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April 19,2007

VIA ELECTRONIC FILING

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20024

Re: MB Docket No. 07-18 (News Corp.-Liberty Media)

Dear Ms. Dortch:

RCN Telecom Services, Inc. ("RCN"), pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, submits for the record in this proceeding a copy of its comments and reply comments in MB Docket No. 07-29, which address the need for access to unaffiliated "must have" programming and the statutory authority for the Commission to prohibit exclusive arrangements such as the National Football League and other sports contracts recently entered by DIRECTV.[1] Without access to "must have" programming that cannot be duplicated or substituted, competitors cannot effectively compete. The critical competitive factor is the "must have" status of programming and not the ownership affiliation.

Although the Commission has previously imposed conditions to protect vertically integrated programming, it is just as important to prevent exclusive carriage arrangements with unaffiliated networks for certain types of non-substitutable, non-duplicable "must have" programming. Sports programming is indisputably "must have" programming, and DIRFCTV itself recognizes

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1 Comments of RCN Telecom Services, Inc., MB Docket No. 07-29, at pp. 12-18 (Apr. 2, 2007) (Attachment 1), Reply Comments of RCN Telecom Services, Inc., MB Docket No. 07-29, at pp. 11-12 (Apr. 16,2007) (Attachment 2); see *also* Comments of Echostar Satellite, L.L.C., MB Docket No. 07-29 (Apr. 2, 2007), Comments of SureWest Communications, MB Docket No. 07-29 (Apr. 2,2007).

its importance to competition? Not surprisingly, however, DIRECTV is only concerned about sports programming that is distributed by vendors that are vertically integrated with cable operators. It does not, and cannot, provide any rational basis for arguing that the denial of unaffiliated "must have" programming is any less detrimental to competition than affiliated programming and, for the reasons set forth in RCN's initial comments, the Commission should prohibit exclusive sports programming arrangements by Applicants condition grant of the Application.

As demonstrated in RCN's comments in this proceeding and in MB Docket No. 07-29, far from being based on "unsupported supposition" and "fuzzy logic," executives of DIRECTV and Liberty Media have themselves touted the power of sports programming to their investors, including programming from unaffiliated "must have" program rights holders. Given the statements by DIRECTV and Liberty Media senior executives to investors, which RCN assumes correctly represent the Companies' views and intentions, it is clear that they have both the incentive and the intent to increase sports content by entering into additional exclusive arrangements with unaffiliated programmers to the detriment of competitors and consumers. Moreover, as shown in RCN's and Echostar's comments, the past conduct by Liberty's management when affiliated with an MVPD strongly suggests that the companies will be even more likely attempt to take advantage of their size and market power to enter into exclusive arrangements.[3] Accordingly, careful scrutiny of this transaction is necessary to ensure that the public interest is served.

Respectfully submitted,

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[2] Comments of DIRECTV, Inc., MB Docket No. 07-29, at pp. 6-7 (Apr. 2,2007).

[3] See Comments of RCN Telecom Services, Inc., MB Docket No. 07-18 (Mar. 23,2007); Petition to Deny of Echostar Satellite, L.L.C., MB Docket No. 07-18, pp. 2-9 (Mar. 23,2007).

ATTACHMENT 1

Comments of RCN Telecom Services, Inc.
MB Docket No. 07-29 (filed April 2,2007)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
Development of Competition and Delivery In Video Programming Distributions Section 628(c)(5) of the Communications Act For Authority to Transfer Control	)	MB Docket No. 07-29
Sunset of Exclusive Contract Prohibition	)	

COMMENTS OF RCN TELECOM SERVICES, INC.

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Dated: April 2,2007

SUMMARY

It is indisputable that competitive multichannel video programming distributors ("MVPDs") need reasonable access to the commercially most important programming – the most popular and most-watched – that is being produced by a limited number of entities. Without such programming, a competitive MVPD's ability to attract and retain subscribers would be seriously jeopardized. Moreover, the denial or threat of denial to programming is not the only anticompetitive tactic faced; targeted pricing discounts continue to stifle competition.

The Commission determined in 2002 to extend for five years the prohibition on exclusive contracts between vertically integrated programming vendors and cable operators in order to protect competitors against unfair methods of competition by incumbents who have market power over programming. At that time, the Commission's focus was on the power that many incumbents had by virtue of their vertical integration with programming suppliers. Such control has not changed since 2002, and the extension of the current Commission rules preventing exclusive contracts by and between vertically integrated programming vendors and cable operators remains as necessary today as it was then. Indeed, it may be more necessary than ever, since incumbents continue to dominate the national and local video markets, and the increased consolidation of incumbents has increased their concentration in clustered systems and their control of vertically integrated programming.

To date, the Commission has directed its rules and remedies against exclusive contracts to vertically integrated programming. However, the need for competitors to access "must have" programming is not limited to programming that is vertically integrated with another operator, nor is an incumbent's market power with respect to such programming limited to programming in which it has an ownership interest. Popular "must have" programming that cannot be duplicated by a competitor is just as important to competition regardless of whether the source of

programming is integrated or non-integrated since subscribers **do** not care how a game by their favorite sports team is carried as long as they are able to watch it. The prohibitions on exclusive agreements should be expanded to include contracts between MVPDs and third party providers for "must have" programming.

In addition, the Commission's rules for resolving program access disputes have proven to be ineffective for promptly resolving programming disputes, and the Commission has therefore bolstered them in the recent merger proceeding by adopting an arbitration procedure. **An** arbitration procedure is equally warranted to improve the dispute process for operators who have not had occasion to seek merger approval. Accordingly, the Commission should adopt arbitration **as an** alternative program access dispute remedy. In order to prevent any interruption in **a** subscriber's service, the Commission should also require a "standstill agreement" to ensure that programming remains available in accordance with the price, terms and conditions of the existing or recently-expired contract while resolution is pending, and require that programmer's carriage contracts be made available subject to confidential treatment to determine if any discrimination in price, terms and conditions.

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COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned matter.[1] RCN, the nation's first and largest facilities-based competitive provider of bundled phone, cable television, and high-speed Internet services with operations in 5 of the 10 largest markets in the United States, urges the Commission to retain the existing prohibition on exclusive arrangements for distribution of vertically integrated programming to protect competition. The prohibition has been crucial to the development and preservation of competition in the multichannel video programming distribution ("MVPD") market. Moreover, based on the experience of competitors in enforcing the current program access rules, and on the Commission's decisions in the context of several recent merger proceedings adopting program

[1] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. *07-29*, FCC 07-7 (Feb. 20, 2007).

access conditions and enforcement mechanisms in addition to those currently contained in the Commission's rules to protect access to "must have" programming, it is clear that several modifications to the Commission's current rules are necessary in order to safeguard competitive access to critical "must have" programming. The Commission should not have to rely on the happenstance of **a** merger in order to assure that programming that is critical to the development of competition is available to new entrants – it should use this proceeding not only to extend the current sunset but also to review the rules and revise them as necessary to assure that MVPDs are not able to use "must have" programming to "engage in unfair methods of competition or unfair or deceptive acts or practices" in violation **of** Section **628 of** the Act.

INTRODU AND UND

Congress and the Commission have repeatedly acknowledged that access to programming is vital to video competition and have taken measures to assure such access. Congressman Tauzin, one of the principal architects of the Cable Act of 1992, which contained what is now Section **628** of the Communications Act, stated in 1998 that:

> In 1992, **we** awakened to the **sad** realization that we had **forgot** one crucia! element, and that was that cable controlled programming. And that controlling programming was a way of making sure that there would be no competitors. **If** a competitor couldn't get the programming, it certainly wasn't going to launch the satellite or put up the antenna. Or, in fact, even build another cable system in the same community to compete with the [incumbent] cable **company.**[2]

When it extended the initial 10-year term of the Section **628** prohibition on program exclusivity for **an** additional five years, the Commission found that access to vertically integrated programming continued to be necessary "for competitive MVPDs to remain viable in the

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[2] Testimony of Representative Billy Tauzin before the Senate Commerce, Science **and** Transportation Committee, July 28, 1998, Tr. at **6.**

marketplace."[3] Furthermore, just this year the Commission again acknowledged the "lack of competition in the video market" and the need to eliminate entry barriers that limit the "interrelated federal goals of enhanced cable competition and broadband deployment."[4] Given that the control wielded by incumbent operators over access to programming has been and remains an essential input for competitors, the Commission should not have to rely on mergers in order to address critical program access concerns, and it therefore must further extend its critical program access prohibitions because they remain necessary to preserve and protect competition and diversity in the distribution of video programming.

The incentive of incumbent operators to use their control over programming to stymie the development of competition has not changed since Congress enacted Section 628 – if anything, this incentive has increased as facilities-based competition has begun to emerge. As the Commission has noted, the larger the number of subscribers controlled by a provider, the larger the benefits of withholding programming from competitors,[5] and the incumbents have steadily increased the number of subscribers they serve and, in the case of the facilities-based incumbents, their concentration in "clustered" markets in order to more fully be able to use program access as a weapon to defend their dominant position against new entrants.

It is indisputable that new entrants need reasonable access to the most popular programming, and especially the types of programming that cannot be duplicated by a new entrant, in order for the new entrant to become a viable choice for consumers. Although there is

[3] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* **Report and Order, 17 FCC Rcd 12124, 159** *(2002)* **("***2002 Sunset Order").*

[4] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984* **as** *amended by the Cable Television Consumer Protection and Competition Act of 1992,* **Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180, ¶¶ 1, 28 (rel. March** *5, 2007) ("Local Franchising Order").*

[5] *2002 Sunset Order* **at ¶** *38.*

certainly more programming available today than there was in 1992 (and even in 2002), the most-watched and commercially most important programming is increasingly produced by a limited number of entities who are either vertically integrated with, or influenced by the huge buying power and number of "eyeballs" controlled by, incumbent operators. For example, Comcast appears to have adopted ownership or control of local and regional sports programming as a device to maintain a competitive advantage in the market.[6] Sports programming is indisputably "must have" programming and in order to effectively sell against an entrenched competitor a MVPD must be able to offer a full sports lineup of local and regional sports and, given the transience of many consumers in RCN's markets, out of region and national sports as well.

"Must have" programming is programming that has no close substitutes and cannot be duplicated no matter how much time and money are committed. Clearly, sports programming is "must have" programming. In addition to sports, much kids programming is "must have" because there are no substitutes and cannot be duplicated (for example, PBS Kids and the programming it offers, is essential for families with small children), and film libraries are similarly "must have" for video on demand offerings (there is only one Gone with the Wind). Competitive MVPDs continue to confront serious problems retaining subscribers when access to such "must have" programming is denied.

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[6] Comcast is already integrated with the regional sports channels in three of RCN's five major markets (Chicago, Philadelphia and Washington, D.C.) and recently announced a deal to become affiliated with the regional sports channel in Boston. *Comcast Shooting for Celtics TV deal would give it leverage over rivals,* THE BOSTON GLOBE, Feb. 27, 2007, at C1. It also has made an inroad into local sports in our fifth market – New York City – by entering into a partnership to deliver Mets baseball. Press Release, "Time Warner Cable and Comcast Announce Deal with Sterling Entertainment Enterprises, LLC to Launch Regional Sports Network," Oct. 11, 2004 at http://www.timewarner.com/corp/newsroom/pr/0,20812,713890,00.html. *See also, Growing number of professional sports teams start own TV networks*, THE ASSOCIATED PRESS, Jan. 6, 2006.

I. MVPD COMPETITION HAS NOT DEVELOPED TO AN EXTENT THAT WARRANTS ELIMINATION OF THE EXCLUSIVITY BAN

While franchised cable providers' share of the national MVPD market has declined, according to FCC statistics they still retain over **69** percent of pay television subscribers nationwide[7] and, together with DBS operators, they retain over 90 percent of that market.[8] According to the NCTA, all facilities-based overbuilders together serve only 0.7 percent, and while incumbent cable and DBS operators offer service to over 90 million subscribers nationwide, overbuilders only serve roughly 1 million.[9] By any realistic standard, therefore, incumbent operators remain the dominant video providers in both the national and local video delivery markets and, with respect to their relative ability to deliver consumer "eyeballs" to programmers, the satellite operators also have a significant purchasing advantage over new entrants such as RCN and other "triple play" overbuilders.

The Commission found in 2002 that the dominant position of incumbent operators, together with their control of "must have" programming provided an incentive for those companies to act anti-competitively,[10] and that the vital and vibrant competitive marketplace that Congress sought to develop when it implemented the program access and exclusive contract prohibition did not yet exist.[11] Five years later, DBS operators have gained significant ground against the cable companies and, in the case of DirecTV have become vertically affiliated with

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[7] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 8 (2006) ("As of June 2005, 69.4 percent of MVPD subscribers received video programming from a franchised cable operator.. ..") (*"Twelfth Annual Report").* Although it calculated this percentage to be somewhat lower than did the Commission, the National Cable & Telecommunications Association acknowledges that as of September 2006, incumbent cable operators held 66.9 percent of the MVPD customers. *Ex Parte* letter from Daniel L. Brenner, National Cable & Telecommunications Association (""NTA"), to Marlene H. Dortch, MM Docket No. 92-264, at 4 (Mar. 16, 2007) (*"NCTA Letter").*

[8] *NCTA Letter* at 4.

[9] *NCTA Letter* at 4.

[10] *2002 Sunset Order* at ¶ 53.

[11] *Id.* at ¶ 45.

video programming providers and, as noted in Section III, *infra*, has correspondingly gained significant ground in its ability to negotiate its own exclusives with third party vendors. However, incumbent cable companies clearly remain the dominant providers and continue to control even more "must have" programming than they did in 2002. *Also,* as noted above, by NCTA's own admission, although new video programming providers continue to enter the market, as of September 2006 they only served 0.7 percent of MVPD subscribers – hardly a sufficient threshold to provide adequate competition to incumbent cable providers.[12] Clearly, a competitive landscape does not yet exist to permit the elimination of statutory protections and protections must be retained.

Moreover, even though the overall national percentage of incumbent cable subscribers has dropped somewhat, the Commission has found, time and time again, that national market share is not the only relevant area for competitive analysis.[13] Incumbents, triple play overbuilders, and DBS companies compete for subscribers one community at a time, one home at a time, within a local market. As a result, "the relevant geographic market for MVPD service is local because consumers make decisions based on the MVPD choices available to them at their residences.. .."[14] Since incumbent cable providers remain the dominant MVPD providers both nationally and, even more importantly, locally, they continue to have the market power to act anti-competitively toward existing and new entrants, and any erosion of their total number of

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12 *NCTA Letter* at 4. *See also Twelfth Annual Report* at ¶ 8.

13 *See Applications for Consent to Transfer of Control of Licenses from Comcast Corporation and A&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 90 *(2002)* ("*Comcast/AT&T*"); *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd 473, 162 *(2004)* ("*Hughes/News*").

14 *See 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, et al.,* Memorandum Opinion and Order, 21 FCC Rcd *8203,* ¶ 64 *(2006)* ("*Adelphia*").

subscribers provides additional, not less, incentive to act anti-competitively in an attempt to stem the flow of those subscribers to other providers.

The local market is also the basis of the Commission's analysis and determination of effective competition in the area of cable rate regulation and, in that arena as well, the facts **show** that incumbent cable companies continue to dominate the market.[15] In 2001, there were 33,000 cable communities in the country and only 419 (approximately 1 percent) had been certified by the Commission as being subject to effective **competition.**[16] Nearly three years later, the number of communities with certified effective competition had grown to 1,241; still only **3.7** percent.[17] Effective competition in **3.7** percent of the country is a clear indication that incumbent cable providers are still the dominant video delivery **method.**[18]

Increased consolidation of incumbent cable operators **has** led to a greater concentration of clustered systems and control of vertically integrated programming, which makes the exclusivity prohibition more, not less, important today. In the last five years, incumbent cable operations had **an** unprecedented expansion **of** regional clusters, producing increased **market power for** carriage negotiations on both a national and regional basis.[19] The Commission previously found

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[15] ***See*** **47** C.F.R. **§ 76.905** (providing that **an** evaluation of effective competition is based **on** the cable operator's franchise area).

[16] 2002 ***Sunset Order*** at ¶ 45; ***Annual Assessment of the Status of Competition in the Market for the Delivery of Videoprogramming, Eight Annual Report,*** 17 FCC Rcd 1244, ¶ 120 ***("Eight Annual Report").***

[17] ***Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,*** Eleventh Annual Report, **20** FCC Rcd **2755,136 (2005)** ***("Eleventh Annual Report").***

[18] The Commission has also found that a second wireline competitor **has** a significant impact on reducing the price of video delivery on average by **15%.** However, due to the **high** barriers to entry, few consumers have access to a second wireline provider. ***Local Franchise Order*** at ¶ *50* ("The record demonstrates that new cable competition reduces rates far more than competition from **DBS.").** ***See*** also Statement of Chairman Kevin J. Martin, ***Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992,*** Report on Cable Industry Prices, **21** FCC Rcd **15087,15126** (2006) ("[T]he presence of a **DBS** operator does not have **an** impact on the price the cable operator charges its subscribers. Significantly, however, where a second cable operator is present, cable prices are significantly lower...."); ***Twelfth Annual Report,*** ¶ **144** ("Relatively few consumers, however, have a second wireline alternative, such **as an** overbuild cable system, **as** indicated by the small number of subscribers to BSPs [broadband service providers] **and** the limited entry of LEC **thus** far.").

[19] ***See, e.g. Comcast/AT&T; Adelphia.***

that clustering can be used anti-competitively and present a barrier to entry for facilities-based "overbuilder" cable companies? In fact, the Commission determined that clustering coupled with increased vertically integrated regional networks amplifies "the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."[21]

11. RETENTION OF THE EXCLUSIVITY BAN REMAINS CRUCIAL FOR ACCESS TO VERTICALLY INTEGRATED PROGRAMMING

Given the current state of the market, the current program access rules remain as important today as at any time since 1992. The Commission has determined that access to vertically integrated programming is "necessary in order for competitive MVPDs to remain viable in the marketplace."[22] Indeed, competitive MVPDs depend upon access to commercially valuable programming to develop their service and subscriber base as much today as five years ago. Prohibiting exclusive agreements between vertically integrated cable operators and their programmers therefore remains crucial to permit access to "must have" programming and other important programming that they control through vertical integration.

The amount of such programming is astounding. As of 2005, 116 satellite-delivered networks were vertically integrated with a cable operator and owned, in whole or in part, by either Comcast, Time Warner, Cox, Charter, or Cablevision – five of the top seven cable operators? An elimination of the exclusivity prohibition would allow those five cable operators to prevent competitors from accessing over one hundred networks. Further, the incumbent cable

[20] *Adelphia* at ¶ 71.

[21] *2002 Sunset Order at* ¶ 47. *See also Twelfth Annual Report* at ¶ 156 ("Possible detrimental effects can include unfair methods of competition, discriminatory conduct, and exclusive contracts that are the result of coercive activity.").

[22] *2002 Sunset Order* at ¶ 59 ("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.").

[23] *Twerfih Annual Report* at ¶ 21.

operators do not need to control all essential content to adversely influence market shares among competitors but only control selective programming that **is** crucial to each demographic market. Regulations such **as** the prohibition on exclusives provide necessary significantly limit to the anti-competitive actions of incumbents.

As the Commission has explained, there are services for which there may be substitutes, services for which there are imperfect substitutes, and services for which there are no close substitutes at **all**.[24] Although a cable operator should not be compelled to make available to its competitors a program which could essentially be duplicated by such competitors, competitors must be **given** access to programming which cannot be duplicated or replicated no matter how much time and money a competitor may commit. Sports programming, for example, falls in to the category of "must have" programming because there are no substitutes available to competitors and **an** MVPD's ability to compete effectively will be significantly harmed if denied access to such programming? **And,** although **sports** programming is the most often cited **type** of "must have" programming since it's the type of programming that has most often been used by incumbents for competitive advantage, much other cable programming -- "be it news, drama, music, **sports,** or children's **programming"**[26] – is equally essential to competition.

But sports does offer a good example. Access to regional sports networks is vital and should not be foreclosed by allowing exclusivity contracts for important programming streams. Without access to regional sports Programming, competitors will be **hard** pressed to secure the necessary number of customers needed **to** succeed. Studies have shown that subscribers to the incumbent cable provider are reluctant to switch to a new cable company that may be unable to

24 *Adelphia* **at ¶ 42;** *Hughes/News* **at ¶** ***126.***

25 *Id.* ***See also 2002 Sunset Order*** **at ¶** ***69.***

26 ***2002 Sunset Order*** **at ¶ 33-34.**

provide coverage of local sports teams? As discussed below, RCN has experienced problems over the years obtaining access to regional sports networks programming thereby hindering its ability to effectively compete.

- In Philadelphia, Comcast initially denied RCN access to its SportsNet programming. Comcast is the dominant cable provider, owns the SportsNet regional sports network, and has a controlling interest in the Philadelphia Flyers National Hockey Team, the 76ers National Basketball team and the two local area sports arenas. Comcast later agreed to make the network available, on a short-term basis, when faced with a Department of Justice review of its acquisition of Home Team Sports in the Washington, DC market.

- In New York City, Cablevision denied RCN access to the overflow programming from its sports regional sports networks, Madison Square Garden Network, Inc. and the Fox Sports Net – New York. RCN filed a program access compliant in October 1999, which was denied because the programming was delivered terrestrially.[28]

Incumbent cable operators have also acknowledged the importance and uniqueness of these regional sports programming and yet used the denial of access as an anticompetitive tactic. Comcast and Time Warner have admitted that access to regional sports programming is essential and that without that programming, competing MVPDs will risk losing subscribers.[29] In addition, even though the Commission has determined that a temporary denial, or the threat of temporary denial to programming, is an anticompetitive tactic to improve a bargaining position "to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier,"[30] incumbents continue to use this tactic. RCN's attempt to retain carriage of the PBS Kids Sprout programming demonstrates the access

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[27] RCN's own survey has determined that approximately 40 to 58% of subscribers would refuse to change cable providers to a start up company if that it did not carry local sports programming.

[28] *See RCN Telecom Services of New York, Inc., Complainant v. Cablevision Systems Corporation, Madison Square Garden Network, Inc. and Fox Sports New-New York, Defendants*, Memorandum Opinion and Order, 16 FCC Rcd 12048 (2001).

[29] *Adelphia* at ¶ 124 ("Applicants [Comcast and Time Warner] acknowledge that an MVPD that drops local sports programming risks subscriber defections and that MVPDs 'will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights.'").

[30] *Adelphia* at ¶ 121.

problems competitors continue to face. The PBS children's programming is "must have" programming for a cable system trying to provide educational and informational programming for younger children. Prior to Comcast's acquisition, RCN received the PBS Kids programming from TVN as part of a video on demand ("VOD") package called Kids Unlimited. After a joint venture between Comcast and PBS was formed, RCN experienced a series of difficulties in retaining accessing that programming. After weeks of unanswered inquiries to Comcast regarding the programming, RCN was informed that it would continue to have access to the PBS Kids programming only if it also agreed to air "Sprout," a venture in which Comcast is a partner. In April 2005, RCN lost access to the PBS programming after only 30 days notice and experienced at 83% drop in usage of its children's VOD service. As a result of Comcast's control of the programming, its insistence of tying the PBS programming services to its own channel and its anticompetitive pricing strategy, RCN experienced significant cancellations of the VOD service.[31] While RCN was ultimately able to regain access to the PBS Kids programming, the harm to its subscribers has already occurred.[32]

Denial of access is not the only anticompetitive tactic RCN has faced. Even when RCN has access to important programming, it pays rates far higher than the incumbent cable providers are required to pay. Generally, incumbent providers pay one rate, usually based on a volume discount, while competitors like RCN pay a different, far higher rate. The Commission has

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[31] Comcast has also used RCN's inability to access important programming as a selling point to potential customers. Comcast refused to wave its exclusive rights to the Boston based New England Cable News, a regional news programming service. While RCN was later able to obtain access to this network, Comcast used RCN's inability to provide this programming as a selling point to Comcast customers. *See* Comments of RCN Corporation, MB Docket No. 03-172, at 8 (Sept. 11,2003).

[32] Subsequently, in 2006, Comcast sought to require providers to use its wholly owned Comcast Media Center rater than TVN as the sole distribution vehicle to access the PBS Kids VOD content. *See* RCN Corporation *Ex Parte* letter, MB Docket No. 05-192 (May 19,2006). After this new issue had been raised in the context of the Adelphia merger proceeding, a deal was negotiated that permitted TVN to continue distributing the VOD content.

determined that "targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive **entry**."[33] Due to that pricing incentive, the Commission imposed conditions on companies in the ***Hughes/News*** and ***Adelphia*** proceedings for RSNs.[34] Other providers have similar pricing incentives **and** the Commission should ensure that the program access rules adequately protect competitors **from** any anticompetitive pricing tactic regarding **RSNs.**

The incentive to engage **in** these **types** of activities against new entrants sill clearly exists. Indeed, the incentive of incumbents **to** engage in them can only have increased given the efforts of well-financed local telephone companies to enter the cable market. If these abuses have occurred with the Commission's exiting rules in place, it is difficult to imagine the types and scale of the abuses that would occur in the absence of Section **628** protections. Accordingly, the Commission must extend its rules.

III. THE COMMISSION SHOULD *ALSO* PROHIBIT EXCLUSIVE AGREEMENTS BY MVPDS WITH THIRD PARTY PROVIDERS OF "MUST HAVE" P[illegible]MMI[illegible]

The Commission has clearly found that there are certain types of programming that is "must have" in the sense that it is popular programming for which "no good substitute exists" and that **if** competitive MVPDs are "deprived of **only** some of this 'must have' programming, their ability to retain subscribers would be **jeopardized**."[35] **As** the Commission stated in 2002,

> **...** cable programming – be it news, **drama, sports,** music, or children's programming – is not akin to ***so*** many widgets. Cable programmers strive to build **an** identity for their channel that is recognizable and sought-after by viewers. For example, when **an** MVPD

[33] ***Comcast/AT&T*** **at ¶ 120.**

[34] ***Adelphia*** **at ¶ 159. The Commission also acknowledged that "an MVPD's ability to gain access to RSNs** and **the price and other terms** of **access can** be **important facts in** its **ability to compete with rivals."** ***Adelphia*** **at ¶ 124.**

[35] ***2002*** **Sunset** ***Order*** **at ¶ 33-34.** ***See also Adelphia*** **at ¶ 122-124 (finding that regional sports programming meets the "must have" definition).**

> loses access to a popular news channel, there is little competitive solace that there is a music channel or children's programming channel to replace it. Even where there is another news channel available, an MVPD may not be made whole because viewers desire the programming and personalities packaged by the unavailable news channel. Moreover, even if an acceptable substitute is found, the competitive MVPD is still harmed because its competitor can likely offer to subscribers both the unavailable programming and its substitute. Thus, there is a continuum of vertically integrated programming, ranging from services for which there may be substitutes (the absence of which from a rival MVPD's program lineup would have little impact), to those for which there are imperfect substitutes, to those for which there are no close substitutes at all (the absence of which from a rival MVPD's program lineup would have a substantial negative impact). ...
>
> The more that the programming package offered by a competitive MVPD lacks the "must have" programming that is a part of the incumbent cable operator's programming package (i.e. the new entrant offers a similar but differentiated product) the less attractive the competitive MVPD's programming package will be to subscribers."[36]

Although the Commission's orders with respect to "must have" programming have to date directed their remedies to vertically integrated programming, and declined to expand the prohibitions to the same types of "must have" programming that is distributed by entities which are not vertically integrated with an MVPD,[37] the rationale for relief applies equally to both types of programming – popular "must have" programming that is not duplicable by competitors is just as important to competition regardless of whether the source of that programming is integrated with an MVPD's competitor or is instead the subject of an exclusive contract between that competitor and a non-integrated programmer, Simply put, it is just as damaging to new entrants if an incumbent has the size and resources to lock up an exclusive third party contract for "must have" programming as it is for that incumbent to buy the source of that programming and then exclude competitors from accessing it.

Although the Commission's 2002 Sunset Order noted that a variety of programming can be categorized as "must have," the clearest example of such programming is sports

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36 *2002 Sunset Order* at ¶ 33-34.

37 *E.g., 2002 Sunset Order* at ¶ 74; *Hughes/News* at ¶ 291

programming. Indeed, in both the ***Hughes/News*** and the ***Adelphia*** proceedings, it was sports programming that generated the most significant concern and constituted the focus of the merger conditions imposed by the Commission. But while those decisions focused on the operators' ownership of regional sports programming, national sports programming is no less important or any more substitutable to a subscriber – to a transplanted Bostonian, the Red **Sox** are the only important baseball team, and substituting the Yankees simply won't cut it **as** a competitive matter. National sports are, like local and regional sports, "must have" from a competitive standpoint.

As recently expressed by Senator Kerry, in commenting on the stories of a new exclusive baseball agreement between Major League Baseball and DirecTV, which will reportedly exclude 60 millions **fans** across the country that currently enjoy access Major League Baseball "Extra Innings":

> "[t]his deal, by definition, reduces consumer choice and competition in the media market. Fans who want to purchase Extra Innings will be forced to pay whatever DirecTV charges, **and** those who cannot subscribe to DirecTV, like some apartment building residents, will have no option at all. ***In short, MLB and DirecTV will pocket millions of dollars at the expense of millions of American consumers and real competition in the marketplace.***"[38]

Senator Kerry also stated:

> "I **am** opposed to anything that deprives people of reasonable choices. In **this** day **and** age, consumers should have more choices – not fewer. I'd like to know how this serves the public – **a** deal that will force **fans** to subscribe to DirecTV in order to tune in to their favorite players. **A** Red **Sox** fan ought to be able to watch **their** team without having to switch to DirecTV," said **Kerry.**[39]

[38] **Letter from Senator** John **Kerry to Chairman Kevin** Martin, **Feb. 1,2007 (emphasis added) (Attachment A). In response, the Chairman indicated that he shares Senator Kerry's concerns about the exclusive arrangement and that the Commission has "contacted the parties and requested additional information about the proposed arrangement." Letter from Chairman Kevin** J. Martin **to The Honorable John Kerry,** Feb. **22,2007 (Attachment B). See** ***also*** **Press Release, "Senate to Hold Hearing on MLB-DirecTV Squeeze Play," Feb. 16,2007 (Attachment C).**

[39] **Press Release, "Kerry to Question FCC Chairman Over DirecTV-Major League Baseball Deal," Jan. 31,2007 (Attachment D).**

Moreover, Senator Kerry is not the only member of Congress who has suggested that access to unaffiliated sports programming is necessary. Senators Stevens and Inouye previously introduced legislation that would have prohibited exclusives for live sporting events regardless of whether a vertical affiliation existed between a programmer and a cable distributor.[40]

As DirecTV's President recently told Wall Street, "sports is the strongest force in television" and DirecTV is a sports content leader though its exclusive services like NFL Sunday Ticket, and NASCAR.[41] A few weeks later, he also told Wall Street that "if you look at [some] of the new things that are coming to television, they're all driven by sports. I mean it is the most powerful programming out there."[42] Sports programming is indisputably "must have" programming, and such designation should not be distorted depending on the corporate identity of the entity that produces it – to a fan, the Redskins are the Redskins, no matter whether distributed though an MVPD affiliate or through an exclusive agreement between an MVPD and the NFL. Denial of unaffiliated "must have" programming is clearly just as detrimental to competition as affiliated programming – consumers, after all, do not care whether their favorite sports team is carried over a channel that is affiliated or unaffiliated with an MVPD, they just want to watch their favorite team's games.

RCN submits that although vertically integrated programming was the primary focus of Congress when it adopted Section 628, the prohibitions therein against "unfair methods of competition or unfair or deceptive acts or practices, the purpose of which is to hinder

---

40 Communications, Consumer's Choice, and Broadband Deployment Act of 2006, S. 2686, at 86 (introduced May 1,2006).

41 Transcript of DTV - Q4 2006 The DirecTV Group, Inc., Earnings Conference Call, at 9 (Feb. 7, 2007).

42 Transcript of DTV - The DirecTV Group, Inc. at Bear, Steams 20th Annual Media Conference, at 7 (Mar. 6,2007).

significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers" apply to cable operators regardless of whether they are affiliated with a programming vendor or not. Specifically, Section 628's prohibitions apply to "a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, **or** a satellite broadcast programming vendor" – there is no requirement that a cable operator be affiliated with a programming vendor in order to be prohibited from engaging in unfair methods of competition?

Clearly, there is no indication in Section 628 that the prohibition on unfair competition was meant to be limited to a prohibition on practices with respect to program access distributed by vendors affiliated with MVPDs – or, indeed even to program access abuses generally. As the Commission tentatively concluded just last week in its Notice of Proposed Rulemaking with respect to exclusive service contracts for provision of video services in multiple dwelling unit ("MDU") buildings, the prohibition of unfair practices is more general and is similar to the language used in the Federal Trade Commission Act.[44] Moreover, the section requires the Commission to promulgate certain "minimum"[45] regulations to enforce this prohibition – the list of such minimum regulations was clearly not intended to be the sum and substance of the Commission's rules with respect to prohibitions of "unfair methods of competition or unfair or deceptive acts or practices," and RCN submits that the Commission has the authority to adopt additional protections as market conditions evolve and other "unfair methods of competition" that impair competition are found to exist, particularly given its overarching authority under

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43 Section 628(b), 47 U.S.C. §548(b) (emphasis added).

44 *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other real Estate Developments*, Notice of Proposed Rulemaking, MB Docket No. 07-51, FCC 07-32, ¶ 9 (Mar, 27,2007).

45 Section 628(c)(2), 47 U.S.C. §548(c)(2).

Section 4(i) of the Act "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[46]

Therefore, for the reasons set forth above, RCN urges the Commission to carry forward its finding that "must have" programming is essential to competition to address the growing use of exclusive arrangements with third party vendors as a competitive weapon.[47] Certainly, the Commission has already made the findings necessary to designate sports as "must have" programming, and although such findings were made in the context of affiliated regional sports programming, RCN believes the Commission has the statutory authority to extend those findings to exclusive sports contracts between MVPDs and unaffiliated programmers and to apply those obligations to DirecTV in the context of its exclusive contracts with the NFL, NASCAR, college basketball and Major League Baseball,[48] and to other MVPDs who, in the future, may seek to use sports programming exclusives to their competitive advantage. And, although it has been

---

[46] Section 4(i), 47 U.S.C. § 154(i).

[47] To the extent that the Commission disagrees with RCN's reading of its statutory authority to prohibit such anticompetitive acts by cable operators, at a minimum it should look closely at the impact on competition and consumers of such exclusive or unreasonably discriminatory contracts and work with Congress to seek the legislative authority it believes it needs to address the anticompetitive impact of those contracts.

[48] For purposes of this prohibition, RCN submits that satellite operators should be considered a "cable operator." Just as it did when it imposed program access conditions on DirecTV in the context of the *Hughes/News* transaction, the Commission should find that there is no basis for treating DirecTV any differently from other cable operators. who have the ability to use their size, resources and market share to be able to obtain exclusive agreements that are in no way shape or form available to new entrants like RCN. RCN understands that DirecTV has approximately 16 million subscribers nationwide. Since Section 628 was adopted in 1992, DirecTV has become an "incumbent" insofar as it has both the financial resources and the market presence to be able to obtain exclusive deals with sports programming entities such as the National Football League and NASCAR. Moreover, even if considered a "new entrant," Congress does not give new entrants a free pass with respect to program access abuses. For example, in establishing open video systems as an alternative means of entry in 1996, the Congress specifically found that Section 628 program access obligations apply. See Section 653(c)(1)(A), 47 U.S.C. §573(c)(1)(A). Clearly, Congress recognized the importance of program access obligations on all industry participants and did not limit it to incumbent cable operators, and it would turn the Congress' goal of precluding program access abuses on its head to exclude DirecTV from any such obligations. Accordingly, even if DirecTV is not a "cable operator' as defined in Section 602, it is completely consistent with Congress' purpose in adopting Section 628(b) for it to be considered as one for purposes of prohibitions on unfair competition, and the Commission should therefore use its power under Section 4(i), 47 U.S.C. § 154(i), to assure that DirecTV is not exempt from such important prohibitions.

sports, **as** the "most powerful programming out there" (according to DirecTV's President), that **has** provided the most notable example to date of use of third party exclusives for anti-competitive purposes, **sports** is not the only category of programming that can be categorized **as** "must have." **As** the Commission recognized in 2002, other types of programming can also be "must have," and the Commission should very clearly state that, to the extent that an MVPD *can* demonstrate that other, non-sports programming is "must have" from a competitive standpoint, the Commission's program access conditions similarly prohibit exclusive agreements pertaining to such programming.

IV. THE COMMISSION SHOULD ADOPT AN ALTERNATIVE PROGRAM ACCESS DISPUTE REMEDY

The Commission's rules **and** procedures for resolving program access disputes have proven to be ineffective in achieving a prompt remedy for program access abuses, and the Commission has therefore buttressed them in the context of recent merger decisions **to** assure **a** more efficient **and** effective dispute resolution process.* The same types of procedures that have been imposed on a case-by-case basis in these merger proceedings are equally warranted to improve the procedures for program access disputes that may arise with respect to operators who have not had occasion to seek merger approval, **and** RCN therefore strongly encourages the Commission to adopt more generally the "baseball" arbitration procedures adopted in the recent *Hughes/News* and *Adelphia* merger proceedings. RCN submits that the Commission **has** the necessary authority to adopt an alternative remedy and implementing arbitration procedures will allow a cost-effective, timely mechanism for resolving program access disputes.

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49 *See Adelphia*; *Hughes/News*.

A. **<u>Commercial Arbitration Measures Similar to *Hughes/News* and *Adelphia* Should Be Adopted</u>**

The Commission implemented a commercial arbitration remedy for regional sports networks ("RSNs") in the *Hughes/News* and *Adelphiu* proceedings to provide "a neutral dispute resolution forum [as] a useful backstop" to ensure that MVPDs are not forced to accept undesirable programming concessions.[50] This remedy provides an aggrieved MPVD with the ability to submit for arbitration a program access dispute whereby each side submits its best offer and the arbitrator chooses one of the two offers. Moreover, the Commission required a "standstill agreement" as part of the arbitration remedy while dispute resolution is pending. A standstill agreement ensures that an aggrieved MVPD has continued access to programming under an existing or expired contract thereby limiting a programming vendor's ability to use temporary foreclosure to affect negotiations.

The rationale for adopting an arbitration remedy in *Hughes/News* and *Adelphiu* proceedings applies equally in the context of negotiations with other distributors which may also seek to foreclose programming or implement objectionable concessions. The goal is to have parties reach agreement "prior to a complete breakdown in negotiations" and to avoid "the possibility that a relatively extreme offer of the other side may be selected by the arbitrator."[51] Vertically integrated programmers besides those subject to the Commission's arbitration conditions in *Hughes/News* and *Adelphiu* have similar incentives to use temporary foreclosures during negotiations. Thus, the Commission should authorize MVPDs to demand commercial arbitration like *Hughes/News* and *Adelphia* when negotiations fail to produce mutually-acceptable prices, terms and conditions, and to have available a standstill mechanism while the

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[50] *Adelphia* at ¶ 173.

[51] *Hughes/News* at ¶ 174.

arbitration is pending. The standstill agreement procedures should expressly provide that (1) an aggrieved MVPD has the right to continued carriage pending resolution **of** the dispute, (2) the price, terms and conditions **of** the existing contract or a recently expired contract will apply pending resolution, **(3)** sale of disputed programming is not required pending resolution **if** no carriage agreement had previously existed between the parties, and **(4)** any new price will be applied retroactively to the date the dispute was filed.

In addition, the Commission should add a discovery rule that requires programmer's carriage contracts to be made available, including in the context of an arbitration, upon request of a MVPD and subject to confidential treatment in accordance with Section 76.9 **of** the Commission's rules. Such agreements are essential for determining whether the programmer is discriminating in the price, terms and conditions between a complainant and the incumbent. Programmers currently impose restrictive confidentiality **and** non-disclosure requirements on their contracts which prevent other buyers from knowing whether the rates, **terms** and conditions offered are consistent with the rates, terms and conditions provided to affiliated MVPDs and competitors. The only basis for securing rates from disclosure is to keep other competitors from knowing whether they are being discriminated against. Permitting transparency of rate information will assist in determining whether a proposal is reasonable and non-discriminatory or would result in ***de facto*** discrimination.

B. The Commission Has Authority to Adopt An Arbitration Remedy

The Commission **has** been charged with the administration of the **Cable** Act, which includes adjudication of program access disputes provided for under Section **628.**[52] Moreover, the Commission has broad authority under Section 628(e) to "include any remedy the

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[52] ***Local Franchising Order* at ¶ 55.**

Commission reasonably deems **appropriate,"**[53] and remedies may include implementing a dispute resolution process through an adjudicatory proceeding.[54] The Commission **has** already viewed commercial arbitration **as** a **"remedy."**[55] Consequently, the Commission **has** the authority to adopt commercial arbitration procedures to resolve program access disputes.

The Commission also has the authority to delegate adjudication of a commercial arbitration remedy to a third-party arbitrator. The Commission has broad rulemaking authority pursuant to Section 303(r) to implement rules **and** regulations "as may be necessary to carry out the provisions of this Act."[56] *Also,* pursuant to Section 4(i) and (j), the Commission may **perform** any **and** all acts "as may be necessary in the execution of its functions"[57] and may "conduct its proceedings in such manner **as** will best conduce to the proper dispatch of business and to the ends **of justice."**[58] Delegating adjudication of program access disputes to a **third-party** arbitrator is therefore within the Commission's statutory authority.

CONCLUSION

The Commission cannot deny that incumbent cable operators possess national and local market power, notwithstanding the competition from other MVPDs like **DBS and** new entrants. Such market power provides incumbents **with** incentive to practice anticompetitive tactics to prevent access to vertically integrated programming. Accordingly, the ban on program exclusivity should remain for another 5 years **with** the understanding that it might be further

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[53] ***Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage,*** **Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10** FCC **Rcd 1902 (1994).**

[54] 47 **U.S.C.** § 548(d), **(f).**

[55] ***Hughes/News Order*** **at** ¶ 177.

[56] 47 **U.S.C.** § 303(r).

[57] **47** U.S.C. **§ 154(i).**

[58] 47 **U.S.C.** § 154(j).

extended, and the Commission should develop rules to address the growing use **of** anti-competitive exclusive contracts by MVPDs that are equally detrimental to competition in the cable market. In addition, the Commission should implement a commercial arbitration remedy similar to the *Hughes/News* and *Adelphia* proceedings to provide a more cost-effective, timely mechanism **for** resolving program access disputes.

Respectfully submitted,

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Dated: April 2,2007

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<u>Attachment A</u>

Senator Kerry Letter to Commissioner Martin

SENATOR John Kerry

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RESULTS

02/01/2007

Kerry Asks FCC to Probe DirectTV 'Extra Innings" Deal

WASHINGTON, DC - Today, Sen. John Kerry sent the following letter to FCC Chairman Kevin Martin, asking him to review a pending business agreement between DirectTV and Major League Baseball, concerning its "Extra Innings" game package.

Below is the text of the letter;

The Honorable Kevin Martin Chairman Federal Communications Commission 445 12th Street SW Washfngton, DC 20554

Dear Chairman Martin:

I write regarding the pending agreement between Major League Baseball

Boston
One Bowdoin Square
Tenth Floor
Boston, MA 02114
(617)565-8519

Springfield
Springfield Federal Building
1550 Main Street
Suite 304
Springfield, MA 01101
(413)785-4610

Fall River
222 Milliken Place
Suite 312
Fall River, Ma 02721
(508)677-0522

(MLB) and DirectTV to offer MLB's "Extra Innings" package of out-of-market baseball games exclusively to DirectTV subscribers. I have serious concerns regarding this deal that I ask you to address.

As you know, Extra Innings is currently available to 75 million subscribers through cable as well as DirectTV and the Dish Network. However, if this exclusive deal is approved, only 15 million DirectTV subscribers will be able to purchase Extra Innings, leaving 50 million Americans without access to out-of-market games that they currently enjoy and a viable alternative to view them.

This deal, by definition, reduces consumer choice and competition in'the media market. Fans who want to purchase Extra Innings will be forced to pay whatever DirectTV charges, and those who cannot subscribe to DirectTV, like some apartment building residents, will have no option at all.

In short, MLB and DirectTV will pocket millions of dollars at the expense of millions of American consumers and real competition in the marketplace.

Many baseball teams have a dedicated national fan base. In the case of my hometown team, Red Sox Natlon stretches all across our country from coast to coast. I am concerned that this deal, and others that may follow, will separate fans from their favorite teams and reduce competition in the sports market. I therefore request that you Investigate this exclusive deal and report to Congress on its implications for consumers and recommend any changes to law or regulation that will ameliorate its negative effects.

Sincerely,

Senator John Kerry

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Attachment B

Commissioner Martin Letter to Senator Kerry

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

The Honorable John Kerry
United States Senate
304 Russell Senate Office Building
Washington, DC 20510

Dear Senator Kerry:

Thank you for your letter regarding the pending agreement between Major League Baseball (MLB) and DIRECTV to offer MLB's "Extra Innings" package of out-of-market baseball games exclusively to DIRECTV subscribers.

I share your concerns regarding this proposed deal. I understand that the Extra Innings package, which includes dozens of out-of-market MLB games each week, has been available to 75 million MVPD subscribers for the last several years and would no longer be available to all MVPD subscribers if DIRECTV obtained rights from MLB.

I am concerned whenever consumers cannot purchase the programming they want or are forced to purchase programming they don't want.

As you request, we have contacted the parties and requested additional information about their proposed arrangement. Once we have this information, we will report to you on the deal's implications for consumers and any recommended changes to the law to ameliorate any harms to consumers.

Thank you for your interest in this matter. If I can be of further assistance with this or any other matter, please do not hesitate to contact me.

Sincerely,

Kevin J. Martin
Chairman

Enclosures

Attachment C

Senator Kerry Feb. 16,2007 Press Release

SENATOR John Kerry
REPRESENTING THE BIRTHPLACE OF AMERICA

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Press Office

RESULTS

02/16/2007

Senate to Hold Hearing on MLB-DirectTV Squeeze Play

Kerry says proposed "Extra Innings" deal would cheat millions of baseball fans

WASHINGTON, DC - Sen. John Kerry announced today that the Senate's Commerce Committee will hold a hearing on a proposal deal that will make it hard - if not impossible - for many die-hard baseball fans to follow their favorite teams this season. Kerry said he wanted to review federal guidelines in this area and explore whether it was appropriate for Congress to take action. Kerry is a senior member of the Senate's Commerce Committee, which has oversight over sports carriage issues.

"By deflnition, this deal with reduce choices for fans," said Kerry. "I have serious problems with any mega-deal that makes it harder for people across the country to follow their favorite baseball team. I'm especially troubled by this agreement, which I believe is not in the best long-term interests of the sport. Major League Baseball is making a short-term

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profit, but they are shutting out fans that can't or won't be able to keep up with their teams If this deal goes through. I appreciate the willingness of Chairman Inouye to organize a full and through airing of this issue."

According to numerous published reports, Major League Baseball has arranged a $700 million exclusive deal with DirecTV for carriage of the popular "Extra Innings" baseball package which allows out-of-market fans to follow their teams. This package will strip access from current cable and satellite subscribers.

Under the new deal, "Extra Innings" would only be available to the 15 million people who subscribe to DirecTV, cutting out 60 million fans across the country that currently enjoy access. Since many cable subscribers are not able to subscribe to satellite service even if they want to, some fans will completely lose access to the games. Two weeks ago, Sen. Kerry asked the Federal Communications Commission to examine the proposed deal; he is still awaiting a response from that agency.

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Attachment D

Senator Kerry Jan. 31,2007 Press Release

SENATOR John Kerry

REPRESENTING THE BIRTHPLACE OF AMERICA

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304 Russell Bldg.
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Washington D.C.
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Press Office

RESULTS

01/31/2007

Kerry to Question FCC Chairman Over Direct TV-Major League Baseball Deal

WASHINGTON, DC – Senator John Kerry said today that he intends to seek answers from the FCC about a pending DirectTV deal that could make it harder for baseball fans to watch their favorite teams. The issue centers on a plan to shift the "Extra Innings" baseball package to DirectTV as part of a $700 million exclusive deal. According to recent press reports, during the last five years, the Extra Innings package has been available to 75 million people. If the deal goes through, the baseball package will be available to the 15 million people who have DirectTV.

"I am opposed to anything that deprives people of reasonable choices. In this day and age, consumers should have more choices – not fewer. I'd like to know how this serves the public - a deal that will force fans to

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subscribe to DirectTV in order to tune in to their favorite players. A Red Sox fan ought to be able to watch their team without having to switch to DirectTV," said Kerry.

The chairman of the Federal Communications Commission, Kevin Martin, is a witness at a hearing tomorrow of the Commerce, Science and Transportation Committee. Kerry is a member of the committee.

###

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April 2007, a copy of the foregoing Comments of RCN Telecom Services, Inc. was served via electronic mail on each of the persons listed below.

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Danielle Burt

ATTACHMENT 2

Reply Comments of RCN Telecom Services, Inc.
MB Docket No. 07-29 (filed April 16,2007)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	
Development of Competition and Delivery In Video Programming Distributions Section 628(c)(5) of the Communications Act For Authority to Transfer Control	)	MB Docket No. 07-29
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF RCN TEI E(SERVI IN

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Counsel for RCN Telecom Services, Inc.

Dated: April 16,2007

TABLE OF CONTENTS

SUMMARY

The multichannel video delivery market has not yet developed into a robust competitive marketplace. Incumbent cable providers continue to dominate the market as well as control the majority of important and competitively critical programming. Mere predictions of increased future video competition by telecommunications and VoIP providers cannot justify abandonment of the program access protections that are essential for such competition to grow. As the record in this proceeding clearly demonstrates, the exclusivity prohibition remains vital and necessary to ensure competition continues to develop.

Although to date the Commission has only applied the exclusivity prohibition to vertically integrated programming, certain non-vertically integrated "must have" programming is just as essential to the growth and continued health of a competitive video services market. This type of programming, which is critical to consumers and cannot be substituted or duplicated by a new entrant or, indeed, any competitor, is clearly vital to assuring that consumers have a full choice in video providers that is not dictated by the exclusive agreements that it has been able to command, whether by virtue of a vertical affiliation or by virtue of its size, purchasing power, or some other attribute. The Commission should take this opportunity to extend the exclusivity prohibition to include such third party "must have" programming. In addition, the Commission should finally close the "terrestrial loophole" which, regardless of why it is deployed, allows incumbent cable providers to avoid the regulations and cut off access to "must have" programming.

Moreover, as the record clearly shows, the processing of program access complaints has been ineffective. The long delays in decision-making foster anti-competitive behavior and have led smaller competitors to avoid the complaint process entirely. As such, the Commission must

provide for a more equitable binding arbitration process and should institute safeguards such as additional discovery procedures and standstill agreements to ensure that the program access complaint process is **not** used **as another anti-competitive weapon against new competitors.**

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Delivery In Video Programming Distributions Section 628(c)(5) of the Communications Act For Authority to Transfer Control Sunset of Exclusive Contract Prohibition	MB Docket No. 07-29

REPLY COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN'), by its undersigned counsel, hereby submits its reply comments in response to the Commission's Notice of Proposed Rulemaking and the initial comments filed in response thereto.[1] The comments filed in this proceeding overwhelmingly demonstrate that the Commission must continue to protect competition in the multichannel video programming distribution ("MVPD") market by extending the exclusive contract prohibition, extending the prohibition to prohibit exclusive contracts with non-affiliated entities for critical "must have" programming, eliminating the so-called "terrestrial loophole," and providing for alternative dispute resolution during program access complaint proceedings.

[1] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition* Act of 1992, Notice of Proposed Rulemaking, MB Docket 07-29, FCC 07-7 (Feb. 20, 2007).

I. EXTENSION OF THE EXCLUSIVITY BAN IS NECESSARY TO ENSURE VITAL COMPETITION

As the initial comments demonstrate, there is overwhelming support for an extension of the exclusivity ban. Numerous entities, including DBS providers, telephone companies, rural video providers, a government agency, and trade associations filed in support of an extension of the ban.” Not surprisingly, the only entities opposing the extension are two of the largest cable operators and their primary trade association?

Comcast, Cablevision and NCTA predictably assert that the exclusivity prohibition is no longer necessary as the video delivery market has reached a level of sufficient competition.’ However, as RCN, Verizon, AT&T and others demonstrated in their comments, while the number of satellite subscribers has grown, the number of facilities-based video delivery customers has not declined correspondingly.‘ In addition, the movement of some subscribers from incumbent cable companies to satellite delivery does not establish that effective

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[2] See *e.g.* Comments of DirecTV, Inc., MB Docket 07-29 (April 2,2007); Comments of EchoStar Satellite L.L.C., MB Docket 07-29 (April 2,2007) (“EchoStar Comments”); Comments of Verizon, MB Docket 07-29 (April 2,2007) (“Verizon Comments”); Comments of AT&T, MB Docket 07-29 (April 2,2007); Comments of The Rural Independent Competitive Alliance, MB Docket 07-29 (April 2,2007); Comments of the Office of Advocacy, U.S. Small Business Administration, MB Docket 07-29 (April 2,2007); Comments of National Telecommunications Cooperative Association, MB Docket 07-29 (April 2,2007).

[3] Comments of Comcast Corporation, MB Docket 07-29 (April 2,2007) (“Comcast Comments”); Comments of Cablevision Systems Corp., MB Docket 07-29 (April 2,2007) (“Cablevision Comments”); Comments of National Cable & Telecommunications Association, MB Docket 07-29 (April 2,2007) (“NCTA Comments”).

[4] See *e.g.* Comcast Comments; Cablevision Comments; NCTA Comments.

[5] As noted by CA2C, since 2002 DBS subscribership has grown from approximately 18.2 million subscribers to 29 million subscribers, but during that period, cables subscribership has decreased by less than a million subscribers, so despite the growth of DBS, cable operators have maintained their position in the market. See Comments of The Coalition for Competitive Access to Content, MB Docket 07-29, p. 5 (April 2,2007) (“Comments of CA2C”). RCN also supports comments filed by American Cable Association and Organization for the Promotion and Advancement of Small Telecommunications Companies stating that the growth and deployment of broadband is linked to and dependent upon the growth of wireline video providers.

competition exists or, more importantly, that it is sufficient to warrant the sunset of important program access protections.[6]

In addition, those opposing **an** extension of the prohibition base **their** assertion of adequate competition on predictions of future services that have not yet even been fully constructed, let alone begun service. Cablevision states that "AT&T and Verizon are expected to offer video service to 14 million households" yet by their very words they acknowledge that those services do not yet exist.[7] And in **a** March 7, 2007 presentation to a financial industry conference, a Cablevision officer was dismissive of the type of penetration that Verizon is likely to achieve in Cablevision's service area, noting that:

> even **in** New York, where FiOS is deployed there are 600,000 active FiOS passings in the New York market. There are 7 million homes in the New **York** Market in total. **...** [T]hey are very much a traditional type of over builder, and we've seen lots of them in the past. **...** We've seen these over builders come and go, and against good cable operators they get high single digit kind of penetrations against poor operators they get midteens kind of penetration. And there is nothing about FiOS in terms of their existing **or** performance heretofore that would indicate that they are any different than any historic over builder.[8]

And on March **28,** Cablevision's Chief Operating Officer noted that Cablevision's strategy to concentrate in a regional market, and its local "marquee" assets such as Madison Square

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[6] Moreover, while it cannot be disputed that the subscriber base of DBS providers has grown since 2002, the effort by DIRECTV to lock up exclusive sports programming contracts with the National Football League and others demonstrates that it has reached sufficient size and scope so **as** to be able to use programming as a barrier to the growth of wireline competition, **and** far **from** justifying a sunset of the rules, RCN showed in its Comments that the prohibitions should be expanded to cover such exclusive contracts.

[7] Cablevision Comments at p. 12 (emphasis added).

[8] Final Transcript, CVC – Cablevision Systems Corp. at **Bear,** Stearns 20th Annual Media Conference, at 4-5 (Mar. 7, 2007) (Attachment 1). RCN notes that the transcript does not identify the speaker of these remarks, but that it **was** either **Mr.** Tom Rutledge, Cablevisions' Chief Operating Officer, or **Mr.** Mike Huseby, Cablevision's Chief Financial Officer, **see** Attachment **1** at 1.

Garden and the Knicks gives Cablevision a "strategic advantage" even though New York is one of Verizon's initial target **markets.**[9]

In fact, the **NCTA** has acknowledged that franchised cable providers' share of the national MVPD market **is** still over **69** percent and all facilities-based overbuilders together serve only 0.7 **percent.**[10] The incumbent cable providers cannot rely on predictions or "expectations" to provide service in their attempt to prove that the MVPD market currently has sufficient competition today. The Commission must review the status of video delivery competition today and base its analysis of the continuing need for the exclusivity ban, not on expectations of future competition, but on its current condition. To sunset the program access rule based on future predictions of growth would stop such growth in its tracks.

Moreover, while the Internet and mobile video service provide a unique – and nascent – outlet for certain types of video programming, Comcast's suggestion that they currently constitute a service that is equivalent to incumbent cable providers or DBS shows how desperately it has had to search for arguments in support of its position. Those platforms do not yet deliver meaningful channels programming into the home, and at best, they provide a way to view short form videos or individual episodes of programs. To **suggest** that ***"the*** most significant developments"[11] in competition is video over the Internet truly grasps at straws – contrary to Corncast's claim, Google's purchase of YouTube does not demonstrate that the video delivery market has reached the level of competition necessary to justify the sunset of

9 Final Transcript, CVC – Cablevision Systems Corp. at Banc of America Media, Telecommunications & Entertainment Conference, at 9 (Mar. **28, 2007) (Attachment 2).**

10 *Ex Parte* letter from Daniel L. Brenner, National Cable & Telecommunications Association ("NCTA"), to Marlene H. Dortch, MM Docket *92-264,* at 4 (Mar. 16, 2007) ("NCTA Letter")

11 Comcast Comments at p. 10.

program access protections.'" Any suggestion that the ability to watch the neighbor's cat on the Internet is in any way comparable to "must have" programming offered by national cable networks must be squarely rejected. **As** RCN showed in its comments, while **DBS** has grown and, in the case of **DIRECTV,** has become a vertically integrated programming provider itself, incumbent cable providers are clearly still the dominant providers and continue to control even more "must have" programming than they did five years ago.[13]

Moreover, as RCN stated in its Comments, the relevant market analysis is not only based on the number of subscribers nationally, but also on the local market where an MVPD must compete for customers community by community. While **DBS** services are in most cases generally available, the incumbent telephone companies will not begin providing service to all communities for years (if not decades) to come – if, indeed, they ever do build out to all communities. It is plain – claims of YouTube, iPod, wireless phone penetration, and future telco construction notwithstanding – that the market for video delivery is not yet competitive, and attempts to demonstrate competition through prediction of future video delivery service clearly should not suffice in support **of** elimination of the very program access protections that will assure that such nascent competition becomes a meaningful reality.

As Verizon noted, competitive video providers are just beginning to develop and implement their plans for growth, and with the huge potential growth in services on the horizon, the Commission must ensure that the potential is fulfilled.[14] Video delivery

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[12] *Id.*

[13] ***See* Comments of RCN Telecom Services, Inc., MB Docket No. 07-29, p. 5 (April 2,2007).**

[14] ***See* Verizon Comments at p. 6 ("Verizon Comments") ("[T]he exclusive contract prohibition in section 628(c)(2)(D) ensures that new entrants will not be denied access to such programming as a result of exclusive contracts between the cable incumbents** and **vertically integrated programmers, retaining that prohibition for a time-limited period will facilitate video competition the Commission is working diligently to encourage.") .**

competition does not yet exist but it could in the future if the current protections against anti-competitive behavior remain in place and new entrants are given the **opportunity** to continue to develop their services.

II. THE COMMISSION MUST CONTINUE ENFORCEMENT OF SECTION 628 TO PROTECT ACCESS TO "MUST HAVE" PROGRAMMING

A. The Commission Should Extend the Prohibition of Exclusive Contracts Between Vertically Integrated MVPDs and Programming Vendors

As the summary of vertically integrated programming interests submitted by the Competitive Access to Content ("CA2C") demonstrates, incumbent cable operators have acquired interests in vast amounts of programming since **1992 –** a pattern of acquisition that has continued unabated since 2002." **As of** 2005, **166** satellite delivered networks were vertically integrated with Comcast, Time Warner, ***Cox*,** Charter **or** Cablevision and, **as** pointed out by Echostar, these "vertically integrated cable conglomerates will capitalize **on** their existing highly successful programming slate to launch new HD **networks."**[16] **As** the Commission recognized in 2002, much of this vertically integrated programming is "must have," and it therefore agreed with RCN and other competitive commenters that if competitive MVPDs are deprived of even some of this programming, their ability to attract and retain subscribers would be in **jeopardy.**[17]

Cablevision is simply wrong when it asserts that the sheer volume of programming available means there is no longer any such thing as programming that **is** essential **from** a

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[15] CA2C Comments, Attachment A **Part** 2; see also, Echostar Comments **at** pgs. 4-10, AT&T Comments **at** pg. **2,** Qwest Comments **at** pg. 5, DirecTV Comments **at** pgs. 6-10, Verizon Comments **at** pgs. 7-11.

[16] **EchoStar** Comments **at** p. 7.

[17] **Implementation *of the Cable Television Consumer Protection and Competition Act of 1992,*** Report **and** Order, 17 FCC Rcd **12124, ¶** 33, 64 (2002).

competitive standpoint.[18] There is only one HBO or Discovery or CNN network, **and** the proliferation of video programming does not change that fact. Perhaps the most important criterion applied by subscribers in their choice of an MVPD is the ability, not just to view generic "programming," but to be able to view the most valuable and popular programming, including sports games and other programming for which there are no substitutes in the minds of consumers. Such programming is therefore essential to competition since it cannot be duplicated or replaced by new entrants with alternative **programming.**[19]

Moreover, not only does such programming exist but, **as** pointed out by the Broadband Service Providers Association ("BSPA"),

> "[i]ncumbent cable operators need only control selective programming that is key to each major demographic making a decision between alternate providers to influence market share significantly. It is not necessary to have control of **all** essential content in a product category to influence the end user buying decision. It would be sufficient to have exclusive access to **onlv** one "must have" programming service in each of the major buying segments (sports, news, family, children, youth, etc.) to be able to influence consumer buying decisions and affect market shares among competitors."[20]

RCN experienced this in no uncertain terms when Comcast withheld access to PBS Kids VOD programs for approximately 6 months in 2005 and RCN **saw** subscriber usage of its children's VOD service **drop** by **83** percent.[21]

Cablevision argues that competitor video providers in Washington, **D.C.** are not providing regional sports networks ("RSNs") yet are somehow able to "compete **effectively.**"[22]

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[18] **Cablevision Comments at p. 4.**

[19] **See AT&T Comments at pp. 10-18; Verizon Comment at p. 5; Comments by Broadband Service Providers Association, MB Docket 07-29, pp. 4-6 (April 2,2007) ("BSPA Comments"); Comments of Qwest Communications International Inc., MB Docket 07-29, at p. 5 (April 2,2007).**

[20] **BSPA Comment at p. 4.**

[21] **RCN Comments at p. 11.**

[22] **Cablevision Comments at p. 5.**

RCN serves the Washington market, and is completely mystified by Cablevision's comment. RCN most assuredly does have to carry Comcast's **RSN** in order to compete **in** the Washington market – a survey conducted by RCN in that market demonstrated that 40-58% of subscribers would not switch to a new entrant cable company if it did not provide local **sports programming.**[23] Moreover, even Comcast must have found that the failure to carry local sports programming **is** competitively harmful when finally entered a carriage contract with the New Mid-Atlantic **Sports** Network **("MASN").** It similarly begs reality when Cablevision argues that because a competitor has access to some games, the withholding **of** RSNs from them is not competitively **harmful.**[24] Indeed, both Comcast and Time Warner have previously acknowledged that regional sports programming **is** essential for a video delivery competitor and that they would continue to "acquire, defend or exploit" their exclusive access to such programming.[25]

Comcast also argues that retaining the exclusive contract prohibition will actually harm competition by reducing the incentive **for** other video delivery companies to invest in new programming. If Comcast were correct, then the last five years would have demonstrated a stagnation or even decline in the number of new networks. However, since the extension of the exclusivity ban in 2002, the number of new satellite-delivered national networks has nearly doubled, increasing by 237 new networks? This increase obviously refutes any attempt to

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[23] **RCN Comments at fn. 27.**

[24] **Cablevision at 4.**

[25] ***See 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, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 1124 *(2006) ("Adelphia").***

[26] ***See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual** Report, **17 FCC Rcd 1244, 14 as compared to *Annual Assessment of the Status of***

suggest that the ban reduces investment in new programming. The incumbent cable providers have attempted to argue that the huge growth in available programming and programming providers justifies lifting the ban while at the same time asserting that the ban stifles development of programming. They cannot have it both ways. As the number of new networks shows, the ban does not stifle new programming and video services; it does, however, protect access to those services by competitors, something the large cable companies would clearly prefer to withhold for competitive reasons.

Commenters opposed to an extension of the exclusivity prohibition also assert that allowing the exclusivity ban to sunset would not hurt competition because there would be no economic incentive for program providers to withhold programming from smaller, alternative video delivery providers.[27] The mere making of this claim disproves its merit, as extension of the ban would be of no consequence to the incumbent cable providers if there is no economic incentive to enter exclusive contracts. They clearly have an economic incentive to acquire exclusive programming and withhold such "must have" programming from competitors – otherwise, why oppose extension of the ban.

In the alternative, Cablevision also suggests that even if vertically integrated cable companies were to withhold programming, there would be no harm to competition or consumers. RCN strongly disagrees. As noted above, RCN's market survey determined that 40-58% of subscribers would not switch to a new entrant cable company if it did not provide

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Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report, 21 FCC Rcd 2503, ¶ 21.

[27] *See* Cablevision Comments *at* p. 17 (asserting there is a high cost to withholding popular programming).

local sports programming."[28] The inability to acquire **40-58%** of customers in a market certainly demonstrates harm to competitive entry.

Moreover, RCN supports comments made **by** both Verizon and the US Telecom Association that cable incumbents have incentive to not only enter exclusive contracts but take every measure possible to withhold programming from **competitors.**[29] While these companies may sacrifice some small short-term profits that could be made through the licensing of vertically integrated programming, by Withholding important programming from new competitors they further two economic goals: **(1)** they stifle the growth of new competition by denying access to "must have" programming, especially regional sports networks, and **(2)** by limiting or eliminating new wireline competition in a given area, consumers **do** not have adequate competitive alternatives and incumbent cable operators can continue to charge higher prices.[30] The incentive for incumbent cable providers to withhold programming is quite clear. They reduce competition, retain their customers and charge them **higher** rates. That is the very definition of **an** economic incentive.

B. The Commission Should Close the "Terrestrial Loophole"

Exclusive contracts are not **the** only way that incumbent cable operators can Withhold important programming from competitors and thereby thwart the pro-competitive goals of both Congress **and** the Commission. The increasing consolidation **of** incumbent cable companies in

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28 *See* RCN comments at fn. 27.

29 *See* Verizon Comments at pp. 11-15; Comments of The United States Telecom Association, pp. **6-12.**

30 ***See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 2992,*** Statistical Report on Average Rates for Basic Service, Cable Programming Service and Equipment, **21** FCC Rcd **15087,** ¶ 2 **(2006)** ("Overall, cable prices increased more than 5 percent last year and by 93 percent since the period immediately prior to Congress's enactment of the Telecommunications Act of **1996..**.. Prices **are** 17 percent lower where wireline cable competition is present. DBS competition, however, does not appear to constrain cable prices - average prices are the same **as** or slightly higher in communities where **DBS** was the basis for **a** finding of effective competition than in noncompetitive communities.").

the last five years, the growth of cable market "clusters" in regional markets by incumbent cable companies, and the upgrade of cable networks to add large amounts of fiber optic distribution capability means that those companies are economically able to move more programming delivery to via terrestrial delivery methods which, whether intentionally or as a side economic "benefit," allows them to prevent competitor access.[31] RCN and other competitors have expressed their concern about the so-called "terrestrial loophole" since 1994 and demonstrated how vertically integrated programming vendors have incentive to circumvent the program access rules by modifying programming distribution.[32] The Commission acknowledged in 2006 that cable operators engage in "foreclosure strategy" by moving vertically integrated programming from a satellite to a terrestrial delivery method to avoid competitors.[33]

As Verizon shows, incumbents are finding new and creative ways to use the terrestrial loophole to withhold important programming. Verizon has found that, while the analog signal of a particular program or sporting event will be available for broadcast because its signal is satellite-delivered, the large cable companies are beginning to move the digital feeds of the same programs to terrestrial delivery methods.[34] This would allow them to hold back the most valuable and high quality feed of the program and keep it as an "exclusive" offering of their company.

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[31] *Twelfth Annual Report* at ¶ 154.

[32] "[U]nless corrected, the problem will grow in the future because vertically integrated programming vendors will have the incentive to modify the distribution of their programming, using fiber optics or other non-satellite means, in order to evade application of the program access requirements." *In the Matter of Annual Assessment of the Status of Competition in the Markets for Delivery of Video Programming,* 9 FCC Rcd 7442,7531 (1994) (quoting Comments of Liberty Cable Co.).

[33] *Adelphia* at ¶ 120.

[34] Verizon Comments at p. 13.

RCN therefore supports SureWest Communications' ("SureWest's") request that the Commission close the terrestrial loophole to prevent incumbents from circumventing the exclusivity prohibition on the basis of how particular programming is distributed and thereby ensure that competitors have continued access to "must have" programming like regional sports networks.[35] For the reasons set forth in SureWest's Comments, the Commission should reevaluate its earlier conclusion that it lacks the statutory authority to regulate terrestrially delivered programming.[36] The Commission should take this opportunity to eliminate the inconsistencies in the program access rules. It is inconsistent to apply the exclusivity ban to only satellite delivered programming, and not terrestrial delivery, just as it is inconsistent to apply the ban to vertically integrated, but not non-vertically integrated programming, as discussed in Section III below.

III. THE EXCLUSIVITY BAN SHOULD BE APPLIED TO "MUST HAVE" PROGRAMMING CONTROLLED BY THIRD PARTIES

As RCN stated in its initial comments, the Commission has so far limited its application of the exclusivity ban to vertically integrated programming only, and has not yet prohibited exclusive arrangements of "must have" programming that are distributed by entities that are not vertically integrated. This proceeding provides the opportunity to do so, and the Commission should now provide this protection for new entrants.

Simply stated, if programming is deemed to be "must have," then it is essential programming regardless of the ownership of the distributor. Surprisingly, additional support for RCN's argument comes from Comcast, the nation's largest cable provider, which agreed

35 Comments of SureWest Communications, MB Docket 07-29 (April 2, 2007) ("SureWest Comments").

36 *Id.* at pp. 5-8.

that it **is** the "must have" status of programming that **is** the critical factor, and not its ownership affiliation. "[T]he current application **of** the exclusivity prohibition is fraught with inconsistencies. For example, the exclusivity prohibition's focus on whether programming is affiliated with a cable operator misses an important point: to the extent that MVPDs cannot survive without **access** to certain programming, it is irrelevant whether that programming **is** 'affiliated;' what matters **is** whether that programming is 'must-have' in order to **compete.**"[37] **RCN** could not agree more.

Both RCN **and** SureWest raised concerns regarding exclusivity deals for sports programming between distributors and non-vertically integrated MVPDs. **As** the Commission has held time and time again, a new competitors ability to offer sports programming to subscribers and new customer is a critical factor in its future success." And new entrants are not the only ones concerned that non-vertically integrated providers could lock up "must have" programming and prevent its access **by** competitors. Just last month Congress held a hearing on that **very** issue regarding DirecTV's exclusive dealing with Major League Baseball ("MLB"). After the hearing, the initiation of **an** investigation by the Commission, and the very strong urging **of** Senator Kerry, the exclusive agreement between DirecTV and MLB **was** revised and an agreement was reached with InDemand that would allow other video delivery services to carry the baseball programming and provide access to millions of subscribers who would have otherwise been **foreclosed.**[39]

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[37] **Comcast Comments at p. 24.**

[38] ***See Applications for General Motors Corporation and Hughes Electronic Corporation, Transferors and The News Corporation Limited, Transferee for Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 126 (2004) ("*Hughes/News*"); *Adelphia* at ¶ 42.**

[39] ***See Baseball keeps 'Extra Innings' on cable,* SEATTLE POST-INTELLIGENCER, Apr. 4, 2007.**

Consumers should not have to rely on special Senate hearings or pending mergers to protect their access to "must have" programming or to ensure that one or two large dominant companies do not severely restrict access to valuable programming. Instead, **the** Commission should step forward to provide proactive protection against such anti-competitive practices by extending the exclusivity ban to programming from non-vertically integrated networks.

IV. THE COMMISSION SHOULD ADOPT ARBITRATION AND DISCOVERY PROCEDURES FOR PROGRAM ACCESS COMPLAINTS

Comcast and NCTA oppose any changes to the Commission's procedures for processing program access complaints including the use of arbitration. This is not surprising given that lengthy proceedings, limited discovery, and long delays in decision-making, help incumbent cable providers act anti-competitively by delaying access to "must have" programming. The incumbent cable providers do not want a revision of the procedures as they **fear** that quicker and more efficient, and therefore less expensive procedures, may draw out many more complaints especially **from** smaller cable providers who cannot current afford the long legal battles.[40]

RCN, along **with** EchoStar, National Rural Telecommunications Cooperative and **BSPA,** has recommended that the Commission adopt the use of "baseball" arbitration procedures, similar to those required by the Commission **as** conditions to the *Hughes/News* and *Adelphia* **mergers.**[41] The procedures were **highly** successful in both of those cases and would provide for faster and more efficient resolution of complaints and, contrary to arguments made

[40] Comment of the Organization for the Promotion **and** Advancement of Small Telecommunications Companies, MB Docket 07-29, p. 8 (April 2,2007) ("The current process **is** so time consuming **and** costly that rural carriers have, in essence, no practical recourse in the event of a complaint. Lacking **the staff and** resources to pursue a lengthy and intensive complaint process, rural MVPDs are typically forced to forgo filing any complaint at the Commission.").

[41] *See* EchoStar Comments at p. 18; BSPA at pp. 7-13; SBA Comments at p. 8.

by Comcast and **NCTA**,[42] the Commission has the authority to mandate arbitration and procedural rules to facilitate their review of such cases.[43]

Comcast opposes any changes in the program access complaints and argues that the Commission has already reviewed and rejected the use of additional discovery procedures.[44] However, that was ten years ago. The Commission should take this opportunity to review its outdated discovery rules and provide competitors with a more even playing field by allowing for the confidential disclosure of carriage contracts. Access to these agreements is essential for determining and demonstrating that a programmer is acting anti-competitively and in a discriminatory fashion.

While the Commission needs to provide for arbitration and discovery procedures, it needs to also ensure that competitors are not further harmed by filing a program access complaint. Therefore, RCN joins other commenters in recommending the adoption of standstill agreements. Use of these agreements protects competitors by maintaining the status quo during the pendency of the complaint process.

CONCLUSION

For the reasons stated herein and in RCN's Comments, the Commission must extend the exclusivity ban for vertically integrated programming for another five years with the understanding that it might be further extended and must expand the exclusivity ban to protect "must have" programming regardless of affiliation and to eliminate the terrestrial loophole. In addition, the Commission must adopt additional rules for program access disputes, including

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42 See Comcast Comments at pp. 28-30; NCTA Comments at pp. 11-14.

43 47 U.S.C. 548(d), (f) (authorizing the use of dispute resolution process through an adjudicatory proceeding).

44 Comcast Comments at p. 29.

an arbitration remedy, a standstill agreement process, and a discovery rule to require production of agreements.

Respectfully submitted,

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Dated: April 16,2007

ATTACHMENT 1

Transcript of Bear, Stearns 20th Annual Media Conference March 7,2007

Attachment 1

FINAL TRANSCRIPT

Thomson StreetEvents℠

CVC - Cablevision Systems Corp. at Bear, Stearns 20th Annual Media Conference

Event Date/Time: Mar. 07.2007 / 9:40AM ET

PRESENTATION

Unidentified Participant

Our next presenter is Cablevision. Before we get started please know that Cablevision is or during the past twelve months has been an investment banking client of Bear Stearns, and within the next three month Bear Stearns intends to seek compensation for such services from this company. Also Cablevision is or during the past twelve months has been a noninvestment banking client for securities related services of Bear Stearns, and within the past twelve months Bear Stearns has received non investment banking compensation from this company.

As most of you know, Cablevision is the fifth largest cable operator in the country, clustered in the New York marketplace and is widely viewed as the industry leader in terms of triple play deployment. Joining us today are Cablevision's Chief Operating Officer, Tom Rutledge and Chief Financial Officer, Mike Huseby. We are very pleased they could be here. The format of today's presentation is 100% Q&A, so we hope to get in as many of everyone's questions as possible. So as a reminder if you have a question for Tom or Mike please raise your hand and a microphone will be delivered to you.

I will go ahead and kick things off with a question or two of my own. I guess my first question relates to growth and maturity. Cablevision is widely viewed as a leader in many aspects of the cable business. This is an enviable position but sometimes double-edged sword in the eyes of the investment community. You've had many industry firsts of operating performance. Yet some view your company as also the first to potentially exhaust its growth potential. Your recent cable guidance shows a deceleration in EBITDA growth, digital penetration of basic should approach mid 80% this year; data penetration should approach 70%. A third of your basic customers already take voice.

So with that a few questions; where do you see your cable company in terms of its growth cycle? How much growth is left for you in the New York marketplace? How does your cable division sustain double digit growth into the future?

Unidentified Company Representative

How do we grow, and are we as penetrated as everyone thinks we are? There are three big areas for Cablevision to drive growth into the future, and we did give guidance recently that our EBITDA and this year we expect it to be in the midteens, which is an aggressive EBITDA growth rate in my view. The three big drivers are to continue to build the core business and to build the residential penetration inside our footprint. And while we have almost 69% video penetration, the upside in terms of what the opportunity is, is greater than we've already taken out of the marketplace. And so how do you say that?

Well, if you look at the voice opportunity in the residential marketplace, if you look at the data opportunity and the video opportunity, add it all together, our 46 million passing presents a $10 billion revenue opportunity of which we are over $4 billion. So there is more upside in terms of market share in those three opportunities than there is already realized.

When we look at our marketplace we look at – go back and trace the steady growth of our data business and the steady growth of our voice business and look at how many more years that kind of growth can go before you tapped out the full potential, it is significantly longer than most people's planning horizons. And the thing that gives me confidence that our opportunity to grow won't be retarded by some sort of cap in the marketplace is that in places where we've been in business for a while we have some communities where our data penetration is now in the mid 70% range of homes past, not of our customers.

And our voice penetration we now have five communities where we are the majority voice provider of wireline services in the communities. So those are places we've been in business the longest. They is a direct proportional relationship to how long your upgrade has been completed and how deep you can get in the marketplace. Yes, there are demographic issues that cause different communities to grow at different rates, but fundamentally everybody is going to have high-speed data. Everybody is going to have voice and hopefully everybody will take our video because it is a superior service.

So I think the residential marketplace is still a huge opportunity. The other two big opportunities for us our business class services, inside our footprint the current telecom spend for business is $5.8 billion. We've cut the rates in half, so it is more like $3 billion of our rate structure. But we think that we can go penetrate that marketplace very similarly to the way we've penetrated the residential marketplace. The difference between us and say Verizon trying to penetrate the video marketplace is, most of the business customer class inside our foot print is already our video customer. Maybe our voice customer. It is most likely our data customer. So we already have an existing relationship with that business class customer base and it's a good relationship. And so I think our opportunity to become a new provider and not have the same issues of incumbency that a phone company does in trying to take video gives us an opportunity to penetrate that market rapidly like we've done the residential market.

And finally there's a huge opportunity out there in advertising and commerce. $300 billion is spent nationalty by businesses trying to reach consumers with messages about their products. So in our footprint that would translate to about $15 billion. Cable share of advertising dollars in a marketplace is actually quite small. For us its a $250 million business. 6% of our revenue. And while it is growing at double-digit rates it is shrinking as a share of our total revenue opportunity over the last few years.

And so how do you shift the dollars that are being spent on newspaper, radio and television today to the real mass media form in the New York marketplace, which is us? Almost 70% of all people who watch television in our footprint get it through us. 70% of all people who have high-speed data in our footprint get it through us. And hopefully voice will be similar in the near future, and so what is the mass media forum in New York? It's Cablevision. Why is the advertising dollar base that is currently being spent to reach consumers going to other media?

The answer is historic and it is – that is what's effective and that is where the inventory is but we think there's an opportunity to create new inventory, new commerce engines on the video screen and transfer some of that $15 billion of spend inside our footprint to us and do that in significant ways. So that's our growth opportunity.

Unidentified Participant

In terms of the growth opportunity I guess your guidance shows a decreased level of reinvestments for growth I guess in terms of the CapEx basis this year. Every management walks a tight rope between returning capital to shareholders and reinvesting for growth. You guys have returned some capital last year and yet the company is still free cash flow positive and that profile continues to emerge. By our estimates we think you will generate roughly $3 billion in aggregate free cash flow between now and 2010. And I was just wondering if you could -- how do you think about prioritizing the use of this free cash flow, given the current competitive environment do you feel restrained with the level of leverage that you have? Are you comfortable with it?

Unidentified Company Representative

I think that's a great question. It is a question that obviously like most management teams look at every day and with our board and with our senior management. I think our strategy, which has been a very successful strategy has clearly been market share, market share strategy. While competitors build out their systems and try to put their products in place and market those products. If you look at the rate of growth that this company has had over the last three years the success, the penetration rates as Tom mentioned, the incumbency it has clearly you want to reinvest as much capital in that core business as possible to keep that market share strategy going. And continue to gain customers. And those aren't just customers that are defined as RGUs. Those are opportunities to drive revenue through increased distribution of DVRs, the world called international product.

The services that are embedded in the core product that aren't defined as what is become known as revenue generating units, which a lot of people focus on. We are trying to focus on expanding the amount of dollars we take out of each home that we pass, whether it is called an RGU or not. So that is clearly the first priority for capital and if that translates into more boxes or if that translates into more DVR boxes, HD boxes to keep the customers happy that's what we are going to focus on first

Outside of that our capital requirements and our other businesses are relatively minor. We have three businesses, the core business obviously being cable communications. We really have very low capital requirements in the other businesses aside from the fact that we are talking about either refurbishing or relocating Madison Square Garden. So then it becomes a question of looking at growth strategies, we want to take some of that capital and do something strategic. Do we want to buy something, do we want to get into a partnership with somebody and those are functions of the opportunities that are presented but we are not necessarily committed solely to organic growth. So in terms of capital priorities if there aren't those opportunities as we demonstrated this last year by returning a $10 special cash dividend to all our shareholders, we'll look at where our stock price is versus where we think it should be and look at alternatives to return capital. If we don't see good opportunities to invest that in the business, which right now we do.

Unidentified Company Representative

In terms of capital required to run the business we are very comfortable with it, and as we forecasted in our guidance it is actually going down because of the mix of RGUs going forward. As our digital penetration has gone over 80% the need for digital set-top boxes will decline at some point, obviously, and that is the bulk of our capital expenditures.

Unidentified Partidpant

Last night Chase Carey was speaking about DirecTV's upcoming lineup of something like 100 national HD. In terms of capital you guys have operated your entire footprint digital broadcast. Is this enough to compete with that level of offerings? Is Wall Street making too big of a deal out of their high definition offering?

Unidentified Company Representative

For one we think we can carry everything on earth that is broadcast simultaneously with switch video architecture and broadcast architecture. We have lots of channel capacity. Our HD product is free. We believe that HD is just a format that its what the television programming is that determines its value. And that we should make HD available to our customers as part of their core package. So as they get HD sets we are swapping out our existing set-top boxes for HD boxes and redeploying those standard definition boxes to other outlets in the house in many cases.

And offering that product at no incremental cost and virtually no hassle for the consumer. So we think and that our HD product has superior picture quality to satellite and that we can have it for no price and that we can have everything that is available to us on our networks. And so when you add all that up we think our competitive posture is vastly superior.

Unidentified Participant

In terms of wireless, at one point your company had wireless (inaudible). Last summer your controlling shareholders were participating in (technical difficulty). Where do you guys stand firmly with your approach towards wireless? There's an upcoming auction. You also – you still own MVDS licenses from regular DBS. Is there some use there for – what is the current strategy?

Unidentified Company Representative

You're right, we do own MVDS licenses across about half of the United States, and we are experimenting with those licenses. Experimenting with those frequencies and considering our options to monetize that asset. In terms of our cable companies opportunity with wireless, we have a minor sales arrangement with Sprint. We have not participated in the consortium with Sprint as some of the other operators have. We have deployed a WiFi hot spot product with aggregators as part of our service offering, which is another non RGU-based revenue product that we sell where you can for $17 a month, you can get access to all the hot spots in our footprint. And we have begun deploying some WiFi services ourselves in specific areas, although not yet commercially. So we've spent some capital over the last year, and we will continue to spend capital in building a WiFi mesh network over some of our footprint to see if we can turn products, turn those into products that can increase the value to our consumers. But we have not commercially launched a wireless service as of today.

Unidentified Participant

You mentioned earlier commercial services; you sized the opportunity. You've been in business I guess the larger business segment with your Lightpath division. What kind of – on a scale of 1 to 10 – what kind of operational focus is Cablevision putting on the smaller sized business market opportunities? And also how should we think about your long-term prospects here? Comcast is targeting 20% penetration in five years. Where do you guys fall out relative to that outlook?

Unidentified Company Representative

We went over 20% penetration in two years in the residential marketplace, and I just said that I thought we had similar opportunities in the business marketplace. There are more impediments to growing the residential, the business marketplace than there is the residential marketplace. It's a little more complex. There is a variety of customers' needs, and their telecom spend may or may not be a significant part of their overall cost structure. So you have a different marketplace than the residential marketplace. You have a variety of legacy phone systems and you've got a variety of types of businesses and the way they are structured from a telecom perspective and their needs.

So we've spent a lot of time over the last year segmenting the marketplace, identifying the 600,000 small businesses in our footprint, where they are. We've mapped out those businesses where we can serve 80% of them right now by just a phone call from the business. In other words, we don't have to go out and survey anything, and of those we do have to survey, meaning it is a more complex installation for the bulk of those are also serviceable without any plant extension or any kind of capital beyond what is already been deployed inside the footprint. So we have a very good database; we've dedicated over 600 people to sales and marketing, customer service. We've built an infrastructure to handle inbound calling to take care of service. All that was done last year. So that footprint in terms of operational capabilities deployed inside our business today, and we expect to perform well in the marketplace and to provide quality service, quality installation throughout our footprint.

We've just been certified by J.D. Powers, our call center that handles business telephony and handles all of our level two service, which is high-speed data and voice has been certified I believe as the first call center in the country to be certified by J.D. Powers under meeting certain criteria that they confirm a seal of approval on. So our business class services are well-positioned and well architected to compete in the marketplace.

Unidentified Participant

I'm sorry, does that mean – is there anything that an RBOC can offer their business customer that you cannot in terms of (technical difficulty) reliability, or is it really a very similar product compared to your offering?

Unidentified Company Representative

Well, it is similar, We can offer better service and better quality, and higher speed data than most businesses can get through DSL technology. So you have to remember that even in New York where FiOS is deployed there are 600,000 active FiOS passings in the New York market. There are 7 million homes in the New York market in total. So while you see marketing that looks like these services are available they are not widely available, and most businesses are served by copper plant. So our plant up against the vast majority of businesses that are inside our footprint is superior to what the phone company has, and our data products are superior so even with traditional telephony, which is pretty simple, the quality is equal to or excellent and when it comes to data, it is superior.

Unidentified Participant

In terms of [indiscernible) you provided us some stats on your recent earnings call in terms of what you are seeing on the marketplace with their triple play. Is it possible to get some updated view on that? I guess in your mind where are their customers coming from? You've seen some minor share loss, as you mentioned earlier.

Unidentified Company Representative

What I was trying to say in my call was that they are very much a traditional type over builder, and we've seen lots of them in the past. If you've been in the cable business any length of time Ameritech did a significant overbuild in the Midwest, and then SBC AT&T bought them and sold those overbuilds. SBC, the PacTel did it in San Francisco or excuse me in San Diego, and GTE Verizon overbuilt parts of Florida and Ceritos, California. And we've seen through the years – RCN, similar type of over builder. We've seen these over builders come and go, and against good cable operators they get high single digit kind of penetrations against poor operators they get midteens kind of penetration. And there is nothing about FiOS in terms of their existing or performance heretofore that would indicate that they are any different than any historic over builder. That was the point of what I was trying to say.

Unidentified Participant

AT&T (indiscernible) most recent availability I believe in a few thousand homes in Connecticut, have you seen any activity in these areas?

Unidentified Company Representative

No, we have not seen at least up until -- unless things have changed in the last day or two, we have not seen them taking orders.

Unidentified Participant

And in terms of your competitiveness with satellite, you made comments in the past about gaining share from the DBS players. Is that something you are still seeing today currently in 2007?

Unidentified Company Representative

Yes, and we talk a lot about Verizon, but satellite is much more of a significant competitor in terms of their footprint inside our service area, and we've had great success in winning back satellite subscribers to cable. And the reason they come back is that the modern cable system, our cable system is a superior video product to satellite. It has better picture quality. It has more channel capacity. It has interactivity and on demand services, more HD, more regional programming and sports programming in HD than satellite offers. It is just a better product every way you look at it. When you add that to the fact that a satellite customer is more likely to have a DSL service, which is an inherently inferior product, very low speeds, and you look at our data speeds against typically marketed DSL product, it is 20 times faster.

And if you look at the typical service level of DSL it is about ten times faster. So our high-speed data truly gives you the ability to watch YouTube, notwithstanding its controversy according to Mark, but it gives you the ability to watch that in high-quality, as high a quality as it can be delivered. And that is simply not true with DSL. So we have a vastly superior DSL product, a high-speed data product and our voice product is a better product. It has all the features that you can have on a voice product, plus it has a portal that allows you to manage your account. You can see who is calling you. You can change the ring tones of your family so you know when they are calling you. You can call forward any way you want, You can get your voicemail on the Web. Those are functions that the traditional phone company doesn't offer, and it's cheaper, So it is a better, cheaper product.

So when you add it all together a satellite customer can save an enormous amount of money by switching and get three better products than they already have. So we are doing well. At their zenith they got to 14% or 15% penetration in our marketplace and to us the opportunity to win that back is actually a more significant opportunity and a more competitive more significantly competitive universe than what Verizon is currently doing.

Unidentified Participant

You mentioned your broadband product and I guess in the marketplace at 65 I think the year 65 penetration basics with your online service. How challenging (indiscernible) penetrate the service even deeper in your footprint, are you bumping into more price sensitive customers at this level? Is there a threshold where a lower-priced tier starts to become more attractive to your management team? And how are they hired here (inaudible) Optimum Boost and Ultra product resonate?

Unidentified Company Representative

Last year we spent about $15 a passing to take our plant architecture up so that we could offer 15 megabits down and two megabits up is our slowest service. And we then added a boost service on top of that at 30 megabits down and five megabits up. And we also offered a service that is 5o megabits down and 50 megabits up. And the opportunity, as I said, in terms of the marketplace I think is still significantly greater than we realized. We are at 46% of homes passed penetrated and as I said there are communities where we've now gone over mid '70s penetration into homes passed with data. And so I see that as kind of where the market opportunity is. You still have significant dial-up conversion and frankly I think DSL is just past dial-up. And the opportunity to convert the DSL universe that has already been achieved by the phone companies to a real high-speed data product is still an opportunity in front of us. And so when I look at the marketplace I see us as having a distinct product, and it is a product that will become the base product in terms of what people need in terms of speed and quality from a high-speed service. So we are not planning on going backwards and offering a lower tier. Our slowest speed will be 15, and we will go up from there.

Unidentified Participant

I guess with your high penetration business also begs the question I think you mentioned that roughly 30% of your footprint is already all-digital in the New York City system.

Unidentified Company Representative

That's right.

Unidentified Participant

It seems like you are not that far off from being able to dispatch your entire plant. Are you interested in going to 100% digital regardless – can you (indiscernible) path that your taking to start to replant some of (indiscernible)?

Unidentified Company Representative

As I said, on our call, New York City is already completely 100% digital, which means we've turned off the analog part of the cable system. Which means that we have more unused channel capacity in New York City than we are using. So our plant is more empty than full. In the rest of our footprint we have been, if you are a digital customer or if you have an 80% chance of being a digital customer of ours, all the signals you see on a digital TV are digital. So we've simulcast all of the analog product in digital so we are 100% digital and 80% in the homes today. From a viewer experience perspective.

But we also have some of the customer base that doesn't have digital set-top boxes, and we also have an enormous amount of televisions that are analog that are not connected to boxes. We put about 2.2 boxes per household in when we do a digital installation and it gradually is growing. And if you think about what's going on in the marketplace today you have HD sets. People are buying in large quantities and they are replacing perfectly good televisions that are not ready to be thrown out so they are going to other rooms.

We have a whole house analog service of 75 channels. You can put that in as many rooms as you want in your house. You don't need a converter and every set that is on it gets 75 channels of pretty good television. In addition, any set that you want to put an HD box on or a digital box on gets the full Cablevision service level which includes a lot more channels and VOD and HD, etc. But when you look at the mix in your household and where your TVs are, if the want the whole household lit up, it's actually a better value proposition the way we are doing it right now.

So there is a tension between going all digital and recovering all the spectrum and having a product that the telephone company cannot replicate, Verizon doesn't have that whole house capability today. However they can do it if they wanted to. And satellite can't do it. So we think it is our position of having some analog and an all digital product is a good position. We think if we wanted to shrink that down to 60 channels, for instance, we thought that 15 channels were superfluous and the number of analog only TVs kept getting smaller. You could get down there in a series of moves or you might do it in one fell swoop. We have actually been digitizing channels, taking them out of the expanded basic analog service and opportunistically adding additional spectrum.

We think we can manage the spectrum along with switch video; in the fourth quarter we launched 60 channels of foreign language programming on our system all in switch video. By the end of this year we'll have switched to HD video. So essentially we have the capacity to have a rich analog service whole house and carry all the channels simultaneously should we want to, a combination of managing an analog spectrum, switch video both HD and SD and a combination of HD and standard definition digital broadcast type products. So we are very comfortable with our spectrum and obviously the deeper you get penetrated within an all-digital sort of world, the easier it is to make the trade-offs between analog and digital product. And so the lower – if you are 20% digital penetration it is much harder algorithm to work with in terms of taking away channels that are widely viewed.

Unidentified Audience Member

You (indiscernible) arithmetic exercise about a (indiscernible) million SMopportunity in front of you. You can do that same kind of arithmetic exercise among larger businesses but it looks to me like Optimum Lightpath which I take it is upper medium and (indiscernible) has run out of steam, basically (indiscernible) and hasn't been for a while. So what's going on there, and what does (indiscernible) for your SME opportunity and maybe you are exaggerating it.

Unidentified Company Representative

It's actually not so. It is true that we took '06 and Lightpath and pivoted our strategy in '06 and went to an all ethernet strategy. So we are converting what has been a traditional CLEC business that was selling in many cases, reselling a substantial portion of the revenues were reselling Verizon services to relatively small businesses, and we've stopped doing that. And we stopped doing it in actually more than a year ago. So that impacted '06's performance from a revenue perspective. But the number of buildings that we are hooking up with new fiber connections in our footprint has expanded rapidly in '06, and will expand even farther in '07. We announced the other day that we had 2000 buildings connected to Optimum Lightpath. Those are big businesses, not small businesses.

And Lightpath's revenues will grow in the future at significantly faster rates than in the past. We are the first cable company in America that has been certified under the world standards body called Metro Ethernet to provide ethernet services at that quality level. We have customers that are buying gigabytes of service from us, big trading companies and so forth. And we are very bullish on our prospects with Lightpath, but we've made a transition in the business, we quit selling on the incrementall circuit switched telephony. We still support our existing customer base, but all of our future revenues essentially are ethernet.

Unidentified Audience Member

(inaudible - microphone inaccessible)

Unidentified Company Representative

No, actually it is all over the tri-state area, including Manhattan. We have a license in Manhattan, as well. Where we don't have video on our cable system.

Unidentified Company Representative

One other thing John, that Lightpath opens up in terms of an opportunity, although it is not huge relative to our total numbers is when we establish that kind of a business relationship with a large company, which we've done in several cases recently, sometimes are able to often able to work *out* deals with their employees. So that if they are not Cablevision customers or even if they are they come under a deal, if you will, that can connect them to the office and that type of thing. So it has somewhat of a drag along effect for residential, but that is not obviously the main focus of the strategy, so there are some other benefits to Lightpath.

Unidentifii Company Representative

The other thing about our telecom strategy if you think about our commerce strategy connecting businesses to consumers, and allowing the businesses to sell their wares to consumers which is what marketing advertising is. We have a fulfillment opportunity business that I think is quite misunderstood in terms of its size, and it's difficult to size. But last year we sold electronically over 600,000 orders of cable services, meaning people bought upgraded their cable service, subscription video on demand. They bought Optimum online by clicking a button on their TV remote and our direct warehouse would ship a modem to a self installation customer, That back office system with an eWallet on the television allows you to ship directly out of warehousing any kind of products.

And for instance you can go onto our Optimum store and buy televisions. You can buy wireless routers, all sorts of electronics. Businesses that have a telecom relationship with us and an integrated strategy to sell products to our customers, can take out costs from their business because we can take orders for them directly from the television. And that opportunity grows out of our subscriber relationships and it grows out of our relationships with the residential customers and the business customers. And I think our opportunity to monetize that in the long run is an even bigger revenue opportunity than business telecom itself.

Unidentified **Participant**

I think we are unfortunately out of time. So thank you veiy much for joining us today.

ATTACHMENT 2

Transcript of Banc of America Media, Telecommunications & Entertainment Conference March 28, 2007

Attachment 2

FINAL TRANSCRIPT

Thomson StreetEvents℠

CVC - Cablevision Systems Corp. at Banc of America Media, Telecommunications & Entertainment Conference

Event Date/Time: Mar. 28.2007 / 8:50AM ET

CORPORATE PARTICIPANTS

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Banc of America Securities - *Analyst*

Tom **Rutledge**
Cablevision Systems Corporation COO

Mike Huseby
Cablevision Systems Corporation *CFO*

CONFERENCE CALL PAR ICIPANTS

John Kornreich
Sandler Capital Management - Analyst

PRESENTATION

Doug Shapiro - *Banc of America Securities* - Analyst

My name is Doug Shapiro and I cover the cable and satellite media conglomerates here at Bank of America at least for the next month or so. Joining me to my left is Rob Dezego who is going to be assuming coverage of cable and satellite over some indeterminate time frame. And before I set off here with Cablevision I just wanted to read our disclosures. As you are aware we are required to make a number of conflict of interest and related disclosures in connection with our participation in this conference and the companies we may discuss. Copies are in the back of the room and also on the webcast.

So joining us today first here is Cablevision; very pleased to have both Tom Rutledge, COO, and CFO Mike Huseby with us. The brief introduction is that Tom is a 3C-year veteran of the cable business including 24 years at Time Warner cable prior to his arrival at Cablevision. He might disagree with this -- I don't know – but he is widely credited with dramatically turning around the company from a bit of an also ran in 2002 to now the highest penetrated US's operator at least across all Rugs. Mike is a 16-year cable veteran having been the CFO at both Charter and AT&T broadband prior to Cablevision. He kind of quietly keeps things together behind the scenes.

So just to start off with – introduction so far, okay, I read it just the way you wrote it – so just to start off I think the big picture question with Cablevision is there are two big picture questions; and the first one is whether you are going to remain an independent public company. And the second one is how fast you can continue to grow in light of how high your penetration levels are. And since you are not going to answer the first one of those or even try I am going to jump right to the second one. You are welcome. So the context here is clearly you guys have done a phenomenal job driving advanced services. I think that there is no question about that; but of course Wall Street is always focused on what is next. And so the big picture question as I said is what do you think your biggest sources of growth are going to come from, respectively. All right?

Tom Rutledge - Cablevision Systems Corporation - COO

Well there are really three fundamental growth drivers for Cablevision going forward. And interestingly the core cable business is still first and foremost among those in terms of opportunity. You know people think of us as being highly penetrated. I think of us as still having a lot more upside in our core business than we have already achieved. The reason is even though we have 69% or so basic video penetration to homes passed, our data penetration to homes passed is 46% and voice penetration at 26%. So if you think about the opportunity in voice, about 87% of people nationally have a voice, a wireline voice line and so we have a lot more opportunity to sell voice than we realize. To date we have been growing at about 10 points penetration a year.

If you look at data we have been in the data business about eight years. We have been growing on average about six points of penetration a year. There are parts of our service area where we now have hit mid-70s data to homes passed penetration. When I joined the company five years ago they were about 40% penetration. So as I look at our data penetration we continue to get excellent growth out of existing service areas. There is a direct correlation to how long we have been in business with a fully upgraded plant and what our penetration is and the amount of PC utilization with Internet connectivity is now in the 80s and still growing. So the opportunity -- I think data is 100% penetrated or 100% of homes passed – opportunity ultimately as much as television is.

And so when you look at all three of those drivers – data, voice, video and we have even video growth even in a world with two satellite providers and a phone company or two trying to be cable operators. We still have growing basic penetration and a superior product to all of those competitors so an opportunity to continue to grow the basic business. So I think if you look at the total revenue residential opportunity of telecom services, it is about a $10 billion business in our marketplace and we are about $4.2 billion of that. So we are 42% penetrated of our residential opportunity, one way of thinking about it.

The other two drivers are business telecommunications and a new advertising form and I will talk about small business and big business. In our marketplace it is about a $6 billion spend right now by small businesses and large businesses inside our footprint for telecom. Historically even though we have had a CLEC business which is an all fiber network called Optimum Lightpath. The bulk of the businesses in our footprint have not been passed with a competing telecommunication service until the cable system was upgraded to two way and became a voice over IP enabled telecommunications provider.

Essentially the business marketplace was a monopoly controlled by the phone company incumbent and it has very high price, so we have an opportunity to go now that we have a full suite of high-end and middle and low market products in IP form to go into those markets and compete against the incumbent phone operator with superior products, superior service and a superior reputation in that marketplace.

And so we think there is a significant opportunity to take share out of the small business marketplace and the large business marketplace. And then finally if you look at advertising, in the United States about $300 billion a year is spent by businesses trying to talk to consumers. So if you take our footprint at 4% of that if you are looking at 4% to 5% of that, you are looking at potentially $12 billion to $15 billion marketplace of businesses trying to talk to our consumers about their products. And right now our advertising business is a $250 million business, relatively inconsequential piece of our overall business, about 6% of our revenue.

So we think that using our two-way interactive platform by creating inventory and new opportunities to present advertising on the television in conjunction with our Internet service and voice services, that we can fulfill the needs of businesses to reach our customers. And create not only an opportunity for businesses to talk to our customers -- by the way our customers are the mass media form. I mean who else reaches almost 70% of the universe they pass in the marketplace with a full suite of video, data and voice services?

And yet its such an inconsequential part of the whole advertising mix; and so we think the opportunity to take advantage of that and then create fulfillment. Last year we did about 600,000 orders through our remote to various products we sell and that fulfillment works by using the customer relationship we have and connecting that customer relationship, including their billing information to a product that they are able to purchase through the remote. We have also launched a similar product with Home Shopping Network.

We have created several interactive advertising platforms for autos and homes and have more to come. We have created VOD platforms for advertisers and so we think that what form it will take is unclear but that there is a huge opportunity for us to turn the television into an interactive advertising platform.

Doug Shapiro - *Banc of America* Securities-Analyst

Well, I have no more questions. Thank you very much for coming. No, let me try to unpack some of that if you don't mind.

Tom Rutledge - Cablevision Systems Corporation - COO

Okay.

Q-AND-A

Doug Shapiro - *Banc of America* Securities - *Analyst*

No, okay. It's a good platform. Just going back to the first one we were talking about, the core cable business and maybe just to focus on voice. I think for a while now you have been talking about your voice selling being around 50% or above 50% -- maybe its a triple play selling, right?

Tom Rutledge - Cablevision Systems Corporation - COO

Right. About 50.

Doug Shaplro - *Banc of America* Securities- *Analyst*

About 50 and by implication your voice sell in is probably not that much higher since if you look at your customer relationships relative to your basic subs it's not that much higher, right? So if you have roughly 70% basic penetration now and you think your guidance this year is for slower basic sub growth of being (indiscernible) then maybe sub growth is slowing down a little bit. So if we are going to stay around that 70-ish level and you had 50%-ish triple play sell in that would imply that probably your voice penetration -- you need to get that?

Tom Rutledge - Cablevision Systems Corporation -COO

No, that's my alarm.

Doug Shapiro - *Banc of America* Securities -Analyst

Implies that your voice penetration probably levels out, probably in the kind of mid to high 30s, just on the map of that. And would be at 27% at the end of '06 and doing about a percent a month, that would imply that somewhere in the course of 2007 you are going to hit that wall. So I guess the question is, do you see implicit in your answer is that you think sell in is going to go a lot higher or that you're going to drive voice much deeper into the nonbasic base?

Tom Rutledge - Cablevision Systems Corporation - COO

Well I think implicit in what I think is that sell in will increase in triple play, consistently. And that would be true even if you weren't growing as your penetration rises your incremental sort of your base of what you have to sell just to stay even goes **up.** And so and we anticipate growing. So it implies, the implication is that the sell in rate has to go up. And really the math is actually quite complicated when you break it apart because you have customers who are just moving who are in that connect rate. And then you have customers who are moving but weren't triple play who have an opportunity to upgrade during the transaction.

And then you have people moving in and out of the area. So it gets really complicated actually when you really break it apart. You really need to look at it from a lot of different angles.

The bottom line I think is that we are growing at a steady constant rate. We have been for a long time. If you look at our data business it has grown around 6 points of penetration a year; some years 7, some years 5.5. But it is a solid, steady conversion of the marketplace and our share of that growth remains relatively constant. And I think that everything I have seen about the voice business to date looks similar in terms of performance in the marketplace.

Doug Shapiro - Banc of America Securities - Analyst

50 I guess just as a follow-up to that because you have this granularity, of course that we can't see, when you look at the sell in voice in your oldest market, I guess A. And also B, when you look at the sell in of former triple play customers who are moving I guess, in terms of their propensity to take the triple play again.

So what are you seeing in terms of those things that would give us comfort that that number can continue to go higher?

Tom Rutledge - Cablevision Systems Corporation - COO

Well as I talked about the data business which I think is a good proxy for voice as far as I can see to date, there were places where five years ago we had some communities at 40% data penetration. When our overall data penetration was in the 20s. And now those communities are in the mid-70s and the whole data penetration of the whole business is in the mid-40s. So you had certain characteristics of communities that have an impact on penetration. You also have longevity in the marketplace. Don't forget we did this rolling upgrade. So there were parts of Long Island that have been upgraded a long time or parts of New York City that have only upgraded a few years. And so you have various rates of penetration, part of which is determined by how long you have been in the marketplace and another part based on the characteristics of the community.

And so I have the most interesting thing about the data business that I think bodes well for the voice business is that growth is continued throughout the footprint, and has not peaked and continues to be steady and solid year after year even in areas with very high penetration. And I think that there is a timeframe for market conversion that is part of human behavior. I am not sure how it works exactly but marketplaces react through time and I think the voice marketplace looks very similar to the data marketplace.

Doug Shapuo - Banc of America Securities - Analyst

Staying on basic cable or core cable business before I want to talk about this small medium business opportunity for a second. One thing you have and you didn't mention, and I don't think you've really talked about a lot is the company is pricing or margins for that matter. But just to focus on the first of those. And Mike if you want to maybe jump in on this. But you have seen steady ARPU growth driven by rising RGU penetration but you haven't changed the price of the $90 bundle.

Tom Rutledge - Coblevision Systems Corporation - COO

That's right.

Doug Shapiro - Banc of America Securities - Analyst

So it's really I guess a two-part question; the first is just setting a baseline. What are you seeing in terms of the actual average ARPU on the 90 odd bundle, just kind of like a 115 number? What are you seeing in month 13? And we do a roll off that first year. And then the second part of the question is what do you think about -- is there a point where you think you might have to start to actually raise prices again as opposed to just rely on penetration growth.

Tom Rutledge - *Cablevision Systems Corporation - COO*

We have done -- we have had aggressive growth, very high revenue and cash flow growth relative to the industry and relative to our history in the company. And we have done that primarily through selling more products to people and creating more value for consumers and driving more value into the home. And we have done that by growing that value proposition rapidly. So the consumers to Cablevision who now agreed on average to pay us $115 a month have done so willingly, not through rate increases but because they wanted our products and they are good value proposition and we have had rapid adoption.

We have priced ourselves so that we can drive as deeply into the marketplace as possible and convert as many customers as possible to triple play as rapidly as possible. And do that in a way that produces excellent financial metrics at the same time. So we have tailored our marketing and our installation processes and our upgrade practices and where we take orders around that proposition. And I think we have successfully executed it to date.

When customers come in at $90 the actual average customer comes in about $115, and after 13 months they are around $140. And that is rising slightly through time because we have added additional things like international calling and a higher-speed high-speed service, 30 megabits. And have incremental products like SVODs and other things like that, that people are buying. So you have the initial purchase; you have the step up and you have incremental purchases beyond that that continue to drive ARPU.

Plus we have things in ARPU that aren't in RGUs like DVRs and SVODs and other things of that nature. So the step up is good. The churn after 13 months, after 18 months is significantly less for a triple play customer who came in at those rates and stepped up than it is for a customer who didn't buy a triple play at the same time.

Doug Shapiro - *Banc of America Securities - Analyst*

Okay. But to answer my question you don't have any intention of raising prices for those -- you know at some point again you will see some sort of stabilization in some of these penetration rates and you will have everyone -- not everyone -- you will have some all your triple play customers -- (multiple speakers)

Tom Rutledge - *Cablevision Systems Corporation - COO*

We have no plans --

Doug Shapiro - *Banc of America Securities - Analyst*

You have no plans. Okay.

Tom Rutledge - *Cablevision Systems Corporation - COO*

To do such a thing.

Doug Shapiro - Banc of America Securities - Analyst

Fair enough. All right. And then on the margins again, I think you had a brief period of a little bit of margin pressure when you were rolling voice out and things seem to have stabilized or even picked up a little bit. When you look out again just within the core business and you have sort of offsets of program price pressure, you have the mix shift to what I think or should be higher margin products, some of these new products. How do you think about the margin outlook?

Tom Rutledge - Cablevision Systems Corporation - COO

Well, you know, our margins have not materially changed. I mean at least in my mind not materially. When they have been within 1% of where they are now, as long as I can recall. And so there is slight variations depending on seasonality and other things. And the mix of products. But we don't actually manage the margins; it is not the way I approach my decision-making process in terms of average margins. We have a variety of products that we offer and we look at transactions and whether what the cost of the transaction is, both in capital terms and what the average subscriber life is and what the return to that transaction is. And if that is a positive result meaning we'd create economic value, we do it.

The mix of margins in a variety of opportunities will change through time. It is actually coincidental that it has remained as it is.

Mike Huseby - Cablevision Systems Corporation - CFO

And on a macro basis Doug, Cablevision has obviously very successfully employed a marketshare strategy through development and packaging, marketing of the triple play as a leader going back several years and kind of achieving a penetration rate that you and Tom have talked about. When you have a marketshare strategy that is employed and you are able to maintain those kinds of margins, just under 40% while you are growing revenues at – in the cable business 18% last year -- that is a pretty good thing. Especially when programming costs and the choices consumers are getting by having more programs available continue to increase fairly substantially.

So managing to that margin which as Tom said we don't manage to a margin, but being able to achieve that margin while rolling out a lot more sports programming, HD, all the things that consumers are now getting and achieving the kind of market share that Cablevision has been able to achieve is a pretty substantial accomplishment. You could turn certain kinds of costs off and make the margin higher but you would be sacrificing your strategy to do that; which with the increased competition isn't the right thing to do. I think what Tom and the operating people are doing is exactly the right thing to do and generating very healthy cash flow as well as the last two years some modest free cash flow, even after the leverage we have taken on to pay the special dividend last year of $3 billion.

Tom Rutledge - Cablevision Systems Corporation - COO

You know the other thing about margins as you are growing rapidly you have transactional and marketing costs that are operating expenses. And so if you mature – not that I think we are maturing like I said earlier, I think there is lots of opportunity -- but if you mature or when you mature then the margin should expand.

Doug Shapiro - *Banc of America* Securities - Analyst

I did then want to segue into part two of your answer which was the business opportunity. And maybe you could give a little bit more details in terms off what you have to do or have already done to put the infrastructure in place in terms of the sales and marketing organization which I am assuming is a separate entity.

Tom Rutledge - Cablevision Systems Corporation - COO

It is.

Doug Shapiro - Banc *of America* Securities- *Analyst*

And what if anything yet you think you need to do in terms of the actual plant infrastructure. And what a reasonable timeline is for you to really attack the market and for us to start to see that in the numbers.

Tom Rutledge - Cablevision Systems Corporation - COO

First of all, all of our guidance for capital, cash flow, margins etc. are, includes the small business marketplace. What we have done is we have gone out and looked at the marketplace and said to ourselves, how are we going to manage this inside the cable business. Historically we have had Lightpath which is a separate entity from the cable company; actually runs a separate network. And that target for Lightpath is the large business enterprise marketplace. It is about a *$22* billion market segment in our footprint, so that means there is a **$3.6** billion small business segment inside our footprint.

Historically cable has been a residential business, so when we count our passings there are homes passed, they are residence passed, they do not include businesses. And so the businesses were not in our database. And so one of the first things we did was went out and build a database and so we collected various business databases and we physically walked out our plant and identified all the small businesses inside our footprint and cross-referenced them against all the various databases.

We identified over 600,000 businesses inside our footprint that we passed with cable that were serviceable today. Serviceable not meaning that they have a wire into the building, but that our hard cable, our physical assets on the poles or in the conduits were in front of that building and all we needed to do was put in an installation drop to create connectivity to that building. We then began marketing those buildings last year, and we are now in the middle of earnestly marketing the 600,000 business marketplace.

We have developed an inbound sales force. We have developed an outbound sales force. We have developed a door-to-door sales force. We have created a separate service call facility to handle customer questions and staffed it 24 hours a day that we can provide the highest quality service. Our call center by the way has just been certified by JD Powers, the first in the country to meet their standards of excellence for a particular call center. This is our business call center and our high-speed data service level two call center.

So we have got our customer service infrastructure. We have got – we trained our personnel, because the installations are different, there is a lot more variety in business telecom installations than there is in residential installations. Because the nature of the marketplace is there is lots of resellers out there who have sold all sorts of hardware that we have to interface with. We have worked our way through all the specifications of the various interfaces that we will have to deal with. And we have created products and priced them in a way that makes us competitive in the marketplace.

Basically we charge about half of what Verizon or AT&T charges for the same service with a higher-quality service and a more sophisticated service, too, because it is all IP. And in terms of data capacity, in terms of voice quality, it is equal to or better than anything the incumbents provide and build for the future.

Doug Shapiro - *Banc of America Securities* - Analyst

So the **$3.6** billion opportunity is really --

Tom Rutledge - Cablevision Systems Corporation - COO

It is really a $1.8 billion -- (multiple speakers)

Doug Shapiro - Banc of America Securities - Analyst

Okay. And then all of that was done last year.

Tom Rutledge - Cablevision Systems Corporation - COO

Essentially the work of getting ready was done last year; I mean we began marketing last year. And we went initially we started selling four lines, and now we are up into 12, 16 lines and gradually increasing that as we move up the spectrum of sophistication to the businesses in our footprint.

Doug Shapiro - Banc of America Securities - Analyst

So if you were to characterize the nature of the marketing process or the effort on a 10 point scale, 10 where you're going to get to, where would you say you are right now? Because you are marketing across the whole footprint, right?

Tom Rutledge - Cablevision Systems Corporation - COO

Well you mean, where, you mean what is our ultimate penetration?

Doug Shapiro - Banc of America Securities - Analyst

No, no, no, no. I mean how hard are you out there pounding the pavement trying to drive --

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Tom Rutledge - Cablevision Systems Corporation - COO

Oh, we are in full battle mode. We are there. We are available everywhere. And we have people out there who are trying to convert business customers to us as rapidly as we can. You know it is a different marketplace than the residential marketplace. The decision for a business to switch providers is a bigger decision. They have to have confidence that it is in their interest and even if they can save half the money it is still a relatively small part of their overall expenditure. They are not going to put their whole business at risk unless they have confidence that you are going to provide good service and it is a good deal.

So we have credibility as a residential provider. We have over 1.3 million voice customers in this footprint. We have several million data customers, most small business owners, buy the best data service that can get so they are buying it from us. And they are buying voice from us because they know value in their own residential world and so you have credibility in the marketplace. It think it is important to establish that and I think that is going to help us through the business marketplace.

Doug Shapiro - Banc of America Securities - Analyst

And Mike, is this something you plan to break out in your financials at some point?

Mike Huseby - Cablevision Systems Corporation - *CFO*

Well, we talk about it. Right now it is – there are two points you look at. You look at first off as Tom mentioned, we don't count those passings in our residential homes passed of about 4.5, 4.6 million. And so when you talk about penetration rates you know to the extent that the numerator which is the number of customers and the denominator tends to change significantly, you want to break it out. But it is not significant enough right now from our perspective to break out in terms of relative materiality and also some of the competitive things that we're looking at, we just don't really want to break it out right now where as Tom said engaging in full battle mode. But when it gets to the point where it is important to the investor and reader's understanding of our results, we will give consideration in putting a lot more detail and disclosure around it.

Doug Shapiro - *Banc of America* Securities - *Analyst*

Okay. Well I do want to definitely leave some time for the audience; I would be remiss if I didn't approach the competitive question. And so I guess you are obviously -- well of all the operators in the country you are probably facing the most concentrated competition from Verizon's FiOS product. Maybe you could give us a sense of what you see happening there really in the trenches; you know I think on your last conference call you outlined some numbers. But even beyond that what you are seeing, what you are doing in terms of win-back offers, what you're seeing in terms of the nature of the Verizon marketing effort.

I think initially there was some anecdotal reports of very aggressive door-to-door marketing and now they have moved to more of a mass medium, seeing radio and a little bit of seeing some outdoor. You know, so how has that – how has that changed?

Tom **Rutledge** - Cablevision Systems Corporation - COO

Well it hasn't changed in any material way since our phone conversation regarding earnings and the numbers that we put out then. I think the interesting thing about the Verizon overbuild and us, we have the advantage-one of our strategic advantages and one of the reasons we put the company together the way we did is to put our eggs in the New 'fork metropolitan area and to have a relatively powerful position in the biggest media market in the country,

And we have marquee assets that support that with our Madison Square Garden and the Knicks and cinemas, and Clearview cinemas, Radio C i Musical Hall. We are a New York centric company and as a result of that we have great success in the marketplace. On the other hand we attract competition, and Verizon is also focusing on certain metropolitan areas and we are part of that. So yes we do have more Verizon overbuild than other MSOs and that is a negative to us. But it is offset by our presence in New York in general.

The thing that I find interesting about their overbuild so far is it is very traditional and it performs very similarly to overbuilds in the past that I have seen with Ameritech and PacBell and Verizon itself, GTE down in Florida. They are up against a good operator. I think, you know, they are a high single digits kind of company and if they are not, they are going to get a little more than that. But it is a very difficult business taking away an incumbent's subscribers with a me too product. There is nothing about the product that is any better than our product and in some ways it is inferior and it is definitely inferior from a pricing perspective. It is actually higher priced than our product.

So our performance is what it is. Now interestingly they have gone to a mass media strategy. If you think about that, several things; they only serve a little over 600,000 passings in the New York metropolitan area. So they are buying advertising for 7 million homes, but 92% of their ad dollars are falling in places where they can't provide the service which is interesting and inefficient. So you really have to think about what their actual service footprint is, not what their advertising is. And what that does to them and what it does to us. To the extent they stimulate interest in triple play and 92% of the places where that is stimulated is us and not them, that could be good for us. But I guess the bottom line is, it is a me too product and it is priced higher.

Doug Shapiro - *Banc of America Securities - Analyst*

I think that roughly 90% of your footprint overlaps with them --

Tom Rutledge - *Cablevision Systems Corporation - COO*

About 92.

Doug Shapiro - *Banc of America Securities - Analyst*

Okay. Sorry. What is your – (indiscernible) talked about getting to I think 15 million – I think roughly around 50% of their passings by the end of the decade.

Tom Rutledge - *Cablevision Systems Corporatian - COO*

Yes.

Doug Shapiro - *Banc of America Securities - Analyst*

Is it your assumption that that is going to be pro rata across your 90% or do you think they are going to have more of that vis-a-vis disproportionally in your footprint?

Tom Rutledge - *Cablevision Systems Corporation - COO*

Well, I don't know the answer to that. It would shock me if they actually keep going to the end of the decade. But the – you know that is what they say – and they do and you know they have said what they have done in our footprint. I saw the other day that there was an article regarding Verizon and they were talking about the fact that they had 6 million passings activated. But 1.5 million weren't really active because they were apartments and so if you think about their capital structure you know, they have talked about what their cost per passing is. And yet they are now saying their passings aren't really passings, that a quarter of them are unserviceable. I think it is economically unbelievably bad in terms of what they are doing in terms of return to capital but and even worse than they were saying.

Doug Shapiro - *Banc of America Securities - Analyst*

But have you seen any change in their behavior patterns (multiple speakers) in terms of their activity.

Tom Rutledge - *Cablevision Systems Corporation - COO*

No.

Doug Shapiro - *Banc of America Securities - Analyst*

Or seeking out new franchises.

Tom Rutledge - Cablevision Systems Corporation - COO

No.

Doug Shapiro - Banc of America Securities - Analyst

Of this is just an aggressive business.

Tom Rutledge - Cablevision Systems Corporation - COO

They are doing what they have been doing.

Doug Shapiro - Banc of America Securities - Analyst

Okay. I guess that is a good segue to open it up to the audience and we are very happy to take any questions. And out of character John Kornreich has a question.

John Kornreich - Sandler Capital Management - Analyst

Two questions on capital spending; one broad and one specific. The specific question is you have had a tremendous surge in '03, '04, '05 and '06 in cable modem boxes and digital boxes. I mean don't these things have a five-year life which would suggest that in '09, '10, '11, '12 you are going to have to replace a lot of stuff and your capital spending for what you call the fixed portion, is going to rise dramatically? That is the specific question.

The broad question is, I think it is a given that the demand for broadband capacity is going to increase pretty rapidly from customers who want more video and from you. You want to do more interactive advertising. And if that is a fact isn't it inevitable that the so-called fixed portion of your capital spending will rise as a percentage of revenue which is what is important; not in absolute terms, but as a percentage of revenue? Thanks.

Tom Rutledge - Cablevision Systems Corporation - COO

To the first part of your question, customer premise equipment replacement, you know Digital set top boxes don't break once they are installed. Neither do TVs by the way. And we have seen with the proliferation of HD sets that people just take their old sets and move them to other rooms; they don't die, they just move. And while equipment does have five-year lives from an accounting and financial perspective it can have much longer life.

Secondly the bulk of the capital CPE spending is on Digital set tops and modems and voice are actually relatively small, and particularly relatively small when it comes to the revenue and cash flow that those businesses generate. Whereas the set top box is actually, while a good return on investment, a much higher capital investment per RGU. And so what will happen you have two trends. One is we are trying to put intelligence in the network so that we don't need to continually increase the sophistication of the set top boxes.

One of the strategies behind the RS-DVR which is just one of a set of option opportunities that a centralized network infrastructure allows, is to have less expensive terminals and put the capital in the network and have that capital have a wider or a lower cost per unit essentially and to be more well utilized by the entire base of customers. So you have that sort of trend going on, the fact the boxes don't die and this other trend which is cable ready sets, meaning digital sets increasingly being sold with cards that you are allowed – that you are able to put in them – ultimately that will be two way. And once that happens the obligation of the cable operator keep buying the hardware or the set top will go away. So I think all of those things mean that ultimately we won't be replacing most of that set top capital.

The second thing about developing interactive infrastructure I think that the revenue upside there is greater than the capital required to make the network smart enough to do the interactivity on a proportional basis. And I haven't figured out all the capital costs that would go into the network. But for instance last year we raised the speed of our high-speed data service from 10 to 15 megabits and launched a new separate tier at 30 megabits and 5 megabits up, and that cost us about $15 a passing in capital to make the network capable of doing that.

So I think we will have those kind of investments on occasion as we increase the network capacity. But I don't see that as being nearly a significant driver of capital spending as CPE was and I think CPE capital [falls] and network capital relative to revenue declines.

Mike Huseby - *Cablevision Systems Corporation - CFO*

Switch video you can manage.

Tom Rutledge - *Cablevision Systems Corporation - COO*

Switch video we launched too last year for literally a couple of dollars a passing. We launched it across our entire footprint.

Doug Shapiro - *Banc of America Securities - Analyst*

I am hesitating here because we have 20 seconds left. So maybe just to follow up on that if you could give a very quick answer. You talked about (indiscernible) reclamation, you talked about switch broadcast as these tool to save bandwidth. Where are you in terms of deploying switch broadcast, and when you say across the whole network, are you going to improve -- are you going to increase the size of the switching groups? Where are we at -- what inning are we in in terms of you taking advantage of those sorts of things?

Tom Rutledge - *Cablevision Systems Corporation - COO*

I think we are at the beginning. I think our network has infinite capacity, doesn't need to be upgraded again. We have launched 60 channels on switch video to date. There are other opportunities -- it is an algorithm based on maximum peak utilization. And it is very efficient depending on the nature of the product and how many viewers there are. And so we need to figure out the right mix of products going forward. We are also launching additional HD channels and it is possible by the end of this year that we will have switch to HD as well.

Doug Shapiro - *Banc of America Securities - Analyst*

All right. With that we ran over, but thank you very much both Mike and Tom.

Tom Rutledge - *Cablevision Systems Corporation - COO*

Thank you.

CERTIFICATE OF SERVICE

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