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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Application of	)	
AT&T Corp. and Comcast Corp.	)	Docket No. MB 02-70
For Consent for Proposed	)	
Transfer of Control	)	

COMMENTS OF EVEREST MDWEST LICENSEE, LLC.
DBA EVEREST CONNECTIONS

Everest Midwest Licensee, LLC. dba Everest Connections, holds cable franchises in the Kansas City metropolitan area and competes with Kansas City Cable Partners, ("KCCP"), a partnership of Time Warner and AT&T. As Everest continues its build-out the Kansas City Metropolitan area, it also will compete with Comcast since that company provides cable service in almost all municipalities in the Kansas City area that are not served by KCCP. Since Everest began rolling out its service in January 2001, it has been the target of various anti-competitive actions initiated by KCCP that are discussed below. If the merger between AT&T and Comcast is permitted to go forward, Everest urges the Commission to impose conditions that will prevent the merged parties from engaging further in this anti-competitive behavior.

BACKGROUND

On February 28, 2002, applicants AT&T and Comcast filed a Public Interest Statement and associated applications for consent to transfer control of certain licenses and authorizations. The applications seek FCC consent for a spin-off of AT&T Broadband Corp. ("AT&T Broadband"), a holding company for AT&T's broadband division, to AT&T's shareholders and the subsequent merger of AT&T Broadband and Comcast into wholly-owned subsidiaries of AT&T Comcast. In addition to providing cable television service to 13.44 million customers directly, AT&T Broadband also holds an attributable equity interest in cable systems, including KCCP, serving several million additional customers. KCCP holds franchises in 62 of the communities that make up the greater Kansas City metropolitan area. AT&T holds a 50 percent equity interest in KCCP.[1] In addition, Comcast serves 24 communities in the Kansas City metropolitan area. Together, KCCP and Comcast are incumbent cable providers to the entire Kansas City metropolitan area.

Everest and its sister company, Ex-Op of Missouri, dba Unite, are facilities-based providers of broadband service, offering telecommunications, cable and high speed Internet through their own facilities.[2] Everest and Ex-Op have passed more than 15,000 homes and provide broadband service to more than 8,000 customers in the Kansas City area. As of this date, Everest is providing service in Lenexa, KS, and Kansas City, MO, and will begin turning up service in part of Shawnee, KS next month. Everest also holds a cable franchise to provide service in Overland Park, KS. Ex-Op holds a franchise to provide service in Kearney, MO, a community of 2,500, approximately 20 miles north of downtown Kansas City. The Commission has determined that Everest's operations in Lenexa, KS, and Unite's operations in Kearney, MO, are subject to effective competition.[3] However, KCCP is not subject to effective competition in Kansas City, MO or Shawnee, KS.

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[1] While AT&T apparently intends to try to sell the equity interest it has in Time Warner directly, it has not stated an intention to divest its ownership interest in its cable partnerships, including KCCP.

[2] Everest is 89% owned by Aquila, Inc. Aquila owns electric and gas distribution companies in seven Midwestern states, Canada, Australia, New Zealand and Great Britain. Aquila also has an energy merchant business.

[3] Memorandum Opinion and Order, CSR 5711-E, released October 29, 2001; Memorandum Opinion and Order, CSR 5650-E, released August 16, 2002.

I. If the Commission permits the AT&T/Comcast merger to proceed, it should impose conditions that make it clear that the combined companies may not continue to engage in predatory pricing practices designed to thwart competition

KCCP has engaged in pricing tactics that are designed to be an end-run around the Section 76.984 of the FCC's rules requiring geographically uniform pricing in the absence of effective competition. On February 5, 2002, Everest filed a complaint at the Commission alleging that KCCP is violating Section 76.984 by offering a steep price discount in the small part of the large Kansas City, MO franchise area where Everest presently provides service. Section 76.984 bars a cable operator from providing discounted cable service in a franchise area where it does not face effective competition. Everest's complaint remains pending.

KCCP has claimed in response to Everest's complaint that Rule 76.984 permits it lawfully to provide a steep price discount in the few Kansas City, MO neighborhoods served by Everest since the KCCP discount scheme applies to a tier of service that consists of both basic service and cable programming service whereas Rule 76.984 requires uniform pricing of the basic cable service tier *alone*. In fact, this argument by KCCP is patently false as both the uniform pricing rule and the statute upon which that rule is based state explicitly.[4]

KCCP's other claim is that its steep price discount scheme in the small part of Kansas City, MO where Everest competes is permissible under Rule 76.984 in the absence of effective competition because it is a "promotion". But that argument is likewise patently false. While the FCC has held that its uniform pricing rules may not

[4] Everest "Reply to Response" at 2-5 (CSR-5845, March 4, 2002) (replying to response of KCCP to complaint by Everest against KCCP requesting immediate relief against KCCP for violating the uniform pricing rule).

prohibit a legitimate promotional discount, the agency has held that a discount plan qualifies as a promotion only if the duration of the discount and the signup window are both explicitly limited. KCCP's non-uniform pricing in the small part of the Kansas City, MO franchise area that Everest serves does not qualify as a promotion since the KCCP discount program lasts far longer than the agency has permitted most promotions to last and since KCCP tries to get around the limited signup window requirement by simply changing every few months certain features of its discount scheme.[5]

On April 17, 2002, KCCP filed a letter with the Commission in an attempt to explain a document that Everest had provided to the Commission as an attachment to a letter dated March 28, 2002. The document filed by Everest had made clear that KCCP customer service representatives received a warning screen on their computer screens reminding them that certain low priced offers were only available in areas where KCCP faced competition from Everest. KCCP, in an obvious attempt at "damage control", disingenuously told the Commission in its April 17 letter that the warning screen was created and "distributed to customer services representatives ("CSRs") without management approval."[6]

In Shawnee, KS, where Everest has been engaging in engineering and pre-construction activities, Everest anticipates turning up service to customers in several neighborhoods next month. Everest sales representatives have been canvassing these neighborhoods and have attempted to sign up customers in anticipation of rolling out

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[5] *Id.* at 5-6. For example, while KCCP recently has changed a few details of the discount scheme applicable to *new* customers in that small area who sign up for discounted service, doing this does not permit the company to claim that its discount scheme has a limited signup window given that the discontinued discount offering in that area was replaced by a new discount program.

[6] Letter p. 1

service. In response, KCCP has begun a win-back campaign by offering three months free service to any customer living in a neighborhood where Everest has commenced construction. Customers who live in Shawnee, but who are not in areas that will be served by Everest in the near future, are told by KCCP that they are not presently eligible for a price discount but that KCCP may give them a discount if they call back after Everest starts to dig in their yard.

If this merger is allowed to go forward, the Commission should bar KCCP and Comcast from engaging in discount pricing in only part of a franchise area until after they have received a determination that they are subject to effective competition in the subject franchise area.

II. If the Commission allows AT&T and Comcast to merge, it should place a moratorium on AT&T and Comcast entering into exclusive contracts to serve multiple dwelling units

Most owners of apartment complexes in the areas served by Everest have been induced by KCCP to enter into exclusive agreements in return for wiring their buildings. Some of these agreements are perpetual since they are for the life of the franchise and any renewals thereof. Others are 15-year agreements entered in the late 1990s when KCCP was completing the digital upgrade of its properties. If this merger is allowed to proceed, the Commission should prohibit KCCP and Comcast from enforcing any agreement that would result in exclusion of competitors from any multiple dwelling unit complex.

III. Should the Commission allow AT&T and Comcast to merge, it should extend the prohibition against program exclusivity and should enforce what has become the exception for terrestrial delivered programming

KCCP has refused to allow Everest to carry Metro Sports, a local sports network established by KCCP even though KCCP permits Comcast to carry MetroSports in the nearby communities that Comcast serves. Denying Everest with access to MetroSports harms the comopany since MetroSports has exclusive rights to certain popular sports programming, such as the basketball games played by the University of Missouri, other college basketball and football games, professional soccer matches, and high school sporting events. Everest's efforts to gain access to this programming service have been stymied by the fact that KCCP distributes it by microwave transmission, not satellite.

If the Commission allows this merger to proceed, it should require that KCCP permit Everest to obtain Metro Sports and any other programming in which either AT&T or Comcast have attributable interests.

CONCLUSION

Everest heartily believes that lower prices and customer choice are two of the hallmarks of competition. This merger, if allowed to proceed, provides the Commission with the opportunity to impose upon conditions upon that will ensure the enforcement of existing laws and which will prevent the merged entity from engaging in tactics that are leverage monopoly power to produce short-term gains for consumers at the expense of the long-term benefits of competition. The merged parties should not be allowed to engage in selected price discounting prior to receiving a determination that a particular franchise is subject to effective competition. The merged entity should not be allowed to exclude competitors from providing service to multiple dwelling units. Finally the merged entity should not be allowed to prevent Everest from obtaining Metro Sports or any other programming in which the merged entity has an attributable interest.

Respectfully submitted,

Everest Midwest Licensee, LLC dba
Everest Connections Corporation

Rachel Lipman Reiber /rlj

Rachel Lipman Reiber
Vice President of Regulatory and Government Affairs
4740 Grand, Suite 200
Kansas City, MO 64112
816.714.2972 Voice
816.714.2995 FAX

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