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September 10, 2002 FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte Notice

**ATTACHMENTS CONTAIN CONFIDENTIAL INFORMATION – SUBJECT TO
PROTECTIVE ORDER IN MB DOCKET NO. 02-70
REDACTED VERSION OF ATTACHMENTS INCLUDED FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

**Re: Applications for Consent to the Transfer of Control of Licenses
from Comcast Corporation and AT&T Corp., Transferors,
to AT&T Comcast Corporation, Transferee, MB Docket No. 02-70**

Dear Ms. Dortch:

This letter and the attached materials respond to recent ex parte submissions by RCN Corporation. Applicants have addressed virtually all of RCN's specific charges in prior submissions; little more remains to be said.

On the issue of "control over access to third party vendors of goods and services," which is briefly mentioned by RCN in its August 16 ex parte letter, Applicants fully addressed this issue months ago. See Reply to Comments and Petitions to Deny Applications For Consent To Transfer Control, MB Docket No. 02-70, at 119 (May 21, 2001) ("*Applicants' Reply Comments*"). On the issue of RCN's access to Comcast SportsNet, RCN's allegation (also in its August 16 letter) that "it still has been unable to negotiate a long-term contract" is misleading at best. Concerning the two contractual provisions to which RCN objects, (1) RCN has inaccurately characterized Comcast SportsNet's current offer regarding service to newly-served communities,¹ and (2) it is entirely reasonable for Comcast SportsNet to retain the option of terminating its agreement with RCN if RCN is discovered, after audit, to have failed to pay

¹ If RCN's mischaracterization is a product of its failure to comprehend the provision in question, that problem can best be resolved through bilateral commercial discussions. There is no reason why this contract should be negotiated publicly, or with government participation, especially given that this is a contract numerous other parties have voluntarily signed. *Applicants' Reply Comments* at 102 (approximately 12 other terrestrial MVPDs have executed agreement to carry Comcast SportsNet).

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monies due under the contract.² The fact is, RCN has spurned the opportunity for negotiations for over a year (during which time it has continued to carry Comcast SportsNet without interruption) and presumably will continue to do so as long as it perceives advantages in manipulating the FCC's processes instead of negotiating reasonably and in good faith with Comcast SportsNet.

Turning to the issue of Comcast's pricing and promotional practices, which are the subjects of RCN's ex parte submissions of August 14, August 16, August 21, and August 27, RCN's arguments and allegations have been largely answered in prior pleadings, most notably Comcast's letter of August 19.³ But one factual issue apparently remains to be clarified, and we do so definitively here. Once RCN's erroneous factual predicate falls away, RCN's proposal for a curative merger "condition" (August 21) becomes irrelevant and its attack on Applicants' candor (August 27) is exposed as lacking substance.

RCN's recent submissions rest entirely on its mistaken belief that Comcast restricts the distribution of discount coupons to areas served by Starpower. In this regard, RCN relies on the declaration of a Starpower employee who was formerly employed by Comcast. That declaration does not, however, prove what RCN claims. Even taken at face value, the declaration at most speaks to the instructions that were given to a particular group of direct sales representatives concerning their marketing efforts over a single 2-5 day period. RCN extrapolates from that episode the conclusion that Comcast made the coupons described by its declarant available only in areas served by Starpower. That extrapolation is unfounded.

In fact, as the attached declaration explains, Comcast has distributed discount coupons in numerous areas that Starpower does not choose to serve, and households outside the Starpower areas have in fact used these coupons. Households throughout Montgomery County have a choice of multichannel video programming distributors (at least three, and, if they live in the few, generally affluent neighborhoods that Starpower has chosen to serve, four). Therefore, Comcast faces competitive pressures throughout the County, and customers *throughout* the County benefit from competitive differentiated pricing by *all* distributors. The DISH Network

² No other parties seeking access to this programming have insisted on preserving their "right" to pay less than they owe with impunity.

³ RCN's earlier comments in this proceeding described the "problem" not in merger-specific terms but as a general industry issue, and RCN's lead complaint was about a cable operator *other than* AT&T Broadband or Comcast. See Petition of RCN Telecom Services, Inc. To Deny Applications or Condition Consent, MB Docket No. 02-70, at 22 (Apr. 29, 2002) ("*RCN Petition*"). Applicants nonetheless responded in some detail. See *Applicants Reply Comments*, 107, 112-115. Notably, RCN's trade association recently filed comments that again described this as an industry issue. Comments of Broadband Service Providers Association, MB Docket No 02-145, at 1-12 (July 29, 2002) (six references to "incumbent cable operators," one reference to "cable monopolists," and one reference to "entrenched monopolists"; no indication of any particular problems with any particular MSOs or resulting from any particular transaction). As the Commission has repeatedly held, arguments involving rules or policies of general applicability are not appropriate for consideration in license transfer reviews. See, e.g., *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, 12 FCC Rcd 19985, ¶¶ 210, 220-221 (1997).

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(EchoStar), DirecTV, Comcast, and (where available) Starpower all price-compete with one another, and each may reward customers of the other for “switching” or reward its current customers for their loyalty. This is precisely the way in which the market for competitive, unregulated services is supposed to work.⁴ Thus, consistent with the information that the Applicants provided to the Commission on July 2,⁵ promotional coupons are *not* distributed only in neighborhoods served by Starpower, and consumers *outside* Starpower areas also enjoy the benefit of competitive pricing practices.

Moreover, although Starpower chooses to ignore it, earlier this year Comcast made available on a region-wide basis – with region-wide advertising – its “Summer Madness” promotion, which included three months of basic, expanded basic, and digital service for \$19.95 per month, plus 14 screens of Showtime Networks free for six months and two free tickets to the Six Flags America theme park. This is a much more substantial discount than the \$6 coupon complained about in the RCN declaration, yet this discount, too, was entirely permissible.⁶

Finally, RCN has no basis to question the candor of either Applicant. Although RCN asserts that Comcast’s most recent ex parte response failed to respond to RCN’s charge of a “lack of candor,”⁷ Comcast’s filing of August 19 could not possibly respond to an allegation that was not made public until two days *later*.⁸ Regardless, there can now be no question that Comcast’s response to Question D.3. of the Commission staff’s first information request was – and is – accurate and proper. As shown above, Comcast’s marketing and promotional offers are not “restricted” in the manner that the FCC staff asked.

⁴ See, e.g., *Orloff v. Vodafone Airtouch*, 17 FCC Rcd 8987 at ¶ 23 (2002) (opportunities for customers to “haggle” over price and terms of service on an individualized basis, even if they lack perfect information about specific promotional offerings, can be beneficial if those customers have the opportunity to “shop around” for a better deal with other competitors).

⁵ Response of AT&T Corp. and Comcast Corporation to June 11, 2202 Document and Information Request, MB Docket No. 02-70, at 15-16 (July 2, 2002) (Comcast’s answer to Question D.3).

⁶ Although RCN has frequently accused Comcast of “predatory pricing,” RCN has never adduced any evidence to support this charge.

⁷ RCN Telecom Services, Inc., Written Ex Parte Comments in Response to Comcast, MB Docket No. 02-70, at 1 (Aug. 27, 2002).

⁸ RCN first made the “lack of candor” charge in its letter of August 16. Because that report was filed manually, rather than electronically, and was not served on Comcast, counsel for Comcast first became aware of RCN’s August 16 letter on the afternoon of August 21, when it was posted to the Commission’s ECFS website. It is also true, for the same reason, that Applicants’ July 2 submission, responding to a *general* question about promotional discounts, did not (and could not) respond to claims, first made in *August*, about restrictions allegedly imposed in conjunction with specific direct sales activities in Montgomery County.

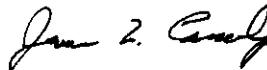
Letter to Marlene H. Dortch, Secretary
September 9, 2002

Ever since these license transfer applications were filed last February, Applicants have diligently worked to provide the Commission with any and all information it has sought,⁹ and they have gone the extra mile to respond candidly even to assertions from parties, like RCN, that seek to use the merger review process to pursue agendas unrelated to the proposed merger.¹⁰ There comes a time, however, when the regulatory gamesmanship by parties like RCN must stop so that the review process may be brought to a conclusion.

RCN has not presented a credible case concerning *any* of the issues that it has raised over the course of this merger proceeding. Nor has it demonstrated why any of these issues are properly cognizable in this license transfer application proceeding. There is nothing "merger-specific" about RCN's contrived problems with Comcast SportsNet, and there is nothing "merger-specific" about the entirely proper distribution of coupons to households in Montgomery County as part of a competitive response in a deregulated market with multiple competitors.

This letter is submitted pursuant to section 1.1206(b)(2) of the Commission's rules. Please let me know if you have any questions.

Sincerely,



James L. Casserly

Attachment

cc:
Roger Holberg
Linda Senecal

⁹ When additional questions have been asked, Applicants promptly and candidly answered them. On July 2, Applicants filed 64 single-spaced pages of narrative responses and hundreds of pages of accompanying documents pertaining to questions asked by FCC staff on June 11. In response to a supplemental information request on July 10, Applicants provided additional materials on July 25.

¹⁰ While merger proceedings may serve as vehicles for parties to raise grievances that are either real or imagined, the Commission must be especially alert to a situation in which the asserted grievance is *contrived*. The Commission must also recognize the potential for parties to use (or abuse) the process as a vehicle for obtaining confidential business information they can use for commercial purposes, *e.g.*, to determine the structure or timing of their own promotional offers and marketing strategies.

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Exhibit A

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