

**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)	
_____)	

**RCN Telecom Services, Inc.,
Written *Ex Parte* Comments
in Response to Comcast**

Andrew Lipman
Jean Kiddoo
L. Elise Dieterich

Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

(202) 424-7500

Counsel to RCN Telecom Services, Inc.

August 27, 2002

Response to Comcast August 19, 2002, Ex Parte Notice

RCN Telecom Services, Inc., hereby responds to the Ex Parte Notice filed August 19, 2002, by counsel for Comcast Corporation, wherein Comcast's position with respect to promotions targeted against RCN's affiliate, Starpower Communications, LLC, which were documented in RCN's August 14, 2002, filing in the above-captioned docket, is summarized. RCN takes strong exception to several of Comcast's assertions in the Ex Parte Notice and, accordingly, presents the following response for the record. Furthermore, Comcast has failed to address its lack of candor in responding to the Commission's June 11, 2002, request for additional information. This lack of candor represents a serious breach of Commission Rule 1.17, 47 C.F.R. § 1.17, in response to which the Commission should take prompt and decisive action.

Comcast Has Engaged in Marketing/Sales Promotions With Geographic- and Customer-Specific Restrictions, As Alleged By Its Competitors In This Proceeding

In its Ex Parte Notice, Comcast asserts that "RCN is not really complaining about geographical and customer-specific restrictions." To be very clear – geographic and customer-specific restrictions on deep discounts and other promotions offered by Comcast are precisely what RCN is complaining about. On August 14, 2002, RCN filed with the Commission a signed Declaration evidencing two such marketing campaigns by Comcast in Montgomery County, Maryland, targeted exclusively to customers and potential customers of RCN's local affiliate, Starpower. As the Declaration attests, these special deals were not promoted to customers outside Starpower's service area. With regard to the first offer, "*Comcast's sales representatives were instructed to make this offer only to Starpower customers and never to put the offer in writing . . . the direct sales representatives were not authorized to offer it to non-Starpower customers.*" Maier Declaration at ¶¶5-6. With regard to the second, coupon-based offer made to

customers in Takoma Park, Maryland, at the time Starpower commenced service there, “*at the end of the campaign, all of the remaining coupons were destroyed to ensure that the direct sales representatives would not give them to customers outside of Takoma Park.*” Maier Declaration at ¶11. Clearly, these campaigns were designed in a manner intended to reach only Starpower’s customers and potential customers, and the fact that the discount rate may have been honored if a customer outside of Starpower’s service area somehow learned of the rate and contacted Comcast to demand it does not alter that fact. Indeed, Comcast has presented no evidence whatsoever that any non-Starpower customer ever received the benefit of the special deals described in the Maier Declaration.

Comcast also asserts in its Ex Parte Notice of August 19 that “RCN has now substantially recast its prior allegations and retreated.” On the contrary, RCN continues to believe that both Comcast and AT&T have engaged in predatory pricing, sales, and marketing tactics targeted against their competitors, as discussed in the comments of RCN and other competitors in this proceeding. The two specific instances documented in the Maier Declaration simply corroborate what RCN and other competitors have long contended. Moreover, even a price that merely meets the competition, as apparently was offered in Comcast’s Takoma Park campaign, is potentially predatory when coupled with costly door-to-door marketing and extraordinary bonus commissions paid to the sales representatives promoting the campaign.

**Comcast Has Failed to Address Its Lack of Candor
In Responding To the Commission’s Questions**

Notably, Comcast apparently now concedes that it engages in the types of targeted campaigns documented in the Maier Declaration and described in the comments of RCN and other competitors on file in the above-captioned docket. Specifically, Comcast does not dispute that its direct sales representatives were instructed to offer the promotions detailed in the Maier

Declaration only to Starpower's customers or in Starpower's geographic service area. Nor does Comcast dispute that steps were taken to ensure that non-Starpower customers would not become aware of these special deals, as the Maier Declaration describes (*i.e.*, not putting the offers in writing, prohibiting the direct sales representatives from offering the deals outside Starpower's service area, and destroying the discount coupons at the end of the campaign). Yet, inexplicably, Comcast continues to insist that "Comcast does not impose geographic or customer-specific restrictions on the availability of its promotions within the system or franchise areas in which such promotions are offered." Comcast Ex Parte Notice, dated August 19, 2002, at 2 (emphasis in original).

RCN and other competitors had alleged previously in this proceeding that the applicants engage in targeted, predatory pricing designed to eliminate competition, a public interest harm that would be exacerbated by the applicants' merger. The Media Bureau, in the appropriate exercise of its regulatory authority, sought to develop the record on that issue. Thus, in Question D.3 in its June 11, 2002, Data and Information Request, the Commission asked: "*Has either Applicant ever included geographic or customer-specific restrictions in marketing/sales promotions with respect to any of its cable franchises?*" RCN submits that the campaigns described in the Maier Declaration, which were marketed exclusively through direct sales representatives, who were expressly instructed to target only Starpower customers or potential customers in Starpower's service area, are, in any common understanding of the phrase, marketing/sales promotions with geographic or customer-specific restrictions. Nonetheless, Comcast answered in response to the question that: "*Comcast does not believe that any of its marketing/sales promotions have geographic or customer-specific restrictions of the sort contemplated by the question.*" Comcast's response can only be interpreted as an attempt to

mislead the Commission into believing that the problem complained of by RCN and other competitors does not exist. Indeed, but for the Maier Declaration, it seems unlikely that the Commission ever would have learned about Comcast's Montgomery County promotions and Comcast's instructions to its direct sales representatives not to give those promotions to non-Starpower customers or customers outside Starpower's service area. Comcast's continued insistence that "Comcast does not impose geographic or customer-specific restrictions on the availability of its promotions" does not make its original response to the Commission's straightforward question any less misleading.

Commission Rule 1.17 provides that no applicant shall "make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." 47 C.F.R. § 1.17. It is well established that "the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *Fox Television Stations, Inc.*, 10 FCC Rcd. 8452 (May 4, 1995), at ¶59. The Commission has said: "There is thus no question that an applicant's candor is an issue of the utmost importance to us." *Id.* In the broadcast context, an applicant's lack of candor has been deemed sufficient grounds to deny a license application. *See, e.g., RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981); *Schoenbohm v. FCC*, 204 F.3d 243 (D.C. Cir. 2000) ("it is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency.") Rule 1.17 is not limited to applicants for broadcast licenses, however, but is "generally applicable to all applicants, licensees, and permittees for all radio facilities." Policy Statement and Order, 5 FCC Rcd 3252 (May 11, 1990), at ¶10. The public interest in this

merger-related proceeding is at least as great as in the case of a broadcast license renewal; consequently, a similarly high standard of candor must apply.

RCN can only speculate as to the strained interpretation of Question D.3 of the Commission's Data and Information Request that allows Comcast to contend that it "offered" or "promoted" the deep discounts described in the Maier Declaration to customers outside of Starpower's service area. Assuming, however, that Comcast has given a similarly strained reading to other questions asked by the Bureau in this proceeding, it is both necessary and appropriate for the Bureau to reopen its inquiries to ensure that information provided by Comcast and its merger partner, AT&T, on each of the competitive issues raised in this proceeding has been full and forthcoming. In particular, RCN urges the Bureau to request from Comcast and AT&T the internal company documents that reflect or describe the manner in which either applicant "exercises its discretion to focus certain marketing and promotional activities in ways that will respond effectively to marketplace developments," Comcast Ex Parte Notice, dated August 19, 2002, at 2, rather than relying upon the applicants' carefully worded narrative response. The Commission also should impose such other sanctions as it concludes are warranted, in view of Comcast's lack of candor in responding to Question D.3 of the Commission's June 11, 2002, Data and Information Request.

Respectfully submitted,

s/
Andrew Lipman
Jean Kiddoo
L. Elise Dieterich

Counsel to RCN Telecom Services, Inc.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Written *Ex Parte* Comments in Response to Comcast of RCN Telecom Services, Inc., were served on August 27, 2002, on the following parties, via e-mail, as indicated below:

Qualex International (via e-mail)

Portals II
445 12th Street, S.W.,
Room CY-B402
Washington, D.C. 20554
e-mail: qualexint@aol.com

Roger Holberg (via e-mail)

Federal Communications Commission
Media Bureau
445 12th Street, S.W.
Room 2-C262
Washington, D.C. 20554
e-mail: rholberg@fcc.gov

Erin Dozier (via e-mail)

Federal Communications Commission
Media Bureau
445 12th Street, S.W.
Room 2-C221
Washington, D.C. 20554
e-mail: edozier@fcc.gov

David Sappington (via e-mail)

Chief Economist
Federal Communications Commission
Office of Plans and Policy
445 12th Street, S.W.
Room 7-C452
Washington, D.C. 20554
e-mail: dsapping@fcc.gov

James Bird (via e-mail)
Federal Communications Commission
Office of General Counsel
445 12th Street, S.W.
Room 8-C824
Washington, D.C. 20554
e-mail: jbird@fcc.gov

Donald Stockdale (via e-mail)
Federal Communications Commission
Office of Plans and Policies
445 12th Street, S.W.
Room 7-C324
Washington, D.C. 20554
e-mail: dstockda@fcc.gov

William Dever (via e-mail)
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W.
Room 5-C266
Washington, D.C. 20554
e-mail: wdever@fcc.gov

Cynthia Bryant (via e-mail)
Federal Communications Commission
International Bureau
445 12th Street, S.W.
Room 6-C807
Washington, D.C. 20554
e-mail: cbryant@fcc.gov

Jeff Tobias (via e-mail)
Federal Communications Commission
Wireless Telecommunications Bureau
445 12th Street, S.W.
Room 2-C828
Washington, D.C. 20554
e-mail: jtobias@fcc.gov

s/

L. Elise Dieterich