

Jean L. Kiddoo  
Direct Phone: (202) 373-6034  
Direct Fax: (202) 424-7645

Our File No.: 4195054009

Bingham McCutchen LLP  
Suite 300  
3000 K Street NW  
Washington, DC  
20007-5116  
202.424.7500  
202.424.7647 fax

bingham.com

Boston  
Hartford  
London  
Los Angeles  
New York  
Orange County  
San Francisco  
Silicon Valley  
Tokyo  
Walnut Creek  
Washington

May 19, 2006

**VIA ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: *Ex Parte* Communication  
MB Docket No. 05-192 (Adelphia)

Dear Ms. Dortch:

On behalf of RCN Corporation (“RCN”), and pursuant to Section 1.1206 of the Commission’s Rules, 47 C.F.R. § 1.1206, this is to provide a copy of a written *ex parte* letter sent today by Richard Ramlall, RCN Corporation’s Senior Vice President, Strategic, External and Regulatory Affairs, to Chairman Kevin J. Martin, Commissioner Jonathan S. Adelstein, Commissioner Michael J. Copps, and Commissioner Deborah Taylor Tate, with electronic copies to the other individuals identified on the letter (the “FCC Recipients”).

This letter is a follow up to RCN’s comments in this proceeding to provide additional recent information in support of RCN’s position that access to “must have” programming, such as regional sports, kids and film library programming, that is directly or indirectly controlled by incumbent cable operators such as Comcast and Time Warner is the most significant barrier to competition in the cable market, and that certain safeguards should be adopted as conditions to its approval of the Adelphia transactions that are the subject of the above-referenced proceeding.

Marlene H. Dortch, Secretary  
May 19, 2006  
Page 2

Should any additional information be required with respect to this *ex parte* notice, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Jean L. Kiddoo". The signature is written in a cursive, flowing style with a large initial "J".

Jean L. Kiddoo

Bingham McCutchen LLP  
bingham.com

cc w/atts. (by electronic mail): FCC Recipients



May 19, 2006

**VIA COURIER**

Chairman Kevin J. Martin  
Commissioner Jonathan S. Adelstein  
Commissioner Michael J. Copps  
Commissioner Deborah Taylor Tate  
Federal Communications Commission  
The Portals  
445 12th Street, S.W.  
Washington, DC 20554

**Richard Ramlall**  
Senior V.P., Strategic & External Affairs

Assistant: Jen Morse  
(703) 434-8408  
fax (703) 434-8409  
Richard.Ramlall@rcn.net

Re: MB Docket No. 05-192 (Adelphia Merger)

Dear Commissioners:

As RCN has set forth in its various comments and other filings in the above-referenced proceeding, and as we have discussed with you, the ability of incumbent cable operators to control competitor access to critical 'must have' programming has been a significant barrier to the expansion of competition. The problems with access to such programming have been ongoing throughout the 10+ years that RCN has been competing in the cable market, and RCN and numerous other competitive providers and consumer advocates have informed the Commission about difficulties encountered in gaining and keeping access to local programming, including regional sports programming, in their comments in this proceeding as well as in numerous earlier proceedings.<sup>1</sup>

The Commission has itself previously recognized that access by competitive providers to certain local and regional programming is critical and that limits need to be created "to prevent cable operators, because of their subscriber reach, from unfairly impeding the flow of programming to consumers."<sup>2</sup> And as was recently pointed out in a letter from Senators Stevens and Dorgan on April 4, 2006, "the Adelphia acquisition could lead to even greater concentration

---

<sup>1</sup> See, e.g., comments and other filings cited in RCN's April 14, 2006 *ex parte* letter, footnote 1, filed in the above-referenced proceeding.

<sup>2</sup> See *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferees, to AT&T Comcast Corporations, Transferors*, Memorandum Opinion and Order, 17 FCC Rcd 23246, at ¶¶ 101, 103 (2002).

for Comcast and Time Warner, resulting in these companies having both the ability and incentive to engage in anti-competitive behavior in these markets.”<sup>3</sup>

The pattern of behavior that RCN and others have reported in past submissions and that gives rise to the concern expressed by Senators Stevens and Dorgan is continuing, and notwithstanding RCN’s repeated attempts to negotiate, recent actions by Comcast, in particular, underscore the need for conditions to the Commission’s approval of the proposed Adelphia transactions.

- A recent anticompetitive tactic by Comcast that limits program access is its tying video-on-demand (“VOD”) sports programming to VOD movie content through the InDemand service.<sup>4</sup> RCN currently receives its VOD content from TVN Entertainment Corporation (“TVN”), an independent VOD aggregator and content provider, but critical VOD sports programming such as “NBA League Pass,” “NHL On Ice” and “MLB Extra Innings” is exclusively provided via the InDemand service. RCN has therefore sought to purchase this important sports programming from InDemand. However, unless we also purchase InDemand VOD movie programming – a product that in our view is limited and more expensive than the VOD movie programming that RCN purchases from TVN – we would be required to pay an onerous surcharge, take a reduced “split” in the revenues, and make a substantial minimum guarantee. This tying arrangement effectively prevents RCN from offering the programming or causes RCN’s customers to pay higher costs. Either way, consumers suffer.

Moreover, RCN may have less and less ability in the future to avoid this problem unless the FCC takes action, and it is certainly not likely to be limited to sports programming. Indeed, at a recent Bear Stearns conference, Comcast CEO Brian Roberts touted the significance of VOD programming, including “275+ Kids Programs from PBS and Sprout to Nickelodeon” as well as “500 Sports Programs Highlights from NFL, NHL and NBA,” to the company.<sup>5</sup> And in response to a question about any future plans for acquiring more programming, Mr. Roberts has stated that “[w]e never speculate on future possibilities. But we obviously like content. We’ve made tremendously successful investments in the past, whether E!

---

<sup>3</sup> A copy of the Senate letter was attached to RCN’s April 14, 2006 *ex parte* letter filed in the above referenced docket.

<sup>4</sup> InDemand, L.L.C. (“InDemand”) supplies VOD, Pay-Per-View and High-Definition (“HD”) programming. InDemand is a partnership venture between Comcast, Cox Cable, Time Warner.

<sup>5</sup> Comcast Powerpoint Presentation at the Bear Stearns 19<sup>th</sup> Annual Media Conference, at p. 4 (Feb. 28, 2006). A copy of that presentation is attached hereto.

and the Style Network or the Golf Channel. We've had niche programming that has proved to be very successful."<sup>6</sup> Given the likelihood that Comcast will continue to pursue new content opportunities, RCN and its competitors will probably face additional and persistent conditions to access programming, including through tying arrangements.

- Another recent competitive challenge has been RCN's inability for over 6 months even to obtain programming pricing quotes from InDemand on certain programming that many RCN subscribers are demanding. Specifically, for months RCN has requested information on "Howard TV," which is the Howard Stern channel offered by InDemand. To date, other than to be told that HowardTV is an "all or nothing" deal tied to purchase of the complete InDemand package and will come with "steep guarantees," RCN has not been given any pricing information, although Comcast and others are carrying this programming. Meanwhile, RCN must respond to customer inquiries, particularly New York City customers, about RCN's inability to offer Howard TV while Comcast and Time Warner do provide it. This failure to provide pricing quotes, let alone reasonable and non-discriminatory pricing, and the tying of the programming to other unwanted programming, underscores the types of anticompetitive devices used to avoid the FCC's program access rules.
- As pointed out by Echostar in a letter dated December 23, 2005, it has experienced another condition of acquiring InDemand programming that has the effect of discriminating against competitors – a requirement that distributors pay a fee based on the number of digital subscribers to their service.<sup>7</sup> Although RCN's digital penetration is less than that of Echostar and other satellite providers, it is still considerably higher than the average for incumbent cable operators (we average approximately 60 percent as compared to the 35-40 percent cited by Echostar as the cable industry average). RCN therefore shares the concern raised by Echostar that an InDemand pricing scheme that requires a fee per digital subscriber could have the effect of discriminating against RCN as compared to cable operators even if not obviously discriminatory on its face.
- Echostar's December 23, 2005 letter also points out Comcast's continuing refusal to give it access to regional sports programming in Philadelphia based on the "terrestrial loophole."<sup>8</sup> Although RCN currently has access to that programming, we note that our contract expires and is up for renewal in September, 2006.

---

<sup>6</sup> Eric J. Savitz, *At Last, a Bright Cable Picture, Interview with Brian Roberts, CEO, Comcast.*

<sup>7</sup> *Echostar Satellite L.L.C. Ex Parte Letter*, MB Docket No. 05-192 at 3 (Dec. 23, 2005).

<sup>8</sup> *Id.* at 4.

Although we have not yet started to negotiate with Comcast for such a renewal, and therefore do not know whether it will entertain renewal or invoke the terrestrial loophole, we are concerned that at a minimum Comcast's ability to invoke the terrestrial loophole gives it extremely significant bargaining power. Accordingly, for all of the reasons set forth in RCN's earlier filings and the earlier filings of Echostar and others, the FCC should ensure that Comcast and Time Warner are not allowed post-merger to invoke the terrestrial loophole to evade the program access rules.

- Incumbent cable operators have undertaken extensive efforts over the past decade to "cluster" their geographic market concentrations and amass control over huge amounts of "must have," nonduplicable programming such as regional sports, children's, and film library content. Indeed, Comcast entered into a joint venture last year that gave it control over popular PBS Kids VOD programming, and then promptly terminated RCN's ability to provide this programming until a technical agreement and an affiliation agreement for a new linear network called "Sprout" were negotiated. Significant delays in the negotiations resulted in RCN's VOD usage dropping by 83 percent, but eventually, RCN obtained access.<sup>9</sup>

Now, less than a year after negotiating access to the PBS Kids/Sprout content, Comcast is seeking to impose a condition that to obtain access to the PBS Kids and Sprout content providers must use its wholly owned Comcast Media Center ("CMC") as the sole distribution vehicle for PBS Kids/Sprout VOD programming that RCN currently receives through TVN, a competitor of CMC. A new transport agreement will have to be negotiated, and equipment installed, with under 60 days to complete. In the agreement provided, there is an onerous clause which gives CMC the ability to raise rates annually without limitation (a term that is impossible for RCN to accept under any circumstances), and technical requirements which would take up valuable space at RCN's headend. And although the nominal cost of the new headend equipment will be waived, RCN will incur maintenance and other support costs for this new equipment going forward. Moreover, the required new equipment is clearly unnecessary given that Comcast has not sought to impose similar requirements to obtain other VOD programming such as E! or Outdoor Life Network.

Once again Comcast is using the bargaining power of the "must have" PBS Kids and Sprout content as leverage to impose onerous terms on one of its competitors, because once again, if our access to this programming is interrupted, we can again expect a significant decrease in VOD subscribership – just as we saw when viewership decreased by 83% during the 6 months or so that we were unable to

---

<sup>9</sup> See, e.g., RCN's Comments in the above-referenced proceeding at 13 (filed July 21, 2005).

provide PBS Kids last year. Therefore, conditions are necessary to ensure access to this critical “must have” programming.

RCN notes that in a program access complaint filed on June 29, 2005 against InDemand, DirecTV raised some of the same issues that Echostar raised in its December 23, 2005 letter and that RCN raises herein. That complaint was dismissed without prejudice by the Commission on April 21, 2006 at the request of DirecTV.<sup>10</sup> It appears that DirecTV may have settled some of these issues with Comcast. Even though DirecTV appears to have been able in this instance to have negotiated acceptable terms, these matters merit examination by the Commission and adoption of the conditions that RCN suggests, since the incentive to Comcast to negotiate reasonable terms during a pending merger proceeding in which all eyes are focused on anticompetitive behavior will be lost after the Commission approves that merger.

Accordingly, to ensure that competitors will have nondiscriminatory access to “must have” programming post-Adelphia and that consumers will have actual choices, RCN respectfully urges the Commission to consider four simple safeguards:

- Prohibit Exclusives
  - Applicants should be prohibited from entering into exclusive contracts, including conditions that preclude the use of techniques that create *de facto* exclusives, for programming (including program-related enhancements) provided by programmers in which they have an attributable interest (*i.e.* vertically integrated programmers) and for regional sports programming.
- Close the “Terrestrial Loophole”
  - The FCC should ensure that Comcast and Time Warner will not be allowed post-merger to invoke the terrestrial loophole to evade the program access rules, especially in view of the increased regional clustering that will occur if these transactions are approved, which will increase their opportunity to monopolize local sports.
- Mandate Contract Rate Transparency
  - Applicants should be required to disclose their contracts for programming upon request of a distributor alleging discrimination and, for contracts with vertically integrated programming affiliates, be required to disclose the effective rates paid by them for programming, after taking into account shared profits. Transparency is essential if a fully competitive, nondiscriminatory market for programming is to develop.

---

<sup>10</sup> *DirectTV vs. iN DEMAND L.L.C.*, CSR-6901-P, DA 06-799 (released Apr. 21, 2006).

- Programmers currently impose restrictive confidentiality and non-disclosure requirements on their contracts which foreclose other buyers from knowing whether the rates, terms and conditions offered them are consistent with the rates, terms and conditions provided to affiliated multichannel video programming distributors (MVPDs) and larger competitors. Clearly, the only basis for securing rates from disclosure is to keep other competitors from knowing whether they are being discriminated against. Absent transparency of rate information, normal market mechanisms that help level the playing field (including the arbitration provision set forth below) cannot work. Thus, the FCC should mandate that in the event of a programming dispute, parties must be granted access to the contractual terms necessary to determine whether unwarranted discrimination is occurring.
- Provide for Dispute Resolution
  - Program access disputes with the Applicants or their vertically integrated programming affiliates should be subject to arbitration. A cost-effective, timely mechanism for the resolution of programming disputes should be provided, similar to that imposed by the Commission in the NewsCorp/Hughes transaction, and should be paired with the transparency condition set forth above so that parties and arbitrators can ascertain whether contracts are discriminatory or would result in *de facto* discrimination.

Very truly yours,



Richard Ramlall  
Senior Vice President, Strategic,  
External and Regulatory Affairs  
RCN Corporation

Attachment

cc w/ atts.: Donna Gregg  
Rudy Brioché  
Heather Dixon  
Aaron Goldberger  
Leslie Marx  
Jessica Rosenworcel  
Royce Sherlock  
Sarah Whitesell  
Tracy Waldon