Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

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SUMMARY

RCN Telecom Services, Inc. ("RCN"), the nation's first and largest broadband overbuilder supplying voice, data, and video signals to residential subscribers over its own state-of-the-art fiber optic and coaxial network, is pleased to provide these comments for the Commission's twelfth annual assessment of the status of competition in the multi-channel video programming distribution ("MVPD") market.

Since the enactment of the Telecommunications Act of 1996 (the "Telecom Act") – which Congress enacted expressly to enable the existence of competitive providers like RCN – RCN has shared with the Commission its view from the frontline trenches of the not-so-level playing field on which cable competition occurs. This year, with the tenth anniversary of the Telecom Act approaching and Congress considering a host of significant proposed updates and reforms, the primary competitive challenges faced by competing wireline MVPDs remain largely the same:

- denial (or the threat of denial) of access to "must-have" programming, and
- discriminatory deep-discount pricing

As in the past, these pernicious anti-competitive practices by the incumbent cable operators continue to both threaten competition and harm consumers.

The context in which these anti-competitive behaviors are occurring, however, has changed significantly. Since 1996, the cable market has seen huge increases in horizontal and vertical market concentration as the largest cable

operators have steadily grown through a seemingly endless series of mergers and acquisitions. Indeed, the Commission currently has before it the request of the first and second largest cable operators in the country to acquire the sixth largest cable operator and to swap systems so as to increase their clustering and reinforce their already formidable regional market dominance. While DBS has held a fairly constant market share *vis a vis* cable, DBS simply cannot match the "triple play" services most cable operators now are providing. As a result, competition from facilities-based broadband service providers ("BSPs") such as RCN has emerged as the only true check on cable prices, customer care, and service quality. Yet BSP competition continues to be impaired by the potential denial of access to "must have" programming and discriminatory pricing practices by the cable incumbents – problems that will only increase as a smaller number of ever-larger cable companies control more and more of the MVPD marketplace. Consequently, the current prognosis for competition and for consumers is a worsening of the longstanding anti-competitive, anti-consumer trends.

These trends are not irreversible. The Commission currently has the opportunity to impose on Comcast and Time Warner appropriate conditions in connection with their acquisition of the Adelphia cable systems, to ensure that the incumbents' increased market dominance does not undermine competitive providers' toehold in the regional markets that Comcast and Time Warner control. Congress, in rewriting the Telecom Act, has the opportunity to close the terrestrial loophole, mandate access to vertically-integrated programming at nondiscriminatory prices, and ensure that all consumers throughout any given franchise area have access to the cable operators' best price offerings.

RCN believes that the current emphasis on local franchise relief for the RBOCs entering the MVPD market is a red herring; pricing and programming are the pressing issues. RCN, despite being far smaller than the RBOCs, successfully obtained some 130 local cable franchise and open video system ("OVS") agreements. The real impediments to competition are the program access and price problems that RCN and other competing MVPDs have long complained of. Remedying these problems requires only modest steps, but steps that are imperative if MVPD competition is to continue and grow. RCN respectfully submits that the Commission and Congress must act now, to make good on the promise of MVPD competition.

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Pursuant to the Notice of Inquiry ("NOI") released by the Commission in the above-captioned matter on August 12, 2005,[1] RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, hereby respectfully submits its Comments to the Commission for the twelfth annual report to Congress on the status of MVPD competition.

I. Introduction

RCN, through its subsidiaries and affiliates, is the nation's largest terrestrial cable overbuilder. RCN constructed and operates its own facilities-based broadband distribution networks in the Boston, New York, Philadelphia/Lehigh Valley,

1 *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Notice of Inquiry, MB Dkt. No. 05-255, FCC 05-155, rel. Aug. 12, 2005.

Chicago, San Francisco, Los Angeles and Washington, D.C. metropolitan markets.[2] RCN offers subscribers a bundled package of local and long distance telephone services, high-speed Internet access, and multi-channel video programming.[3] RCN

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[2] The company was restructured in a Chapter 11 bankruptcy proceeding last year, emerging in December 2004 with a new management team, new Board of Directors, and improved balance sheet.

[3] RCN's video services include:

Basic Analog Cable TV – All of RCN's video customers receive a package of basic programming which generally consists of local broadcast television, local community programming, including governmental and public access, and limited satellite-delivered or non-broadcast channels. The basic channel line-up generally has between 18 and 35 channels.

Expanded Basic Cable TV - This expanded programming level includes approximately 45 to 60 channels in addition to the basic channel line-up, including many popular cable networks.

Digital Cable TV - Access to this level of service requires a digital set-top box and includes approximately 31 to 50 channels of additional programming. The set-top box comes with an interactive program guide and 45 channels of digital music. Digital cable subscribers can receive advanced services such as Video on Demand and High Definition Television (described below).

Premium Channels - These channels provide commercial-free movies, foreign language programming and adult content for an additional monthly fee. A converter box is required to receive these offerings. Subscribers that have a digital set-top box receive multiple screens of popular premium channel services, such as HBO, Showtime, Starz! and Cinemax with their subscription.

Pay-Per-View - This service allows customers to receive and pay on a per event basis to view a single showing of a recently released movie, a one-time special sporting event, music concert, or similar event on a commercial-free basis by tuning into a specific activated channel.

Video on Demand and Subscription Video on Demand - RCN offers VOD service in all markets, except Los Angeles, which allows customers to access hundreds of movies and other programming at any time with the ability to pause and rewind. RCN also offers SVOD services that are included as part of several of RCN's service bundles or that can be added for an additional fee by customers if they have a digital set-top box.

High Definition Television - HDTV is offered to digital cable subscribers in most markets. HDTV is a digital television service that displays enhanced picture quality that surpass standard analog and digital television images.

Digital Video Recorder - In 2004, RCN launched its DVR service. DVR technology is included with certain set-top boxes RCN offers and allows customers to digitally record has been instrumental in introducing competition into the local telephone market, especially for residential customers, and has been at the forefront of providing an alternative to the incumbent cable operators. RCN's MVPD services currently are offered pursuant to over 100 active local cable franchise and OVS agreements.

It is well documented that competition by RCN and other facilities-based BSPs in the MVPD marketplace is the most important driver for competition's benefits to consumers, including lower prices, improved customer service, and the innovation and introduction of new services. The Commission has long acknowledged the benefits of the competition that BSPs such as RCN provide:

> "In communities where head-to-head competition is present, the incumbent cable operator has generally responded . . . by lowering prices, providing additional channels at the same monthly rate, improving customer service, [or] adding new services. . .."[4]

Indeed, RCN is precisely the type of competitor Congress envisioned when it opened the broadband market to competition through passage of the Telecom Act.

The Government Accounting Office ("GAO") in 2004 confirmed the significant benefits to consumers of BSP competition:

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television programs and watch them on their own schedule. In addition to recording and replay, DVRs also allow customers to pause and rewind live programming. RCN offers dual-tuner DVRs that allow customers to record programs while watching other channels on a real-time basis.

4 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).

> 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].[5]

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 responded to BSP entry by lowering prices, enhancing the services that they provide, and improving customer service. ...The combined effect of <u>BSP entry and incumbent companies' response provides significant benefits for consumers</u>.[6]

The Commission's own findings also support the conclusion that the presence of a competitor 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%.[7]

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[5] 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.

[6] *Id.,* at 4 (emphasis added).

[7] FCC Releases Report on 2002 Cable Industry Prices, FCC News Release, July 8, 2003.

To continue to provide the level of customer choice, service, and value necessary to bring the benefits of competition to consumers, however, RCN and other smaller MVPDs must – at a minimum – have nondiscriminatory access to "must have" programming, and compete in a marketplace in which price competition is fair, uniform, and based on market realities, rather than targeted campaigns to eliminate big-cable's competitors.

RCN raised these concerns, and the Commission acknowledged them, in the context of the AT&T-Comcast merger three years ago. Now, these concerns are heightened, as the size and market power of the largest cable operators continues to grow. Commenters in the pending Adelphia proceeding have observed that the transactions proposed there will significantly increase Comcast's and Time Warner's market dominance.[8] The Consumer Federation of America and Consumers Union go so far as to characterize the merger proposal as "an anticompetitive market allocation agreement."[9] The consumer groups report that approximately 1.8 million of the 6.9 million subs changing hands in the proposed transactions are "pure transfers between Comcast and Time Warner designed to allow these two firms to consolidate their control over key markets."[10] "Dominance over distribution in regional clusters interacts with control of regional, 'must-have'

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8 It recently has been reported that Comcast also is in talks to acquire Susquehanna Pfaltzgraff Co.'s cable properties in six eastern states in areas contiguous to Comcast's existing systems and those it is acquiring from Adelphia.

9 Reply Comments of Consumer Federation of American and Consumers Union, dated August 8, 2005, in MB Docket No. 05-192, at 3.

10 *Id.*, at 4-5.

programming to create an immense amount of vertical leverage."[11] Consumers Union and the Consumer Federation of America assert that "[t]he Comcast-Time Warner-Adelphia transactions cause a pervasive and massive increase in market concentration," with the merger-induced change in the HHI averaging 800 for 5 of the top 10 DMAs (designated market areas), 1070 for 11 of the top 25 DMAs, and 890 for 22 of the top 50 DMAs. RCN competes with Comcast and Time Warner in 7 of the top 8 DMAs.[12] The HHI for 18 of the top 29 regional sports network footprints increases by 380, according to the consumer groups.[13]

II. The Impediments to MVPD Competition are Longstanding

In its pleadings filed in previous years, RCN has provided the Commission with detailed information on the barriers to competition that RCN has faced over the years as a new entrant in the MVPD market.[14] And,

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11 *Id.*, at 7.

12 *Id.*, at 56, Exhibit 1.

13 *Id.*

14 *See e.g.*, Comments of Residential Communications Network, Inc., dated July 19, 1996, in CS Docket No. 96-133 (for the *Third Annual Report*); Reply Comments of RCN Telecom Services, Inc., dated Aug. 20, 1997 (for the *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 (for the *Fifth Annual Report*); Comments of RCN Corporation, dated Aug. 6, 1999, and Reply Comments of RCN Corporation, dated Sept. 1, 1999, in CS Docket No. 99-230 (for the *Sixth Annual Report*); Comments of RCN Corporation, dated Sept. 8, 2000, and Reply Comments of RCN Corporation, dated Sept. 28, 2000, in CS Docket No. 00-132 (for the *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, in CS Docket 01-290 (for the *Eighth Annual Report*); Comments of RCN Corporation, dated Sept. 11, 2003, and Reply Comments, dated Sept. 26, 2003, in MB Docket 03-172 (for the *Tenth Annual Report*); Comments of RCN Corporation, dated July 23, 2004, in MB Docket 04-227 (for the *Eleventh Annual Report*); *see also* Initial Comments of RCN Telecom Services., Inc., dated

the Commission has acknowledged the reality of RCN's competitive concerns. For example, the Commission specifically found, in analyzing the AT&T-Comcast merger, that program access is essential to competition:

> [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.[15]

In addition, the Commission found the largest cable incumbents have the capacity to deny competitors access to "must have" programming:

> The record demonstrates that AT&T and Comcast individually already have sufficient presence in their respective franchise areas to secure exclusive contracts for unaffiliated national, local and regional programming.[16]

The Commission also has found evidence of the discriminatory pricing practices that RCN has long complained of, and recognizes their pernicious effects. 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

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January 4, 2002, in CS Docket 98-82 (Cable Attribution Proceeding); Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, dated April 29, 2002, in MB Docket No. 02-70 (AT&T/Comcast Merger); Comments of RCN Telecom Services, Inc., dated June 16, 2003, in MB Docket No. 03-124 (Hughes/News Corp. Merger); Comments of RCN Corporation, dated Aug. 11, 2004, in MB Docket 04-207 (A La Carte Programming Proceeding).

15 *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*") .

16 *Id.*, at ¶108.

> 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.[17]

The Commission pledged at that time: "We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis."[18] To date, however, the Commission has taken no regulatory enforcement action against any cable operator for its discriminatory deep discounts targeted against competing MVPDs.

III. Anti-Competitive Practices by the Incumbent Cable Operators Continue

Although the record since 1996 is replete with instances of program access and discriminatory pricing problems, these concerns are not merely historical. Despite competitors' efforts for many years to persuade the Commission and Congress to act to remedy these anti-competitive practices, they continue today and threaten cable competition's future. Most recently, RCN informed the Commission of its ongoing concerns in the context of Comcast's and Time Warner's proposed acquisition of the Adelphia cable systems and swap of systems among Comcast and Time Warner to increase their regional clustering and dominance in major metropolitan markets. These concerns are reiterated, below.

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17 *Id.*, at ¶ 120.

A. Program Access

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.[19] 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.[20] As set forth in RCN's previous comments to the Commission, initially, Comcast denied RCN access to its SportsNet programming in 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,

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18 *Id.,* at ¶ 122.

19 *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 (*"RCN Comments re AT&T-Comcast"*), MB Docket No. 02-70, at pg. 19.

20 *See* Comments of RCN Corporation, dated Sept. 11, 2003, MB Docket No. 03-172 (for the *Tenth Annual Report*).

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 cable incumbents' affiliated programming, it pays rates far higher than the incumbents 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 cable operators pay one rate; competitors, such as RCN, pay another, far higher rate.[21] 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 VOD programming, since that programming came under the control of Comcast Media Center through a joint venture between Comcast and PBS for a new network called "Sprout." Formerly, RCN received PBS Kids' programming through programming supplier TVN as part

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[21] 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 largest 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 in the Adelphia proceeding regarding their rates, terms, and conditions for programming, and the rates, terms, and conditions offered by their affiliated programmers to the Applicants'

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 <u>83% drop</u> 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 was not been able to carry the programming for several months. As a consequence, RCN experienced significant cancellations of VOD service by parents for whom this programming is "must have."

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competitors, such as RCN.

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 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 cable incumbent. 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."[22]

The so-called "terrestrial loophole" exacerbates the program access problem, and is particularly an issue where regionally clustered systems provide the dominant incumbent cable operator 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,[23] Comcast (formerly AT&T) refused to

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22 Copy attached as Exhibit A to Comments of RCN Telecom Services, Inc., dated July 21, 2005 (*"RCN Comments re Adelphia Acquisition"*), MB Docket No. 05-192 .

23 *See* Comments of RCN Corporation, dated Sept. 11, 2003, MB Docket No. 03-172, at 8.

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.[24] This kind of anti-competitive behavior not only impedes RCN's ability to effectively compete, it potentially also denies consumers the benefits of competition and access to the programming they demand. Because RCN competes head-to-head with Comcast in many of its markets, the majority of examples program access problems that RCN has brought to the Commission's attention involve Comcast. However, any vertically integrated cable operator with sufficient market power has the ability to threaten competitiors' access to must-have programming in the same ways.

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."[25] 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

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[24] 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*").

[25] *AT&T-Comcast Merger Order*, *supra*, n. 14, ¶ 101.

> 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>.[26]

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."[27] Thus, the as trend toward greater horizontal market concentration and clustering of regional cable systems continues, the problem will only grow worse.

B. 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.[28] As set forth fully in

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26 *Id.* ¶ 101.

27 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order,17 FCC Rcd 12124, ¶ 47 (2002).

28 See Annual Assessment of the Status of Competition in Markets for the Delivery of

previous comments to the Commission,[29] 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."[30] 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.[31]

Recently, Comcast has been offering deep discounts available exclusively to RCN customers in the Boston-area communities of Dedham, Waltham, and Burlington. As the flyer attached to RCN's comments in the Adelphia proceeding 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 that, according to the flyer, are more than 40% off Comcast's regular

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Video Programming, Eighth Annual Report, 17 FCC Rcd 1244 at ¶¶ 203-206 (2002) ("*Eighth Annual Report*").

29 See, e.g., *RCN Comments re AT&T-Comcast*, *supra* n. 19, at 11-14.

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

31 *See* Comments of RCN Corporation, dated Sept. 11, 2003, MB Docket No. 03-172, at

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.[32] Such offers clearly go far beyond ordinary promotional discounts, and are calculated not to compete with RCN, but to eliminate RCN as a competitor.

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 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.

IV. Congress and the Commission Must Act to Ensure Fair and Open MVPD Competition

Consumers deserve the full benefits of competition that Congress intended to deliver when it enacted the Telecom Act. Similarly, wireline competitors like RCN, that have invested literally billions of dollars in state-of-the-art facilities to deliver broadband services to American consumers, deserve a fair and open playing field on which to compete. To these ends, RCN urges the following:

- The Commission should strictly enforce its program access rules and, where necessary, seek legislative changes that will ensure competitors non-discriminatory access to critical programming

11, fn. 25.

32 Copy attached as Exhibit B to *RCN Comments re Adelphia Acquisition*, *supra* at n. 22.

under reasonable rates, terms and conditions. Regulation of the telecommunications industry has long recognized that there is a potential for discriminatory pricing by vertically integrated suppliers – most often with respect to the offering of competitive services by ILECs where some of the inputs are not competitively available. Vertically-integrated programmers should be required to comply with the same type of affiliate transaction restrictions (requiring that sales between affiliated companies be recorded at arm's-length market prices) and/or imputation obligations (requiring that the price of cable services reflect the market price of non-competitive inputs).

- The Commission should impose appropriate conditions on Comcast and Time Warner in connection with their acquisition of the Adelphia cable systems and proposed system swaps, to ensure that neither company denies its competitors access to "must have" programming.
- Insofar as the Commission believes it cannot close the terrestrial loophole, due to statutory language referencing only satellite-delivered programming, it should inform Congress of the urgent need for legislation to permit expansion of the program access rules to close this anti-competitive gap in the law.

- The Commission should work with Congress to enact legislation strengthening regulations that will prevent incumbent cable operators from engaging in discriminatory and predatory pricing and other acts of anti-competitive behavior aimed at driving competitors out of the market.
- Congress and the Commission should reject the RBOCs' request for relief from local franchise requirements, which have not prevented competitors like RCN from entering the market, or should grant RCN equivalent relief, if new entrants are to be relieved of franchise burdens.

V. Conclusion

Despite the competitive impediments discussed above, RCN and other BSP competitors have gained a significant toehold in the MVPD market, and delivered to consumers many of the benefits that Congress envisioned in enacting the Telecom Act. In order for BSPs like RCN to grow and prosper in the current market, however, Congress and the Commission must act immediately and decisively to remedy the program access and pricing problems that remain as barriers to full and fair MVPD competition.

Respectfully submitted,

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APPENDIX A

RCN SERVICE CONNECTIONS

RCN's network currently passes approximately 1.4 million homes in the following major markets: Boston, New York, the Philadelphia area, Pennsylvania's Lehigh Valley, Washington, D.C., Chicago, San Francisco, and Los Angeles.

Customer connections as of December 31, 2004, by service:[33]

Voice	280,116
Video	382,713
High-Speed Internet	222,402
Total	**885,231**

Average monthly revenue by service, as of December 31, 2004: [34]

Voice	$44.64
Video	$52.63
High-Speed Internet	$38.28

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33 As reported in the RCN 2004 10-K Annual Report to U.S. Securities and Exchange Commission, copy available at the following web address: http://investor.rcn.com/edgar.cfm?PageNum=2&DocType=&SortOrder=Date%20Descending&Year=#

34 *Id.*