

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

In the Matter of)	
)	
Applications for Consent to the)	
Transfer of Control of Licenses)	
)	
Comcast Corporation and)	
AT&T Corporation,)	MB Docket No. 02-70
Transferors,)	
)	
To)	
)	
AT&T Comcast Corporation,)	
Transferee)	
_____)	

**PETITION OF RCN TELECOM SERVICES, INC.,
TO DENY APPLICATIONS OR
CONDITION CONSENT**

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Summary

For the reasons set forth in these comments, RCN believes it is imperative and appropriate that the Commission consider denying the requested transfer of licenses and authorizations to the merged AT&T Comcast or, if the transfers are to be approved, that the Commission impose conditions on the merged entity that will help to enable the survival of competitive cable and broadband providers in the face of this huge further consolidation in the MVPD market.

In these comments, RCN seeks to impress upon the Commission the competitive context in which this proposed merger is occurring. Despite Congress' mandate to the Commission to protect and promote competition in the MVPD marketplace, it is a marketplace increasingly dominated by a smaller and smaller number of larger and larger players, in which competition is increasingly vulnerable. Thanks to previous mergers (though none has even approached this one in terms of size); the concerted, anti-competitive tactics of the large incumbent cable operators; the trend toward clustering of regional cable systems and accompanying migration of programming to terrestrial delivery; and the inability of the Commission through its program access rules to protect competitors' access to essential programming, competitive providers of cable services face higher barriers to market entry than ever before. It is not an overstatement to say that, if the few competitive broadband providers currently in the marketplace do not survive, competition itself in many sectors of the MVPD market will perish, and consumers again will be confronted with unconstrained monopoly service providers.

To prevent this clearly unacceptable outcome, the Commission, consistent with its statutory mandate, must either deny the requested transfer of licenses and authorizations to the merged entity, or at a minimum condition its approval of those transfers on the following:

- 1) access for competitors to AT&T Comcast affiliated programming on non-discriminatory pricing and terms;
- 2) a prohibition on exclusive arrangements between AT&T Comcast and third-party suppliers of programming, essential technologies, and other essential services; and
- 3) a requirement for uniform subscriber pricing, to deter AT&T Comcast from engaging in predatory pricing, sales, and marketing tactics.

Together, these three simple conditions would greatly mitigate the potential anti-competitive impact of the market concentration that will result from the proposed combination of Comcast and AT&T. These remedies are essential to communicate to investors, local franchise authorities, and the public that the Commission is committed to, and will support, continued broadband competition in the MVPD marketplace.

Table of Contents

INTRODUCTION 2

CABLE COMPETITION HAS PRODUCED TANGIBLE BENEFITS FOR CONSUMERS; WITHOUT VIABLE COMPETITION, CONSUMERS WILL BE HARMED 3

THE COMMISSION MUST FULFILL ITS STATUTORY MANDATE TO PRESERVE AND PROMOTE COMPETITION IN THE MVPD MARKET BY DENYING OR, AT A MINIMUM, CONDITIONING, THIS MEGA-MERGER 5

RCN HAS AN IMPORTANT INTEREST IN THIS PROPOSED MERGER AS A COMPETING PROVIDER OF BUNDLED BROADBAND SERVICES..... 9

THE CABLE INDUSTRY STILL IS COMPRISED OF GEOGRAPHIC MONOPOLIES, AND AT&T COMCAST’S DOMINANCE OF THE NATIONAL CABLE MARKET WILL IMPAIR THE ABILITY OF BROADBAND PROVIDERS LIKE RCN TO CONTINUE TO COMPETE IN LOCAL AND REGIONAL MARKETS 10

LARGE CABLE OPERATORS, INCLUDING THE MERGER PARTNERS, HAVE A HISTORY OF ANTI-COMPETITIVE BEHAVIOR THAT SUGGESTS AT&T COMCAST WILL WIELD ITS MARKET SHARE AGGRESSIVELY 12

 I. Interference in Local Franchise Negotiations 15

 A. Prince George’s County, MD 15

 B. Philadelphia, PA 16

 II. Obstruction of RCN’s Access to Services of Third-Party Contractors Upon Which RCN Relies To Construct and Deploy Its Network..... 16

 III. Withholding or Threatening to Withhold Access to Essential, Non-Substitutable Local Sports Programming 19

 IV. Impediments to Building Access 21

 V. Predatory Pricing 22

THE PROPOSED MERGER OF AT&T AND COMCAST PRESENTS SPECIFIC, PROSPECTIVE COMPETITIVE CONCERNS 23

 I. Access to Programming 24

 A. Affiliated Content Providers – Merged Entity Will Control Or Be Able To Influence Licensing Of A Host of Essential, Non-Substitutable Programming Assets 25

B.	Non-Affiliated Content Providers – Merged Entity Will Have Monopsony Power Over Third-Party Programming Providers	29
II.	Exercise of Monopsony Power By Merged Entity Could Preclude Competitors’ Access to Third-Party Vendors of Essential New Technologies	32
III.	Predatory Pricing, Sales, and Marketing Tactics	34
	THE APPLICATION FOR THE TRANSFER OF LICENSES AND AUTHORIZATIONS TO THE MERGED ENTITY SHOULD BE DENIED OR, AT A MINIMUM, CONDITIONED	35
	EXHIBIT A: STATEMENTS OF RODDY GAYMON, ROSALIND APPLEWHITE, PAUL PHILLIPS, AND BRUCE WIRT	36

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**PETITION OF RCN TELECOM SERVICES, INC.,
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RCN Telecom Services, Inc., (“RCN”) hereby petitions the Commission to deny the Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corporation to AT&T Comcast Corporation (“Transfer Application”), on the ground that the applicants have failed to meet their burden of showing that the proposed transfers will serve the public interest, convenience, and necessity.¹ In the alternative, RCN respectfully urges the Commission to impose safeguarding conditions on AT&T Comcast in connection with the proposed transfers, to preserve and promote competition in the MVPD marketplace, consistent

¹ 47 U.S.C. §§214, 310.

with the mandates of Congress, the Communications Act of 1934 as amended,² and the objectives of the Commission.

Introduction

The proposed merger of the AT&T Broadband Division of AT&T Corporation with Comcast Corporation will create by far the largest multiple system operator (“MSO”) in the multichannel video programming distribution (“MVPD”) market. According to the Commission’s Public Notice soliciting comments on the proposed transfer of licenses and authorizations to the merged entity, AT&T Comcast will acquire: cable systems serving 13.4 million subscribers, in which AT&T Broadband owns a 50% or greater interest; AT&T Broadband’s interests in cable systems in which it holds a less than 50% stake, serving another 16.6 million subscribers; and Comcast’s attributable interests in cable systems serving 8.5 million subscribers. AT&T Comcast thus will control systems serving approximately 22 millions subscribers, and will have an interest in – and, therefore, potential influence with respect to – systems serving another 16.6 million subscribers. Even if AT&T divests itself of its 25.5% limited partnership interest in Time Warner Entertainment, with its 12.8 million subscribers, AT&T Comcast still will have access in some form to more than 25 million cable television subscribers, representing 35% of the total cable market, and 28% of the MVPD marketplace. This compares with second-place AOL Time Warner, which has an estimated 12.7 million subscribers and, even at that market share, considerable market power, as detailed below.

The merged AT&T Comcast will have subscribers in 17 of the nation’s top 20 metropolitan areas, and a presence in 41 states. In addition to its access to an unprecedented number of cable subscribers, and the market clout that accompanies such dominance, AT&T

² 47 U.S.C. §151, *et seq.* (“Communications Act” or “Act”).

Comcast also will hold attributable interests in critical, non-substitutable programming, including local and regional sports and news and national video programming networks. AT&T and Comcast have indicated the intent of the merged entity to expand the merger partners' current broadband service offerings, including local telephone and highspeed Internet services, for the purpose of allowing the merged entity to compete aggressively in the nascent market for bundled telecommunications services – the sector of the MVPD market in which RCN and other broadband providers compete.

**Cable Competition Has Produced Tangible Benefits For Consumers;
Without Viable Competition, Consumers Will Be Harmed**

I. More Choice and Better Service

It is axiomatic that, where consumers have a choice of multiple providers from whom they can purchase service, providers have a far more powerful incentive to upgrade their service than exists in a monopoly environment. In the MVPD industry, this translates into better services and, as discussed in greater detail below, better value for the dollar. The Commission has recognized this: “[I]n communities where head-to-head competition is present, the incumbent cable operator has generally responded to competitive entry in a variety of ways, such as by lowering prices, providing additional channels at the same monthly rate, improving customer service, [or] adding new services”³

II. Lower Prices

RCN's presence in the market has consistently held down prices and resulted in other economic benefits to the local community. Examples include:

³ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, rel. Jan. 14, 2002, at ¶197.

» **Somerville, MA**

Incumbent Time Warner announced rate freezes in Somerville, a Boston suburb, upon RCN's entry, even though it was raising rates in most of the eastern Massachusetts communities in which it was the franchisee by 10% to 15%.

» **Boston, MA**

The City was able to negotiate a franchise renewal with Cablevision that imposed obligations on the incumbent more favorable to the public than would otherwise have been possible because RCN was already operating in the city as an OVS.⁴ Cablevision agreed to increase its commitment to public, educational and government ("PEG") channels and increase the channel capacity of its system. Cablevision also moderated its regional rate increase in the Boston area because it faced competition from RCN.

» **Allentown, PA**

Allentown is one of the very few communities in the United States which has been served for 20 years by competitive cable companies. In Allentown the competitors are RCN and Service Electric. Both have almost fully built-out the city, so that most residences have two broadband wires available at each house. As a result of the competition, cable rates are significantly below the national average, and penetration is higher than the national average (approximately 90% of the city is wired by both companies). There are also fewer customer complaints on a percentage basis than the industry experiences nationally.

» **Washington, D.C. Metropolitan area**

RCN's affiliate in Washington, D.C., Starpower,⁵ has provoked dramatic changes in the offerings of incumbent cable operators, discouraging price increases and improving service offerings. Upon the announcement of Starpower's entry into the market, the D.C. incumbent's rate increases moderated from previously announced annual increases in the range of 7% to a mere 2% in 1998. In 2001, Starpower's basic rate in Washington, D.C. was \$31.95 for 96 channels and no installation fee. Comcast charged \$33.87 for 56 channels with a

⁴ As the Commission is aware, RCN operates in some jurisdictions as an Open Video System ("OVS") provider, rather than as a traditional cable franchisee. However, RCN's franchise obligations in both situations are similar, and its product offerings and services are indistinguishable from the subscribers' point of view. Accordingly, we do not differentiate in these comments between traditional cable and OVS, using the term "cable" to refer generally to RCN's offerings in competition with incumbent cable providers.

⁵ The figures and examples cited herein for RCN incorporate those for Starpower, a joint venture in the Washington, D.C., market owned 50% by RCN and 50% by PEPCO Communications.

\$39.95 installation fee.⁶ In anticipation of competitive entry, Cox Cable announced that it would upgrade its cable to 860 MHz capacity in Fairfax County. In Prince George's County, Comcast announced an upgrade of its plant beyond its franchise obligation when it believed Starpower's arrival was imminent. Comcast in Arlington announced a major overhaul of its channel line-up with significant additional channel capacity and digital upgrades to make its offerings more competitive with newly-franchised Starpower.

The ability of broadband cable providers to bundle their services also has resulted in distinct benefits for consumers. When introduced in 2000 in the Boston area, for example, RCN's ResiLinkSM Platinum service, which provides telephone, cable and high-speed Internet access, cost \$156 per month. Typical cable and phone providers in the Boston area at that time offered less for a combined monthly total of about \$243 per month.⁷ AT&T and Comcast have emphasized the ability to offer bundled services as a justification for their merger.⁸ However, the price at which their bundled services are offered and the scope of their packages undoubtedly will be influenced by whether or not other bundled service providers are able to remain in competition with the merged entity in its markets. If competition perishes, so to will the benefits to consumers that competition has produced.

**The Commission Must Fulfill Its Statutory Mandate
To Preserve And Promote Competition In The MVPD Market
By Denying Or, At A Minimum, Conditioning, This Mega-Merger**

The standard applicable to the Commission's review of AT&T Comcast's request for transfer of the merger partners' licenses and authorizations is straightforward:

⁶ Starpower cites these 2001 figures as an indication of the price and service differential as competition in the market became established. Today, Starpower charges \$34.95 per month for 94 channels of basic cable, and still generally provides free installation through various promotions; Comcast currently offers 60 channels for \$35.86 per month.

⁷ RCN Annual Report for 2000, at 12.

⁸ See Declaration of Robert Pick at ¶¶11-12, dated February 27, 2002, *In re the Applications of Comcast and AT&T Broadband for Transfer of Control of Licenses*, MB Docket 02-70.

To obtain Commission approval of their Application, the Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity. In this regard, we must weigh the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the benefits outweigh the harms.⁹

The Commission has recognized as a relevant factor in its analysis the question whether the transaction “would substantially frustrate or impair the Commission’s implementation or enforcement of the Communications Act, or would interfere with the objectives of the Communications Act and other statutes.”¹⁰ RCN submits that the likely harm to competition that will result from the proposed AT&T Comcast merger, as described in detail in these comments, in fact will frustrate the pro-competitive objectives of the Communications Act, and that Applicants have failed to meet their burden of demonstrating that this public interest harm is outweighed by the purported benefits of their proposed merger. If so, the Transfer Application must be denied.

Short of denying the transfers, the Commission’s ability to impose safeguarding conditions on the transfer of licenses and other authorizations in connection with a merger that threatens to harm consumers is clear.¹¹ Sections 4(i) and 303(r)¹² of the Act give the Commission broad authority to adopt such rules or policies, not otherwise inconsistent with law, as it deems necessary to implement the other provisions of the Act. Section 4(i) provides, in

⁹ *In Re Applications of MediaOne Group, Inc., Transferor, and AT&T Corp., Transferee*, FCC 00-202 rel. June 6, 2000, (“*MediaOne Group/AT&T Order*”) at ¶ 1.

¹⁰ *Id.* at ¶ 9. Whether or not one applies the four-part public interest test discussed in the *MediaOne Group/AT&T Order*, the question whether approval of the proposed transaction will tend to undermine the objectives of the Communications Act is relevant to whether the public interest will be served.

¹¹ *Id.* at ¶¶ 184-192; *In Re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, FCC 99-279 rel. Oct. 8, 1999, at ¶¶ 1,3, and 46-54.

¹² 47 U.S.C. §§ 154 (i) and 303 (r).

part, that the Commission may “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.” Section 303(r) grants the Commission authority to “make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act”

The Commission has interpreted these sections of the Act broadly on many occasions, and these interpretations have been upheld by the courts. For example, when the cable inside wiring rules were under consideration, incumbent cable operators argued that the forced disposition of cable home run wiring goes beyond the narrow language of sections 623(b) and 624(i) of the Act.¹³ The Commission rejected these arguments, relying on its authority under sections 4(i) and 303(r):

We conclude that the Commission has authority under §§ 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly § 623, to establish procedures for the disposition of MDU home run wiring upon termination of service. The Commission may properly take action under § 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission’s functions.¹⁴

Over 30 years ago the Supreme Court, in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), sustained the Commission’s assertion of regulatory authority over cable television systems even though no provision of the Act as it then existed purported to give the Commission

¹³ 47 U.S.C. §§ 543(b) and 544(i).

¹⁴ *Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket 95-184 and MM Docket No. 92-260, 13 FCC Rcd. 3659, ¶ 83 (1997) (“*Inside Wiring Order*”), recon. pending and appeal pending sub nom. *Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Circuit). (Emphasis added).

such authority. In doing so, the Court emphasized the breadth and scope of the Commission's authority:

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to 'all interstate and foreign communication by wire or radio . . . ' 47 U.S.C. s 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . ' 47 U.S.C. s 151. *Id.* at 167-8 (footnotes omitted).

Similarly, in affirming the very substantial expansion of the Commission's jurisdiction to encompass regulation of cable, the Court observed that "[W]e may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'"¹⁵

These principles have been consistently reaffirmed by the courts. In *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), the court affirmed the Commission's contention that it had authority under section 4(i) of the Act to allow non-LECs to provide OVS service pursuant to section 653(a)(1),¹⁶ even though that section expressly authorizes only LECs to provide such service: "The fact that the first sentence of § 653 (a)(1) expressly authorizes LEC's to provide OVS service, however, does not bar the Commission from permitting other entities to provide it, for the Commission has ancillary authority under § 4(i) of the Communications Act to permit non-LEC's to be certified as OVS operators."¹⁷ As the court observed, "if the FCC had ancillary

¹⁵ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), quoting from *Permian Basin Area Rate Cases*, 390 U.S. 747.

¹⁶ 47 U.S.C. § 573(a)(1).

¹⁷ *City of Dallas, Texas v. FCC.*, 165 F.3d 341, 351-2, citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 and *General Tel Co. of Southwest v. United States*, 449 F.2d 846, 853-4 (5th Cir. 1971).

authority to adopt an entire regulatory regime for cable television, it surely has ancillary authority to extend to non-LEC's the permission to operate OVS's."¹⁸

These precedents and principles, and those relied upon by the Commission in its *MediaOne Group/AT&T Order*, which placed substantial conditions on that merger, provide the Commission with ample authority to impose on the Applicants the conditions necessary to mitigate the merged entity's excessive market power in the cable and bundled broadband services sectors of the MVPD market.

RCN Has An Important Interest In This Proposed Merger As A Competing Provider of Bundled Broadband Services

RCN is the nation's first and largest facilities-based competitive provider of bundled phone, cable television, and high-speed Internet services. As of the end of 2001, RCN's network passed approximately 1.5 million marketable homes, and RCN had more than 800,000 customer connections to its network.¹⁹ RCN operates in jurisdictions in 7 of the 10 largest markets in the United States, including in the Boston, Chicago, Los Angeles, New York, Philadelphia, San Francisco, and Washington, D.C., areas. The Commission has acknowledged the benefits of the

¹⁸ *Id.* at 352. See also *Mobile Communications Corp (MTEL) v. FCC*, 77 F.3d 1399 (D.C. Cir. 1999), *cert. den.* 117 S.C. 81, in which the Court resoundingly sustained the Commission's decision to rely on § 4(i) and 303(r) of the Act to expand its auction authority notwithstanding narrower language in § 309(j) of the Act specifically setting forth such authority. The court in *MTEL* quoted from its own earlier decision in *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685 (D.C. Cir. 1991): "[A] congressional prohibition of particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger." 940 F.2d at 694. See also *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372-3 (1973) (a congressional decision to prohibit certain activities does not imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger). In *North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985), the Commission, relying on § 4(i), required the Bell holding companies to file capitalization plans for equipment subsidiaries, although the Communications Act conferred no authority over holding companies and the legislative history suggested that Congress had considered and rejected such authority. The court sustained the Commission, because it found that "Section 4(i) empowers the Commission to deal with the unforeseen – even if that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries." *Id.* at 1292.

¹⁹ A single customer may have multiple connections to the network for phone, Internet, and cable television service.

competition that RCN, and providers like it, provide: “[C]ompetition often results in lower prices, additional channels, improved services, or additional non-video services.”²⁰ Indeed, RCN is precisely the type of competitor Congress sought to bring into the market when it opened the broadband market to competition through passage of the Telecommunications Act of 1996.

**The Cable Industry Still Is Comprised Of Geographic Monopolies,
And AT&T Comcast’s Dominance Of The National Cable Market
Will Impair The Ability Of Broadband Providers Like RCN To Continue To Compete
In Local And Regional Markets**

In considering the proposed merger, it is imperative to recall that the cable industry is one of historical local monopolies, dominated by entrenched incumbents that established their subscriber base in the era before competition and retain, in most markets in the country, a potent monopoly as the sole cable television provider. Although there will remain, if the proposed AT&T Comcast merger is approved, several other large cable MSOs and a host of smaller cable operators, in any given geographic market in which AT&T and Comcast operate, there is no more than one cable competitor, if there is any cable competition at all. AT&T Comcast simply does not compete with the other large cable MSOs, so the presence of other large cable MSOs in the MVPD market is largely irrelevant. Rather, the large MSOs have tacitly divided the national market into a series of geographic clusters, wherein the incumbent cable MSO retains a local monopoly or near-monopoly, and the only other MVPD competition comes from one or two DBS providers and the local competitive broadband provider if there is one.

For consumers that want bundled telecommunications services, an increasingly popular option in which customers pay a single rate to receive a combination of video programming,

²⁰ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Seventh Annual Report, FCC 01-1, rel. Jan. 8, 2001, at ¶ 39.

highspeed Internet, and telephony services,²¹ the incumbent cable operator or a broadband overbuilder often are the only choice, because DBS simply cannot match the bundled services capabilities of a terrestrial, facilities-based network.²² In touting the synergies that will be achieved by the proposed merger, AT&T Comcast has focused heavily on the merged entity's ability to add telephony to the services it provides to customers throughout the merged entity's network footprint:

AT&T Broadband's cable telephony business has already been able to generate significant benefits for AT&T Broadband, including a reduction in subscriber "churn" [W]e estimate that, within five years, AT&T Comcast should generate an additional \$600 to \$800 million in EBITDA annually by providing cable telephony to Comcast's former service areas.²³

If RCN or another broadband overbuilder in competition with AT&T Comcast in a given market is forced out of business, competition for bundled services will cease to exist in that market, and consumers seeking bundled services will, again, face a monopoly provider.

Given the dearth of competition in any given geographic market, strong action by the Commission is essential, to ensure that the merged entity's dominance in the national marketplace does not result in the elimination of local competition. The Commission can protect consumers in the MVPD market, particularly with respect to cable television and bundled

²¹ In RCN's experience, consumers view the bundled service offering as highly attractive, more so than video programming offered as a stand-alone product. According to an August 2001 study by CENTRIS, published by the Cable and Telecommunications Association for Marketing, more than half of all consumers (56%) express a preference for using one company for all of their telecommunications services.

²² RCN recognizes that DBS providers offer competition to monopoly cable providers with respect to video programming. However, DBS providers cannot currently match AT&T Comcast's anticipated capability to provide bundled cable, highspeed Internet access, and telephony services to customers – at present, only the handful of competitive broadband cable overbuilders, such as RCN, can do so. Nor can DBS providers fully compete with the incumbent cable operators with respect to video on demand and other interactive services, as discussed more fully below.

²³ Declaration of Robert Pick at ¶¶11-12, dated February 27, 2002, *In re the Applications of Comcast and AT&T Broadband for Transfer of Control of Licenses*, MB Docket 02-70.

services, only if it constrains the power of providers with national market power to use that market power to eliminate smaller, local competitors through their control of essential programming, exercise of monopsony purchasing power, and concerted, predatory pricing, sales, and marketing tactics.

**Large Cable Operators, Including the Merger Partners,
Have a History of Anti-Competitive Behavior That Suggests
the Merger Partners Will Wield Their Market Share Aggressively**

In this section, RCN seeks to provide the Commission with a sense of the increasingly difficult market context in which the proposed AT&T Comcast merger will occur. Some of the examples given are familiar to the Commission. Nonetheless, it is important to view together the many tactics employed by the large cable operators to impede competition, in order to understand in the aggregate the huge competitive challenges that broadband overbuilders face, and will face in even greater magnitude, if the proposed AT&T Comcast merger is approved.

Competing with an existing cable operator is not for the faint-hearted or the thinly-capitalized. The new competitor must be able to market its services against an entrenched cable operator who has substantial advantages in the competitive battle: name recognition, an embedded customer base, strong economies of scale, established relationships with local franchise and governmental authorities, a corporate presence in the community, and vertically integrated programming affiliates or established contracts for programming. The new entrant has no captive subscribers, no initial revenue, and faces enormous start-up expenses.

Accordingly, the potential competitor must earmark funds, purchase long lead-time items, enter into programming commitments, hire hundreds of employees in each market, and, most important, fight for each subscriber because the local residents who want cable service are probably already customers of the incumbent. Installing fiber optic or coaxial cable throughout a

community can cost \$100,000 to \$300,000 per mile. As a result, it has generally been thought that competitive MVPD service based on construction of a second local broadband distribution network is not sustainable financially²⁴ and there has been relatively little of it, either before passage of the 1996 Act, or thereafter. RCN's vitality, therefore, is all the more remarkable, and its continued success all the more essential to the future of competition in the cable and broadband sectors of the MVPD industry.

The entry of a cable overbuilder into the market requires the new competitor to clear a series of very high barriers to market entry. First, the overbuilder must obtain from the local franchise authority ("LFA") a viable cable franchise. Negotiating such franchises is challenging. The incumbent, monopoly cable operator's franchise often is presented by the LFA as the starting point for negotiation, with little or no regard for the fact that the incumbent operator typically has had many years – without any competition – to build out its network, establish a subscriber base, recover its costs, and build a revenue stream. Thus, RCN typically is asked to assume large up-front financial obligations, including build-out deadlines and PEG support commitments,²⁵ that will come due long before the company can expect to have any significant subscriber base or revenue stream. The incumbent (which, by definition, has been in the community for some time and, therefore, is a political as well as commercial presence) can be expected to lobby the LFA hard to impose the highest possible burdens on the competitive provider. If a viable franchise can be negotiated, RCN then must construct its state-of-the-art

²⁴ Typically, it is said that "[o]nce an incumbent system has captured a large share of the viewing public in a particular area, it is quite difficult for a new system to come into the market and offer potential subscribers as favorable pricing and viewing options as those available from the incumbent system." Piraino, *A Proposal For the Antitrust Regulation of Professional Sports*, 79 B.U.L. Rev. 889 (1999) at n. 387.

²⁵ Support for public, educational, and governmental access, which requires both substantial monetary and in-kind contributions.

network from the ground up, a costly and lengthy undertaking that yields no return on investment until the network begins serving subscribers. To win subscribers to the new network, RCN must secure attractive programming, at competitive prices. RCN also must be able to reach its subscribers, many of whom live in multiple dwelling units (“MDUs”), to which access often is controlled by the incumbent cable company. Once in, RCN must be able to provide subscribers a better package of services at lower cost than does the incumbent, in order to win subscribers away from the existing, former monopoly provider – a difficult proposition, to say the least, where the incumbent is offering predatory discounts and incentives targeted specifically to those customers RCN seeks to serve. Only when it has won customers does RCN begin to have a revenue stream and, eventually, a return on its mammoth investment.

At each step in this lengthy process of market entry, RCN faces stiff opposition from the incumbent cable operators, examples of which are given in the sections that follow. As these examples illustrate, Comcast has been a particularly rapacious opponent to RCN in RCN’s Philadelphia and Washington, D.C., area markets.²⁶ Insofar as Comcast’s management will assume operational control of the merged entity, RCN harbors a very real concern that Comcast’s anti-competitive tactics are likely to be adopted by the merged entity and employed on a concerted basis in multiple markets simultaneously and on a far broader scale than has heretofore been seen.

²⁶ When the incumbents succeed in their efforts to obstruct and delay an overbuilder’s entry into the market, the effect on competition is devastating. As the current financial status of many competitive providers reflects, investors have simply become unwilling to continue funding cable overbuilders indefinitely, while waiting for their network to be deployed and to generate the revenues necessary for them to become financially self sustaining. Indicative of the downturn in the market, RCN’s stock declined from a high of \$67 per share in March 2000, to \$1.30 by early this year. RCN has recently had to renegotiate its credit agreements with lenders to ensure its continuing financial viability. As the Commission undoubtedly is aware, RCN’s experience is unique only insofar as it has managed to remain financially viable and continue to implement its business plan. The financial challenges RCN has faced recently are attributable, in no small part, to the fact that it has been much harder than originally anticipated to clear the barriers to market entry detailed herein.

I. Interference With Local Franchise Negotiations

RCN, in its negotiations with LFAs, has faced vocal opposition from incumbents in virtually every market it has entered. This is to be expected. In two prominent instances, however, excessively aggressive lobbying of the LFA by Comcast led to the failure of RCN's efforts to negotiate a viable franchise, with the consequence that consumers in those two markets still face a cable monopoly today. Although perhaps not illegal, Comcast's conduct is indicative of the lengths to which it will go to impede competition in its markets.

A. Prince George's County, MD

RCN operates in the Washington, D.C., area through Starpower, a 50/50 joint venture of RCN Telecom Services, Inc., and PEPCO Communications. Starpower first approached Prince George's County in October of 1997 to discuss Starpower's interest in providing competitive video programming services in the County. Between June of 1998 and March of 2000, Starpower negotiated the terms of a franchise with the County Executive's staff and the County's attorneys.²⁷ In March of 2000, after input from all interested parties, including the incumbent cable operator, the Prince George's County Cable Commission (appointed by the County Executive) unanimously approved Starpower's proposed cable franchise agreement. Nonetheless, in response to objections belatedly instigated by Comcast, which acquired Jones Communications' cable system in Prince George's County in 1999, the County reopened its negotiations with Starpower and reconsidered the merits of Starpower's franchise agreement. Subsequently, in October of 2000, the Cable Commission again unanimously approved

²⁷ Starpower established its regional headquarters in Lanham, MD, in Prince George's County, at the outset of this process. The company's cable headend, telephone switching facilities, and technical operations base all continue to be located there. Thus, Starpower had every expectation that it would be a long-term partner with the County and its residents.

Starpower's proposed cable franchise agreement, as originally submitted. The County Council unanimously approved Starpower's franchise agreement in November of 2000. Rather than approve the franchise, however, the County Executive, in an unexpected reversal, presumably at Comcast's urging, reopened negotiation of the franchise once more. After months of additional negotiation, during which the County continued to increase its demands, Starpower decided, in the summer of 2001, that it no longer could proceed with its plans to serve customers in Prince George's County, despite having its base of operations there. Consequently, Prince George's County residents today do not have a choice of cable television providers.

B. Philadelphia, PA

Similarly, Comcast influenced the Philadelphia City Council to delay granting RCN a cable franchise for many months, while RCN was forced to respond to Comcast-scripted questions regarding its application. There, as in Prince George's County, after laboring for some three years to obtain a franchise, RCN ultimately determined that it was not feasible to proceed, and withdrew its franchise application. Consequently, while RCN is serving customers in jurisdictions around the City of Philadelphia, Philadelphia residents do not today have a competitive choice for their cable service.

II. Obstructing RCN's Access to Services of Third-Party Contractors Upon Which RCN Relies to Construct And Deploy Its Network

To succeed as an overbuilder, RCN must be able to rapidly and cost-effectively deploy its network in a market. Indeed, in many markets, RCN is subject to build-out requirements that require it to achieve the capability to provide service to a specified number of homes within a given timeframe.²⁸ Once its network has been deployed in a given area and is operational, RCN

²⁸ Typically, these build-out requirements are imposed by the local franchising authority at the behest of the incumbent cable operator, in the name of establishing a "level playing field." In reality, however, it is anything but

must be able to provide timely and high-quality installation service to its customers, to connect the customer's home to RCN's network. If an incumbent can disrupt RCN's ability to meet either of these two objectives – by delaying RCN's network deployment and/or impeding RCN's ability to timely connect customers to its system – RCN's deployment costs rise, potential customers are lost, it cannot garner needed revenues to support further deployment of its system, and its return on investment is ultimately reduced. In short, RCN is placed at an enormous competitive disadvantage.

Comcast is well aware of this fact, and has exerted its full weight in the Philadelphia-area market to impede RCN's ability to deploy its network and connect its customers by actively interfering with RCN's ability to hire the independent construction and installation contractors on whom RCN, like every other cable company, depends for such services. RCN is aware of no less than fifteen (15) contractors in the Philadelphia market – representing virtually all of the viable construction and installation contractors in the area – whom Comcast or, prior to its acquisition by Comcast, Suburban Cable,²⁹ have prevented or tried to prevent from doing business with RCN.³⁰

competitively “level” to require a competitor to build out at the same pace that an incumbent monopolist originally built, or, more typically, is rebuilding, its system. Whereas the incumbent had a captive, untapped customer base upon deployment of its network, RCN must win its subscribers away from the incumbent.

²⁹ Suburban Cable was an incumbent regional cable operator with franchises throughout the Philadelphia and Harrisburg, PA, markets, which Comcast acquired in January of 2000 as part of its strategy to consolidate and control regional cable “clusters” in the Philadelphia, Baltimore, and Washington, D.C. , metropolitan area markets. This “clustering” of cable systems by Comcast, and the market domination that has accompanied it, has greatly increased the anti-competitive impact of Comcast's actions in each market, because such actions now impact RCN (or, in Washington, its affiliate, Starpower) throughout the relevant market. This is in contrast to the fragmented state of the regional markets when RCN originally entered them, wherein no one competitor could act in a concerted manner to impede RCN's market entry.

³⁰ RCN will provide the names of these contractors, their principals, the names of Comcast personnel who participated in these tactics, and the approximate dates of such incidents to the Commission pursuant to the protective order, DA 02-734, rel. March 29, 2002, in MB Docket 02-70.

Upon RCN's entry into the Philadelphia-area market, Suburban began requiring contractors, as a condition of receiving Suburban's business, to sign "non-compete" clauses in their contracts barring the contractor from working for any competing cable operator in the same jurisdiction.³¹ Furthermore, Suburban, and later Comcast, aggressively enforced these "non-compete" clauses, going to extraordinary lengths to document "violations" and intimidate contractors who were thought to be in contact with, or working for, RCN. For example, Suburban construction and engineering management personnel, many of whom went to work for Comcast when Suburban was acquired, went so far as to follow contractors in their trucks, taking photographs to document that the contractor had been seen at an RCN office or work site. These photographs were then used as "evidence" to support the contractor's termination. Other contractors, who had not done work for RCN, have been threatened with the loss of their work for Comcast if they were found to be providing service to RCN.

A few of the contractors subjected to these bullying tactics no longer are working for Comcast and since have contracted to work for RCN. Others have declined to work for RCN, citing their desire to retain their lucrative Comcast contracts. In at least one instance a large contractor that provides construction services in multiple markets refused to work with RCN in Comcast territory, although it did substantial work for RCN in non-Comcast markets.

These heavy-handed, anti-competitive tactics – which can only grow worse when AT&T Comcast comes to control an even larger share of the market and can act concertedly in multiple jurisdictions – have adversely affected RCN and, consequently, competition in the Philadelphia market, in several ways. First, contractors in the Philadelphia market demand significantly

³¹ The sole competing cable operator, of course, was RCN.

higher prices from RCN for their services, because they anticipate being harassed or black-listed by Comcast. These prices are both higher than RCN pays in markets where its competitor has not engaged in such tactics, and, RCN believes, higher than the prices Comcast pays. Second, RCN has suffered delays and construction setbacks, and accompanying expense, when no willing contractor could be found to perform the work or contractors have abruptly backed out of their commitments to RCN due to Comcast's interference. In some instances, contractors have abandoned their work for RCN after being threatened by Comcast with reprisals, leaving RCN unable to proceed until it was able to locate and retain an alternate contractor. Disturbingly, Starpower has recently received indications that Comcast now is replicating these anti-competitive tactics in the Washington, D.C., area. Several of Starpower's local contractors have told Starpower in the past few months that Comcast has told them they will lose Comcast's work if they also do work for Starpower.³²

III. Withholding, or Threatening to Withhold, Access to Essential, Non-Substitutable Local Sports Programming

RCN has previously made the Commission aware of the difficulties it has encountered in gaining, and keeping, access to critical, non-substitutable local programming controlled by Comcast and other incumbent cable companies.³³ Although RCN currently has a contract in place for Comcast's SportsNet Mid-Atlantic, and believes it will be able to complete negotiation of an agreement for SportsNet (Philadelphia),³⁴ obtaining acceptable long term contracts has

³² Starpower will provide additional detail to the Commission pursuant to the protective order, DA 02-734, rel. March 29, 2002, in MB Docket 02-70..

³³ *See, e.g.*, Initial Comments of RCN Telecom Services., Inc., in CS Docket 01-290, dated Dec. 3, 2001, and proceedings and comments cited at note 25 therein.

³⁴ After first stating that it would not make SportsNet (Philadelphia) available to RCN, then limiting RCN to successive 3-month contracts, Comcast in October of 2000 eventually entered into a 6-month agreement with RCN

been contentious and difficult. In the Philadelphia area, Comcast³⁵ acquired the great bulk of the local sports programming, as well as their venues, and threatened to deny RCN long term access.³⁶ Comcast sales representatives were expressly directed to tell RCN's potential subscribers that RCN would not be able to offer SportsNet once existing contracts expired.³⁷ The threat was mitigated only when Comcast faced Justice Department review of its plan to acquire Home Team Sports in the Washington, D.C., area.³⁸ RCN also has experienced difficulties obtaining local sports programming from other large cable operators. In New York City RCN has been deprived by Cablevision of access to overflow sports programming.

Cablevision, an incumbent with some 2.7 million subscribers in the New York metropolitan area,

for carriage of SportsNet. However, the uncertainty inherent in such a short term agreement, for a critical, non-substitutable, and expensive programming asset, is commercially untenable. Moreover, the agreement contained a requirement, not contained in RCN's agreements with any other programming provider, that RCN obtain consent before providing SportsNet to subscribers in new communities added to its network, as its network build-out progressed. RCN has been attempting for some time to negotiate an acceptable longer-term agreement for SportsNet (Philadelphia), comparable to its current agreement for SportsNet Mid-Atlantic, which runs through 2006. Drafts have been exchanged, and Comcast has asserted that it is willing to execute a longer-term agreement, but none has been executed, to date.

³⁵ Comcast serves 1.9 million subscribers in the Philadelphia metropolitan area, about 90% of the total subscribership.

³⁶ Through subsidiaries, Comcast owns a controlling interest in the Philadelphia Flyers National Hockey Team, the 76ers National Basketball team and two area arenas. It also holds a controlling interest in SportsNet which controls the great bulk of the professional area sports programming in the Philadelphia area. SportsNet carries approximately 66% of the games of the Philadelphia Flyers (NHL) and 73% of the Philadelphia 76ers' (NBA) regular season games as well as 49% of the Phillies' games (MLB). Comcast also owns exclusive rights to broadcast games of the Philadelphia Phantoms (American Hockey League), Philadelphia Wings (National Lacrosse League), and Philadelphia Kixx (National Professional Soccer League), as well as numerous football and basketball games of regional colleges and universities. This programming is distributed terrestrially to 2.7 million subscribers in the Philadelphia marketing area. In its own promotional material Comcast has touted the strategic importance of SportsNet: "SportsNet provides a significant marketing advantage against satellite TV and other competitors."

³⁷ Exhibit A hereto, Statements of Rosalind Applewhite, at ¶ 3, Statement of Paul Phillips, at ¶ 4, Statement of Bruce Wirt, at ¶ 5.

³⁸ The issue of Starpower's continuing access to Home Team Sports ("HTS") in the Washington, D.C. area arose in 2000 when Comcast proposed to acquire the entity owning the HTS programming rights. Comcast even went so far as to refuse the request of a member of the Arlington County, VA, Board to agree in principle to make its vertically integrated programming available to competitors. However, the Department of Justice issued civil investigative demands to Comcast and to others and, as a result, HTS (now SportsNet Mid-Atlantic) has continued to be available to MVPD competitors in the Washington, D.C., area, at least for now.

at one time controlled programming rights for seven of the nine local professional sports teams³⁹ and their venues. In early 1999, Cablevision revised its sports programming distribution system from satellite to terrestrial so as to preclude RCN's carriage of an important tier of extremely popular local sports programming. Industry commentators recognize the value of the sports programming monopoly to cable operators. Commenting on Cablevision's then-monopoly with respect to the Yankees, one commentator observed:

[P]rofessional sports leagues have further extended their economic power by allying with other monopolies in related markets. The leagues' relationships with broadcast networks and cable systems have limited competition in local media as well as sports markets. The New York Yankees, for instance, have granted Cablevision the exclusive right to broadcast games in the New York area in exchange for a payment of \$486 million over twelve years. Such a relationship, however, does not only increase the Yankees' monopoly profits. By giving Cablevision exclusive control over sports programming critical to any cable system's success, the Yankees have allowed Cablevision to preclude potential competitors from entering the New York cable market.⁴⁰

The clustering of affiliated systems, a strategy Comcast has aggressively pursued, creates another potential impediment to program access, because it enables the large cable operator to deliver local programming terrestrially to the merged systems, thereby exempting it from the Commission's program access rules. With an expanded national footprint that combines the geographic markets dominated by Comcast with those dominated by AT&T, the merged entity's ability to cluster, and to migrate programming to terrestrial delivery, will be greatly increased.

IV. Impediments to Building Access

³⁹ Cablevision at that time carried the Yankees, Mets, Knicks, Nets, Rangers, Islanders, and the N.J. Devils. Cablevision owns outright two of these teams: the Knicks and the Rangers. The Yankees now run their own programming.

⁴⁰ Piraino, *supra*, at 891 (emphasis added; footnotes omitted). Possessing the rights for seven of the nine teams in the New York metro area allowed Cablevision to triple its previous subscribership. *Id.*, at 919.

Even once its network is deployed, and RCN has succeeded in obtaining the programming customers want to view over that network, incumbent cable operators often attempt to block RCN from reaching its potential customers in MDUs, an attractive target market. In the Washington, D.C., metropolitan area, for example, Starpower has encountered numerous instances in which the incumbents (Comcast and its predecessors) have received exclusive building rights covering a period of years.

Frequently these exclusive contracts involve up-front payments to building owners, and it has proven very difficult to offer service in any such building.⁴¹ While it may be possible, at least in some states, to litigate the legality or enforceability of such arrangements, doing so creates ill-will with the MDU owner, is expensive, and is time consuming.

V. Predatory Pricing

Another tactic employed by the large cable operators to inhibit competition is to offer highly aggressive discounts only to those subscribers to whom competitive service is available.⁴² RCN has faced predatory pricing tactics in many of the markets in which it has begun to win subscribers away from the incumbent cable operator.⁴³ For example, in Manhattan, the incumbent, Time Warner, adopted an aggressive bulk discount plan for apartment buildings targeted for service by RCN. Comcast has been particularly aggressive in its pricing and sales tactics. In Folcroft, PA, just prior to RCN's entry into the market, Comcast established a sales

⁴¹ For additional examples of the building access problem *see, e.g.*, comments in CS Docket 95-184.

⁴² *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, rel. Jan. 14, 2002, at ¶¶203-206.

⁴³ Absent discovery, RCN is not in a position to show that the aggressive discounts offered by its competitors are below its competitors' marginal costs. However, there can be no question that customers who do not currently have a choice of cable or bundled service providers and, therefore, do not have these discounts made available to them by the incumbents, are, in effect, subsidizing those subscribers to whom competition has come.

“Swat Team” that was instructed to sign customers up for 18-month contracts, in exchange for receiving a lower price for their cable service. “Comcast’s mission was to get all their customers to agree to the 18-month contract before RCN entered the market so that RCN would be locked out of the market.”⁴⁴ Currently, in Washington, D.C., Comcast is distributing flyers to residents only in MDUs served by Starpower, offering drastic discounts and free services.⁴⁵ Although an important benefit of competition is to hold down prices for consumers, consumers are ultimately harmed by predatory price reductions targeted to drive competitors out of the market.

The Proposed Merger of AT&T and Comcast Presents Specific, Prospective Competitive Concerns

It is against the competitive backdrop described above that the Commission must consider the pending Transfer Application. Abstract economic analysis of the relevant market may well lead the Commission to conclude that the proposed license transfers are not in the public interest. Nonetheless, it is RCN’s contention that the competitive issues currently before the Commission are more visceral and more immediate than an academic analysis of the marketplace might show, as illustrated in the real-world examples described herein. Stated bluntly, Comcast and other large cable operators have demonstrated both the inclination and the wherewithal to use their market power to crush broadband competition in their local markets wherever it has had the audacity to appear. If AT&T and Comcast are allowed to combine, and to expand their concerted reach across 17 of the 20 largest markets and 41 of the 50 states, their ability to impose the anti-competitive tactics described in this Petition in a coordinated way,

⁴⁴ Exhibit A hereto, Statement of Roddy Gaymon, at ¶ 3; *see also* Statements of Rosalind Applewhite, Paul Phillips, and Bruce Wirt.

⁴⁵ One such flyer obtained by Starpower offers digital cable at less than \$30 for three months and two months of the seven Starz! channels for free.

across multiple markets, to choke off nascent broadband competition will be unprecedented and, likely, unstoppable. As the Commission has recognized, “[t]he 1996 Act set a clear national policy that competition leading to deregulation, rather than continued regulation of dominant firms, shall be the preferred means for protecting consumers.”⁴⁶ However, to meet this laudable goal, it is necessary first that competition flourish. Thus, the Commission, in reviewing a merger such as that which the Transfer Application here would effectuate, considers not only whether the proposed merger will reduce competition in the market but also “whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets.”⁴⁷ This merger, for the reasons detailed below, can only make the dominant firms in the market more dominant, thereby failing that essential test.

I. Access to Programming

As the Commission well knows, access to programming is a cable operator’s lifeblood. Cutting off or even impeding the flow of programming to a competitor is one of the most powerful ways an incumbent cable operator can kill off competition. Comcast currently has – and has exercised – the power to do so, as discussed above. With the proposed merger, however, the combined AT&T Comcast entity will have a stake in even more programming assets and will wield purchasing power that is far and away the greatest in the MVPD market.

Absent the ability to provide the programming that customers desire, no cable company can succeed in a competitive market. This, historically, has been the reason behind the program access rules promulgated by the Commission, which bar vertically-integrated programmers and

⁴⁶ *MediaOne Group/AT&T Order, supra*, at ¶10 (quoting *Bell Atlantic-NYNEX Order*, 12 FCC Rcd. at 20035 ¶95).

⁴⁷ *MediaOne Group/AT&T Order*, at ¶10.

their cable affiliates from entering into exclusive arrangements for the distribution of cable programming without explicit Commission approval. Similarly, the Commission has historically imposed horizontal concentration and vertical integration limits on MVPD owners, to prevent any single company from dominating the programming market to the detriment of competition. Competitive providers, in recent proceedings, have presented a compelling set of arguments to the Commission regarding the need for continuation of these constraints.⁴⁸ In the event the Commission approves the Transfer Application of AT&T Comcast, even if conditions are imposed, it will be all the more imperative that the program access rules prohibiting exclusives be extended and the ownership limits continued.⁴⁹

Even with continuation and appropriate enforcement of the Commission's current rules, however, RCN believes that access to programming for competing providers, like RCN, will be impaired as a result of AT&T Comcast's market power, unless appropriate merger conditions are imposed barring the merged entity from entering into exclusive or "sweetheart" deals with affiliated content providers, and exercising monopsony power over third party providers of programming to the detriment of smaller MVPD companies.

A. Affiliated Content Providers –Merged Entity Will Control Or Be Able To Influence Licensing Of A Host of Essential, Non-Substitutable Programming Assets

Comcast, AT&T, and companies in which one or both have an ownership interest, own and control a formidable slate of programming assets.⁵⁰ Moreover, AT&T Comcast has indicated

⁴⁸ See, e.g., comments filed in CS Docket 01-290.

⁴⁹ See Initial Comments of RCN Telecom Services, Inc., dated Dec. 3, 2001, and Reply Comments of RCN Telecom Services, Inc., dated January 7, 2002, in CS Docket 01-290; and Initial Comments of RCN Telecom Services, Inc., dated January 4, 2002, in CS Docket 98-82 .

⁵⁰ See Applications and Public Interest Statement, at 14-15, 24-25, *In re the Applications of Comcast and AT&T Broadband for Transfer of Control of Licenses*, MB Docket 02-70.

its intention to increase its stake in programming, especially local programming that can be provided via regional clusters,⁵¹ implying the threat that such programming will be delivered terrestrially and, therefore, placed outside the scope of the Commission's program access rules.

An essential programming asset controlled by Comcast is local sports programming in the Philadelphia and Mid-Atlantic markets. RCN's difficulties in obtaining access to this local sports programming are detailed above. Surveys conducted for RCN by professional polling organizations confirm the vital importance of local sports programming to a cable operator's success: the data show that some 40-58% of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming and, in one survey, an additional 12% of subscribers said they were not sure whether the absence of local sports programming would impact their decision whether to take the service. In rough terms, this means that a competitive cable operator that does not have local sports programming will have little or no chance of winning as subscribers as much as 40-70% of its potential customer base.

As a cable overbuilder, RCN's business plan anticipates a market penetration rate of about 30% of the homes passed in each market it builds out. This 30% market share can only be achieved by 1) winning subscribers away from the incumbent cable provider, or 2) gleaning new subscribers from the minority of households that do not already have cable. Without local sports programming, because roughly half of potential subscribers indicate they will not take cable service that doesn't include it, RCN's projected penetration rate drops to something in the neighborhood of 15% – a level at which the huge investment necessary to build out a ubiquitous

⁵¹ “The proposed merger also will . . . stimulat[e] the production and delivery of local and regional programming. Comcast is widely recognized as an industry leader in the development of successful, high-quality programming geared to regional and local markets. The merger will enable AT&T Comcast to extend this expertise

fiber optic network in competition with the monopoly incumbent no longer makes economic sense. Investors simply will not supply the hundreds of millions of dollars required for cable overbuilds, if no more than a 15% market penetration rate is to be expected. Stated differently, without local sports RCN must try to win 30% of the market from a potential subscriber base that only includes 30-60% of the market to begin with. Consequently, if the incumbent cable operator controls local sports programming, as Comcast does in both the Philadelphia and Washington, D.C., area markets, and AT&T does in New England, and is allowed to deny its competitor access to that programming, competition cannot survive in those markets.⁵²

Local sports programming, however, is not the only category of “must have” programming. The cable customer base is, in many ways, an aggregation of specialty patrons.⁵³ For many, as noted, their choice of cable company is driven by their desire to have access to local sports. Other customers choose to subscribe, however, in order to have access to in-depth programming on gardening, history, science, entertainment, or music; to access home shopping; or to view niche-market cultural or foreign language programming. Thus, each and every channel to which RCN is denied access impairs its ability to reach some segment of its potential

to areas in which AT&T Broadband has significant clusters.” Applications and Public Interest Statement, at 4, *In re the Applications of Comcast and AT&T Broadband for Transfer of Control of Licenses*, MB Docket 02-70

⁵² Perhaps RCN should consider itself fortunate to have SportsNet on any terms and conditions since both DirecTV and EchoStar have been denied access to the programming altogether. Grim as that situation is, however, DBS providers can survive with a 15% market penetration rate (which is about their current share of the MVPD market), because they do not face the franchise requirements and huge infrastructure investment necessary to deploy a cable system.

⁵³ If there were any doubt about this, one need only look to the list of programming to be launched this year. Planned programming offerings include: Anthropology Programming and Entertainment; Anti-Aging Network; Baby TV; Children’s Fashion Network; Hobby Craft Interactive; Puppy Channel; Seminar TV; The Gospel Network; and The Tennis Channel. *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, rel. Jan. 14, 2002, at Table D-4.

subscriber base. Aggregated, these segments quickly can add up to enough subscribers to render effective competition impossible.

In New York recently, as an example, RCN sought to negotiate carriage of the Greek channel. The owner of this programming informed RCN that he would “have to check with Time Warner,” his largest customer, and has not responded to RCN’s efforts since to engage in further negotiations. Although the audience for the Greek channel may be only a small fraction of the total subscriber base, customers who care about that programming will undoubtedly choose Time Warner as their provider, over RCN. RCN probably can survive not having access to the Greek channel, but if RCN were to lose the Greek channel audience, together with the Golf Channel audience, and subscribers who want E!, and the ones who must have Outdoor Life, and so on, one can see that each of these fractions of the market quickly add up to a significant, and competitively insurmountable, market share.

Having access to this programming on nondiscriminatory terms now and in the future, both for broadcast and, as we discuss in further detail below, to supply content for video on demand and the other emerging new products that will drive the demand for cable services as the market evolves, is absolutely crucial to the survival of competitors like RCN. In 1998 testimony before a Senate Committee, Congressman Tauzin, one of the principal architects of the Cable Act of 1992, observed that:

In 1992, we awakened to the sad realization that we had forgot one crucial 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 incoming [incumbent] cable company.⁵⁴

⁵⁴ Testimony of Representative Billy Tauzin before the Senate Commerce, Science and Transportation Committee, July 28, 1998, Tr. at 6 (text in bracket added).

The same observation holds true today.

B. Non-Affiliated Content Providers – Merged Entity Will Have Monopsony Power Over Third-Party Programming Providers

While the merged AT&T Comcast obviously will control, through its ownership interests, a significant block of highly desirable programming, including “must have” programming that includes SportsNet (Philadelphia), SportsNet Mid-Atlantic, QVC,⁵⁵ and others, RCN also is concerned that AT&T Comcast, through sheer market share, will exert huge influence over non-affiliated third-party programming providers. If pressured to choose between selling content to AT&T Comcast, or to RCN, the choice is clear: AT&T Comcast, with its millions of subscribers, will win. Similarly, if pressured to price their product at levels that will impede RCN’s ability to compete with AT&T Comcast, particularly where the programming is “must have,” there is little doubt that third-party providers of programming will desire to keep their largest customer happy. Again, these concerns are not hypothetical. As illustrated in the examples set forth above, Comcast and other large cable operators have demonstrated, in other contexts, that they are well aware of their monopsony purchasing power, and will use it to influence and even control third-party vendors to the detriment of competitors in their markets.⁵⁶

⁵⁵ Continued access to QVC, like regional sports programming, is of great importance to RCN’s competitive success. According to recent data, nearly ten percent (9.6%) of RCN subscribers buy from QVC, generating annual commissions in excess of \$1 million. This contrasts with cable subscribers generally (across all MSOs), of whom 7.4% buy from QVC.

⁵⁶ Again, it is important in this context to emphasize that none of the large cable operators are in competition with one another, due to the geographic segregation of their markets. As a result, the presence of multiple MSOs in the national market is largely irrelevant to AT&T Comcast’s monopsony power. Content providers could enter into “non-compete” agreements with AT&T Comcast, such as those described in the next section, that exclude overbuilder competitors, and still do business with all of the largest cable operators in the country, reaching the vast majority of subscribers. “For purposes of assessing the impact of horizontal concentration, it is appropriate to examine both the national programming market and the local distribution market because cable operators generally acquire programming on the national level and distribute it on the local level through their locally franchised systems.” *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, rel. Jan. 14, 2002, at ¶ 116.

II. Exercise of Monopsony Power By Merged Entity Could Preclude Competitors' Access to Third-Party Vendors of Essential New Technologies

RCN has described above the problems Comcast has caused for RCN in the local Philadelphia marketplace and now is attempting to cause in Washington, D.C., through its coercion of local contractors, as one example of the manner in which a hostile and aggressive competitor with sufficient market dominance can choke off competition by exercising monopsony power over third-party vendors. Of even greater prospective concern, however, is the power of large cable companies to impede competitors' access in the national or even international market to new technologies, such as video on demand ("VOD"), just now emerging. Although all of the 2 – 3 largest cable operators wield significant market power, if the AT&T Comcast merger is approved, it will be the largest of the large cable operators, dominating roughly 30% of the cable marketplace, and could potentially impose exclusivity requirements applicable to 100% of the subscribers for whom RCN or another overbuilder competes, in markets in all 41 states in which the merged entity will operate.

VOD is just one of the emerging technologies, barely conceivable a few short years ago, that analysts anticipate will drive the success of the cable industry in the coming years.⁵⁷ The

⁵⁷ VOD allows cable subscribers to receive digital video movies and events of their choice, directly to their television set, whenever they want it. Subscribers can select from a library of available programming, and can use rewind, fast-forward, pause and stop functionality to control viewing, in the same manner as with a VCR. Once ordered, subscribers have access to a chosen movie for a period of 24 hours, before it is "returned." Other examples of new technologies that, like VOD, will change the face of the cable industry are personal video recorders (best known currently under the TIVO brand name), interactive television applications, and other advanced digital technologies. The concerns expressed herein with respect to VOD apply equally to other emerging technologies, including those not now imagined that may become crucial to the industry in the future. RCN is using the example of VOD to illustrate the potential anticompetitive effect that the exercise of monopsony power by the largest MVPD providers is having and will have, because VOD currently is the most mature of the emerging new cable technologies, and the only one for which RCN, to date, has negotiated deployment contracts. There is no reason to think, however, that the situation is likely to be appreciably different for other new technologies, for which there may be only one or a few viable vendors (*i.e.* TIVO).

Commission has recognized the growing importance of these emerging video technologies.⁵⁸ VOD is viewed as critical to the continued viability of cable, which has lost significant market share to satellite-delivered video services in recent years. This is because true VOD, which is highly desired by subscribers, cannot currently be provided over the satellite platform, thereby giving cable operators who offer VOD a renewed competitive edge.⁵⁹

To operate cost-effectively, VOD requires two things: 1) a technology platform that can be acquired at reasonable cost, and 2) attractive programming content. As to the first factor, it is important to understand that for VOD, as is expected to be the case for most emerging and future technologies, there are very limited number of viable vendors. Currently, there are four viable vendors of VOD equipment: Seachange International, nCube, Concurrent Computers, and Diva Systems. Diva is not considered to be a financially viable company, and is predicted to go out of business before the end of the year.⁶⁰ The success of nCube to date in deploying its equipment has been limited; accordingly, it is not RCN's vendor of choice. The remaining two vendors – Seachange and Concurrent – have shown an affinity for the largest cable providers that has impeded RCN's efforts to negotiate acceptable contracts for the deployment of their technology. Both companies have contracts with Comcast as well as with Time Warner Cable. In fact, as proof that RCN's concern is not speculative, Time Warner Cable, the second largest MSO, has exerted its monopsony buying power to negotiate exclusive non-compete clauses in its contracts

⁵⁸ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, rel. Jan. 14, 2002, at ¶187.

⁵⁹ Although VOD has been technologically feasible for some time, the high cost of VOD equipment has discouraged deployment. Recently, the cost of VOD equipment has come down to a viable level, and cable operators currently are rushing to bring the service to market.

⁶⁰ Diva Systems announced recently that it laid off 20% of its staff, and has sufficient cash only to get it through the end of June. See <http://www.cedmagazine.com/cedailydirect/0204/cedaily020418.htm>.

with both companies that prevent RCN from deploying technology provided by either Seachange or Concurrent in any market in which Time Warner operates.⁶¹

Comcast owns a stake in Seachange, which could influence Seachange to enter into similar non-compete agreements with the merged entity. To RCN's knowledge, Comcast has not insisted on exclusive commitments from Seachange or Concurrent in contracts recently negotiated, but may well attempt to do so in the future as it has in other instances. In another example of Comcast's influence with respect to new technologies, Comcast is one of four large cable operators invested in WorldGate Communications' TV Gateway product, an important alternative to the popular, patented TV Guide electronic programming guide that allows subscribers to navigate the wealth of channel choices now available via cable. TV Gateway has informed RCN that, due to exclusives with its financial partners, it cannot license RCN to use its product in any market in which RCN competes with any of its four cable operator investors: Comcast, Charter, Adelphia, and Cox. If the ability of the largest incumbent cable operators to negotiate exclusive arrangements with vendors is not constrained, and were to be exercised with multiple vendors or in multiple markets, competitors like RCN could effectively be "locked out" of the market for VOD or other new technologies. In that scenario, RCN simply could not compete effectively and would inevitably be driven out of the market due to its inability to satisfy consumer demand for the latest technology and services. By virtue of the AT&T Comcast's increased market share as result of the merger, if approved, its monopsony power can only increase, and with it the likelihood of more anti-competitive arrangements with vendors such as those described above.

⁶¹ The companies involved have sought to keep this information regarding the terms of their contracts confidential, but the existence of the exclusive arrangements became known to RCN in the negotiation of its contract with Seachange and in analyzing the proposal submitted to RCN by Concurrent.

This concern is very real. As discussed above, Time Warner already has negotiated non-compete arrangements with two of the three or four viable VOD vendors.⁶² Four cable operators have non-compete arrangements with TV Gateway. Further evidence of the threat posed to competitors by large cable operators' market dominance was provided recently when RCN experienced reluctance from its VOD vendor in the Philadelphia market, which Comcast dominates, to be publicly identified with RCN's VOD deployment in that market, for fear it would negatively impact the vendor's relationship with Comcast.

The second factor in the success of VOD – the need for access to attractive programming content – heightens the importance of the program access issues discussed at length above. Because of the nature of VOD, cable operators are required to negotiate agreements with content providers for the transmission of programming on demand that are separate from their contracts to broadcast that same programming. Accordingly, all of the competitive concerns discussed above in connection with the acquisition of programming generally apply equally, and for a second time, in connection with RCN's ability to compete in providing VOD. Many of the properties identified as "must have" programming for broadcast are equally important to the

⁶² Another example is provided by the experience with the large 1's dominance of the market for set-top boxes. The market for set-top boxes, essential for providing cable subscribers with access to digital channels, among other advanced digital services, like the market for VOD equipment, is controlled by a very small number of viable vendors. Time Warner has negotiated an exclusive arrangement with Scientific Atlanta that precludes that vendor from supplying set top boxes to RCN in any Time Warner market. Currently, RCN obtains its set-top boxes from Motorola. While this arrangement has generally been satisfactory, RCN has experienced problems during periods of peak demand, when Motorola has provided its entire available inventory to the largest cable operators, while forcing RCN to wait. The result of this preferential treatment has been that large cable operators could provide service to new subscribers, while RCN could not, creating an obvious and enormous competitive handicap for RCN. Again, this circumstance illustrates the potential anticompetitive effect of the large cable operators' monopsony power – a circumstance that grows worse as market concentration increases.

success of RCN's VOD product offering. This includes, if it is migrated to the VOD platform, the vital local sports programming that Comcast controls in the Philadelphia and Washington, D.C., area markets.

III. Predatory Pricing, Sales, and Marketing Tactics

Currently, any predatory pricing strategy or anti-competitive sales and marketing tactics employed by Comcast or AT&T affect RCN's efforts to compete in just a few of its markets at any given time. Once merged, however, AT&T Comcast will have the power to employ predatory tactics against its overbuilder competitors in virtually all of the competitor's markets simultaneously, with potentially devastating effects. This eventuality is directly relevant to the Commission's consideration of the Transfer Application:

We conduct our public interest review against the backdrop of the "broad aims of the Communications Act," which include, among other things, the implementation of Congress' pro-competitive, deregulatory national policy framework designed to open all communications markets to competition Our public interest analysis may also entail assessing whether the merger will affect the quality and diversity of communications services Following passage of the Telecommunication Act of 1996 ("1996 Act"), local communications markets have been undergoing a transition to competitive markets, so a transaction may have predictable yet dramatic consequences for competition over time even if the immediate effect is more modest. Therefore, when a transaction is likely to affect local communications markets, our statutory obligation requires us to assess future as well as current market conditions. In doing so, the Commission may rely upon its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.⁶³

Therefore, it is directly relevant to the Commission's consideration of the Transfer Application that, although the proposed merger may not appreciably reduce the number of players in the MVPD market immediately, its effect over time may be to eliminate broadband competition in particular geographic markets altogether.

⁶³ *MediaOne Group/AT&T Order, supra*, at ¶11-12 (citations omitted).

**The Application for the Transfer of Licenses and Authorizations to the Merged Entity
Should Be Denied Or, At a Minimum, Conditioned**

For the reasons stated herein, RCN submits that the Commission cannot properly conclude that the proposed transfer of licenses and authorizations to the merged AT&T Comcast will serve the public interest, convenience, and necessity. To the contrary, the proposed merger will significantly imperil continued competition in the MVPD market, particularly in the cable and broadband, bundled service sector of that market, to the significant detriment of consumers. Should the Commission conclude, however, that the transfers can be approved, any such approval should be conditioned upon the imposition of the following safeguards:

- 1) access for competitors to AT&T Comcast affiliated programming on non-discriminatory pricing and terms;
- 2) a prohibition on exclusive arrangements between AT&T Comcast and third-party suppliers of programming, essential technologies, and other essential services; and
- 3) a requirement for uniform subscriber pricing, to deter AT&T Comcast from engaging in predatory pricing, sales, and marketing tactics.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent were served on April 29, 2002, on the following parties, via e-mail or Federal Express, as indicated below:

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