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WILLKIE FARR & GALLAGHER LLP

EX PARTE  
1875 K Street, NW  
Washington, DC 20006-1238  
Tel 202 303 1000  
Fax 202 303 2000

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

November 18, 2003

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

*Ex Parte Notice*

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 03-172.

Dear Ms Dortch:

On behalf of our client, Comcast Corporation ("Comcast"), we are compelled to respond further to statements regarding Comcast and New England Sports Network ("NESN") made by RCN Corporation ("RCN") in a letter and accompanying declaration and attachments filed in the above docket on October 16, 2003 (collectively, the "October 16<sup>th</sup> filing"). With this letter and the attached declaration of NESN's Vice President of Marketing Peter Plaehn, Comcast hopes to complete the record on the "dispute" that RCN has attempted to fabricate.

As an initial matter, RCN's October 16<sup>th</sup> filing admits -- or at least does not contest -- key facts pertaining to this dispute, including multiple facts omitted from, or misstated in, the reply comments RCN filed on September 26. The following facts were recounted in Comcast's letter of October 8 and are not disputed in RCN's October 16<sup>th</sup> filing:

- First, Comcast took the initiative to work with NESN, an unaffiliated regional programmer, to create high-definition programming for NESN ("NESN HD"), and stepped forward with financial support, equipment, and promotional assistance to help create and launch NESN HD.
- Second, RCN took no such initiative.
- Third, during the development of NESN HD, Comcast and NESN negotiated and entered into a *non-exclusive* contract for Comcast's carriage of NESN HD even though an *exclusive contract* would have been wholly consistent with the Communications Act and the Commission's rules.
- Fourth, after RCN's Washington, DC counsel filed the September 26 reply comments criticizing NESN and Comcast for entering into an alleged exclusive contract for NESN

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HD, and before Comcast filed its October 8 response, RCN's Boston personnel called NESN's President and apologized for the allegations in the reply comments.

- Fifth, contrary to RCN's earlier comments about the importance of access to NESN HD for the Red Sox playoff games, NESN HD did not carry any Red Sox playoff games.
- Sixth, contrary to RCN's earlier comments about access to NESN HD being "must-have" programming that is "critical" to its ability "[t]o compete effectively," NESN-HD could only be viewed and enjoyed in that tiny fraction of homes equipped with high-definition TV sets (currently an estimated 5% of TV households in a typical market).

This, then, leaves open solely the question of whether RCN reasonably believed at the time of its September 26 reply comments that, as it then asserted, "Comcast has entered into *an exclusive arrangement*" to carry NESN HD. But tellingly, RCN's October 16<sup>th</sup> filing now acknowledges that RCN was aware from the Boston Globe article of September 14 that NESN was publicly discussing its hopes of arranging carriage of NESN HD by Cox, Charter, Adelphia, and Time Warner by the end of the year. So RCN has now shifted from claiming that it thought the programming was "exclusive" to Comcast, to claiming that it thought that RCN alone was being denied access to the programming.

That revised position is equally unsupported.

RCN's October 16<sup>th</sup> filing continued to insist that RCN "was given every indication" that NESN HD would not be made available to RCN and asserts that "NESN's representative told RCN's representative, 'in essence, "Comcast paid for it -- it's their programming.'""<sup>1</sup>

As is demonstrated by the attached declaration of Peter Plaehn, the NESN representative to whom RCN's filing refers, RCN's characterization is both inaccurate and misleading. Although RCN did contact Mr. Plaehn, he declares that he neither stated nor implied that NESN HD was or would be provided to Comcast on an exclusive basis. In fact, Mr. Plaehn declares that he expressly clarified that Comcast had no rights "that would prevent or inhibit NESN from entering into an agreement for RCN to carry NESN HD." See Declaration of Peter Plaehn ¶ 4 (attached as Exhibit 1). Far from stating, or implying, that "Comcast paid for it -- it's their programming," Mr. Plaehn made clear his willingness to discuss arrangements for RCN's carriage of NESN HD. Before NESN *or* RCN took any further steps to pursue such discussions, RCN filed the reply comments that needlessly -- and inaccurately -- brought this issue before the Commission.

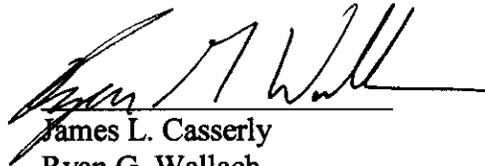
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<sup>1</sup> RCN ex parte letter, filed in MB Docket No. 03-172, at 2, Ex. 1 (Oct 16, 2003) (citing an attached declaration of John Murawski, Director of Programming for RCN)

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This letter is filed pursuant to Section 1.1206(b)(1) of the Commission's rules. Please let me know if you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ryan G. Wallach", written over a horizontal line.

James L. Casserly  
Ryan G. Wallach  
Willkie Farr & Gallagher LLP  
1875 K Street, N.W.  
Washington, DC 20006  
(202) 303-1119

**Attachment**

cc: Ken Ferree  
Bill Johnson  
Linda Senecal  
Andrew Wise

## DECLARATION OF PETER PLAETHN

I, Peter Plaehn, do hereby declare as follows

1 I am Vice President of Marketing at New England Sports Network ("NESN") My business address is 70 Brookline Avenue, Fenway Park, Boston, Massachusetts 02215 I am involved in program carriage contract negotiations for NESN.

2 NESN is a 24-hour, regional TV sports service that began operations in 1984 NESN is delivered to over 3.5 million homes via cable operators such as Comcast and Time Warner, overbuilders such as RCN Corporation ("RCN"), and DBS operators such as DIRECTV and DISH Network

3 In May 2003, NESN began considering a high-definition version of its programming ("NESN HD"), and developed a plan that, with the assistance of Comcast, would allow it to launch NESN HD in September 2003 On September 14, 2003, the Boston Globe reported that Comcast would begin airing NESN HD on September 15, 2003, and that "Cox, Charter, Adelphia, and Time Warner ha[d] indicated great interest in carrying NESN's HD signal by the end of the year "

4 On September 15, 2003, I received an e-mail from John Murawski, Director of Programming for RCN, requesting that I contact him as soon as possible to discuss carriage rights for NESN HD I called him promptly and we had a conversation in which I responded to his inquiries about NESN's new high-definition programming I informed him that Comcast had underwritten some of the costs to make NESN HD possible I also informed him that, although I did not have a proposal for RCN's carriage of NESN HD ready to discuss at that time, a proposal for carriage would be forthcoming At no point in the conversation did I state or imply that NESN HD was or would be provided to Comcast on an exclusive basis, nor has Comcast been granted any rights on an exclusive basis Indeed, in response to a statement by Mr Murawski that implied that Comcast had exclusive rights to NESN HD, I expressly clarified that Comcast had no such exclusive rights that would prevent or inhibit NESN from entering into an agreement for RCN to carry NESN HD

5 In late September 2003, I became aware of a September 26, 2003 filing RCN made at the FCC that asserted that "NESN has not provided [its] HDTV programming to RCN because of NESN's exclusive arrangement with Comcast " In the intervening eleven days between my September 15, 2003 conversation and RCN's filing, Mr Murawski did not contact me further about carriage of NESN HD, nor did I discuss such carriage with anyone else from RCN

6 I have reviewed the declaration of Mr Murawski filed by RCN in MB Docket No 03-172, alleging that, in my September 15, 2003 conversation with him, he was told that NESN "was not prepared to discuss" making NESN HD available to RCN, that NESN would not offer

any "time frame" for making the programming available to RCN, and that Mr Murawski was told "in essence, 'Comcast paid for it -- it's their programming'" On each of these points, the declaration is misleading, inaccurate, or both

7 As mentioned previously, I informed Mr Murawski in our first and only conversation on the matter that, although I did not have a proposal for RCN's carriage of NESN HD ready to discuss at the time of the call, a proposal for such carriage would be forthcoming To the extent he understood that to mean I was not "prepared to discuss" RCN's carriage of NESN HD and there "was 'no time frame' for the programming to be made available to [RCN]," at anytime in the future, he misunderstood Again, this call was our initial conversation regarding a newly formulated, tangible product. I did not have specific terms of a proposal, nor did he have a specific offer available for discussion at that time There was "no time frame" as terms and carriage would need to be negotiated and I was, at that moment, merely responding to his inquiry With respect to the assertion that I said "in essence, 'Comcast paid for it -- it's their programming,'" that is neither an accurate quote nor a fair characterization of my remarks In fact, the distribution rights for NESN HD belong to NESN, not Comcast, and in no way would I imply otherwise

8 NESN is prepared to discuss RCN's carriage of NESN HD at any time RCN desires to make an offer for carriage of NESN HD Programming carriage contracts, however, involve complex issues and may require extensive negotiations, especially in the context of a new service using new technology, with a limited potential audience and unusual cost characteristics Accordingly, as in any contract negotiation, a specific time frame for RCN's carriage of NESN HD cannot be pinpointed and depends on a host of issues

9 I declare under penalty of perjury under the laws of the United States that the foregoing is true and accurate



Peter Plaehn

November 13, 2003