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October 24, 2003

ELECTRONICALLY FILED

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20024

**Re: Notice of *Ex Parte* Communication
MB Docket 03-124**

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this will provide notice that on October 23, 2003, Deborah Royster, Senior Vice President of Regulatory and External Affairs for RCN Corporation ("RCN") and General Counsel for Starpower Communications, LLC, John Murawski, Director of Programming for RCN, and the undersigned had an *ex parte* meeting concerning issues in the above-captioned proceeding with the following Commission staff: (1) Barbara Esbin, Media Bureau; (2) Tracy Waldon, Media Bureau; (3) Erin Dozier, Media Bureau; (4) Marcia Glauberman, Media Bureau; (5) Donald Stockdale, Office of Strategic Planning and Policy Analysis; (6) JoAnn Lucanik, International Bureau; (7) Marilyn Simon, International Bureau; (8) Neil Dellar, Office of General Counsel; (9) Thomas Horan, Media Bureau; and (10) Steven Broeckaert, Media Bureau.

During this meeting, RCN discussed its concerns regarding the proposed transaction between The News Corporation and Hughes Electronics Corporation. In particular, RCN expressed concern about the impact the transaction will have on access to programming, especially essential regional sports programming, and on rates, terms and conditions governing retransmission consent agreements. A detailed outline of the issues discussed is attached.

Secretary Dortch
October 24, 2003
Page 2

This *ex parte* notice is being electronically filed for inclusion in the public record for the above-referenced docket, pursuant to 1.49(f) of the Commission's Rules. Please direct any questions concerning this filing to the undersigned.

Sincerely,

Kathy L. Cooper
L. Elise Dieterich
Counsel to RCN Corporation

cc (via e-mail):
Kenneth Ferree
Barbara Esbin
Tracy Waldon
Erin Dozier
Marcia Glauberman
Donald Stockdale
JoAnn Lucanik
Marilyn Simon
Neil Dellar
Thomas Horan
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Linda Senecal
Douglas Webbink
Simon Wilkie
James Bird
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RCN Corporation
Meeting with FCC
On News Corp./Hughes Merger
October 23, 2003

I. Introduction

- RCN is the nation's first and largest single-source facilities-based provider of bundled telephony, video and high-speed data services to residential customers. RCN is building state-of-the-art broadband facilities that are capable of meeting the high-speed, broadband demands of consumers.
- RCN has constructed its own facilities-based broadband distribution network in the Boston, New York, Philadelphia/Lehigh Valley, Chicago, San Francisco, Los Angeles and Washington, D.C. metropolitan markets.
- RCN is one of the very few residentially focused competitors and is one of the few competitive local exchange carriers with a comprehensive bundled service offering that includes video.
- Although RCN is the largest competitive broadband overbuilder in the nation, it is nonetheless dwarfed by the 10 largest cable MSOs and the two primary DBS providers, which together control approximately 85% of the multichannel video programming distribution (MVPD) market. Moreover, RCN does not own or control any essential "must have" cable or broadcast programming. As such, RCN does not have the bargaining power, financial resources or leverage these other entities do in negotiating program access agreements or opposing program access discrimination.
- One of the most significant impediments to RCN's market entry has been the discrimination and anticompetitive behavior RCN has experienced in its attempts to secure programming for its consumers.
- The merger of News Corp., which controls essential programming, with Hughes, which owns DirecTV, one of the largest video distribution platforms in the nation against which RCN must compete, is cause for concern. This concern is heightened by the fact that News Corp.'s programming subsidiary already has demonstrated its willingness to discriminate against RCN in RCN's efforts to obtain essential programming.
- It is essential that the FCC impose, at a minimum, the voluntary commitments of the applicants, with certain clarifications, as conditions to approval of the transaction. To best protect the public interest, assuming this transaction is to be approved, the FCC also should adopt other safeguards as suggested by other commenters in this proceeding.

II. *Programming Issues*

- Although competition between incumbent cable operators (the big MSOs) and large DBS providers such as DirecTV often is cited as evidence of healthy competition in the MVPD market, it is important to recognize that DBS is not a perfect substitute for cable. Thus, to afford consumers true choice, it is vitally important that competition by smaller cable operators and next generation broadband providers, such as RCN, also be encouraged. If vertical integration between programmers and DBS providers results in the denial of program access for smaller competitors like RCN, competition in the MVPD market is substantially harmed.
- News Corp. is well known for the tight control it exercises over affiliated companies, and it is to be expected that the vertical integration of Fox with DirecTV will be used by News Corp to full advantage, subject only to the limits of the law and any constraints imposed by the Commission, as News Corp. owes nothing less to its shareholders.
- Applicants argue that there is no evidence of or incentive for exclusives or foreclosure of programming to other MVPDs, but RCN's experience has been to the contrary.
- In 1998 RCN filed a formal program access complaint against Fox Sports Net-New York, protesting its refusal to provide the full range of local area sports programming to RCN's New York City OVS system. Fox Sports Net – New York is owned in part by News Corp. In that proceeding, Fox Sports Net refused to provide RCN with access to essential overflow sports programming on the basis that such programming was delivered via terrestrial distribution and thus was not subject to the program access rules.
- This demonstrates that News Corp. is willing to take advantage of loopholes in the law to avoid providing essential programming to its competitors. The News Corp./Hughes transaction, which combines the largest programming vendor with one of the largest distribution networks in direct competition with RCN, only increases the potential and incentive for such anticompetitive behavior.
- The FCC has recognized that regional sports programming is essential to competition in the MVPD market.¹
- Surveys conducted for RCN by professional polling organizations confirm the vital importance of local sports programming to a cable operator's success: the data show that some 40-58% of cable subscribers would be less likely to

¹ In re the Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd 23246, ¶ 101 (2002) (“*AT&T-Comcast Merger Order*”) (emphasis added; internal citations omitted).

subscribe to cable service if it lacked local sports programming and, in one survey, an additional 12% of subscribers said they were not sure whether the absence of local sports programming would impact their decision whether to take the service. In rough terms, this means that a competitive cable operator that does not have local sports programming will have little or no chance of winning as subscribers as much as 40-70% of its potential customer base.

- As a cable overbuilder, RCN's business plan anticipates a market penetration rate of about 30% of the homes passed in each market it builds out. This 30% market share can only be achieved by 1) winning subscribers away from the incumbent cable or DBS provider, or 2) gleaning new subscribers from the minority of households that do not already have cable. Without local sports programming, because roughly half of potential subscribers indicate they will not take cable service that doesn't include it, RCN's projected penetration rate drops to something in the neighborhood of 15% – a level at which the huge investment necessary to build out a ubiquitous fiber optic network in competition with the monopoly incumbent cable operator no longer makes economic sense. Investors simply will not supply the hundreds of millions of dollars required for cable overbuilds, if no more than a 15% market penetration rate is to be expected.
- Stated differently, without local sports RCN must try to win 30% of the market from a potential subscriber base that only includes 30-60% of the market to begin with. Consequently, if DirecTV or its vertically integrated affiliates are allowed to control local sports programming and are allowed to deny competitors access to that programming, competition in those markets will be severely impaired.
- Denial of access to cable programming is not the only threat to competition posed by the integration of a major programmer (News Corp.) with a major DBS provider (DirecTV). The Center for Digital Democracy filing dated August 20, 2003, points out the potential harm to competition if vertically integrated broadcast programmers acquire the market power and competitive incentive to impose excessive retransmission consent fees.
- News Corp's Murdoch downplays the leverage a News Corp./Hughes entity will have over pricing for broadcast programming, indicating that entrenched cable monopolies have stronger negotiating positions. This position, however, ignores the plight of smaller competitors such as RCN. While the largest cable MSOs may, indeed, enjoy sufficient market power to countervail the market power of a News Corp./Hughes combination, that is an insufficient check and balance to safeguard the interests of consumers in having broad-based MVPD competition that includes smaller players, as well as the very large.
- RCN's experience in negotiating retransmission consent with Fox broadcast stations provides an example of the principle that, the larger an entity, the greater its bargaining power. It is understood that, when RCN negotiates

retransmission consent for Fox owned and operated (O&O) stations, the agreement for all such stations will be with Fox Television Holdings, Inc. (“FTH”). To gain an agreement with FTH for the Fox O&Os in all of RCN’s markets, however, RCN has been compelled to make commitments to launch other Fox cable programming that currently is under contract, carry Fox’s new extreme sports channel “Fuel,” and extend the term of RCN’s agreement for the Fox “FX” channel. While the term of the retransmission consent agreement is relatively short, the obligation to carry FX and Fuel extends much longer. Furthermore, the agreements for these “tied” channels extend even to those RCN markets where the Fox affiliated station is not a Fox O&O. Despite its agreement with FTH, RCN still must negotiate a retransmission consent agreement with the non-O&O Fox affiliate, in order to provide the locally broadcast programming to its subscribers in those markets. Accordingly, programming costs for cable subscribers in those markets are, in effect, higher, because costs are incurred both locally and nationally for the Fox programming RCN is required to carry.

- In contrast, RCN’s dealings with smaller station groups representing non-O&O affiliates or with individual stations (who understand the demands and challenges of running a local business) generally involve no such channel tying arrangements. Those agreements typically are limited to the market in which the station broadcasts and, in instances where a smaller station group does tie other programming to retransmission consent, the two agreements are of coterminous duration. RCN’s bargaining power vis a vis these entities is greater, because, unlike the situation with FTH, if agreement cannot be reached, only a single market, rather than all of RCN’s markets, will be affected.
- As these examples make clear, the greater a programmer’s reach, the more bargaining power it wields. Thus, the greater the potential detriment both to consumers and, where a programmer is affiliated with a given MVPD and its market power is used to benefit its sister company, to the affiliated MVPD’s competitors.
- What may be considered “nondiscriminatory” in terms of rates and conditions for DirecTV and the large cable MSOs, may be cost-prohibitive or a barrier to RCN. Ultimately, increases in such costs are passed on to consumers. In addition, inflated programming costs impede RCN’s ability to effectively compete in the market. Consumers not only suffer from high cable rates, they also will suffer from lack of sufficient competition in the market.

III. Conditions Are Necessary to Safeguard the Public Interest in Full and Fair MVPD Competition

- The public interest standard under which the FCC is obliged to evaluate the merger is a higher and broader standard than is the standard under the antitrust laws, and derives from the FCC’s regulatory authority over DirecTV as a user of the public airwaves.

- Antitrust law addresses anti-competitive behavior in established, fully developed markets. In such markets, it may be reasonable to expect that the competitor who is harmed can afford the time and money necessary to obtain redress under the antitrust laws. The competitive broadband market, however, is still in its infancy. It is the FCC's mandate to use its regulatory authority to help the broadband market develop and become established. Until it does, the antitrust laws alone are insufficient to address the competitive harms that a merger like News Corp./Hughes will inflict.
- At a minimum, the voluntary program access commitments proposed by Applicants should be imposed by the FCC as conditions for approval of the transaction and extended for a duration sufficient to protect nascent competition until it can become more fully established.
- RCN also requests that the Commission clarify the following points with respect to the commitments proposed by the Applicants:
 - That the program access commitments proposed by the Applicants will apply to all new programming and technologies created or purchased by the Applicants on a going forward basis, including High Definition programming and digital programming.
 - That the commitment that DirecTV will not enter into any exclusive distribution arrangements with an "Affiliated Program Rights Holder" apply to all future programming acquisitions by either party in which the Applicants have an attributable interest.
 - That an aggrieved MVPD is permitted to file a program access complaint against the Applicants or its affiliates for any violation of the proposed commitments.
- In addition, RCN supports the ACA's suggestion that News Corp.'s existing practices be memorialized as a benchmark in the merger order. In this way, the FCC can hold News Corp. to its promise that the combination with DirecTV will not cause Fox to adopt new anti-competitive policies for the benefit of its affiliated DBS provider, without having to impose FCC-created rates, terms, or conditions of program access. Such benchmarks would not regulate rates, as such, but would ensure that the existing disparity between the rates charged large and small competitors does not widen as a result of the News Corp./Hughes combination.
- RCN also supports the safeguards suggested by the Joint Cable Commenters.² Clearly, if these large MSOs believe their access to programming and retransmission consent negotiations will be adversely impacted by the News

² Advance/Newhouse Communications, Cable One, Cox Communications and Insight Communications.

Corp./Hughes combination, the interests of smaller cable competitors, such as RCN, can only be in even greater jeopardy.