

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 07-269
Competition in the Market for the	)	
Delivery of Video Programming	)	

**REPLY COMMENTS OF RCN TELECOM SERVICES, INC.**

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## SUMMARY

RCN Telecom Services, Inc., provides cable and open video services in Boston, Chicago, the Lehigh Valley and suburban Philadelphia, Pennsylvania, New York City and Washington, D.C. Competitive cable operators like RCN continue to face impediments to competition. First and foremost, incumbent operator control over the terms of programming availability remains a formidable obstacle to competition.

- Certain practices, such as volume discounts and most favored nation provisions result in smaller cable providers such as RCN paying higher rates for the same programming or not having access at all. These types of discriminatory agreements and pricing arrangements harm consumers and are contrary to the public interest.
- The current retransmission consent process with local television broadcast station also impedes competition. RCN is unable to compete in a market without carrying the local stations and these stations have the ability to threaten the viability of small cable companies. As a result of their market power, broadcast stations are forcing cable companies to agree to unreasonable and unjustified demands.
- In addition, vertically integrated and third party regional sports networks and other essential, non-duplicable programming are “must have” for any competitor and the denial of, or discriminatory access to, those services harms competition and consumers. Now, AT&T and Verizon are experiencing difficulties in obtaining access to these networks. Clearly, the deck is stacked against cable competition and access to this “must have” programming is essential.
- The growing use of contracts with term commitments and early termination fees also harms competition and consumers.
- The closing of the terrestrial loophole would assist competition.

RCN respectfully requests that the Commission review all of these issues and move to improve conditions for competition in the video marketplace.

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RCN Telecom Services, Inc. (“RCN”), by its undersigned counsel, hereby submits its reply comments in response to the Commission’s Supplemental Notice of Inquiry, and the initial comments filed in response thereto.<sup>1</sup> The comments filed in this proceeding overwhelmingly demonstrate that the multichannel video delivery market has not yet developed into a robust competitive marketplace. While new service providers have entered the market place in the last several years, such entrants face significant obstacles from in-trenched larger incumbent providers and rapidly escalating fees from broadcasters and cable networks. The continued existence of problems such as access to regional sports networks, as well as the existence of agreements that work to shut-out smaller providers by demanding unreasonable and discriminatory fees, will force providers to pass along these increased fees to their customers which will inevitably continue to stymie the growth of competition in the video marketplace.

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<sup>1</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, FCC 09-32 (2009).

## DISCUSSION

### I. RCN PROVIDES EXPANDED AND IMPROVED DIGITAL SERVICES

RCN provides cable and open video services in the Boston, Chicago, the Lehigh Valley and suburban Philadelphia, Pennsylvania, New York City, and Washington, D.C., areas and offers video programming services, local and long distance telephone services and Internet services. This year RCN will complete the conversion of all of its markets to an entirely digital transmission platform. RCN's expanded basic subscribers are now receiving more than double the number of channels they previously received. The digital system provides a much more efficient use of spectrum and allows RCN to offer many new channels and cutting-edge features. For example, customers on the all-digital system enjoy many more channels of high definition programming and new standard definition channels (such as RCN Global passport which allows it to provide new international special interest channels to subscribers), video-on-demand (VOD) services, self-help channels, and interactive channel guides.<sup>2</sup> But as discussed below, RCN's ability to deploy new services such as interactive programming is often constrained by a variety

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<sup>2</sup> With the new all-digital system, subscribers need a set-top box or cable card to view the digital network, but they are receiving a far greater value for virtually the same price as their former analog service. As Montgomery County, Maryland noted in its comments, RCN has made minor increases in the price of its expanded basic service in the last two years and customers must use a converter box, CableCARD or QAM tuner to access the digital platform, the RCN price for converter boxes has actually decreased in price and consumers on the all-digital system enjoy many more channels of high definition programming and new standard definition channels (such as RCN Global passport which allows it to provide new international special interest channels to subscribers), video-on-demand services, self-help channels, and interactive channel guides. Through this process, RCN has been able to reclaim spectrum, which then allows it to deliver many more HD channels and other digital content, and to support its continued growth in high speed data broadband services. Indeed, the conversion has allowed RCN to essentially double its standard digital and HD line-up. As such, RCN's customers are now receiving far greater value for virtually the same price as their former analog service. Indeed, the price for the limited basic and expanded basic tiers of service did not change as a result of the digital conversion. However, as a result of this change, customers who previously subscribed only to the analog expanded basic tier of service consisting of 80 analog television channels will have many additional channels available on the digital expanded basic "Signature" tier. The number of additional channels varies slightly from market to market based on local sports and other local channels, but for example, in the Washington market, Signature tier subscribers receive 153 channels of television and music and, with an HD set-top box, 46 HD channels (a total of 199 channels) for the same monthly price. So RCN's expanded basic subscribers are more than doubling the number of channels they receive for the same monthly rate, and even though these subscribers will need a set-top box or cable card to view the digital network, they are receiving significantly greater value for their tier of service at the same price of the tier.

of devices, such as the most favored nation (“MFN”) clauses insisted upon by large programmers, which mean that for capacity, economic or other reasons RCN does not have the flexibility to develop innovative new service options, by the control over programming that is exercised by incumbent MVPDs either through vertical integration or their control of independent programming, and by exclusive distribution rights and discriminatory rates that favor the large incumbent MVPDs.

## **II. IMPEDIMENTS TO COMPETITION CONTINUE TO EXIST**

### **A. The Commission should investigate discriminatory and other harmful programming practices.**

A review of the entities who filed comments in this proceeding provides an illusion that the video delivery market is flourishing and enjoys robust competition. Unfortunately, notwithstanding the significant efforts of the Congress and the FCC, a more detailed review demonstrates that the reality does not necessarily match this impression and incumbents continue to find new ways to exercise market power to impede competition. As RCN has advised the Commission over the nearly 15 years that it has endeavored to bring competition to the cable market, the control that incumbents exercise over programming – either through vertical integration or through their large buying power – is perhaps the single most formidable obstacle to a competitive market.<sup>3</sup> That has not changed, and more recently programming costs in general have skyrocketed, and the increase has had a disproportionate effect on smaller cable providers, such as RCN, who cannot qualify for the volume discounts demanded by the large cable MSOs and do not have the bargaining power to negotiate most favored nation and other advantageous –

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<sup>3</sup> See e.g. Comments of RCN Telecom Services, Inc, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket 03-172, filed Sept. 26, 2003; Comments of RCN Telecom Services, Inc. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation*, MB Docket No. 05-192, filed July 21, 2005; Comments of RCN Telecom Services, Inc. *News Corporation and the DIRECTV Group, Inc., Transferors and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB Docket No. 07-18, filed on March 23, 2007;

and discriminatory – contract provisions. Such providers are therefore disadvantaged in the retail market by their unequal programming cost structure, which has greatly impeded – and continues to thwart – the growth of competition in a cable marketplace dominated by the large MSOs and satellite providers.

Certain practices, such as volume discounts to large incumbent cable providers, have raised Commission concerns in the past. In the AT&T-Comcast merger, for example, the Commission found that “the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and ... these practices ultimately may harm consumers.”<sup>4</sup> RCN’s recent experience with one cable network illustrated the point – the rate proposed to RCN for the channel was literally double the rate that, on information and belief, the network is charging the largest MSOs. Neither this particular network nor any other in RCN’s experience, have been able to provide any economic or business justification for the discounts other than that the large MSOs are able to demand such anticompetitive discounts.

Most favored nations provisions are another non-negotiable tool often inserted by cable networks into programming agreements (and by broadcasters in retransmission consent agreements) or are asserted as being in agreements with other operators that are used to stymie innovation and competition. Although seemingly benign, networks hide behind their purported MFNs with larger operators as excuses for why they cannot negotiate more flexible agreements with smaller operators. And on the flip side, they demand MFNs in their contracts with smaller operators like RCN that serve to stymie innovation because any such innovation would set off a

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<sup>4</sup> See Comments of RCN Telecom Systems, Inc, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, at 7, n. 17 filed on Sept. 19, 2005 (citing *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246 ¶ 120 (2002)).

daisy chain of renegotiations under pre-existing contracts. For example, if RCN were to enter into a contract with new network X to provide a new interactive service, it would trigger MFN obligations to offer the same service and capacity to all of the entities who have demanded MFNs in pre-existing contracts – a process that often stops the innovation in its tracks.

When smaller cable providers such as RCN are forced to pay higher rates for the same programming or else lose access to a network, competition is clearly harmed, either the loss of programming channels when cable operators refuse or cannot afford to pay the prices demanded, or through an increase in service rates to customers that are the unfortunate result of unjustified programming fees. In the recent experience noted above, viewership of the network simply does not justify the very large per subscriber fee sought by the network, yet as a practical matter a competitive cable company like RCN simply cannot, as a competitive matter, drop the channel. Unlike the large MSOs who have many cable systems in which there is no facilities-based competition, RCN and other over-builders by definition compete with an incumbent for every one of its subscribers. So when a competitive entity drops a channel, every single one of its subscribers has the option of obtaining service from an incumbent who has access to that channel at a fraction of the cost to its competitor. The competitive entity therefore simply does not have the competitive leverage of the incumbent.

Discriminatory agreements and pricing arrangements harm consumers and are contrary to the public interest. RCN supports other commenters in calling on the FCC to review these practices and to use its authority under Section 628 to ensure that exclusive and discriminatory agreements and price structure can no longer harm competition and consumers.<sup>5</sup> Pursuant to the

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<sup>5</sup> See Comments of Consumers Union, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 4, filed on July 29, 2009 (“*Consumers Union Comments*”); Comments of Verizon, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 4, filed on July 29, 2009 (“*Verizon Comments*”).

federal court's decision in *NCTA v. FCC*,<sup>6</sup> Section 628 provides the Commission with broad authority to regulate agreements that potentially harm competition. The Commission should exercise this authority to review and potentially regulate these discriminatory practices before the resulting economic harm further damages competition.

**B. The current retransmission consent process also serves to impede competition.**

During the most recent cable carriage election cycle, there was a significant shift in how broadcasters approached the election process. A majority of broadcast stations have now moved away from must-carry elections to retransmission consent negotiations and agreements. While some commenters, such as the National Association of Broadcasters, continue to suggest that cable operators control the market, the significant increase in the number of retransmission agreements, and steeply increased obligations, clearly demonstrates that it is broadcasters and not other MVPDs, who have the market power.<sup>7</sup> As the American Cable Association noted in its comments, a broadcaster may withhold carriage of its station from smaller cable companies without being significantly harmed, but a smaller cable operator providing service in a competitive community, has no option but to agree to unreasonable terms in order to secure carriage of the network and local programming carried on broadcast stations.<sup>8</sup>

Put simply, customers expect carriage of what they perceive to be “free” over-the-air local broadcast stations, and RCN cannot compete in a market without carriage of at least the major networks. As the Commission has noted, broadcast network stations have the ability to

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<sup>6</sup> *NCTA v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

<sup>7</sup> See Comments of American Cable Association, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 11-14, filed on July 29, 2009 (“ACA Comments”).

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

threaten the viability of small cable companies.<sup>9</sup> Due to the popularity of network television as well as the important programming they provide, such as local news and sports, it is absolutely essential that RCN carry these signals. As a result, however, consumers are often harmed by unreasonable broadcaster demands. In some cases, broadcast stations are removed from carriage when negotiations fail and viewers lose access to local news and weather information.<sup>10</sup> In other cases, faced with subscriber expectations and demands, cable companies must accept the terms offered by local stations even if it means agreeing to unreasonable and unjustified demands. And in one particularly egregious situation during the last retransmission cycle, a broadcast station used a termination provision in its contract to come back to RCN only a few months after signing a 3-year agreement to new significantly higher demands than the ones it had just agreed to – and was perfectly willing to say that the changed was based on what it had subsequently heard that other local stations had demanded and received in their negotiations.

RCN has repeatedly asked broadcasters for general information about the retransmission rates (be it monetary or some other form of payment) in the market in an effort to ensure that terms that it is being offered are nondiscriminatory, but has generally been refused. Without this information RCN has no way of verifying that it is being treated fairly. So too must the Commission have confidential access to this information in order to truly assess whether competitively harmful discrimination and exclusivity exists.

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<sup>9</sup> *Id.* at 12, n.7 (citing *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and the News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 176, 202 (2004)).

<sup>10</sup> *See* Comments of DISH Network, L.L.C., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 7, filed on July 29, 2009 (“*DISH Comments*”).

**C. Vertically integrated regional sports networks are clearly “must have” programming and denial of access continues to harm competition and consumers.**

Only two months ago, the United States completed its transition to digital television and American consumers are more aware than ever of the advantages of programming provided in high definition (“HD”) with its superior sound and picture. As such, there is an ever increasing consumer demand for cable networks to be provided and carried in HD, including the popular regional sports networks. The Commission has repeatedly evaluated and deemed regional sports networks to be “must have” programming for cable providers,<sup>11</sup> and their HD feeds have become essential. In order to compete in today’s marketplace, video service providers must be able to deliver regional sports networks to customers in the highest quality audio and video available. As Verizon noted, many customers require that competitors carry a regional sports network, including the HD version, before they will even consider changing service providers,<sup>12</sup> and RCN has found similar responses in its markets. Unfortunately, as noted by Verizon, suggestions by NCTA to simply allow regional sports networks and competitive cable providers to negotiate deals for carriage are disingenuous and misleading.<sup>13</sup> The simple fact of the matter is that these incumbents who control these networks refuse to negotiate with competitors, and thereby deny them access to this “must have” programming.

As RCN has repeatedly reported to the Commission, the metropolitan markets in which RCN operates all now have critical sports programming controlled by RCN’s incumbent

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<sup>11</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124, ¶ 33-34 (2002) (“2002 Sunset Order”).

<sup>12</sup> *Verizon Comments* at 2.

<sup>13</sup> *Verizon Comments* at 3.

competitor,<sup>14</sup> and it has faced unreasonable demands and complete denial of access to regional sports networks over the years. Now, AT&T, one of the largest media companies in the country, has also run up against incumbent cable providers who have refused to provide access to regional sports programming in significant markets such as California and New York. When two of the largest telephone companies in the country, AT&T and Verizon, are facing difficulties accessing necessary programming, then it should come as no surprise that RCN, a small cable over builder operating in six markets, is unable to successful obtain access to these must have networks at reasonable prices in order to compete. Clearly, the deck is stacked against new cable competition, and the Commission must ensure incumbents provide access to “must have” programming, such as regional sports networks, at reasonable, market rates.

**D. Competition is also harmed by exclusive or discriminatory agreements between large incumbent MVPDs and third party sports networks and other suppliers of ‘must have’ programming.**

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.”<sup>15</sup> 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

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<sup>14</sup> These include: (1) in New York City - SportsNet New York (Comcast), Madison Square Garden (Cablevision), and SNY (Time Warner and Comcast); (2) in Boston – SportsNet New England (Comcast, formerly Fox); (3) in Washington DC – SportsNet New England (Comcast); (4) in Philadelphia – SportsNet Philadelphia (Comcast); and (5) in Chicago – SportsNet Chicago (Comcast). Indeed, the only other regional sports networks in these markets – and the only ones in which an incumbent cable operator does not have an ownership interest, are Yankees Entertainment System (YES) in New York City, New England Sports Network (NESN) in Boston, and Mid-Atlantic Sports Network (MASN) in Washington, DC.

<sup>15</sup> 2002 *Sunset Order* at ¶ 33-34. See also *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, ¶ 122-124 (2005) (“*Adelphia*”) (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."<sup>16</sup>

Clearly, 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 or discriminatory 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.<sup>17</sup>

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 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

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<sup>16</sup> *Id.*

<sup>17</sup> Another way that incumbents use their market power to impede competitive access to programming is by contracting to serve as a 'gatekeeper' of such programming such that any competitor must go through the incumbent or its affiliate to obtain the programming. For example, RCN has developed an innovative suite of international service packages and even for international programming networks has had to go through an affiliate of an incumbent competitor in order to obtain much of that content.

conditions imposed by the Commission. But while those decisions focused on the operators' integrated 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. Similarly National and, increasingly, international sports are, like local and regional sports, "must have" from a competitive standpoint.

As expressed by Senator Kerry, in commenting on the stories of an exclusive baseball agreement between Major League Baseball and DirecTV:

"[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.*"<sup>18</sup>

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.<sup>19</sup>

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

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<sup>18</sup> See Comments of RCN Telecom Services, Inc. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29, filed April 2, 2007, Attachment A, Letter from Senator John Kerry to Chairman Kevin Martin, Feb. 1, 2007 (emphasis added) ("*RCN Comments*"). 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." *RCN Comments*, Attachment B, Letter from Chairman Kevin J. Martin to The Honorable John Kerry, Feb. 22, 2007. See also *RCN Comments*, Attachment C, Press Release, "Senate to Hold Hearing on MLB-DirecTV Squeeze Play," Feb. 16, 2007.

<sup>19</sup> *RCN Comments*, Attachment D, Press Release, "Kerry to Question FCC Chairman Over DirecTV-Major League Baseball Deal," Jan. 31, 2007.

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.<sup>20</sup>

Two examples of the market power of third party ‘must have’ programming illustrate its importance to a competitive industry, and the importance of assuring that it is not provided only to the largest incumbents on an exclusive or discriminatory basis.

First, the power of ‘must have’ sports programming is obvious from the recent carriage dispute between Comcast and the NFL network that sports networks wield huge bargaining power even against the largest cable incumbent. But through a combination of its ability to ability to spend large amounts in litigation and the large number of subscribers it brings to the table, Comcast was reportedly able to reach a settlement which reduced the asking prices from 70 cents per subscriber to 40-45 cents per subscriber on the basis that it move the NFL Network from its sports package to the more widely distributed Digital Classic tier.<sup>21</sup> New entrants typically do not have the bargaining leverage of a Comcast, either in terms of litigation war chests or numbers of subscribers and without prohibitions of exclusivity and discrimination typically cannot receive a competitive rate.

Second, the importance of sports programming is illustrated by the market that DIRECTV has continued to build around its exclusive sports programming agreements with unaffiliated domestic and international “must have” program rights holders such as the NFL, which enables it to exclusively package the NFL Sunday Ticket service.<sup>22</sup> As DirecTV’s President told Wall Street in 2007, “sports is the strongest force in television” and DirecTV is a

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<sup>20</sup> Communications, Consumer's Choice, and Broadband Deployment Act of 2006, S. 2686, at 86 (introduced May 1, 2006).

<sup>21</sup> See *Comcast, NFL Network reach programming accord*, Houston Chronicle, (May 19, 2009).

<sup>22</sup> *In the Matter of General Motors Corporation and Hughes Electronic Corporation, Transferors, and the News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 127 (2004).

sports content leader through its exclusive services like NFL Sunday Ticket, and NASCAR.<sup>23</sup> 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.”<sup>24</sup> 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 through an MVPD affiliate or through an exclusive agreement between an MVPD and the NFL – for many subscribers, it is the Sunday Ticket service, and that service alone, that dictates their decision to subscribe to DirecTV over any other competitor. 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.

**E. The growing prevalence of contracts with term commitments and early termination fees is serving to impede competition and customer choice.**

Another trend that is serving to impede competition is the growing use of multi-year contracts with early termination fees (“ETFs”) that are being used to lock customers into long-term commitments to an MVPD. They are particularly prevalent among the large incumbent telephone and cable operators, who unlike smaller entrants have the ability to subsidize the discounts through either higher rates for other non-cable high capacity services or rates in areas where no competition exists. While on their face such contracts may seem to offer attractive up front benefits, in practice the contracts often contain poorly explained rate escalators during the

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<sup>23</sup> *RCN Comments* at 15, n.41 (citing transcript of DTV - Q4 2006 The DirecTV Group, Inc., Earnings Conference Call, at 9 (Feb. 7, 2007)).

<sup>24</sup> *Id.* at 15, n.42 (citing transcript of DTV - The DirecTV Group, Inc. at Bear, Stearns 20th Annual Media Conference, at 7 (Mar. 6, 2007)).

term and the threat of a substantial ETF acts as a deterrent to customer choice. This is an issue that has been of concern to consumer groups<sup>25</sup> as well as regulators<sup>26</sup> and legislators<sup>27</sup> in the wireless industry context as a deterrent to competition and consumer choice, especially where the ETF is not related to a particular cost such as an equipment cost or is not prorated over the term of the contract. RCN urges that the Commission review the impact of such agreements in the context of competitive cable and satellite services as well.

**F. Competition would benefit from the closing of the terrestrial loophole.**

RCN and other competitors have repeatedly informed the Commission of their concerns about the “terrestrial loophole” since 1994 and have demonstrated how incumbent providers have increased their use of fiber optic technology to move programming from satellite delivery to terrestrial delivery, which allows them to prevent access by competitors.<sup>28</sup> As articulated in the Consumer Union comments, the terrestrial loophole continues to provide an “unfair advantage” that allows companies to withhold programming, especially regional sports networks, from competitors.<sup>29</sup> RCN agrees with those commenters that have called upon the Commission to review its authority under Section 628 to close this loophole and protect competition. The record is clear in this and related proceedings that the terrestrial loophole continues to result in serious harm to competition. and RCN agrees with other commenters that the FCC has the

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<sup>25</sup> See, e.g., Testimony of Joel Kelsey on behalf of Consumers Union, Consumer Federation of America, Free Press, the Media Access Project, and Public Knowledge, before the Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy and Consumer Rights, <http://judiciary.senate.gov/pdf/06-16-09KelseyTestimony.pdf> (July 16, 2009).

<sup>26</sup> See, e.g., Remarks of Commissioner Michael J. Copps “Free My Phone”, New America Foundation Forum, Washington, D.C., [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-279631A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-279631A1.pdf) (Jan. 22, 2008); Chairman Kevin J. Martin Remarks, Early Termination Fees Public Hearing, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-282898A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282898A1.pdf) (June 12, 2008).

<sup>27</sup> See, e.g., S. 2033, Cell Phone Consumer Empowerment Act of 2007, introduced Sept. 7, 2007.

<sup>28</sup> See Reply Comments of RCN Telecom Services, Inc. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29, at 11, filed April 16, 2007.

<sup>29</sup> Consumer Union Comments at 3.

authority to close the terrestrial loophole and that such action should be taken with all due haste.<sup>30</sup>

### CONCLUSION

RCN has greatly expanded its services and provided its customers with improved all-digital video delivery while keeping costs reasonable. However, in order to remain a viable service provider in the video delivery marketplace, unreasonable and discriminatory practices by incumbents must be eliminated. Pricing discrimination, harmful agreements that hinder competition and the continued existence of the terrestrial loophole must be addressed by the Commission.

Respectfully submitted,

/s/

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<sup>30</sup> See Comments of AT&T, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, at 4, filed on July 29, 2009.