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July 6, 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 notice of *ex parte* meetings in connection with the above-referenced proceeding on the afternoon of July 5 and morning of July 6, 2006. The meetings were attended by Peter D. Aquino, RCN's Chief Executive Officer, Richard Ramlall, RCN's Senior Vice President, Strategic, External and Regulatory Affairs, Lynne Buening, RCN's Senior Vice President, Programming, Amy R. Mehlman of Mehlman Capitol Strategies, Inc., and the undersigned ("RCN Participants"). The RCN Participants met separately with Chairman Kevin J. Martin and Heather Dixon, Commissioner Deborah Taylor Tate, Aaron Goldberger and Ian Dillner, Commissioner Michael J. Copps and Jessica Rosenworcel, and Cristina Chou Pauzé ("FCC Participants").

The purposes of these meetings was to discuss some of the points raised in RCN's comments and *ex parte* submissions filed in MB Docket No. 05-192 concerning examples of program access abuses that support the need for the Commission to impose conditions on the proposed mergers that will protect and promote competition in the marketplace for the delivery of multi-channel video

programming to consumers. In particular, the RCN Participants demonstrated the need for the Commission to close the terrestrial loophole, eliminate exclusive and unreasonable carriage arrangements and establish arbitration obligations to resolve carriage disputes, especially for such "must have" programming as regional sports, PBS Kids and other children's programming, and film libraries. Copies of written materials distributed to some or all of the FCC Participants at the meetings that are not already a part of the record in the above-referenced docket are attached hereto.

Among other things set forth in RCN's earlier filed comments and *ex parte* letters, the RCN Participants demonstrated the need for program access conditions on the merger that will help to assure reasonable and non-discriminatory access to "must have" programming (*i.e.* non-duplicable programming that cannot by its nature be replicated by a competitor):

1. Prohibit the Applicants and programmers from entering into anti-competitive contracts and close the terrestrial loophole for "must have" programming that cannot be duplicated or replicated by competitors:

    - Applicants should be prohibited from entering into exclusive contracts, including the use of techniques that create *de facto* exclusives or exclusive distribution channels, and from imposing discriminatory or unreasonable pricing, for programming (including program-related enhancements) provided by programmers in which they have an attributable interest (*i.e.* vertically integrated programmers); and

    - 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 and other "must have" programming.

        - The FCC has been instrumental in moving technology forward and to the deployment of advanced fiber optic communications networks that

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provide superior transmission capabilities and quality at lower cost, and absent this type of condition, the Applicants will have the ability to evade program access obligations by moving programming to terrestrial facilities – in essence, the "loophole" to the program access rules would become the rule, not the exception, and the effort of Congress to eliminate the ability of competitors to use program access as a competitive tool would be eviscerated.

- These conditions should apply to the Applicants throughout their markets nationwide and there can be no reasoned basis to exclude individual markets, such as Philadelphia.
  - To the extent that the Commission nevertheless decides to exclude Philadelphia or any other market where a competitor currently has access to the regional sports programming controlled by an Applicant, it must assure that (1) the Applicant cannot invoke the terrestrial loophole against such competitors following the merger and that (2) the competitor may invoke the arbitration process if it is unable to reach reasonable contract renewal terms with the Applicant in the future.
  - For example, RCN's contract for Comcast's regional sports in Philadelphia expires this year. Absent protection, following the merger there would be nothing to stop Comcast from invoking the terrestrial loophole either to deny the renewal outright (as it has done with respect to DBS providers) or as leverage to increase prices. Unlike DBS customers in Philadelphia, who signed up for service knowing that sports is unavailable, RCN's customers have had such programming and to deny it to them now would clearly be extremely disruptive and harmful than if they'd knowingly subscribed without it.

2. Provide for Arbitration as a means to resolve program access disputes for "must have" programming.

    - 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.

    - Such arbitration should specifically allow for the programmer's carriage contracts with Applicants or other parties be available on a confidential basis in the context of such arbitrations so that the Arbitrator can determine whether a proposal is reasonable and non-discriminatory, or would result in *de facto* discrimination.

Where one competitor controls critical inputs to the business of another competitor there is an opportunity for anticompetitive abuse of such control. Certain types of non-duplicable programming that cannot be replicated by a competitor are clearly by nature critical "must have" inputs for any competitor. The record in this proceeding clearly and unequivocally demonstrates that local and regional sports and publicly funded, non-commercial PBS Kids programming, and film libraries are non-duplicable, "must have" inputs necessary for robust competition.

- Sports programming cannot be duplicated or replicated. To the extent that one competitor controls such programming in a local market and either denies or imposes discriminatory and/or unreasonable rates for such programming on its competitors, effective competition cannot exist. For example, RCN cannot replicate the White Sox by substituting the Red Sox in its Chicago market (and vice versa in Boston), so to the extent that Comcast controls access to such programming in either market, it has the power to use such programming in an anti-competitive manner.

- PBS Kids programming that is produced on a non-commercial, publicly funded basis cannot be duplicated or replicated by any competitor. Therefore, the control over such programming by Comcast has given it leverage to interrupt service, impose

increased costs, and otherwise harm its competitors who "must have" such programming to compete effectively.

- Film libraries, an important component of video-on-demand services, similarly cannot be duplicated or replicated by any competitor. There is only one "Gone With the Wind", and to the extent any competitor can deny or unreasonably restrict access to it, competition is harmed and consumers are the losers.

Application of the conditions listed above to this type of "must have" programming is essential if the Commission truly wants to see competition emerge in the cable industry. However, there likely are or will be other types of "must have" programming that comes under the control of one of the Applicants in the future, and the Commission should impose its conditions on all such programming. Specifically, RCN urges that the Commission impose its conditions on:

> All programming that is non-duplicable and cannot by its nature be replicated by competitors, including but not limited to local and regional sports programming; publicly-funded, non-commercial programming such as children's programs, and film libraries.

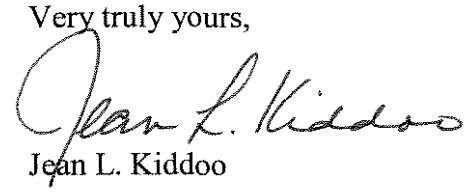
One real-world example of the type of abuse that control over "must have" programming can allow was cited in RCN's earlier-filed comments and *ex parte* letters with respect to the effect of Comcast's taking control over PBS Kids VOD programming. The RCN Participants advised the Commission Participants that the effect of the 6-month interruption of the programming last year was not only an 83% drop in children's VOD viewership (clearly empirical evidence of the "must have" nature of the programs) but also the precipitated the end of RCN's very successful effort to market a "Kids Unlimited" VOD "a la carte" programming option in which PBS Kids, Disney, and other children's programming was offered to subscribers for a small monthly fee. After the PBS Kids VOD content was disrupted by Comcast, the value of the programming decreased significantly and Disney withdrew from participating in the package. Thus the effort of RCN to fulfill the challenge of many members of Congress and FCC Commissioners to offer consumers more diverse programming packages and greater choice of the programming they receive came to an abrupt end when Comcast took control of the licensing and distribution of PBS Kids VOD.

In addition, notwithstanding that RCN, an MVPD entitled to non-exclusive and nondiscriminatory access to the Comcast-PBS joint venture programming, has directly and repeatedly asked the joint venture for access to the programming in a manner that permits its chosen VOD vendor to put the programming into the appropriate format for distribution over the RCN system, the Comcast-PBS joint venture has refused to deliver the programming as requested by RCN and instead is requiring it to be acquired through a Comcast affiliate – and thereby imposing new costs on RCN and new revenues to Comcast. As noted above, the Commission's conditions should at a minimum prohibit Applicants from

> entering into exclusive contracts, including the use of techniques that create *de facto* exclusives or exclusive distribution channels, and from imposing discriminatory or unreasonable pricing for programming (including program-related enhancements) provided by programmers in which they have an attributable interest (*i.e.* vertically integrated programmers) and permit RCN and others to challenge such unreasonable and exclusive arrangements through arbitration.

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

Very truly yours,



Jean L. Kiddoo

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