

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

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

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

Pursuant to the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned dockets,¹ RCN Telecom Services, Inc. (“RCN”) submitted its initial comments on January 4th, 2002. RCN herewith submits brief Reply Comments. RCN, one of the principal so-called “overbuilders” operates competitive cable systems in 7 of the 10 major

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

urban markets. Based on the difficulties it has faced in seeking to compete with entrenched cable operators, RCN urged the Commission to carefully consider the history of cable incumbents' anticompetitive abuses in reconsidering the current horizontal and vertical limits imposed under section 613(f) of the Act.² However, more important to RCN than national ownership limits is the imposition of procompetitive obligations on the cable industry in a market-by-market context.

² 47 U.S.C. § 533(f).

While national ownership and channel occupancy 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. Section 613(f) was intended by Congress to give the FCC the statutory basis to enhance competition and diversity in video programming by curbing 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.³ Therefore, RCN recommended 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, RCN contended, 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 or their use of their cable channels on a national basis.

The initial comments of the cable industry, of course, urge the Commission to terminate its horizontal and vertical limits, arguing that the market is now competitive and there is no

³ Only a few days after initial comments were filed in this proceeding, The Washington Post ran a number of stories which are relevant to the issues in this docket. The first, on January 8, 2002, noted significant increases in cable rates. Subsequent articles, on January 10 and 11, provided details on the poor service being provided in the Washington, D.C. area by Cox Cable, one of the cable MSOs which likes to think of itself as a premier operator. Further critical articles appeared in the Post on February 7, and February 11, 2002.

realistic likelihood that MSOs could or would abuse dominant market positions. To substantiate this argument, the industry relies on a variety of academic papers as well as on ultimate resort to antitrust law to assure that marketplace abuses would not occur. In particular, the industry emphasizes that in light of the remand in *Time Warner, L.P. v. FCC (Time Warner II)*, 240 F.3d, 1126 (D.C. Cir. 2001), *reh. den.* May 4, 2001, *cert den. sub nom. Consumer Federation of America v FCC*, 122 S.Ct. 644, Dec. 3, 2001 (No. 01-223), to which the FNPRM responds, the Commission must rest any ownership, channel limits, or attribution rules on “substantial evidence” of a “non-conjectural” nature.

While there is undoubtedly a fine line between “conjectural” concerns, and the Commission’s entirely legitimate exercise of its special expertise, particularly with respect to predictive judgments about the industry which it has been directed by Congress to regulate, nevertheless there need be no difficulty in justifying reasonable, market-by-market limitations on the ability of an entrenched, dominant cable operator to withhold vital programming from its local MVPD competitors.⁴

It is ironic that, while decrying the potential for the Commission to rely on (alleged) “conjectural” harms to the public interest to justify horizontal and vertical limits on the cable industry, the industry’s initial filings virtually without exception fall back on little more than

⁴ The importance of this aspect of the cable industry’s historical performance is set forth in RCN’s Initial and Reply Comments recently filed in Docket 01-290, concerning the potential sunset of the ban on exclusivity in program access practices. *See* 47 U.S.C. § 548(c)(2)(5). RCN incorporates those filings herein by reference.

theoretical, that is, conjectural, hypothetical, abstract, and inconclusive academic “proofs” that the industry would behave properly if left to its own devices. But as RCN noted in its Initial Comments, the record contains all the hard evidence needed to justify structural or conduct limitations on the cable industry, citing to its own difficulties and those of other new MVPD competitors in seeking access to vital local, unreproducible programming which has been acquired by incumbents and then withheld from RCN and others.

The mandate of section 613(f) of the Act is broad: to encourage competition and diversity in the MVPD market. Events since passage of that provision in 1992 have amply proven that the cable industry cannot be allowed to serve its own narrow interests without the imposition by the Commission of reasonable regulatory provisions to encourage competition. These provisions are not intended to advance the interests of RCN or any other MVPD competitor, nor to force sharing of efficiencies or profits, as alleged by the cable commenters. Rather, these pro-competitive regulations are intended to encourage the emergence of a broad, vigorous competitive MVPD industry because the interests of the viewing public can only be assured by such a development.

The Commission should therefore initiate further proceedings to consider the specific imposition of regulations tailored to the historical facts, on the one hand, and to the continuing congressional mandate, on the other, to encourage the development of competition and diversity in the provision of MVPD services to the public.

Respectfully submitted,

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