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EX PARTE OR LATE FILED

November 1, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

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

Re: Redacted Version for Public File of RCN Telecom Services, Inc., Written Ex Parte Presentation in Response to Comcast and AT&T, re Media Bureau Staff Research Papers, and in Support of RCN Petition to Deny Applications or Condition Consent, filed November 1, 2002, in MB Docket No. 02-70.

Dear Secretary Dortch:

Attached please find for the public files two (2) copies of the redacted version of RCN Telecom Services, Inc., Written Ex Parte Presentation in Response to Comcast and AT&T, re Media Bureau Staff Research Papers, and in Support of RCN Petition to Deny Applications or Condition Consent. The unredacted version, which references Confidential Information, is being filed under seal this same date, pursuant to the protective order, DA 02-734, issued by the Commission in MB Docket No. 02-70. This version omits the protected Confidential Information.

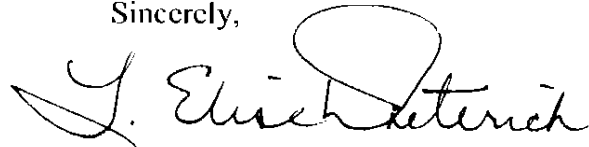
RCN Telecom Services, Inc., by its attorneys, is submitting the attached redacted written *ex parte* presentation by hand delivery or electronic mail to the decision makers named in the "cc" list, below. Pursuant to section 1.1206(b)(1) and 1.49(f) of the Commission's Rules, this *ex parte* notice is being filed for inclusion in the public record for the above-referenced docket

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If you have questions regarding the attached, please contact the undersigned.
Thank you.

Sincerely,



L. Elise Dieterich

Counsel to RCN Telecom Services, Inc.

Attachment

cc (by hand): **Kenneth Ferrce, Chief, Media Bureau**

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Catherine Crutcher Bohigian, Legal Advisor to Commissioner Martin

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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Applications for Consent to the)
Transfer of Control of Licenses)
)
Corncast Corporation and)
AT&T Corporation,)
Transferors.)
)
TO)
)
AT&T Comcast Corporation,)
Transferee)

EX PARTE OR LATE FILED
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MB Docket No. 02-70

RCN TELECOM SERVICES, INC.,
FURTHER WRITTEN *EX PARTE* PRESENTATION
IN RESPONSE TO COMCAST AND AT&T,
RE MEDIA BUREAU STAFF RESEARCH PAPERS, AND
IN SUPPORT OF RCN PETITION TO DENY APPLICATIONS OR CONDITION CONSENT

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Counsel to RCN Telecom Services, Inc.

November 1, 2002

Introduction

RCN Telecom Services, Inc., hereby responds to the following recent *ex parte* filings by the Applicants in the above-captioned proceeding: the *ex parte* letter and attachment filed September 10, 2002, by Coincast Corporation, which purport to address submissions in this proceeding by RCN regarding the Applicants' pricing and promotional practices; the October 2, 2002, notice by AT&T and Corncast, attaching the parties' joint *ex parte* letter to Ken Ferree, Chief of the Media Bureau, responding to the Supplement to Petition to Deny filed September 30, 2002, by Consumers Union, Consumer Federation of America, and the Media Access Project; and, the October 11 joint *ex parte* letter from AT&T and Comcast responding to the Broadband Service Providers Association ("BSPA") October 2, 2002, *ex parte* filing. These several filings have a number of substantive issues in common. Accordingly, for convenience, RCN has organized its response to AT&T and Comcast's recent filings by substantive issue, in Part I hereof.

In Part II of this *ex parte* presentation, RCN briefly addresses the Staff Research Papers released by the Media Bureau on October 9, 2002,¹ and their relevance to the pending Transfer Applications of AT&T and Comcast.

Finally, in Part III hereof, RCN summarizes the substantial record developed in this proceeding to date, which supports RCN's Petition to Deny Applications or Condition Consent, filed April 29, 2002. Accordingly, RCN respectfully reiterates its request for relief as set forth in the April 29 Petition.

¹ DA 02-2568, rcl. October 9, 2002, in CS Docket Nos. 98-82, 96-85, MM Docket Nos 92-264, 94-150, 92-51, 87-154, and the instant docket, MB 02-70.

I. Response *to* Recent **AT&T** and **Corncast Ex Parte** Filings

Comcast's Predatory Pricing Practices Have Been Amply Documented, and Conditions Are Necessary to Constrain This Anti-Competitive Behavior

RCN and other broadband service providers that compete with AT&T and Comcast have contended since the outset of this proceeding that Comcast engages in sales, marketing, and promotional practices that are predacious in nature.⁷ Specifically, the overbuilder competitors have provided numerous examples in which Comcast offered to customers or potential customers of its overbuilder competitors deep discounts or special promotions that were not publicly advertised or made available to other customers within the given franchise area except, perhaps, in those instances when a customer somehow learned of and demanded the discount or promotional deal. For example, RCN in its Petition provided evidence of a Comcast "Swat Team" deployed in Folcroft, Pennsylvania, which was instructed to give potential RCN customers discounts in exchange for signing an 18-month service contract. "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."⁸ The BSPA provided information that:

. . . customers of WideOpenWest ('WOW') are being offered rate discounts of 33 percent, 50 percent, and more, for periods of six months and beyond, to switch back to Comcast. They are also being offered free digital service, free pay per view, and other giveaways. Existing Comcast customers are being offered similar benefits not to cancel their service in order to subscribe to service from WOW. These offers are not publicized, nor are they made available to anyone other than

⁷ See, e.g., Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent, dated April 29, 2002 ("Petition"), at 22 and Exh. A; Comments of Everest Midwest Licensee, LLC, DBA Everest Connections, dated April 29, 2002, at 3 (addressing predatory pricing by AT&T affiliate Kansas City Cable Partners); Comments of the Broadband Service Providers Association, dated May 21, 2002 ("BSPA Comments"), at 10-11; *Ex Parte* Notice filed by the Broadband Service Providers Association, September 19, 2002 ("BSPA *Ex Parte*"), and attached Statement of Mark Haverkate, dated April 23, 2002, at 10-11.

⁸ Petition, at 22 and Exh. A

the competitor's customers and Comcast customers who have expressly requested to be disconnected in order to switch over to the competition.⁴

The BSPA also has submitted information that: "In Augusta, Georgia, Comcast is offering discounts in excess of 50 percent for basic and digital cable, high speed data, and other services -- but only in areas where Knology offers competitive services."

However, as RCN has pointed out, "Information received by RCN and Starpower regarding targeted deep discounts by the applicants typically comes from individual customers who have received such offers and, accordingly, the information is anecdotal and extremely difficult to document." "Thus, RCN and its Washington-area affiliate, Starpower, were interested when the Applicants were asked, in the Commission staff's June 11, 2002, Document and Information Request, whether either Applicant ever included geographic or customer-specific restrictions in marketing/sales promotions and, if so, to provide details regarding such practices. RCN was, to say the least, surprised and dismayed when, in response to the Commission's inquiry, the Applicants asserted that each Applicant "does not believe that any of its marketing/sales promotions have geographic or customer-specific restrictions of the sort contemplated by the question." RCN knew better -- and, after diligent effort to elicit the facts from a witness with first-hand knowledge, provided a Declaration detailing promotions by Comcast in Montgomery County, Maryland, aimed specifically at Starpower customers and areas where Starpower has built out its network, but not other areas of the County. Tellingly, Comcast has not denied that the information contained in the Maier Declaration is completely

⁴ BSPA Comments. at 10-11

BSPA *Ex Parte*, Statement of Mark Haverkate, at 12

⁶ RCN Telecom Services, Inc., Written *Ex Parte* and Accompanying Declaration, dated August 14, 2002, at 3

accurate. Instead, Comcast, as described below, has gone to great lengths to try to reconcile the information in the Maier Declaration with its earlier responses, has further dissembled, and, paradoxically, has also attempted to justify as permissible the sales and marketing practices it previously denied exist

Comcast begins its September 10 *ex parte* letter to Secretary Dortch with the statement that virtually all of RCN's specific charges in prior submissions have been addressed and "little more remains to be said." Notwithstanding, the letter then spends three single-spaced pages on the issue of Comcast's pricing and promotional practices, and attaches a three page, single-spaced declaration purporting to address Comcast's pricing and promotional practices in Montgomery County, Maryland, to which the Maier Declaration referred. In the letter, the Applicant continues to assert that "Comcast's marketing and promotional offers are not 'restricted' in the manner that the FCC staff asked" in the June 11 Document and Information Request. Bizarrely, however, Comcast deemed its Declaration detailing those supposedly openly available promotions to be so super-secret that not only was the entirety of the Declaration redacted from the public record, the Declaration was deemed "copying prohibited" under the terms of the applicable protective order,⁷ and RCN's attorney was allowed to view it only under the watchful supervision of Comcast's legal representative,

In any event, a close reading of Comcast's statements in the letter and the confidential Declaration reveals that Comcast still does not deny that the targeted promotions and discounts detailed in the Maier Declaration exist, but argues instead that, because Comcast engages in additional types of targeted or restricted promotions (in particular, those directed to the

⁷ The Protective Order, DA 02-734, rcl. March 29, 2002 ("Protective Order"), Exhibit A, at 1-2, provides that a document may be marked "Copying Prohibited" if, "in the judgment of the

customers of the DISH Network and DirecTV), its Starpower-targeted promotions should be viewed as unobjectionable.⁸ Indeed, the redacted Declaration is most notable for what it does not say. It does not say that the Declarant directs, supervises, or has personal knowledge of the instructions given to Conicast direct sales representatives like Mr. Maier; accordingly, Comcast's Declarant does not appear to be qualified to refute the facts set forth in the Maier Declaration.

[REFERENCES TO CONFIDENTIAL INFORMATION REDACTED]

The Applicants' response to the Supplement to Petition to Deny filed by Consumers Union, Consumer Federation of America and the Media Access Project (collectively, the "Consumer Groups"), attempting to dismiss the Consumer Groups' concerns as untimely and "procedurally improper" seems disingenuous, in view of the additional evidence of discriminatory pricing introduced into this proceeding in August and the fact that the Applicants

Submitting Party, a document contains information so sensitive that it should not be copied by anyone."

⁸ *Ex Parte* Letter from counsel for Comcast to Secretary Dortch, dated September 10, 2002 ("Comcast Letter"), at 2-3.

themselves have continued to submit to the Commission, on an almost daily basis, new and additional advocacy in support of their Transfer Applications. To suggest that those opposed to the Applications should not have the same opportunity to submit written *ex parte* communications into the record, in whatever format, is simply inappropriate.

The substance of the Applicants' rebuttal to the Consumer Groups' arguments seems disingenuous, as well. In essence, Applicants argue that the pro-consumer merger conditions sought by the Consumer Groups are somehow anti-consumer, because revealing publicly (via website posting) the discounts offered to select customers, or requiring that discounts be offered uniformly throughout a franchise area, would reduce the ability of individual consumers to "haggle" with the Applicants to obtain special deals. This argument is nonsensical. Nowhere does the federal Cable Act contemplate that cable rates should depend upon the bargaining power of individual cable subscribers. Moreover, only those customers to whom a choice of cable providers is available have the leverage to "haggle" effectively with the Applicants. All those to whom cable competition has not yet come have little leverage with which to extract a "deal" from AT&T or Comcast, insofar as their only choice, if they have one at all, is DBS, which cannot currently compete with the broadband capabilities that AT&T and Comcast are touting as a justification for their merger. The Commission should trust the Consumer Groups, not the Applicants, to accurately speak for the interests of consumers in this proceeding, and the Consumer Groups have made their position clear: selective discounts are detrimental to consumers, and should be constrained through appropriate merger conditions.

Comcast Continues to Impede RCN's Access. on Commercially Viable Terms, to
Essential Local Sports Programming

In its September 10, 2002, *ex parte* filing, Comcast again asserted:

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, 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 monies due under the contract.⁹)

Comcast goes on to suggest that these issues be resolved in "bilateral commercial discussions" and implies that RCN is attempting to preserve the right to pay less than is owed under the agreement. These statements do not reflect the facts of the parties' negotiations to date

First, RCN has been engaged in ongoing "bilateral commercial discussions" with Comcast SportsNet regarding an acceptable long-term agreement since the beginning of this year." While it does now appear that the new communities issue can be satisfactorily resolved, no revised language to implement the parties' compromise has as yet been proposed by Comcast SportsNet, contrary to the implication in Comcast's September 10 filing that RCN has received but "misunderstood" Comcast SportsNet's revised proposal. As to the audit provision, RCN seeks only to substitute the industry standard provision – that if a 5%+ discrepancy in remittances is found in an audit, RCN will pay the amount owed plus all audit costs – for draconian language in

⁹ Comcast Letter. at 1-2

¹⁰ RCN initiated negotiations on the agreement in January, and sent its comments on the draft agreement to Comcast SportsNet on February 22nd. Comcast SportsNet did not return its mark up to RCN until April 18. RCN reviewed the mark up and had a conference call with Comcast SportsNet on May 2, at which time Comcast SportsNet promised to send a further revised agreement for RCN's review. That further revised agreement was not received from Comcast SportsNet until July 9, and still contained the unacceptable and non-standard terms regarding the addition of new communities and audit remedies described in RCN's earlier filings in this proceeding. Negotiations between the parties to resolve these two provisions have been ongoing since that time.

the current draft that would allow Conicast SportsNet to terminate the programming agreement based upon even a relatively minor (5%) remittance error.”

The Applicants Assertion That Their Merger Will Not Increase
Clustering or Regional Market Power,
or Result in Migration of Programming to Terrestrial Delivery. Is Implausible

The BSPA on October 2, 2002, submitted a map illustrating the proximity of various systems that will merge or become affiliated as a result of the proposed merger of AT&T and Comcast, and, **like** RCN, has argued that the increased regional consolidation and clustering that will result from the proposed merger are relevant to the Commission’s public interests analysis, because clustering necessarily increases market power and creates opportunities for strategic abuses (for example, by coordinating predatory pricing practices across multiple franchise areas or by migrating programming owned or controlled by the Applicants to terrestrial delivery, in order to escape the Commission’s program access rules). In their October 11 *ex parte* letter, the Applicants again point to past practice in defense of their position, while making no enforceable commitments with regard to future conduct. For example, the Applicants make much of the fact that “[a]s for programming, the vast majority is delivered by satellite and is subject to the program access **rules**, and Comcast has always made its one terrestrially delivered sport programming service available to the overbuilders that comprise BSPA’s membership.” But, as RCN has informed the Commission, Comcast has made its terrestrially-delivered programming available only grudgingly, and has offered absolutely no promise that programming in which it holds an attributable interest will not be migrated to terrestrial delivery and withheld from its

¹¹ Again, whether other cable providers in the Philadelphia market have agreed to the audit clause as proposed by Comcast SportsNet is irrelevant, because RCN is the only provider that competes head-to-head with Comcast and, therefore, the only provider that Comcast SportsNet has an incentive to terminate.

competitors upon the expiration of existing contracts, once the merger is approved. The Applicants are arguing, in essence, that the synergies generated by their proposed merger justify its approval, while at the same time claiming that, post-merger, past practice will remain the same and they will not take advantage of their larger, consolidated footprint. RCN submits that the conflict inherent in this position is obvious. If the Commission intends to rely on the Applicants' assertion that they will not further cluster systems, nor migrate programming to terrestrial delivery, nor use their regional market power to the detriment of competition, the Applicants' promises should be set forth in an enforceable form

Coincast Has Exhibited a Lack of Candor in This Proceeding, Thus Inviting Closer
Scrutiny By the Commission

Comcast, in particular, has exhibited a troubling, ongoing lack of forthrightness in this proceeding, electing to argue legal technicalities and only responding to the legitimate competitive concerns raised in this proceeding with carefully limited general denials and documents filed under seal, instead of responding fully, openly, and on the merits. For example, Comcast in its September 10 *ex parte* letter asserts:

RCN has no basis to question the candor of either Applicant. Although RCN asserts that Comcast's most recent *ex parte* responses failed to respond to RCN's charge of a "lack of candor," Comcast's filing of August 19 could not possibly respond to an allegation that was not made public until two days *later*.¹²

But RCN has publicly contended since long before this proceeding that the Applicants engage in marketing and sales promotions with geographic and customer-specific restrictions targeted against RCN and Starpower. and reiterated that concern in its April 29, 2002, Petition. Comcast was well aware of RCN's competitive concerns on the pricing issue from the outset of this

¹² Comcast Letter at 3.

proceeding. Therefore, Coincast only compounds its earlier obfuscation when goes on to state in its September 10 letter that:

the 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.¹³

The question posed by the June 11 Document and Information Request invited a yes/no response: either Comcast has engaged in marketing and sales promotions with geographic or customer-specific restrictions, in which case details were to have been provided, or it has not. The fact that RCN did not obtain and submit until August 2002 direct evidence of such promotions refuting Comcast's carefully crafted and misleading answer in no way excuses Comcast's failure, in the first instance, to answer the Commission's straightforward question directly, completely, and forthrightly. Comcast's corporate practices did not change in August – only its response to the Commission did.

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.* The Commission should weigh Comcast's apparent lack of candor carefully in assessing the issues raised in this proceeding.

¹³ Comcast Letter. at footnote 8.

II. The Cable Studies Recently Released by the Media Bureau Show the Perils of Allowing Unconstrained Mega-Mergers of this Sort

RCN believes that the Media Bureau staff research papers released on October 9, 2002, further reinforce the arguments made to date in this proceeding, which show that the merger of AT&T and Comcast will have severe anti-competitive effects and, accordingly, cannot be found to be in the public interest, absent the imposition of merger conditions designed to mitigate those harmful effects. The staff paper entitled “Most-Favored Customers in the Cable Industry” concludes that the largest cable operators, when they have most-favored customer clauses in their programming contracts, enjoy significant market advantages, reinforcing the conclusion that an overbuilder competitor like RCN, which already is disadvantaged by the volume discounts and other benefits routinely granted to the largest cable operators, suffers even greater competitive harm when the largest cable operators obtain most-favored customer status. The staffpaper on “Asymmetric Bargaining Power and Pivotal Buyers,” is also of significance to RCN, because it demonstrates what RCN has long argued: as big as AT&T and Comcast are individually, combining them into a single mega-company will make the competitive landscape even worse.

The papers concludes that “large buyers [in the programming market]. . . can extract greater gains from trade than smaller buyers when there are asymmetries in bargaining power,” and that these results imply that “horizontal merger might be used as a strategy to enhance bargaining position.” In other words, cable mergers increase market power, to the detriment of others bargaining for programming. RCN believes this effect may be even more dramatic than the paper postulates. The market for cable programming is characterized by historical monopoly providers, which control bottleneck facilities that are, in some instances, the only viable conduit through which programming or other content can reach its intended audience. Programming is valued according to the number of eyeballs it teaches, so programmers are, to a large degree,

hostage to those cable companies that control the largest number of these bottleneck facilities.

The importance of the paper's finding for this proceeding is that it establishes that the merger is not market-neutral, as the Applicants have argued, but rather, as many of the commenters in this proceeding contend, will enhance the bargaining power of the merger partners in the market for programming, thereby further reducing competitors' access to crucial video programming and Internet content

111. Based Upon the Record in This Proceeding, the Commission Must Deny Consent to the Applications or Impose Conditions Adequate to Protect and Further the Public Interest.

RCN has now documented its competitive concerns in connection with the proposed merger of AT&T and Comcast in numerous presentations to the Commission in this proceeding, as follows:

- Petition to Deny Applications or Condition Consent, dated April 29, 2002 (with attached signed statements of Roddy Gaymon, Rosalind Applewhite, Paul Phillips, and Bruce Wirt);
- Reply Comments, dated May 21, 2002;
- Detailed factual material re Comcast interference with third-party contractors in the Philadelphia and Washington, D.C., markets, filed May 29, 2002 (redacted and confidential versions);
- Reply to Opposition of AT&T and Comcast to Petition, dated June 5, 2002;
- July 2, 2002, in-person meeting with staff, described in *Ex Parte* Notice dated July 3, 2002;
- Comments re OPP Working Paper Number 35 - Horizontal Concentration in the Cable Industry: **An** Experimental Analysis, dated July 18, 2002;
- Written *Ex Parte* and accompanying Declaration of Ron Maier, dated August 14, 2002;
- August 15, 2002, in-person meeting with staff, described in *Ex Parte* Notice dated August 16, 2002 (with accompanying videotape of statements by Comcast re pricing practices, in connection with Montgomery County, MD, franchise transfer hearing);
- Written *Ex Parte* Presentation Proposing Condition, dated August 21, 2002;

- Written *Ex Parte* Comments in Response to Coincast, dated August 27, 2002.

When the Applicants have challenged RCN's assertions, RCN has sought to support them with such additional information as is available to it. However, it is incumbent on the Commission to recognize that only the Applicants, not their competitors, can know their practices and intentions with respect to the three competitive concerns RCN has raised: denial of access to programming, interference with third-party vendors, and predatory pricing. It is the Applicants, not their competitors, who bear the burden of establishing that the public interest benefits of their proposed merger outweigh the substantial harms that RCN, other commenters, and the FCC's own studies have shown are likely to occur

A host of other commenters have echoed RCN's competitive concerns. RCN, in its Reply Comments dated May 21, 2002, detailed the comments filed through that date that supported RCN's assertions; many more comments consistent with RCN's have been filed in this docket since that time, including the Consumer Groups' filing dated September 30, 2002, and filings by the BSPA on May 21 and September 19, 2002. In sum, the Commission cannot simply ignore the substantial record developed in this docket, showing conclusively the harms to competition – and, consequently, to the public interest – that **will** occur if the pending license Transfer Applications are unconditionally approved

Conclusion

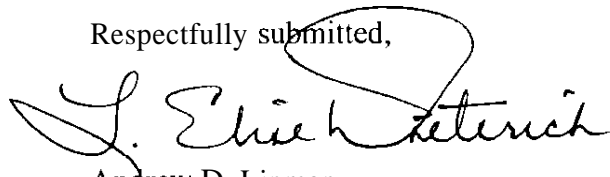
The standard applicable to the Commission's review of AT&T Comcast's request for transfer of the merger partners' licenses and authorizations is straightforward:

To obtain Commission approval of their Applications, 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.¹⁴

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.”” RCN submits that the proposed AT&T Comcast merger 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 combining their two companies. If so, the pending Transfer Applications must be denied or, if approved, conditioned in a manner designed to mitigate the resulting public interest harms.

Respectfully submitted,



Andrew D. Lipman
Jean L. Kiddoo
L. Elise Dieterich

Counsel to RCN Telecom Services, Inc.

Date: November 1, 2002

¹⁴ *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.

¹⁵ *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.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Further Written *Ex Parte* Presentation in Response to AT&T and Comcast, re Media Bureau Staff Research Papers and in Support of Petition to Deny Applications or Condition Consent of RCN Telecom Services, Inc., were served on November 1, 2002, on the following parties, via hand delivery, as indicated below:

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Counsel to RCN Telecom Services, Inc.

November 1, 2002

Introduction

RCN Telecom Services, Inc., hereby responds to the following recent *ex parte* filings by the Applicants in the above-captioned proceeding: the *ex parte* letter and attachment tiled September 10, 2002, by Coincast Corporation, which purport to address submissions in this proceeding by RCN regarding the Applicants' pricing and promotional practices; the October 2, 2002, notice by AT&T and Comcast, attaching the parties' joint *exparfe* letter to Ken Ferree, Chief of the Media Bureau, responding to the Supplement to Petition to Deny filed September 30, 2002, by Consumers Union, Consumer Federation of America, and the Media Access Project; and, the October 11 joint *ex parte* letter from AT&T and Comcast responding to the Broadband Service Providers Association ("BSPA") October 2, 2002, *exparfe* filing. These several filings have a number of substantive issues in common. Accordingly, for convenience, RCN has organized its response to AT&T and Comcast's recent filings by substantive issue, in Part I hereof.

In Part II of this *ex parte* presentation, RCN briefly addresses the Staff Research Papers released by the Media Bureau on October 9, 2002,¹ and their relevance to the pending Transfer Applications of AT&T and Comcast.

Finally, in Part III hereof, RCN summarizes the substantial record developed in this proceeding to date, which supports RCN's Petition to Deny Applications or Condition Consent, filed April 29, 2002. Accordingly, RCN respectfully reiterates its request for relief as set forth in the April 29 Petition.

¹ DA 02-2568, rel. October 9, 2002, in CS Docket Nos. 98-82, 96-85, MM Docket Nos 92-264, 94-150, 92-51, 87-154, and the instant docket, MB 02-70.

I. Response to Recent AT&T and Comcast *Ex Parte* Filings

Comcast's Predatory Pricing Practices Have Been Amply Documented, and Conditions Are Necessary to Constrain This Anti-Competitive Behavior

RCN and other broadband service providers that compete with AT&T and Comcast have contended since the outset of this proceeding that Comcast engages in sales, marketing, and promotional practices that are predacious in nature.² Specifically, the overbuilder competitors have provided numerous examples in which Comcast offered to customers or potential customers of its overbuilder competitors deep discounts or special promotions that were not publicly advertised or made available to other customers within the given franchise area except, perhaps, in those instances when a customer somehow learned of and demanded the discount or promotional deal. For example, RCN in its Petition provided evidence of a Comcast "Swat Team" deployed in Folcroft, Pennsylvania, which was instructed to give potential RCN customers discounts in exchange for signing an 18-month service contract. "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."³ The BSPA provided information that:

. . . customers of WideOpenWest ('WOW') are being offered rate discounts of 33 percent, 50 percent, and more, for periods of six months and beyond, to switch back to Comcast. They are also being offered free digital service, free pay per view, and other giveaways. Existing Comcast customers are being offered similar benefits not to cancel their service in order to subscribe to service from WOW. These offers are not publicized, nor are they made available to anyone other than

² *See, e.g.*, Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent, dated April 29, 2002 ("Petition"), at 22 and Exh. A; Comments of Everest Midwest Licensee, LLC, DBA Everest Connections, dated April 29, 2002, at 3 (addressing predatory pricing by AT&T affiliate Kansas City Cable Partners); Comments of the Broadband Service Providers Association, dated May 21, 2002 ("BSPA Comments"), at 10-11; *Ex Parte* Notice filed by the Broadband Service Providers Association, September 19, 2002 ("BSPA *Ex Parte*"), and attached Statement of Mark Haverkate, dated April 23, 2002, at 10-11.

³ Petition, at 22 and Exh. A

the competitor's customers and Comcast customers who have expressly requested to be disconnected in order to switch over to the competition,'

The BSPA also has submitted information that: "In Augusta, Georgia, Comcast is offering discounts in excess of 50 percent for basic and digital cable, high speed data, and other services – but only in areas where Knology offers competitive services."⁵

However, as RCN has pointed out, "Information received by RCN and Starpower regarding targeted deep discounts by the applicants typically comes from individual customers who have received such offers and, accordingly, the information is anecdotal and extremely difficult to document."⁴ Thus, RCN and its Washington-area affiliate, Starpower, were interested when the Applicants were asked, in the Commission staffs June 11, 2002, Document and Information Request, whether either Applicant ever included geographic or customer-specific restrictions in marketing/sales promotions and, if so, to provide details regarding such practices. RCN was, to say the least, surprised and dismayed when, in response to the Commission's inquiry, the Applicants asserted that each Applicant "does not believe that any of its marketing/sales promotions have geographic or customer-specific restrictions of the sort contemplated by the question." RCN knew better – and, after diligent effort to elicit the facts from a witness with first-hand knowledge, provided a Declaration detailing promotions by Comcast in Montgomery County, Maryland, aimed specifically at Starpower customers and areas where Starpower has built out its network, but not other areas of the County. Tellingly, Comcast has not denied that the information contained in the Maier Declaration is completely

⁴ BSPA Comments, at 10-11.

⁵ BSPA *Ex Parte*, Statement of Mark Haverkate, at 12.

⁶ RCN Telecom Services, Inc.. Written *Ex Parte* and Accompanying Declaration, dated August 14, 2002, at 3

accurate. Instead, Comcast, as described below, has gone to great lengths to try to reconcile the information in the Maier Declaration with its earlier responses, has further dissembled, and, paradoxically, has also attempted to justify as permissible the sales and marketing practices it previously denied exist.

Comcast begins its September 10 *ex parte* letter to Secretary Dortch with the statement that virtually all of RCN's specific charges in prior submissions have been addressed and "little more remains to be said." Notwithstanding, the letter then spends three single-spaced pages on the issue of Comcast's pricing and promotional practices, and attaches a three page, single-spaced declaration purporting to address Comcast's pricing and promotional practices in Montgomery County, Maryland, to which the Maier Declaration referred. In the letter, the Applicant continues to assert that "Comcast's marketing and promotional offers are not 'restricted' in the manner that the FCC staff asked" in the June 11 Document and Information Request. Bizarrely, however, Comcast deemed its Declaration detailing those supposedly openly available promotions to be so super-secret that not only was the entirety of the Declaration redacted from the public record, the Declaration was deemed "copying prohibited" under the terms of the applicable protective order,⁷ and RCN's attorney was allowed to view it only under the watchful supervision of Comcast's legal representative.

In any event, a close reading of Comcast's statements in the letter and the confidential Declaration reveals that Comcast still does not deny that the targeted promotions and discounts detailed in the Maier Declaration exist, but argues instead that, because Comcast engages in additional types of targeted or restricted promotions (in particular, those directed to the

⁷ The Protective Order, DA 02-734, rel. March 29, 2002 ("Protective Order"), Exhibit A, at 1-2, provides that a document may be marked "Copying Prohibited" if, "in the judgment of the

customers of the DISH Network and DirecTV), its Starpower-targeted promotions should be viewed as unobjectionable.⁸ Indeed, the redacted Declaration is most notable for what it does not say. It does not say that the Declarant directs, supervises, or has personal knowledge of the instructions given to Comcast direct sales representatives like Mr. Maier; accordingly, Comcast's Declarant does not appear to be qualified to refute the facts set forth in the Maier Declaration.

[REFERENCES TO CONFIDENTIAL INFORMATION REDACTED]

The Applicants' response to the Supplement to Petition to Deny filed by Consumers Union, Consumer Federation of America and the Media Access Project (collectively, the "Consumer Groups"), attempting to dismiss the Consumer Groups' concerns as untimely and "procedurally improper" seems disingenuous, in view of the additional evidence of discriminatory pricing introduced into this proceeding in August and the fact that the Applicants

Submitting Party, a document contains information so sensitive that it should not be copied by anyone."

⁸ *Ex Parte* Letter from counsel for Comcast to Secretary Dortch, dated September 10, 2002 ("Comcast Letter"), at 2-3.

themselves have continued to submit to the Commission, on an almost daily basis, new and additional advocacy in support of their Transfer Applications. To suggest that those opposed to the Applications should not have the same opportunity to submit written *ex parte* communications into the record, in whatever format, is simply inappropriate.

The substance of the Applicants' rebuttal to the Consumer Groups' arguments seems disingenuous, as well. In essence, Applicants argue that the pro-consumer merger conditions sought by the Consumer Groups are somehow anti-consumer, because revealing publicly (via website posting) the discounts offered to select customers, or requiring that discounts be offered uniformly throughout a franchise area, would reduce the ability of individual consumers to "haggle" with the Applicants to obtain special deals. This argument is nonsensical. Nowhere does the federal Cable Act contemplate that cable rates should depend upon the bargaining power of individual cable subscribers. Moreover, only those customers to whom a choice of cable providers is available have the leverage to "haggle" effectively with the Applicants. All those to whom cable competition has not yet come have little leverage with which to extract a "deal" from AT&T or Comcast, insofar as their only choice, if they have one at all, is DBS, which cannot currently compete with the broadband capabilities that AT&T and Comcast are touting as a justification for their merger. The Commission should trust the Consumer Groups, not the Applicants, to accurately speak for the interests of consumers in this proceeding, and the Consumer Groups have made their position clear: selective discounts are detrimental to consumers, and should be constrained through appropriate merger conditions.

Comcast Continues to Impede RCN's Access, on Commercially Viable Terms, to
Essential Local Sports Programming

In its September 10, 2002. *ex parte* filing, Comcast again asserted:

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, 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 monies due under the contract."

Comcast goes on to suggest that these issues be resolved in "bilateral commercial discussions" and implies that RCN is attempting to preserve the right to pay less than is owed under the agreement. These statements do not reflect the facts of the parties' negotiations to date

First, RCN has been engaged in ongoing "bilateral commercial discussions" with Comcast SportsNet regarding an acceptable long-term agreement since the beginning of this year.'" While it does now appear that the new communities issue can be satisfactorily resolved, no revised language to implement the parties' compromise has as yet been proposed by Comcast SportsNet, contrary the implication in Comcast's September 10 filing that RCN has received but "misunderstood" Comcast SportsNet's revised proposal. **As** to the audit provision, RCN seeks only to substitute the industry standard provision – that if a **5%+** discrepancy in remittances is found in an audit, RCN will pay the amount owed plus all audit costs – for draconian language in

⁹ Comcast Letter. at 1-2.

¹⁰ RCN initiated negotiations on the agreement in January, and sent its comments on the draft agreement to Comcast SportsNet on February 22nd. Comcast SportsNet did not return its mark up to RCN until April 18. RCN reviewed the mark up and had a conference call with Comcast SportsNet on May 2, at which ~~Line~~ Comcast SportsNet promised to send a further revised agreement for RCN's review. That further revised agreement was not received from Comcast SportsNet until July 9, and still contained the unacceptable and non-standard terms regarding the addition of new communities and audit remedies described in RCN's earlier filings in this proceeding. Negotiations between the parties to resolve these two provisions have been ongoing since that time.

the current draft that would allow Coincast SportsNet to terminate the programming agreement based upon even a relatively minor (5%) remittance error.!

The Applicants Assertion That Their Merger Will Not Increase
Clustering or Regional Market Power,
or Result in Migration of Programming to Terrestrial Delivery, Is Implausible

The BSPA on October 2, 2002, submitted a map illustrating the proximity of various systems that will merge or become affiliated as a result of the proposed merger of AT&T and Comcast, and, like RCN, has argued that the increased regional consolidation and clustering that will result from the proposed merger are relevant to the Commission's public interests analysis, because clustering necessarily increases market power and creates opportunities for strategic abuses (for example, by coordinating predatory pricing practices across multiple franchise areas or by migrating programming owned or controlled by the Applicants to terrestrial delivery, in order to escape the Commission's program access rules). In their October 11 *ex parte* letter, the Applicants again point to past practice in defense of their position, while making no enforceable commitments with regard to future conduct. For example, the Applicants make much of the fact that "[a]s for programming, the vast majority is delivered by satellite and is subject to the program access rules, and Coincast has always made its one terrestrially delivered sport programming service available to the overbuilders that comprise BSPA's membership." But, as RCN has informed the Commission, Comcast has made its terrestrially-delivered programming available only grudgingly, and has offered absolutely no promise that programming in which it holds an attributable interest will not be migrated to terrestrial delivery and withheld from its

¹¹ Again, whether other cable providers in the Philadelphia market have agreed to the audit clause as proposed by Comcast SportsNet is irrelevant, because RCN is the only provider that competes head-to-head with Comcast and, therefore, the only provider that Comcast SportsNet has an incentive to terminate.

competitors upon the expiration of existing contracts, once the merger is approved. The Applicants are arguing, in essence, that the synergies generated by their proposed merger justify its approval, while at the same time claiming that, post-merger, past practice will remain the same and they will not take advantage of their larger, consolidated footprint. RCN submits that the conflict inherent in this position is obvious. If the Commission intends to rely on the Applicants' assertion that they will not further cluster systems, nor migrate programming to terrestrial delivery, nor use their regional market power to the detriment of competition, the Applicants' promises should be set forth in an enforceable form

Comcast Has Exhibited a Lack of Candor in This Proceeding. Thus Inviting Closer
Scrutiny By the Commission

Comcast, in particular, has exhibited a troubling, ongoing lack of forthrightness in this proceeding, electing to argue legal technicalities and only responding to the legitimate competitive concerns raised in this proceeding with carefully limited general denials and documents filed under seal, instead of responding fully, openly, and on the merits. For example, Comcast in its September 10 *ex parte* letter asserts:

RCN has no basis to question the candor of either Applicant. Although RCN asserts that Comcast's most recent *ex parte* responses failed to respond to RCN's charge of a "lack of candor," Comcast's filing of August 19 could not possibly respond to an allegation that was not made public until two days *later*."

But RCN has publicly contended since long before this proceeding that the Applicants engage in marketing and sales promotions with geographic and customer-specific restrictions targeted against RCN and Starpower, and reiterated that concern in its April 29, 2002, Petition. Comcast was well aware of RCN's competitive concerns on the pricing issue from the outset of this

¹² Comcast Letter at 3

proceeding. Therefore, Comcast only compounds its earlier obfuscation when goes on to state in its September 10 letter that:

the 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.¹³

The question posed by the June 11 Document and Information Request invited a yes/no response: either Comcast has engaged in marketing and sales promotions with geographic or customer-specific restrictions, in which case details were to have been provided, or it has not. The fact that RCN did not obtain and submit until August 2002 direct evidence of such promotions refuting Comcast's carefully crafted and misleading answer in no way excuses Comcast's failure, in the first instance, to answer the Commission's straightforward question directly, completely, and forthrightly. Comcast's corporate practices did not change in August – only its response to the Commission did.

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.* The Commission should weigh Comcast's apparent lack of candor carefully in assessing the issues raised in this proceeding.

¹³ Comcast Letter, at footnote 8.

II. The Cable Studies Recently Released by the Media Bureau Show the Perils of Allowing Unconstrained Mega-Mergers of this Sort

RCN believes that the Media Bureau staff research papers released on October 9, 2002, further reinforce the arguments made to date in this proceeding, which show that the merger of AT&T and Comcast will have severe anti-competitive effects and, accordingly, cannot be found to be in the public interest, absent the imposition of merger conditions designed to mitigate those harmful effects. The staff paper entitled “Most-Favored Customers in the Cable Industry” concludes that the largest cable operators, when they have most-favored customer clauses in their programming contracts, enjoy significant market advantages, reinforcing the conclusion that an overbuilder competitor like RCN, which already is disadvantaged by the volume discounts and other benefits routinely granted to the largest cable operators, suffers even greater competitive harm when the largest cable operators obtain most-favored customer status. The staff paper on “Asymmetric Bargaining Power and Pivotal Buyers,” is also of significance to RCN, because it demonstrates what RCN has long argued: as big as AT&T and Comcast are individually, combining them into a single mega-company will make the competitive landscape even worse.

The papers concludes that “large buyers [in the programming market]. . . can extract greater gains from trade than smaller buyers when there are asymmetries in bargaining power,” and that these results imply that “horizontal merger might be used as a strategy to enhance bargaining position.” In other words, cable mergers increase market power, to the detriment of others bargaining for programming. RCN believes this effect may be even more dramatic than the paper postulates. The market for cable programming is characterized by historical monopoly providers, which control bottleneck facilities that are, in some instances, the only viable conduit through which programming or other content can reach its intended audience. Programming is valued according to the number of eyeballs it reaches, so programmers are, to a large degree,

hostage to those cable companies that control the largest number of these bottleneck facilities

The importance of the paper's finding for this proceeding is that it establishes that the merger is not market-neutral, as the Applicants have argued, but rather, as many of the commenters in this proceeding contend, will enhance the bargaining power of the merger partners in the market for programming, thereby further reducing competitors' access to crucial video programming and Internet content

111. Based Upon the Record in This Proceeding, the Commission Must Deny Consent to the Applications or Impose Conditions Adequate to Protect and Further the Public Interest.

RCN has now documented its competitive concerns in connection with the proposed merger of AT&T and Comcast in numerous presentations to the Commission in this proceeding, as follows:

- Petition to Deny Applications or Condition Consent, dated April 29, 2002 (with attached signed statements of Roddy Gaymon, Rosalind Applewhite, Paul Phillips, and Bruce Wirt);
- Reply Comments, dated May 21, 2002;
- Detailed factual material re Comcast interference with third-party contractors in the Philadelphia and Washington, D.C., markets, filed May 29, 2002 (redacted and confidential versions);
- Reply to Opposition of AT&T and Comcast to Petition, dated June 5, 2002;
- July 2, 2002, in-person meeting with staff, described in *Ex Parte* Notice dated July 3, 2002;
- Comments re OPP Working Paper Number 35 - Horizontal Concentration in the Cable Industry: An Experimental Analysis, dated July 18, 2002;
- Written *Ex Parte* and accompanying Declaration of Ron Maier, dated August 14, 2002;
- August 15, 2002, in-person meeting with staff, described in *Ex Parte* Notice dated August 16, 2002 (with accompanying videotape of statements by Comcast re pricing practices, in connection with Montgomery County, MD, franchise transfer hearing);
- Written *Ex Parte* Presentation Proposing Condition, dated August 21, 2002;

- Written *Ex Parte* Comments in Response to Coincast, dated August 27, 2002.

When the Applicants have challenged RCN's assertions, RCN has sought to support them with such additional information as is available to it. However, it is incumbent on the Commission to recognize that only the Applicants, not their competitors, can know their practices and intentions with respect to the three competitive concerns RCN has raised: denial of access to programming, interference with third-party vendors, and predatory pricing. It is the Applicants, not their competitors, who bear the burden of establishing that the public interest benefits of their proposed merger outweigh the substantial harms that RCN, other commenters, and the FCC's own studies have shown are likely to occur

A host of other commenters have echoed RCN's competitive concerns. RCN, in its Reply Comments dated May 21, 2002, detailed the comments filed through that date that supported RCN's assertions; many more comments consistent with RCN's have been filed in this docket since that time, including the Consumer Groups' filing dated September 30, 2002, and filings by the BSPA on May 21 and September 19, 2002. In sum, the Commission cannot simply ignore the substantial record developed in this docket, showing conclusively the harms to competition - and, consequently, to the public interest - that will occur if the pending license Transfer Applications are unconditionally approved

Conclusion

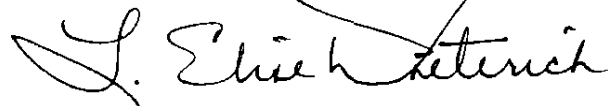
The standard applicable to the Commission's review of AT&T Comcast's request for transfer of the merger partners' licenses and authorizations is straightforward:

To obtain Commission approval of their Applications, 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.¹⁴

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.”¹⁵ RCN submits that the proposed AT&T Comcast merger 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 combining their two companies. If so, the pending Transfer Applications must be denied or, if approved, conditioned in a manner designed to mitigate the resulting public interest harms.

Respectfully submitted,



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Counsel to RCN Telecom Services, Inc.

Date: November 1, 2002

¹⁴ *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.

¹⁵ *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.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Further Written *Ex Parte* Presentation in Response to AT&T and Comcast, re Media Bureau Staff Research Papers and in Support of Petition to Deny Applications or Condition Consent of RCN Telecom Services, Inc., were served on November 1, 2002, on the following parties, via hand delivery, as indicated below:

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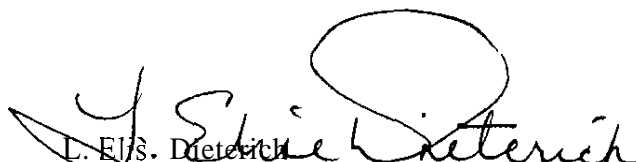
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