

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

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

**RCN TELECOM SERVICES, INC.,  
REPLY TO OPPOSITION OF AT&T AND COMCAST  
TO PETITION TO DENY APPLICATIONS OR CONDITION CONSENT**

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## **REPLY TO OPPOSITION TO PETITION TO DENY**

### **Introduction**

Applicants Comcast Corporation and AT&T Corporation (the “Applicants”), in their opposition to the Petition of RCN Telecom Services, Inc. (“RCN”), to Deny Applications or Condition Consent, have distorted and, in some instances, misrepresented matters pertinent to the Commission’s analysis of RCN’s request that the proposed transfer of licenses from the Applicants to a merged AT&T Comcast Corporation be denied or, at a minimum, made subject to conditions designed to safeguard continued competition in the multichannel video programming distribution (“MVPD”) market. RCN submits these brief Reply Comments in rebuttal, for purposes of clarifying and correcting the record.

### **Threatened Withholding of Access to Programming**

The Applicants contend, somewhat shockingly, that “RCN has been treated no differently than other affiliates of Comcast SportsNet (Philadelphia), including Comcast’s own cable operations.”<sup>1</sup> In its Petition, RCN provided the Commission with specific examples, supported by signed statements, of instances in which Comcast’s sales representatives were instructed to tell RCN customers and potential customers that the customer should not take RCN’s service, because RCN could not guarantee continued access to Comcast-controlled local sports programming. Granted, RCN cannot say with certainty that Comcast’s sales representatives have not made similar representations to subscribers of SportsNet affiliates that are not in

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<sup>1</sup> AT&T Corporation and Comcast Corporation Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control, dated May 21, 2002, in MB Docket No. 02-70 (“AT&T Comcast Comments”), at 101.

competition with Comcast, but it seems highly improbable that they would. Moreover, it is disingenuous, at best, for Comcast to assert that “RCN was presented with a five-year agreement for [SportsNet (Philadelphia)] in October 2001 but has chosen not to sign it.”<sup>2</sup> Had RCN been presented with an acceptable long-term agreement in October, it certainly would have signed it. Unfortunately, the agreement proffered by SportsNet deviated significantly from the industry norm in several respects vitally important to RCN as a competitor to Comcast. RCN has now been in negotiations with Comcast SportsNet for more than half a year in an effort to forge an acceptable agreement, but the parties remain at impasse on provisions in the proposed agreement that would empower SportsNet to deprive RCN of the programming under two possible circumstances. First, the agreement as proposed by SportsNet would allow termination of RCN’s right to carry SportsNet in the event a financial audit showed a 5%+ underpayment of fees, even if cured, and even if due to an innocent bookkeeping or clerical error. This termination provision stands in sharp contrast to the remedy ordinarily provided in such agreements, which typically state that, in the event of a 5%+ underpayment, RCN must cure the deficiency and pay the audit costs, but do not contemplate termination of the programming agreement. Second, Comcast SportsNet has insisted on language that affords SportsNet discretion to deny RCN the right to carry its programming in any new communities added to the network as RCN’s planned system build-out continues. These terms are commercially unacceptable, as they continue the threat that Comcast SportsNet could prevent RCN from bringing this must-have regional sports programming to subscribers in new areas or could revoke the right to the programming based upon an inadvertent underpayment. Comcast, therefore,

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<sup>2</sup> AT&T Comcast Comments, at 102.

significantly misrepresents the situation when it suggests that there is no problem with program access, because RCN and Starpower now have and have always had access to Comcast-controlled programming. It is true that RCN and Starpower have managed to continue carrying Comcast programming despite Comcast's steadfast refusal to agree to negotiate an industry-standard, long-term agreement. Nonetheless, Comcast's sales force has used the company's control over this must-have programming, and the threat that RCN will not be allowed to carry it in the future, to deter subscribers from switching to RCN, and SportsNet continues still to hold onto the implied threat that RCN will be unable to offer Comcast-controlled programming to subscribers in new areas, as RCN's network expands.

### **Predatory Pricing By The Merger Partners**

AT&T and Comcast do not deny engaging in the selectively targeted deep discounting alleged in RCN's petition and the comments of other providers. Instead, the Applicants seek to avoid responsibility for the practice by asserting that "even if [it is] real" the providers against whom these practices are targeted have failed to show that predatory pricing "would be exacerbated by the proposed merger."<sup>3</sup> The Applicants then go on to argue that their predatory pricing practices do not technically violate the uniform rate requirements in the Communications Act or the Commission's rules, which apply only to "basic" cable service. Apparently, the Applicants have forgotten the standard applicable to the Commission's consideration of their transfer applications. It is not sufficient merely to show that the merger partners' pricing practices are in technical compliance with the law, or that their anti-competitive behavior will

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<sup>3</sup> AT&T Comcast Comments, at 113.

not be “exacerbated” by the merger – AT&T and Comcast have the affirmative burden to show that the transfer of their licenses in furtherance of the merger will serve the public interest, convenience, and necessity. And, the Commission has a duty to impose conditions on the license transfers as necessary to ensure that the public interest, convenience, and necessity will be served. Accordingly, it is wholly appropriate that the Commission impose as a condition of its approval a requirement that AT&T Comcast offer any discounts to all subscribers uniformly, and not just to those who might otherwise switch to a competitor’s service. In this way, price competition truly becomes a permanent and ubiquitous benefit to consumers, not just a means by which to drive competitors out of business.

### **The Merger Partners’ History of Anti-Competitive Behavior**

In its Petition, RCN cited several anti-competitive practices in which AT&T and/or Comcast historically have engaged, as examples of behavior that the Commission should expect to see on a wider scale, if the merger of the two companies is allowed to proceed. These include interference in local franchise negotiations, obstruction of access to the services of third-party construction and installation contractors, and impediments to building access imposed by exclusive agreements with owners of multiple dwelling units (“MDUs”). The Applicants seek to dismiss these behaviors as “irrelevant” to the issues pending before the Commission, although it is difficult to understand how past anticompetitive behavior can be irrelevant to the Commission’s assessment of the likely competitive impact of the proposed merger of the two companies and the merger’s concomitant impact on the public interest. Nonetheless, the Applicants then go on to attempt to refute RCN’s contentions and, in so doing, misstate the facts.

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Access to MDUs. Comcast admits that it “has in some cases obtained the right to be the exclusive cable provider of an MDU.”<sup>4</sup> It then asserts, however, that “Comcast has encountered numerous instances in which Starpower has received exclusive building rights.”<sup>5</sup> This is simply untrue. In no instance have Starpower or RCN entered into an agreement to be the exclusive cable provider to an MDU. In some instances, Starpower has obtained exclusive rights from an MDU to market its services, but such marketing arrangements do not preclude competing cable companies such as Comcast or AT&T from providing services to tenants of the MDU.

Employment of Contractors. RCN cited in its Petition interference by Comcast and, prior to its acquisition by Comcast, Suburban Cable, with fifteen construction and installation contractors in the Philadelphia area market, and reports of similar interference recently occurring in the Washington, D.C., area market. Significantly, Comcast does not deny that the interference occurred, but rather asserts that there are pro-competitive reasons in favor of its efforts to preclude contractors from performing work for RCN and Starpower. The Applications state further that “RCN cites no specific examples to buttress its claims.” Again, this is simply untrue. As promised in footnotes 30 and 32 of its Petition, RCN has filed with the Commission pursuant to Protective Order<sup>6</sup> the names of contractors in both the Philadelphia and Washington, D.C., area markets who were threatened by Comcast with loss of their work for Comcast if they did business with RCN or Starpower, together with additional detail regarding those instances. Out of concern that the contractors involved could experience further reprisals by Comcast, RCN

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<sup>4</sup> A&T Comcast Comments, at 118.

<sup>5</sup> AT&T Comcast Comments, at 118-119.

<sup>6</sup> DA 02-734, issued by the Commission in MB Docket No. 02-70, rel. March 29, 2002.

elected not to name them in the public record. However, Comcast's counsel requested and has been provided with copies of RCN's confidential filing with the Commission, pursuant to the terms of the Protective Order, for review.

Franchise Disputes. Comcast contends that the delays experienced by RCN and Starpower in their franchise negotiations with Philadelphia and Prince George's County, respectively, stem from the constricted capital markets resulting from the recent economic downturn, and cannot properly be attributed to Comcast. This assertion is empirically incorrect, as Comcast well knows. But for Comcast's interference and the delays that resulted, RCN and Starpower's franchise negotiations would have been completed well prior to the market downturn, when capital for the planned build-outs remained readily available. In fact, in Prince George's County, the County Cable Commission unanimously approved Starpower's cable franchise in March of 2000. Only after Comcast acquired the incumbent cable system in Prince George's County and raised objections regarding the franchise did Starpower's negotiations with the County stall. In response to Comcast's objections, the County Cable Commission reconsidered Starpower's franchise, unanimously approving it as originally negotiated for the second time in October of 2000. The County Council unanimously approved the negotiated franchise in November of 2000. AT&T and Comcast in their comments suggest that Starpower's franchise foundered because Starpower balked at the "request" of the County Executive to pay an up-front fee of \$400,000 to fund high-speed Internet service to government offices and schools. The Applicants neglect to mention, however, that the County Executive's demand for this additional sum, payable to the County prior to construction of Starpower's system and before the company would have any revenue stream, was first made two months after the Council had approved Starpower's franchise and only after intense lobbying of the County

Executive by Comcast. For the Commission's reference, attached as Exhibits A and B hereto are the full text of the June 26, 2001, letter from Deborah M. Royster, general counsel of Starpower, to Barbara L. Holz, Deputy Chief Administrative Officer for Prince George's County, a portion of which the Applicants quoted out of context in their comments, and a contemporaneous article from the Washington Post discussing the circumstances of Starpower's eventual decision not to enter the Prince George's County market, and Comcast's role.

### **Conclusion**

RCN has offered the Commission numerous, fact-specific examples of the manner in which the anti-competitive practices of the combined AT&T Comcast Corporation can be expected to harm competition in the MVPD market, thereby demonstrating that the proposed transfer of licenses from AT&T and Comcast to the merged entity cannot possibly serve the public interest, convenience, and necessity, unless appropriate conditions are imposed to safeguard continued competition for the benefit of telecommunications consumers. Numerous commenters have echoed RCN's concerns, and provided additional factual support for RCN's assertions, as summarized in the Reply Comments of RCN Telecom Services, Inc., dated May 21, 2002, in MB Docket No. 02-70. AT&T and Comcast have failed to refute these assertions, or to meet their burden of showing in this proceeding that the public interest, convenience, and necessity will be served. Wherefore, RCN respectfully reiterates its request that the Commission deny the pending applications or, in the alternative, impose at least the following competitive 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RCN Telecom Services, Inc., Reply to Opposition of AT&T and Comcast to Petition to Deny Applications or Condition Consent, and Exhibits A and B thereto, were served on June 5, 2002, on the following parties, via e-mail or Federal Express, as indicated below:

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