proclivity on the part of incumbent MSOs to use their control over vital local programming, especially sports programming, to try to inhibit, delay,

burden or outright preclude competitive entry. This history is all the evidence and all the justification the Commission needs to continue to impose limits on horizontal and vertical exercises of dominant market power. Moreover, in light of the cable industry's history of program access abuse, such limits are easily justified and fully defensible under the D.C. Circuit's decision in *Time Warner Entertainment Co., L.P., v. FCC.*

Therefore, RCN recommends that the Commission adopt ownership, subscribership access, or program carriage criteria which would bar a local incumbent cable operator from refusing to make available to a local MVPD competitor on non-discriminatory terms and conditions programming it controls – and which cannot otherwise be duplicated by the local competitor. Such limitations would do more to control the anticompetitive tendencies of large MSOs than mechanical limits on the number of subscribers they will be allowed to serve on a national basis.

These criteria should be imposed on a market-by-market basis. To do this properly it is crucial that the Commission adopt a realistic assessment of what constitutes a local market for competitive purposes. Such a definition should not be limited to local franchise areas, but should encompass a broader concept of geographic or economic markets in which MVPDs may vie for subscribers.

RCN recognizes that such limitations are inconsistent with a fully deregulated competitive market. However, the MVPD industry is in a period of transition from an era of almost wholly monopolistic incumbent cable operators to a period in which other MVPD competitors are able to enter and compete for MVPD market share. During this transitional period it is crucial that the Commission manage the deregulatory process so as to assure that competitive prospects see realistic conditions for entry, and can enter the market. As it has done historically in the regulation of common carriers under Title II of the Act, the Commission can and should distinguish between dominant and nondominant MVPDs. If competition continues to grow meaningfully, at some point in the future the Commission can consider again whether regulatory limits on the dominant MVPD suppliers should be adjusted or eliminated. Now, however, is not the time to do so.

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INITIAL COMMENTS

OF

RCN TELECOM SERVICES, INC.

Pursuant to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned dockets,[1] by the undersigned counsel RCN Corporation ("RCN") submits its initial comments. RCN, the largest OVS operator in the country, and one of the largest broadband overbuilders with subscribers in 7 of the 10 largest markets in the U.S., is pleased to

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[1] FCC 01-263, *rel.* Sept. 21, 2001, 66 Fed. Reg. 51905.

have this opportunity to set forth its views on the numerous important issues raised in the FNPRM. This proceeding turns on the meaning of section 613(f) of the Communications Act of 1934, as amended,[2] a provision passed by Congress over sustained and ferocious opposition from the entrenched cable industry and a veto by President Bush. Section 613(f) was intended by Congress to give the FCC the statutory basis to curb the ever-growing dominance by cable operators of the multichannel marketplace, a dominance accompanied by widespread public dissatisfaction with the services and the rates imposed on the public by the cable industry.

I. INTRODUCTION

RCN has participated in the Commission's annual review of the status of competition in the MVPD industry for many years and recently submitted extensive Comments in this year's proceeding.[3] Rather than repeat much of the information contained in that filing, RCN incorporates herein by reference those Initial Comments. Although the focus of the MVPD competition proceeding is a general review of the status of competition in that industry, and thus is far broader than the instant proceeding, nevertheless virtually all of the views and data submitted by RCN in that docket are relevant to the instant matter. Similarly, RCN incorporates by reference its Initial Comments in the Commission's on-going proceeding in which it is exploring the need for extending the current general ban on program exclusivity in instances where programming is vertically integrated with a cable operator.[4] What bears emphasis, and

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[2] 47 U.S.C. § 533(f).

[3] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket 01-129.

[4] *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Delivery in Video Programming*

indeed increasing emphasis as the incumbent cable industry becomes more concentrated[5] 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 recently proposed merger of AT&T Broadband and Comcast, creating a cable giant with access to 22 million subscribers in 17 of the nation's largest 20 markets, only underscores the continuing need for close scrutiny of ownership concentration in the cable industry. 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 MVPD entrant has no captive subscribers, no initial revenue, and enormous start-up expenses such as securing the local franchise. This latter process alone generally takes

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Distribution, Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Docket No. 01-290, Notice of Proposed Rulemaking, FCC 01-301, *rel.* October 18, 2001.

[5] Notwithstanding the decline in cable's share of the MVPD market to some 80%, the cable industry has grown ever more concentrated, with the 4 largest multiple system owners ("MSOs") now accounting for some 52.5% of the programming 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 7th Annual MVPD Report, CS Docket No. 00-132, *rel.* Jan.8 2001, 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.*).

six months to a year or even longer. Local franchise authorities impose as high a price as possible for granting a franchise. 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.[6] Of course, RCN also enjoys certain competitive advantages: its newly designed and installed fiber optic network is among the most advanced in the world,[7] it is able to offer bundled service combining local and long distance telephony, high speed Internet access, and broadband video from day one.

The Commission knows quite well that competition works in the MVPD market, despite all the difficulties faced by competitors, and has broadly addressed this issue in prior annual

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[6] 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 FNPRM makes the same point at ftnt 150, indicating that the economic viability of overbuilding is open to question. *See also* Senate Report 102-92, at 13 noting that there are strong pressures militating against the establishment of competitive cable systems and relatively few existed in 1992.

[7] *See* Morgan Stanley Dean Witter Report, March 31, 1999. RCN has been rated number 2 out of 100 of the most innovative telecommunications companies in America. *See* Forbes ASAP Dynamic 100 List, April 5, 1999.

reports on the status of competition in the MVPD market.[8] Typical observations are the following: "[C]ompetition often results in lower prices, additional channels, improved services, or additional non-video services."[9] "Generally, we find that in communities where head-to-head competition is present, the incumbent cable operator has responded to competitive entry in a variety of ways, such as lowering prices, providing additional channels at the same monthly rate, improving customer service, adding new services including high speed Internet and telephone services, or by challenging the legality of the entrant's activities."[10]

The instant FNPRM initiates a timely reevaluation of the Commission's horizontal and vertical limits on cable ownership, and on its attribution rules in respect to ownership, in response to *Time Warner Entertainment Company v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*"Time Warner"*). In that proceeding, finding an inadequate basis in the record for these rules, the Court of Appeals reversed and remanded the FCC's rules limiting to 30% horizontal ownership in the cable industry and to 40% a vertically integrated cable operator's programming of its own channels.[11] Certain other Commission policies concerning ownership attribution as applied to the cable industry were also stricken by the *Time Warner* court.[12]

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[8] *See, e.g., 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; *Sixth Annual Report*, 15 FCC Rcd 978 at ¶¶129-133; *Seventh Annual Report, supra*, at ¶ ¶ 213-238.

[9] FCC, *Seventh Annual Report* at ¶ 39.

[10] *Id.*, at ¶ 213.

[11] *See* 47 C.F.R. §§ 76.503, 76.504.

[12] *See* 240 F.3d at 1142-44.

II. THE NATIONAL MVPD MARKET IS SIGNIFICANT ONLY AS AN AGGREGATION OF LOCAL MVPD MARKETS

The Commission's cable ownership and channel usage rules address issues of national scope, as do the various provisions of Title VI of the Communications Act which are relevant to this proceeding. Nevertheless, it is important – indeed it is vital – to keep in mind that little or nothing in the MVPD marketplace which occurs at the national level directly affects consumers: consumers use MVPD services in their own local markets, urban or rural. Competition or monopoly/monopsony occurs at the local level, programming is distributed or withheld at the local level, revenue is collected at the local level and consumers make choices at the local level. This is true even of the inherently nationwide signal distribution of DBS. In a sense, this is an obvious point, and is widely recognized by the Commission,[13] the courts,[14] and Congress.[15] The ultimate significance of a national market penetration cap, whether it is 30% or 60%, or something else, is not that number, but what it means for the local distribution of programming. RCN wishes to emphasize this point, because RCN is attempting to provide broadband competition using its own fiber optic cable in a series of individual markets, not on a national basis. Stated differently, RCN is not principally concerned about the total number of MVPD subscribers served by any particular MSO, so long as it is not frozen out of one of its target markets by anticompetitive tactics, including the inability to carry vital programming.

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[13] *See, e.g.* FNPRM, ftnt 53 and Commission orders cited therein.

[14] *Time Warner, supra*, at 1139, quoting 47 U.S.C. § 533(f)(2)(C), directing the FCC to take "*particular* account of the market structure... including the nature and market power of the local franchise." (Emphasis in Court's opinion).

[15] *See, e.g.*, Senate Report No. 102-92, at 23-26, discussing the market power of incumbent cable operators.

Of course, establishing national caps based on a rational assessment of the impact of such caps and vertical program carriage limitations, is entirely legitimate, and RCN does not intend in any way to minimize the importance of well-conceived horizontal and vertical structural limitations. RCN simply wishes to keep the Commission focused on the point where the rubber meets the road: in subscribers homes in thousands of local communities.

III. *TIME WARNER V. FCC* IS ONLY ONE OF A NUMBER OF LEGAL GUIDEPOSTS DEFINING THE COMMISSION'S AUTHORITY TO CURB THE CABLE INDUSTRY'S ANTICOMPETITIVE PRACTICES

The Commission's present task is to respond appropriately to the mandate issued by the Court of Appeals in *Time Warner*. Having elected not to seek reconsideration or further review of the Court's opinion, the Commission is of course legally obligated to implement the directions it received from the Court. Nevertheless, the Commission must exercise its own independent judgment in doing so: the first and most basic obligation of the Commission is to adhere faithfully to the statute adopted by Congress – here, section 613 of the Communications Act, other applicable provisions of Title VI, and other sections of the Communications Act of 1934, as amended. The Commission is also, of course, bound by other judicial interpretations of the relevant sections of the Act, including prior Supreme Court rulings and prior opinions of the D.C. Circuit. It is the Commission's obligation to reach a new public interest determination giving full weight to the Court's opinion, but ultimately exercising its own judgment as to where the public interest lies.[16]

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[16] RCN emphasizes this point because it believes the *Time Warner* decision suffers from inconsistencies, is occasionally obscure in meaning, and on the whole imposes an erroneous and impractical burden on the Commission in respect to the degree of "proof" required in the record to sustain cable ownership rules against attack.

More specifically, while the FNPRM is on the whole a careful and thoughtful response to the *Time Warner* decision, the Commission goes seriously off the track on a fundamental point in characterizing section 613 of the Act. Presumably in response to the narrow reading of section 613 adopted in *Time Warner*, the FNPRM notes that "Congress has expressed a concern that concentration in downstream markets would be detrimental to MVPD consumers generally and to the health of the video program packaging industry specifically."[17] Section 613 does not express a "concern"; it expresses a direction which is clear, unequivocal, and uncomplicated. To simplify only slightly, the core of section 613(f) is that in order to enhance effective competition, the Commission "shall prescribe" rules and regulations establishing reasonable limits on the number of cable subscribers an entity is authorized to reach and the number of channels that can be occupied by the cable operator.[18] The Commission is also directed by the law to prescribe rules and regulations to ensure that cable operators or any one operator cannot unfairly impede the flow of video programming and do not unreasonably restrict the flow of video programming of their affiliated programmers to other video distributors.[19] RCN respectfully submits these are not "concerns." They are mandates which the Commission simply cannot ignore.

The FNPRM also seeks comment specifically on the portion of the D.C. Circuit's opinion which indicates that the statement of purpose in section 613(f) "supports a reading that sharply confines the authority to regulate solely in the interest of diversity," quoting from *Time Warner* at

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[17] FNPRM, ¶ 40.

[18] 47 U.S.C. § 533(f)(1)(A) and (B).

[19] 47 U.S.C. § 533(f)(2)(A) and (B).

240 F.3d at 1136.[20] The Commission asks, in effect, what is the proper weight to give diversity, as well as other public interest factors, in developing MVPD structure limitations. While RCN understands that the Commission is bound by the Court's interpretation of section 613(f), it is nevertheless constrained to note that it does not at all agree with the Court's opinion on this point. Indeed, the Court's contention that the primary purpose of section 613 is to assure "fair" competition is unpersuasive and RCN believes, simply incorrect in minimizing the importance of diversity.[21]

But even if the Court's reading of section 613 were correct, the Commission would still have ample authority under section 613 and other sections of Title VI to impose structural restraints in the interest of promoting diversity.[22] Moreover, the Commission may rely in this

[20] FNPRM, ¶ 59.

[21] The Court's citation in ftnt 8 of its opinion, 240 F.3rd at 1136, to the "two other sections" specifying a dominant purpose to buttress its contention that diversity is a secondary factor do exactly the opposite. Both demonstrate that diversity and fair competition are parallel, and so far as appears, coequal Congressional concerns. *See also* Conference Report No. 102-862 at 2 identifying a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media. Moreover, the *Time Warner* decision is inconsistent with the Court's earlier *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313 (2000), in which the Court quotes an excerpt from H.R. CONF. REP No. 102-862 quoting from a Senate Report setting forth the "first" concern about concentration of the media in the hands of a few who may control the dissemination of information, and the "second" concern about horizontal concentration that it can be the basis of anticompetitive acts. *See* 211 F. 3d at 1316. Indeed, the opinion goes on to note that "In *Turner I* this bottleneck power was seen to jeopardize the viability of broadcast television: in this case, it arguably threatens diversity and competition in the provision of cable programming." *Id.*, at 1318 (underlining for emphasis added). Finally, in the earlier decision the Court agreed with the government's contention that "the legislative concern was not with the speech of a particular source but solely with promoting diversity and competition in the cable industry." *Id.* at 1321.

[22] *See, e.g.,* §§ 601(4), 612(a), (e)(2)-(3), 612(g). *See also* 628(a), 628(c)(1), 628 (c)(4)(D), 628(c)(5). Indeed, diversity is set forth in the Communications Act as a goal in a wide variety of contexts. *See, e.g.*, §§ 257(b), 230(a)(3), 396(a)(3), and 396(a)(5).

context, as it has in so many others, on sections 4 (i) and 303 (r)[23] to do what is necessary to fulfill the purposes of the Act. That RCN's success in the marketplace would contribute to diversity can hardly be doubted. It is one of the largest terrestrially based overbuilders in the country and ranks in the top 20 MVPDs.[24] It currently passes some 1.5 million homes with a second broadband wire. As yet, however, because programming is extremely expensive to produce an entity of RCN's size cannot reasonably participate in that segment of the MVPD industry. If its growth were not constrained by the anticompetitive efforts of the incumbent cable industry, however, it would at some point find vertical integration advantageous and could be expected to participate as an independent owner of programming.

IV. THERE IS AMPLE EVIDENCE OF THE DELETERIOUS EFFECTS OF UNDUE CABLE DOMINANCE OF THE MVPD INDUSTRY

Given the Court's *Time Warner* decision finding an inadequate basis in the record for the FCC's horizontal and vertical ownership rules, it is not surprising that the FNPRM refers again and again to the need for empirical evidence of the harm unconstrained cable growth has had on the market.[25] RCN understands that the Commission is inviting the submission of formal studies conducted by industrial or academic economists or analysts, but is not in a position to make such submissions. It can, however, in response to the request for information in ¶ 15 of the FNPRM,

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[23] 47 U.S.C. § 154(i) and § 303(r). *See, e.g.*, *Amendment of Commission's Rules and Policies Governing Pole Attachments*, 23 CR 1288, 2001 LEXIS 4952, 66 Fed. Reg. 34569 (2001); *Federal-State Joint Board on Universal Service, Petition for Reconsideration*, 16 FCC Rcd 5748 (2001); *Closed Captioning and Video Description of Video Programming*, 16 FCC Rcd 5067 (2001).

[24] *See* FNPRM, ¶ 23.

[25] *See, e.g.*, FNPRM, ¶ ¶ 7, 24, 30.

supply concrete evidence of the harm done to the ultimate consumer and to the potential MVPD competitor, by the exercise of unconstrained market power of large MVPD enterprises.

This harm consists in the inability to carry certain vital programming in a number of markets because the dominant cable provider owns the programming and refuses to make it available to RCN.[26] These instances, which have occurred in three of RCN's seven markets, have been fully set forth in a number of filings and RCN will only briefly describe them here:

A. Boston, MA. In the Boston market RCN was initially denied access by the local incumbent to local programming. After filing a formal complaint the matter was settled between the parties.

B. New York City. In the New York City market RCN was denied access to certain local sports programming by one of the incumbent cable companies. RCN filed a formal complaint but has not been able to carry the programming because the Commission declined to apply the program access rules to terrestrially-distributed programming.[27]

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[26] Of course, there is nothing new about this sort of anticompetitive activity. The Senate Report accompanying the 1992 Cable Act alludes to the problem of the denial of access to certain programming. Senate Report No. 102-92, at 26.

[27] *See RCN Telecom Services of New York, Inc. v. Cablevision, et al*, 23 CR 1424, ___ FCC Rcd _____ (2001). At ¶ 29 the FNPRM speaks of just such a scenario as RCN is experiencing in New York City but in footnote 73 claims that the Program Access Rules assure competitive access to satellite delivered programming. In New York City Cablevision removed a portion of its sports overflow programming from satellite distribution and then denied it to RCN. The Commission's rejection of RCN's formal complaint without permitting RCN to discover Cablevision's motives in moving the contested programming from satellite to terrestrial distribution wholly eviscerated the Program Access rules. While RCN believes this ruling was mistaken as a matter of law, it only underscores the desirability of having strong structural limitations in place pursuant to section 613(f), entirely apart from the Program Access Rules.

C. Philadelphia, PA. In the suburban markets of Philadelphia RCN was initially denied the right to carry the bulk of local sports programming on its newly-initiated cable systems by Comcast, the local incumbent and owner of the programming rights. Recently, under external pressure, Comcast agreed that RCN could carry the programming on a normal commercial basis.

It bears emphasis that in each of these cases RCN was ready, willing and able to pay industry standard rates for the desired programming.

These real world illustrations of the abuse of market power emphatically confirm the theoretical concern expressed in the FNPRM concerning the tendency of market dominant MSOs to use their programming leverage to raise the cost of entry in an effort to discourage it.[28] Not only have these circumstances adversely affected RCN in individual markets, they have also served to make the investment community aware that access to vital local sports programming was an iffy proposition. This widespread awareness, in turn, may reasonably be expected to impact adversely the ability to raise new money and even the value of RCN's publicly traded stock. Indeed, given the recurrence of this problem as reported by RCN and other incipient competitors, new competitive entry into the MVPD market is very likely inhibited by such incumbent tactics.[29] Of course, as the FNPRM notes, the marginal cost to the program

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[28] FNPRM, ¶ 43. As the Commission notes in ftnt 95 the denial by a vertically integrated MSO of terrestrially delivered affiliated programming to a rival MVPD is an example of such behavior.

[29] RCN understands that the Commission seeks specific and concrete evidence of such effects to justify whatever ownership or channel limits it adopts. However, these kinds of propositions, which are preeminently matters of common experience and fall well within the ambit of the FCC's presumptive special expertise, are essentially unprovable.

developers of distributing these programs in their respective markets on RCN's facilities is utterly trivial, and RCN would readily agree to pay any reasonable carriage fees. Instead, RCN's subscribers are denied, or threatened with denial of, highly popular local programming, RCN's ability to penetrate the local market is adversely affected, and the program developer is denied the additional carriage fees, all so that the vertically integrated incumbent cable operator can impede RCN's competitive entry into the local market.

In this connection, the FNPRM seeks information on the current state of the MVPD market as compared to that which existed in 1992 when section 613(f) of the Act was passed.[30] It notes the significant increase in the number of competitive franchises and the strong growth of DBS as a nationwide competitor. RCN believes that these observations overstate competitive developments in the MVPD market. As one of the largest terrestrial overbuilders in the country, RCN is currently operating only in seven markets after some five years of effort and the expenditure of some $ 5 billion. There are not very many other overbuilders which have significant shares of their markets or of the national market. The reasons for this are simple: the cost of building a second broadband infrastructure in a market is so high that doing so purely to offer video programming is not economically feasible. The history of unavailability of vital programming is by now well known to the investment community. Even if an entity like RCN eventually succeeds, after years of struggle, in securing such programming, the negative overhang on other potential entrants or on investors is a powerful inhibiting factor. Nor is the development of DBS, as dramatic as it has been, a complete answer to the Congressional purpose

[30] FNPRM, at ¶ ¶ 20-22.

set forth in section 613(f), because DBS has substantial technology limitations including line of sight, return path, cost, and local programming limitations.

Where competition does exist, however, it has an immediate constructive effect on the incumbent's offerings and service quality, as RCN has demonstrated in recent filings.[31] But it is also extremely effective in improving the incumbent's commitments to the local LFA, as suggested in the FNPRM which observes that "we believe that there is some potential for using other cable operators' offerings and performance to influence the behavior of an incumbent cable operator."[32] RCN can confirm from its own experience that the Commission's belief is entirely justified. RCN has engaged in franchise and OVS agreement negotiations in dozens of metropolitan markets in the last few years. In virtually each case the starting point for the LFA was the contents of the incumbents' commitments. In turn, LFAs have used or sought to use such negotiations with RCN to influence an existing incumbent's obligations, both current ones, and in renewal negotiations. Frequently RCN has encountered LFAs that seek to ratchet up commitments from both the incumbent and the new entrant in an atmosphere not materially different from an owner of real estate negotiating with multiple buyers for the same property.

The FNPRM asks how extensive this disciplining effort is. RCN has participated in such efforts in virtually each of the markets in which it operates, holds a franchise, or sought a franchise. The issues have ranged from undergrounding distribution plant to PEG and I-net contributions, to service quality, to the run-of-the-mill commercial terms of the franchise. It is

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[31] *See*, *e.g.* RCN's Initial Comments in the most recent assessment of the status of MVPD competition, *supra*, n. 3.

[32] FNPRM, ¶ 33.

quite often the case, as the FNPRM suggests,[33] that LFAs have access to franchise or OVS agreements negotiated with other LFAs and seek to use the terms in those documents to extract more concessions from both incumbents and new entrants. Indeed, over the last few years RCN has expended a substantial amount of internal personnel resources negotiating with LFAs who are well informed about other agreements in other markets.

V. MARKET POWER IS A VALUABLE MEASURE OF POTENTIAL HARM TO THE PUBLIC INTEREST AND CAN BE USED TO ENCOURAGE COMPETITION

At ¶ ¶ 60-73 the FNPRM considers the use of market power, as compared with market share, as a measure of anticompetitive potential, and seeks comment on the applicability of market power to the MVPD industry.[34] RCN believes that market power can indeed be a useful way to gauge and to control the accretion of anticompetitive capabilities.[35] From RCN's perspective, as previously noted, the market structure problem lies not so much in the horizontal ownership of MSOs in and of itself, but in what that horizontal ownership allows incumbents to do in local markets, *e.g.* to acquire excessive influence in the programming marketplace, to

[33] FNPRM, ¶ 34.

[34] 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 such provider possesses 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."

[35] 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, 30,

control competitors' access to vital programming, to chill entry both at the community or market level and at the investor level.[36]

The more difficult question, of course, is how to measure market power. RCN suggests that at least one – and not necessarily the only – way is to analyze an entity's ability to control the availability of sought-after programming in individual markets. If a DBS operator, or a new competitive overbuilder cannot get access on normal commercial terms to, and cannot, through normal commercial efforts replicate, such programming which it deems vital to that particular market, and that inability is the product of the incumbent's power to control the programming, a presumptive finding of excess market power can be made in that community. Such a finding should compel the owner of the programming, or any party which controls the distribution of that programming, to make it available. RCN would much prefer any such policy to be embedded in self-executing rules, so that enforcement does not become an expensive and drawn out affair, as is typical of program access complaints today.[37] In addition, however, to an affirmative rule requiring that such programming be made available, again on industry-standard terms and

[36] In this context the Commission's observation in ¶ 60 that a regulation based on market power would target directly the cable industry's control over programmers' access to the home is somewhat wide of the mark. Presumably any subscriber to Cablevision in the New York City area can get all of Cablevision-controlled local sports programming. It is RCN's subscribers who cannot get it, which simply means that RCN's competitive success in that market is less than it would otherwise be. Accordingly, it is not only the programmers' access to the home which is implicated by Cablevision's excess market power in New York City, but also the intermediate factor of diminished competitive entry, an entry which in the long run can be expected to enhance subscribers' access to a wide variety of programming offered by competitive providers.

[37] RCN first lost access to vital New York City area sports programming in the winter of 1999 and filed a Program Access Complaint in March of that year. It was not until April of 2001, some two years later, that the Commission addressed the complaint. Two years is an eternity in the world of MVPD competition, not to speak of the relative impatience of investors and stockholders.

conditions, there should be a rocket-docket type complaint process so that alleged violations of the rule can be adjudicated quickly and relatively inexpensively.

Of course, as suggested above, any such regulation would require careful drafting to assure that large MSOs are not compelled to provide highly individualistic localized programming which a competitor could for all practical purposes produce itself, but instead would be limited to unique and otherwise unobtainable programming.[38] This concept of measuring market power by control over programming in individual markets is also compatible with the so-called threshold approach outlined in the FNPRM at ¶ ¶ 64-65. As the Commission notes, such an approach would suspend or waive horizontal limits if there were alternative means for programmers to reach consumers sufficient to alleviate Congressional concerns expressed in section 613. The FNPRM notes that this approach takes account of the economic viability of smaller competitors, *i.e.* "we would seek to set a limit that prevents large cable MSOs from disadvantaging smaller rival alternative MVPDs anticompetitively." *Id.* at ¶ 64. In other words, whatever horizontal limits are set, the threshold approach would look market-by-market to test the ability of the incumbent (or any MVPD in that market) to curtail a competitor's access to programming it deemed vital to competitive entry. In its Initial Comments in the Commission's NPRM concerning the sunset or extension of section 628(c)(2)(D) of the Act concerning

[38] By way of illustration, the full panoply of overflow sports programming in New York City to which RCN has been denied access by Cablevision is not available in any other way than through Cablevision. On the other hand Cablevision produces some of its own New York City area localized programming such as traffic or cultural calendars which could be substantially duplicated by any local operator willing to spend the funds. The latter should not be considered an element of market power whereas the former should be.

exclusivity for vertically integrated programming,[39] RCN suggested that the Commission extend the ban on vertically integrated program exclusivity another 10 years, but that if it concluded the ban should be narrowed going forward, it should apply the rule to any vertically integrated cable operator serving 50% or more of any individual local market. There, as here, RCN urges the Commission to impose limits on a market-by-market basis rather than nationally.

To do this properly it is crucial that the Commission adopt a realistic assessment of what constitutes a local market for competitive purposes. Such a definition should not be limited to local franchise areas, but should encompass a broader concept of geographic or economic markets in which MVPDs may vie for subscribers. One way to measure local markets for this purpose would be to use the Standard Metropolitan Statistical Area ("SMSA") which is used by the Census Bureau. Another would be to look to areas of dominant influence, or areas in which an incumbent controls a certain percentage of local subscribers or dominates the delivery of program services. What is crucial in any such assessment is that rules limiting the exercise of anticompetitive practices should be based on a realistic measure of an MVPD's market power within an economically defined market rather than simply the boundaries in which it is authorized to provide service.

VI. THE ANTICOMPETITIVE PRACTICES OF THE CABLE INDUSTRY CANNOT BE ADEQUATELY CONTROLLED BY MONITORING, BUT MUST BE SUBJECT TO SPECIFIC, READILY-ENFORCEABLE RULES

At ¶ 71 the FNPRM requests comment on the most effective methods for enforcing whatever rules the Commission adopts to control anticompetitive practices or anticompettive potential in the MVPD industry. The Commission specifically seeks views on the adequacy of a

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[39] Notice of Proposed Rulemaking, FCC 01-290, *rel.* October 18, 2001.

monitoring system. RCN believes that it is crucial to the development of a more competitive MVPD industry that the Commission adopt specific rules to control the well-known and well-documented anticompetitive practices of the cable MSOs. In tandem, it is important that there be a rapid, relatively expeditious and inexpensive enforcement regime, so that the resolution of inevitable disputes does not become itself a barrier to entry. In RCN's experience and, it believes, generally, the Cable Services Bureau has not given a high priority to the resolution of program access complaints. *A fortiori*, reliance on a passive or diffuse monitoring system would be disastrous; indeed, it would constitute "progress in a retrograde direction." In addition, any such system would appear to be inconsistent with section 613(f) which constitutes a clear mandate and direction to the Commission to adopt rules and regulation to enhance effective competition.[40] The adoption of a monitoring program in lieu of affirmative rules and regulations would demonstrably fall short of the statutory direction. Moreover, its passivity would inevitably send the wrong signal to the entrenched competition-adverse cable industry.

VII. THE COMMISSION SHOULD ADOPT RULES WHICH COMPEL INCUMBENT CABLE OPERATORS TO PROVIDE ACCESS TO SPECIFIC KINDS OF PROGRAMMING IN ANY MARKET IN WHICH THE INCUMBENT IS A DOMINANT MVPD

In view of the foregoing, RCN suggests that the Commission amend sections 76.503 and 76.504 of its rules to require an incumbent cable operator to make certain programming available in any market in which it is a dominant MVPD. Specifically, RCN recommends that the Commission adopt ownership, subscribership access, or program carriage criteria which define

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[40] The only exception is in respect to imposing limits on the degree to which MVPDs may engage in the creation or production of video programming, as to which the Commission's only statutory task is to "consider the necessity and appropriateness" of such limitations. 47 U.S.C. § 533(f)(1)(C).

instances in which a local incumbent cable operator may not decline to make available to a local MVPD competitor on non-discriminatory terms and conditions programming it controls – and which cannot otherwise be duplicated by the local competitor. Such a regime would do more to control the adverse and anticompetitive tendencies of large MSOs than mechanical limits on the number of subscribers they will be allowed to serve on a national basis. These obligations should be instituted on a market-by-market basis. To do this properly it is crucial that the Commission adopt a realistic assessment of what constitutes a local market for competitive purposes. Such a definition should not be limited to local franchise areas, but should encompass a broader concept of geographic or economic markets in which MVPDs may vie for subscribers.

Such amendments are justified by the broad language of section 613(f)(1)(A) and by section 613(f)(2)(A) and (B) which specify that, with respect to the prescription of rules and regulations establishing reasonable limits on the number of cable subscribers any entity may be authorized to reach or reasonable limits on the number of channels on a cable system occupied by a vertically integrated programmer, the Commission:

shall, among other public interest objectives –

> (A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer;
>
> (B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors;

Accordingly, the Commission has ample statutory authority to conclude that when an incumbent cable operator in a market denies a competitive MVPD access on reasonable commercial terms to vertically integrated programming which is unique and otherwise beyond the power of the competitor to produce, its own ability to provide such programming in the affected market shall be limited. In addressing the horizontal ownership limits in 1999, the Commission noted that section 613 of the Act does not require the Commission to use a formula but rather to consider and balance, among other public interest objectives, seven specific public interest guidelines.[41] These guidelines are more than broad enough to encompass the kinds of limitations RCN suggests.

There are numerous possible approaches to implement these policies. In both New York City and in the Philadelphia suburban markets RCN has been faced with the local incumbent cable operator using its ownership of local sports programming rights to deny or threaten to deny RCN access to some or all of such programming, in one case entirely and in another during a sensitive market-building period. One possible way to address this issue, therefore, would be to make individual market power findings in individual markets and bar such discriminatory activities where such market power exists. However, this approach is likely to be cumbersome and to require detailed analysis of individual markets. Instead, RCN recommends that the Commission adopt a series of procompetitive policies by which the industry is put on notice that in instances in which an incumbent serves, for example, more than a certain percentage of the local subscribers, or has access to vital programming, or has franchise rights to a significant

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[41] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, 14 FCC Rcd 19098, at ¶ 8.

geographic block within a designated area, it may not refuse, directly or indirectly, to provide access to programming it controls which is unique and not practically reproducible by a competitor.[42]

RCN recognizes that such limitations are inconsistent with a deregulated market. However, the MVPD industry is in a period of transition from an era of almost wholly monopolistic incumbent cable operators to a period in which other MVPD competitors are able to enter and compete for MVPD market share. During this transitional period it is crucial that the Commission manage the deregulatory process so as to assure that potential competitors see realistic conditions for entry, and can indeed enter the market. As in the case of Title II of the Act, the Commission can adopt dominant/nondominant distinctions in the manner in which it regulates incumbents, provided such distinctions are designed not to inhibit, but to stimulate competitive entry.[43] If competition continues to grow meaningfully, at some point in the future the Commission can consider again whether regulatory limits on the dominant MVPD suppliers

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[42] As suggested above, unique programming is programming which is not reasonably or practically reproducible by a competitor, such as programming for which the incumbent has secured contractual rights for sole distribution, or in any other fashion artificially rendered the programming unavailable. By way of illustration, if an incumbent secures the sole right to all local sports programming, that programming would be unique in that market; by contrast, a locally produced sports program which reports on local sports events using publicly available material, would not fall within the ambit of the proposed restriction.

[43] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*Detariffing Order*); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Order on Reconsideration, 12 FCC 15014 (1997) (*Reconsideration Order*); *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004 (1999) (*Second Reconsideration Order*).

should be adjusted or eliminated. Now, however, when competitive entry other than DBS is still at an early and tentative stage, is not the time to do so.

VIII. CONCLUSION

The *Time Warner* remand to which the present FNPRM responds is a fortuitous opportunity for the Commission to reexamine the present state of competition in the MVPD market, taking into account the dynamic nature of the market. Unless the Commission is prepared to remit all procompetitive policy concerns to the growth and viability of the DBS segment of the market, it simply must do more than it has heretofore done to encourage entrepreneurial entry into the MVPD market at the local level. The new policies proposed by RCN herein would contribute materially to redressing existing anticompetitive practices.

Respectfully submitted,

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January 4, 2002

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