Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses	)	
	)	
Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to **Time Warner Cable Inc.** (subsidiaries), Assignees;	)	**MB Docket No. 05-192**
	)	
Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to **Comcast Corporation** (subsidiaries), Assignees and Transferees;	)	
	)	
Comcast Corporation, Transferor, to Time Warner Inc., Transferee;	)	
	)	
Time Warner Inc., Transferor, to Comcast Corporation, Transferee.	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

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contracts and discount pricing offers. As the Commission is aware, programmers typically impose draconian non-disclosure terms on their MVPD customers, making information regarding the comparative rates, terms, and conditions available to various competitors extremely difficult to document. Similarly, deep discounts offered to competitors' customers are often secretive, communicated by direct sales representatives that visit customers door-to-door, or by phone representatives engaged in targeted "win back" campaigns. By definition, these offers are not publicized through general advertising outlets and, accordingly, RCN's evidence of such offers is necessarily anecdotal.

For the reasons set forth fully in these comments, RCN respectfully requests the Commission to condition its approval of the proposed transfers on the following specific restrictions:

> 1) access for competitors to Comcast and Time Warner affiliated programming on non-discriminatory pricing and terms, and a prohibition on exclusive or discriminatory arrangements between Comcast or Time Warner and third-party suppliers of programming; and
>
> 2) a requirement for uniform subscriber pricing throughout franchise areas, to deter predatory pricing tactics designed to undermine competition.

These proposed conditions represent the minimum conditions necessary to ensure a fair, competitive cable marketplace, wherein consumer choice has the opportunity to flourish. Accordingly, it is incumbent upon the Commission, consistent with the public interest, to condition its approval of the proposed transfers from Adelphia to Comcast and Time Warner and among Time Warner and Comcast on these minimal fair play requirements.

Table of Contents

INTRODUCTION 2

CABLE COMPETITION HAS PRODUCED TANGIBLE BENEFITS FOR CONSUMERS; WITHOUT VIABLE COMPETITION, CONSUMERS WILL BE HARMED 3

THE COMMISSION MUST FULFILL ITS STATUTORY MANDATE TO PRESERVE AND PROMOTE COMPETITION IN THE MVPD MARKET BY CONDITIONING THE PROPOSED LICENSE TRANSFERS 5

RCN HAS AN IMPORTANT INTEREST IN THE PROPOSED TRANSACTIONS AS A COMPETING PROVIDER OF BUNDLED BROADBAND SERVICES 7

THE CABLE INDUSTRY STILL IS COMPRISED OF GEOGRAPHIC MONOPOLIES, AND COMCAST'S AND TIME WARNER'S INCREASED DOMINANCE IN THE CABLE MARKET WILL IMPAIR THE ABILITY OF BROADBAND PROVIDERS LIKE RCN TO CONTINUE TO COMPETE 8

THE ANTI-COMPETITIVE BEHAVIOR NOTED IN PREVIOUS MERGER PROCEEDINGS CONTINUES 9

I. Impeding Access to Essential Programming 10

II. Discriminatory Deep Discount Pricing 15

APPROVAL OF THE APPLICATIONS FOR THE TRANSFER OF LICENSES AND AUTHORIZATIONS SHOULD BE CONDITIONED 18

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COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc., ("RCN") hereby urges the Federal Communications Commission ("Commission") to condition the Applications for Consent to the Transfer of Control of Licenses from Adelphia Communications Corporation ("Adelphia") to Comcast Corporation ("Comcast") and Time Warner Inc. ("Time Warner"), and among Comcast and

Time Warner (the "proposed transactions").[1] RCN respectfully submits that conditions are necessary to protect the public interest in a fair, competitive cable marketplace, which should include, at a minimum (1) access for competitors to "must have" programming on a nondiscriminatory basis, and (2) uniform, nondiscriminatory cable pricing for consumers, all as required by pro-competitive intent of the Communications Act of 1934 as amended[2] and the applicable license transfer standards.[3]

Introduction

The Applicants' proposed transactions will result in two major and important changes in the cable marketplace. First, Adelphia, currently the 5th largest cable multiple system operator ("MSO") and 7th largest multichannel video programming distributor ("MVPD"), will cease to exist. In its place, Comcast will consolidate its position as the nation's largest MVPD, with an estimated 26.8 million subscribers, or a 28.9% share of the total MVPD market, and Time Warner will emerge as the 2nd largest player, with 16.6 million subscribers, or a 17.9% market share. By both decreasing the number of MSOs in the MVPD marketplace and simultaneously increasing the market power of the first and second largest players, the proposed transactions will, by definition, increase the ability of the Applicants to use their market power to anti-competitive effect. Second, as a result of Comcast's and Time Warner's proposal to "swap" systems, each will establish itself in its respective regional markets as the indisputably dominant

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1 *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees; Adelphia Communications Corporation, Assignors and Transferors, to Comcast Corporation, Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, Applications and Public Interest Statement*, MB Docket No. 05-192 (filed May 18, 2005).

2 47 U.S.C. § 151, *et seq.* ("Communications Act" or "Act").

3 47 U.S.C. §§ 214 and 310.

MVPD. As the Commission has acknowledged, increased regional clustering of cable systems increases the likelihood of anticompetitive harm.[4]

Cable Competition Has Produced Tangible Benefits For Consumers; Without Viable Competition, Consumers Will Be Harmed

It is well established that, in the MVPD industry, more choice translates into better services and lower prices for consumers. The Commission has recognized this: "[I]n communities where head-to-head competition is present, the incumbent cable operator has generally responded to competitive entry in a variety of ways, such as by lowering prices, providing additional channels at the same monthly rate, improving customer service, [or] adding new services . . . ."[5] RCN's presence in the market has consistently held down prices and resulted in other economic benefits to the local community, as documented in previous Commission proceedings.[6] The empirical evidence that wireline competition – and, in particular, competition from broadband service providers ("BSPs"), such as RCN, that offer bundled phone, cable, and Internet access services – holds down cable prices has been borne out in numerous studies.

For example, the comprehensive report by the U.S. Public Interest Research Group released in August 2003 ("USPIRG Report") states that:

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[4] *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8565 at ¶¶ 14-17 (1993) (acknowledging the potential anti-competitive harm that regional concentration may have on the local advertising and programming marketplace, but concluding, based on the relatively unconsolidated state of the market in 1993, that "[i]n the absence of record evidence suggesting that any cable operator possesses undue power in the local programming or advertising market, we conclude that it is unnecessary to adopt regional limits at this time.").

[5] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244 at ¶ 197 (2002).

[6] *See, e.g.,* Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent, dated April 29, 2002, MB Docket No. 02-70, at 3-5; Comments of RCN Corporation, dated September 11, 2003, MB Docket 03-172, at 5-6.

> Cable price increases have been restrained by competition only when a wireline competitor, often referred to as an overbuilder, enters a market to challenge the incumbent. Where such overbuilder competition exists, the effect is dramatic: One GAO report concluded that cable rates are 17% lower where there is an overbuilder in a franchise area.[7]

The report by the United States Government Accounting Office ("GAO") cited by USPIRG concluded that:

> Competition from wire-based and DBS operators leads to lower cable rates and improved quality and service among cable operators. Competition from a wire-based provider – that is, a competitor using a wire technology, such as a second cable operator, a local telephone company, or an electric utility – is limited to very few markets. However, in those markets where this competition is present, cable rates are significantly lower . . . than cable rates in similar markets without wire-based competition.[8]

In a subsequent report focused specifically on the competition provided by BSPs, such as RCN, in comparative markets, the GAO found that:

> The rates for telecommunications services were generally lower in the 6 markets with BSPs than in the 6 markets without a BSP. For example, expanded basic cable television rates were 15 to 41 percent lower in 5 of the 6 markets with a BSP when compared to their matched [demographically comparable] market [without a BSP].[9]

The GAO concluded:

> On the basis of the 12 markets we examined, it appears that BSPs' entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services. Incumbent cable operators often

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[7] U.S. Public Interest Research Group, *The Failure of Cable Deregulation: A Blueprint for Creating a Competitive, Pro-Consumer Cable Television Marketplace*, August 2003, at 1 ("USPIRG Report").

[8] U.S. Government Accounting Office, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, October 2003, Results in Brief, at 3.

[9] U.S. Government Accounting Office, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, U.S. Senate, *Wire-Based Competition Benefited Consumers in Selected Markets*, February 2004, Highlights, at 1.

> responded to BSP entry by lowering prices, enhancing the services that they provide, and improving customer service. . . .The combined effect of BSP entry and incumbent companies' response provides significant benefits for consumers.[10]

The Commission's own findings also support the conclusion that the presence of a BSP in the market is one of the few factors that acts as a check on cable rate increases:

> As of [July 1, 2002], cable operators facing competition were charging, on average, $37.84 while operators not facing competition were charging $40.26. The difference in average monthly rates between the competitive and noncompetitive groups (the "competitive differential") was 6.4% for 2002, close to the 5-year average differential of 6.5%. On a per channel basis, competitive and noncompetitive cable operators, respectively, charged 63.7 cents and 66.6 cents per channel as of July 1, 2002, a differential in average monthly rate per channel of 4.6%.[11]

The Commission Must Fulfill Its Statutory Mandate To Preserve And Promote Competition In The MVPD Market By Conditioning the Proposed License Transfers

Congress, in enacting the Telecommunications Act of 1996, gave the Commission a clear mandate to foster competition in the MVPD market. Moreover, the interests of the public, as consumers of MVPD services, demand that competition be nurtured, so as to produce the benefits to consumers that only competition can bring. As RCN has asserted in past comments, the alternative – a return to cable monopolies in a de-regulated MVPD world – is antithetical to the pro-competitive intent of the Telecommunications Act of 1996, and is contrary to the public interest.[12]

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10 *Id.* at 4.

11 FCC Releases Report on 2002 Cable Industry Prices, FCC News Release, July 8, 2003.

12 *See, e.g.,* Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, MB Docket No. 02-70, at 5-9; Comments of RCN Corporation, dated September 11, 2003, MB Docket 03-172, at 5-6.

The standard applicable to the Commission's review of a proposed license transfer is as follows:

> To obtain Commission approval of their Application, the Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity. In this regard, we must weigh the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the benefits outweigh the harms.[13]

The Commission has recognized as a relevant factor in its analysis the question whether the transaction "would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of the Communications Act and other statutes."[14] The Commission has stated:

> Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act," which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services.[15]

Short of denying the transfers, the Commission's ability to impose safeguarding conditions on the transfer of licenses and other authorizations in connection with a consolidation of cable systems that threatens to harm consumers is clear.[16] Sections 4(i) and 303(r)[17] of the

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[13] *In Re Applications of MediaOne Group, Inc., Transferor, and AT&T Corp., Transferee,* Memorandum, Opinion and Order, 15 FCC Rcd 9816 at ¶ 1 (2000) ("*MediaOne Group/AT&T Order*").

[14] *Id.* at ¶ 9. Whether or not one applies the four-part public interest test discussed in the *MediaOne Group/AT&T Order*, the question whether approval of the proposed transaction will tend to undermine the objectives of the Communications Act is relevant to whether the public interest will be served.

[15] *In re Applications of Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum, Opinion and Order, 17 FCC Rcd 23246 at ¶ 27 (2002) (*"AT&T-Comcast Order"*).

[16] *Id.* at ¶¶ 184-192; *In Re Applications of Ameritech Corp, Transferor, and SBC Communications Inc., Transferee*, Memorandum, Opinion and Order, 14 FCC Rcd 14712 at ¶¶ 1, 3, and 46-54 (1999) ("*Ameritech-SBC Order*").

[17] 47 U.S.C. §§ 154 (i) and 30 (r).

Act give the Commission broad authority to adopt such rules or policies, not otherwise inconsistent with law, as it deems necessary to implement the other provisions of the Act. This authority, and that relied upon by the Commission in its *MediaOne Group/AT&T Order*, which placed substantial conditions on that merger, provide the Commission with ample authority to impose on the Applicants the conditions necessary to mitigate the potential anti-competitive effects arising from the increased national market power and regional clustering that Applicants Comcast and Time Warner will enjoy as a result of the proposed transactions.

RCN Has An Important Interest In The Proposed Transactions As A Competing Provider of Bundled Broadband Services

RCN, as the primary wireline cable competitor to Comcast and Time Warner, has a unique interest in this proceeding. RCN is the nation's first and largest facilities-based competitive provider of bundled phone, cable television, and high-speed Internet services. RCN operates as a BSP in 7 of the 10 largest markets in the United States, including in the Boston, New York, Philadelphia, Washington, D.C., Chicago, San Francisco and Los Angeles areas. As an MVPD, RCN competes head-to-head with Comcast in the majority of these markets, and with Time Warner in New York City. Indeed, RCN is precisely the type of competitor Congress sought to bring into the market when it opened the broadband market to competition through passage of the Telecommunications Act of 1996. Conditioning the proposed transactions to ensure a fair, competitive market within which BSPs, such as RCN, may operate without discrimination by the dominant MSOs clearly is within the mandate that Congress has given the Commission, and will serve the public interest.

The Cable Industry Still Is Comprised Of Geographic Monopolies, And Comcast's and Time Warner's Dominance In The Cable Market Will Impair The Ability Of Broadband Providers Like RCN To Continue To Compete

In considering the proposed transactions, it is imperative to recall that the cable industry is one of historical local monopolies, dominated by entrenched incumbents that established their subscriber base in the era before competition and retain, in most markets in the country, a potent monopoly as the sole cable television provider. In any given geographic market in which Comcast and Time Warner operate, there is no more than one cable competitor, if there is any cable competition at all. Moreover, if the proposed license transfers are approved and Comcast and Time Warner are allowed to further consolidate their already heavily clustered regional systems, their dominance in their respective markets will be complete. The presence of other cable MSOs in the national MVPD market is largely irrelevant, insofar as the large MSOs have tacitly divided the national market into a series of geographic clusters, wherein the incumbent cable MSO retains a local monopoly or near-monopoly. Although certain RBOCs have announced plans to deploy fiber to the home and to provide MVPD services, such deployment is currently limited and incomplete. Thus, currently, the only established MVPD competition to Comcast and Time Warner comes from one or two DBS providers and the local competitive BSP, where there is one. Moreover, DBS simply cannot match the service capabilities of a terrestrial, facilities-based network.[18] For this reason, as the reports cited in the first section of these comments demonstrate, only wireline BSP competition, such as that provided by RCN, currently yields the maximum benefits of competition for consumers. It is especially imperative,

[18] RCN recognizes that DBS providers offer competition to monopoly cable providers with respect to video programming. However, DBS providers cannot currently match Comcast's and Time Warner's capability to provide bundled cable, highspeed Internet access, and telephony services to customers – at present, only BSPs, such as RCN, can do so.

therefore, that the Commission act to protect and promote BSP competition in Comcast's and Time Warner's markets.

In touting the "benefits" of the proposed transactions, Comcast and Time Warner focus heavily on the fact that Comcast will become more integrated in Pennsylvania, Minnesota, southern Florida, the greater Washington, D.C., metropolitan area, and New England, while Time Warner will consolidate its systems in western New York, Ohio, Texas, Maine, southern California and the Carolinas. Comcast states, further, that the proposed transactions will enhance its ability to expand its production and delivery of local and regional programming. This "benefit", however, has a potential dark side, insofar as Comcast and other MSOs have historically used their control over local and regional programming anti-competitively, as documented in past proceedings and discussed further below. Similarly, as discussed further below, increased regional clustering will enhance the potential ability of Comcast and Time Warner to engage in discriminatory, deep discount pricing targeted to their wireline competitors' customers – an exceptionally anti-competitive practice with the potential to gravely harm BSPs in Comcast's and Time Warner's markets. If Comcast or Time Warner are allowed to engage in anti-competitive practices that force RCN or other BSPs out of their markets, consumers will, again, be faced with a monopoly wireline cable provider.

The Anti-Competitive Behavior Noted
In Previous Merger Proceedings Continues

Virtually since its inception, RCN has provided the Commission with information regarding the challenges faced by competitive wireline MVPDs seeking to gain entry to the

former monopoly cable market.[19] Chief among these challenges are the problems faced by smaller competitors seeking access to "must have" programming on viable terms, and the harm to competition caused by discriminatory, deep discount pricing targeted to the competitor's customers but not offered to the general public. As discussed herein, the Commission has acknowledged the potential harm to competition arising from these anti-competitive practices, but has taken little action to constrain such behavior by the largest MSOs. Consequently, these threats to competition continue. This proceeding affords the Commission an opportunity to mitigate these ongoing concerns, through the imposition of appropriate conditions on the Applicants.

I. Impeding Access to Essential Programming

RCN has previously made the Commission aware of the difficulties it has encountered in gaining, and keeping, access to critical, non-substitutable local programming controlled by Comcast and other incumbent cable companies.[20] Access to

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[19] *See, e.g.,* Comments of Residential Communications Network, Inc., dated July 19, 1996, CS Docket No. 96-133 (Third Annual Report); Reply Comments of RCN Telecom Services, Inc., dated Aug. 20, 1997 (Fourth Annual Report); Comments of RCN Telecom Services, Inc., dated July 13, 1998, and Reply Comments of RCN Telecom Services, Inc., dated Aug. 31, 1998, in CS Docket No. 98-102 (Fifth Annual Report); Comments of RCN Corporation, dated Aug. 6, 1999, and Reply Comments of RCN Corporation, dated Sept. 1, 1999, CS Docket No. 99-230 (Sixth Annual Report); Comments of RCN Corporation, dated Sept. 8, 2000, and Reply Comments of RCN Corporation, dated Sept. 28, 2000, CS Docket No. 00-132 (Seventh Annual Report); Initial Comments of RCN Telecom Services., Inc., dated Dec. 3, 2001, and Reply Comments of RCN Telecom Services, Inc., dated January 7, 2002, CS Docket 01-290 (Eighth Annual Report); *see also* Initial Comments of RCN Telecom Services., Inc., dated January 4, 2002, CS Docket 98-82 (Cable Attribution Proceeding); Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, MB Docket No. 02-70 (AT&T/Comcast Merger); Comments of RCN Telecom Services, Inc., dated June 16, 2003, MB Docket No. 03-124 (Hughes/News Corp. Merger).

[20] *See, e.g.,* Initial Comments of RCN Telecom Services., Inc., dated Dec. 3, 2001, CS Docket 01-290, and proceedings and comments cited at note 25 therein. *See also*, Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, MB Docket No. 02-70, at pg. 19.

programming is crucial to the success of MVPD competition.[21] Recognizing this, the Commission determined, in 2002, that the existing program access rules prohibiting exclusive agreements between cable operators and their affiliated programmers should be continued.[22] The Commission correctly concluded that, "where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators."[23] As a result, the Commission found it was necessary to retain the prohibition on exclusives until at least October 5, 2007, to "preserve and protect diversity in the distribution of video programming."[24]

It has become apparent over the years, however, that the Commission's program access rules are insufficient, alone, to address the difficulties competitors continue to face in securing essential programming. For example, RCN reported to the Commission in 2003 that Comcast was continuing to use its leverage over vertically owned or controlled programming to deny competitors access to critical programming, particularly regional sports and news programming.[25] As set forth in RCN's previous comments to the Commission, initially, Comcast denied RCN access to its SportsNet programming in

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21 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, ¶ 59 (2002) ("Program Access Order"). "[T]he Order finds that access to vertically integrated programming continues to be necessary in order for competitive MVPDs to remain viable in the marketplace. An MVPD's ability to provide service that is competitive with an incumbent cable operator is significantly harmed if denied access to 'must have' vertically integrated programming for which there are no good substitutes."

22 *Id.* ¶ 60. Section 628(c)(5) of the Communications Act required the FCC to eliminate the prohibition on exclusive programming contracts on October 5, 2002, unless it found that such a prohibition was necessary to preserve competition. 47 U.S.C. § 548(c)(5).

23 *Id.* at ¶ 59.

24 *Id.* at ¶ 60.

25 *See* Comments of RCN Corporation, dated September 11, 2003, MB Docket No. 03-172 (Tenth Annual Report).

Philadelphia altogether. It wasn't until Comcast faced the Department of Justice's review of Comcast's acquisition of Home Team Sports in the Washington, D.C. area that Comcast agreed to make the SportsNet programming available to RCN, and even then, only made it available to RCN on a short-term basis. After several years of negotiation, RCN eventually was able to finalize a long-term agreement with Comcast for the SportsNet programming. However, Comcast long employed its control over this "must have" regional programming to RCN's detriment, and there is no guarantee that RCN will retain access to this Comcast-controlled programming in the future.

Even where RCN has full access to the Applicants' affiliated programming, it pays rates far higher than the Applicants themselves are required to pay. Although these rate differences in general are nominally based on "volume discounts," there is little market justification for such pricing differences, particularly as pertains to regional programming. In short, large MSOs pay one rate; competitors, such as RCN, pay another, far higher rate.[26] Such discriminatory programming pricing impedes competition and should not be allowed.

Recent examples of the continuing problems faced by competitors like RCN in accessing "must have" programming include RCN's experience attempting to negotiate continued carriage of PBS Kids video-on-demand ("VOD") programming, since that programming came under the control of Comcast Media Center through a joint venture between Comcast and PBS for a new

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[26] Because programmers typically impose draconian non-disclosure terms on their MVPD customers, it is extremely difficult to document the comparative rates, terms, and conditions available to various competitors. Nonetheless, on the basis of its own experience and publicly available information, RCN can assert with confidence that it is required to pay substantially higher rates than its large MSO rivals. If additional documentation of this phenomenon is deemed necessary, the Commission should exercise its authority to request – under protective order, if necessary – additional information from the Applicants regarding their rates, terms, and conditions for

network called "Sprout." Formerly, RCN received PBS Kids' programming through programming supplier TVN as part of its children's' VOD package. PBS Kids programming, while appealing only to viewers with young children, is "must have" programming for that demographic. Since Comcast Media Center became the supplier for this programming, RCN has experienced a host of difficulties in accessing the programming. First, requests by RCN to Comcast for pricing information and terms of carriage went unanswered for weeks. Then, when information was finally forthcoming, RCN was informed that it would be allowed to carry the PBS Kids VOD programming only if it also committed to launch "Sprout," the new children's channel in which Comcast is a partner, and only if RCN agreed to pay additional licensing and equipment fees in connection with accessing Comcast Media Center's programming, amounting to approximately $66,000 in initial charges and $118,000 in new annual recurring charges – all for programming for which there is a limited (albeit fiercely loyal) audience. RCN was given 30-days' notice in March 2005 that its access to the PBS Kids VOD programming would be terminated, and lost the programming in April. Within sixty (60) days thereafter, RCN experienced an 83% drop in its customers' usage of its Kids Unlimited VOD service. As a result of Comcast Media Center's delay in negotiating with RCN for carriage of this programming, RCN has not been able to carry the programming since April. As a consequence, RCN has experienced significant cancellations of VOD service by parents for whom this programming is "must have."

Comcast also exerts its power in the programming market in other ways. As the Commission is aware, Comcast has been in a dispute with Major League Baseball and the

programming, and the rates, terms, and conditions offered by their affiliated programmers to the Applicants' competitors, such as RCN.

Baltimore Orioles with regard to programming on the Orioles-controlled Mid-Atlantic Sports Network ("MASN"). RCN had been offered, and took advantage of, access to MASN on better terms than typically are available to RCN for regional sports programming, which often is controlled by the regionally dominant MSO. As a result of its agreement with MASN to carry the programming, RCN's subscribers have had ongoing access to the Orioles' games. However, on April 21, 2005, RCN received a letter from Comcast SportsNet warning that MASN's efforts to license its programming to multi-channel video distributors "evidence a serious and material breach of Comcast SportNet's contractual rights . . .." The letter concludes "we are putting you [RCN] on notice that Comcast SportsNet reserves all avenues of recourse to enforce and protect its contractual rights to the fullest extent permitted by law." (Copy attached as Exhibit A.)

The so-called "terrestrial loophole" exacerbates the program access problem, and is particularly an issue where regionally clustered systems provide the dominant MSO with ample opportunity to produce regional programming delivered terrestrially. In the Boston market several years ago, as RCN reported to the Commission at the time,[27] Comcast (formerly AT&T) refused to waive its exclusive rights to carry terrestrially-delivered New England Cable News ("NECN"), thereby denying RCN's subscribers access to this important local programming. While RCN has since obtained access to NECN programming, historically, Comcast representatives have used RCN's inability to access essential local programming as a selling point for Comcast with consumers.[28] This kind of anti-competitive behavior not only impedes

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[27] *See* Comments of RCN Corporation, dated September 11, 2003, MB Docket No. 03-172, at 8.

[28] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26901 at ¶ 141 (2002) (*"Ninth Annual Report"*).

RCN's ability to effectively compete, it potentially also denies consumers the benefits of competition and access to the programming they demand.

As has been clearly documented in the Commission's MVPD proceedings, "[D]espite the presence of the program access rules, lack of access to programming, especially sports programming, remains a significant barrier to entry and an impediment to the successful development of a competitive MVPD business."[29] Due to the terrestrial loophole, access for competitors to "must have" programming cannot be assured. The Commission has stated:

> We recognize that access to certain local and regional programming can be important for alternative MVPDs to compete. As we recently concluded in our *Program Access Order*, we believe cable operators that are affiliated with programmers generally have the incentive and ability to secure exclusive distribution rights that prevent their MVPD competitors from gaining access to popular programming in which the cable operator has an interest. The program access rules prohibit such arrangements with respect to satellite-delivered programming, <u>but not terrestrially delivered programming</u>.[30]

Significantly, the Commission has found that regional clustering of cable systems – which Comcast and Time Warner tout as a benefit of their proposed transactions – can exacerbate the terrestrial loophole issue. The FCC has stated "we believe that clustering, accompanied by an increase in vertically integrated regional networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anti-competitive foreclosure of access to vertically integrated programming."[31]

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29 *AT&T-Comcast Order*, *supra*, n. 15, ¶ 101 (emphasis added; internal citations omitted).

30 *Id.* ¶ 101.

31 *Program Access Order*, *supra* n.20, ¶ 47.

II. Discriminatory Deep Discount Pricing

Another exceptionally detrimental tactic employed by regionally dominant cable MSOs to inhibit competition is to offer highly aggressive discounts only to those subscribers to whom competitive service is available.[32] As set forth fully in previous comments to the Commission,[33] RCN has faced such predatory pricing tactics in many of its markets, when it has begun to win subscribers away from the incumbent cable operator. Comcast has been particularly aggressive in its pricing and sales tactics. In Folcroft, PA, just prior to RCN's entry into the market, Comcast established a sales "Swat Team" that was instructed to sign customers up for 18-month contracts, in exchange for receiving a lower price for their cable service. "Comcast's mission was to get all their customers to agree to the 18-month contract before RCN entered the market so that RCN would be locked out of the market."[34] In Washington, D.C., as reported by RCN in its 2003 comments to the Commission, Comcast distributed flyers to residents only in MDUs served by RCN affiliate Starpower, offering drastic discounts and free services.[35]

Recently, Comcast has been offering deep discounts available exclusively to RCN customers in the Boston-area communities of Dedham, Waltham, and Burlington. As the attached flyer illustrates, these discounts are dubbed the "RCN Offer" and lure subscribers with deeply discounted prices on premium cable services, together with rates for phone and Internet

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32 *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244 at ¶¶ 203-206 (2002) (Eighth Annual Report).

33 *See, e.g.*, Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, MB Docket No. 02-70, at 22-23; Comments of RCN Corporation, dated September 11, 2002, MB Docket No. 03-172, at 11-14.

34 Exhibit A to RCN Comments in AT&T-Comcast proceeding, Statement of Roddy Gaymon, at ¶ 3; *see also* Statements of Rosalind Applewhite, Paul Phillips, and Bruce Wirt, attached thereto.

35 *See* Comments of RCN Corporation, dated September 11, 2003, MB Docket No. 03-172, at 11, fn. 25.

that, according to the flyer, are more than 40% off Comcast's regular rates. Moreover, these rates are offered for a full year to RCN subscribers who switch to Comcast, as an incentive to permanently abandon their RCN service. (Copy attached as Exhibit B.) Such offers clearly go far beyond ordinary promotional discounts, and are calculated not to compete with RCN, but to eliminate RCN as a competitor.

RCN and other BSPs have expressed concern for some time regarding the predatory effect of discriminatory, secretive, and targeted discounts and promotions by cable operators that are employed against BSPs in areas where cable competition has established a toehold.[36] RCN provided specific, documented evidence of these practices in connection with the AT&T-Comcast merger review proceeding.[37] In the Order approving the AT&T-Comcast merger, the Commission observed:

> Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers. We also disagree with Applicants' claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be pro-competitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry.[38]

Although an important benefit of competition is to hold down prices for consumers, consumers are ultimately harmed by predatory price reductions targeted to drive competitors out

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36 *AT&T-Comcast Order*, *supra* n. 15, ¶¶ 117-122..

37 Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent, dated April 29, 2002, MB Docket No. 02-70, at 22.

38 *AT&T-Comcast Order*, *supra* n. 15, ¶ 120.

of the market, particularly where customers in non-competitive areas are not receiving the benefits of such discounts and are, in effect, subsidizing the predatory discounts targeted to competitors' customers.[39] This eventuality is directly relevant to the Commission's consideration of the Applicants' license transfer requests:

> We conduct out public interest review against the backdrop of the "broad aims of the Communications Act," which include, among other things, the implementation of Congress' pro-competitive, deregulatory national policy framework designed to open all communications markets to competition . . .. Our public interest analysis may also entail assessing whether the merger will affect the quality and diversity of communications services . . . Following passage of the Telecommunication Act of 1996 ("1996 Act"), local communications markets have been undergoing a transition to competitive markets, so a transaction may have predictable yet dramatic consequences for competition over time even if the immediate effect is more modest. Therefore, when a transaction is likely to affect local communications markets, our statutory obligation requires us to assess future as well as current market conditions. In doing so, the Commission may rely upon its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.[40]

Therefore, it is directly relevant to the Commission's consideration of the Applications that the effect over time of the proposed transactions could be to eliminate BSP competition in particular geographic markets altogether.

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[39] Again, deep discounts offered to competitors' customers are often secretive, communicated by direct sales representatives that visit customers door-to-door, or by phone representatives engaged in targeted "win back" campaigns. By definition, these offers are not publicized through general advertising outlets and, accordingly, RCN's evidence of such offers is necessarily anecdotal. Should the Commission believe that this anecdotal information is insufficient to support conditions, it should exercise its authority to request from the Applicants specific disclosure regarding their targeted discounts and "win back" offers.

[40] *MediaOne Group/AT&T Order, supra* n. 13, ¶ 11-12 (citations omitted).

Approval of the Applications for the Transfer of Licenses and Authorizations Should Be Conditioned

For the reasons explained above, RCN respectfully submits that the Commission cannot properly conclude that the proposed transfer of licenses and authorizations to Comcast and Time Warner will serve the public interest, convenience, and necessity, unless protections are put into place to ensure that the Applicants will not wield their increased market power in an anti-competitive manner. To the extent that the Commission believes the development of additional record evidence on the issues discussed in these comments is appropriate, RCN encourages the Commission to require submission by the Applicants (in confidence, as appropriate) of additional data regarding their programming contracts and discount pricing offers. Should the Commission conclude that the requested transfers should be approved, any such approval should be conditioned upon the imposition of the following safeguards:

1) access for competitors to Comcast and Time Warner affiliated programming on non-discriminatory pricing and terms, and a prohibition on exclusive or discriminatory arrangements between Comcast or Time Warner and third-party suppliers of programming; and

2) a requirement for uniform subscriber pricing throughout franchise areas, to deter predatory pricing tactics designed to undermine competition.

Respectfully submitted,

July 21, 2005

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L. Elise Dieterich

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Washington, DC 20007

(202) 424-7500

Counsel to RCN Telecom Services, Inc.

EXHIBIT A

3601 South Broad Street • Philadelphia, PA 19148-5290

Jack L. Williams
President & CEO

April 21, 2005

VIA FACSIMILE – 609-734-3791
AND OVERNIGHT MAIL

Ms. Barbara Herbs
SVP of Product Management
RCN Corporation (Starpower)
105 Carnegie Center
Princeton, NJ 08540-6215

Dear Ms. Herbs,

Comcast SportsNet Mid-Atlantic ("Comcast SportsNet") owns the rights to produce and exhibit on local pay television the major league baseball games of the Baltimore Orioles through the end of the 2006 season. As part of the agreement by which Comcast SportsNet acquired these television rights, it also acquired the exclusive right until November 1, 2005 to negotiate an extension of this agreement or a new agreement, among other valuable consideration.

It has come to our attention that an entity referred to as Mid-Atlantic Sports Network ("MASN") and controlled by the Orioles, is making representations to multi-channel video distributors that it has acquired the rights to exhibit on local pay television the major league baseball games of the Baltimore Orioles beginning in the 2007 season, and is seeking to license such rights to these distributors. These representations (and any affiliation agreements entered into based upon these representations) evidence a serious and material breach of Comcast SportsNet's contractual rights, including but not limited to the exclusive negotiating rights referenced above.

We have today notified Major League Baseball and the Baltimore Orioles of this serious breach of our legal rights, and have instituted legal action against them to redress the blatant disregard for and interference with these and other rights.

By this letter, we are putting you on notice that Comcast SportsNet reserves all avenues of recourse to enforce and protect its contractual rights to the fullest extent permitted by law.

Sincerely,

Jack Williams
President & CEO
Comcast SportsNet Mid-Atlantic

cc: Peter Angelos (by facsimile)
Robert A. DuPuy (by facsimile)
General Counsel (by facsimile)

RCN OFFER

Cable, Internet & Phone –$95.88/month

Phone	Cable	Internet
Unlimited long distance	70+ Channels	7 Email boxes
Call Waiting & Caller ID	HBO (7 Channels)	4 Megabit download
Digital quality	DVR & HDTV	Free self install
Keep your number	Access to ON Demand	$50 premium install
Regular: $48.95	Regular:	Regular: $45.95
Promo: $28.95	**Promo: $39.99 (incl. 1 box)**	**Promo: $25.95**
Add Classic: $101.83 (100+ channels, 40+ music, HDTV channels)		
Add Plus: $106.83 (125+ channels, 40+ music, HDTV channels)		
Price fixed for 12 months		

EXHIBIT B