

**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	)	
_____	)	

**REPLY COMMENTS  
OF RCN TELECOM SERVICES, INC.**

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## REPLY COMMENTS

### **Introduction**

RCN Telecom Services, Inc., (“RCN”) is encouraged to find that it is not alone in its concerns regarding the proposed transfer of control of licenses from Comcast Corporation and AT&T Corporation to a merged AT&T Comcast Corporation, and in its belief that the proposed merger will create an entity with monopsony power and the opportunity and incentive to abuse it. RCN has petitioned the Commission to deny the Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corporation to AT&T Comcast Corporation, or, in the alternative, to impose safeguarding conditions on AT&T Comcast in connection with the proposed transfers,<sup>1</sup> to preserve and promote competition in the MVPD marketplace, consistent with the mandates of Congress, the Communications Act of 1934 as amended,<sup>2</sup> and the objectives of the Commission. A multitude of commenters in this proceeding now have echoed RCN’s principal assertions and concerns, thus supporting RCN’s Petition, and have requested conditions similar or identical to those proposed by RCN.<sup>3</sup> RCN reiterates briefly here the major contentions of AT&T Comcast’s cable, broadband, and DBS competitors, as well as consumer interests, in an effort to demonstrate, in a format convenient to the

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<sup>1</sup> See Petition of RCN Telecom Services, Inc., to Deny Applications or Condition Consent, dated April 29, 2002, in MB Docket No. 02-70.

<sup>2</sup> 47 U.S.C. §151, et seq. (“Communications Act” or “Act”).

<sup>3</sup> RCN also notes that numerous individual consumers, many in the Philadelphia-area market, filed comments with the Commission expressing their concern about poor service quality and excessive rates engendered, several commenters assert, by the lack of competition. RCN is confident that, by fostering robust competition through the imposition of the simple, pro-competitive conditions RCN has advocated in this proceeding, the Commission would find such consumer complaints greatly reduced.

Commission, the overwhelming evidence in support of imposing conditions that will help to mitigate the anti-competitive effect of Comcast's proposed merger with AT&T.

### **The Market for Cable Services Continues to Be Monopolistic**

In the Petition to Deny filed by the Consumer Federation of America and the Media Access Project on behalf of numerous consumer groups, the consumer groups persuasively argue, as has RCN, that the cable industry continues to be one of local and regional monopolies, in which the large cable operators decline to compete with one another, leaving the upstart broadband providers as the only potential cable competition. Moreover, as the consumer groups explain: "The claim that one big monopoly is no worse than two little monopolies is simply wrong."<sup>4</sup> The consumer groups also correctly assert that allowing cable operators to become bigger does not necessarily translate into public interest benefits for consumers, if competition is not also present. Indeed, the consumer groups point to the FCC's own data for the proposition that the largest providers charge the highest rates.<sup>5</sup> All of which supports RCN's contention that enabling the success of competitive providers through appropriate constraints on AT&T Comcast is essential, if the proposed transfers of licenses to the merged entity are to be approved, to satisfy the Commission's statutory mandate to ensure that the public interest, convenience, and necessity will be served.

### **The Merger Partners Have a History of Anti-Competitive Behavior**

Everest Connections has filed comments alleging anti-competitive behavior on the part of Kansas City Cable Partners ("KCCP"), a partnership of Time Warner and AT&T, that is

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<sup>4</sup> Petition to Deny of Arizona Consumers Council, et al., dated April 29, 2002, in MB Docket No. 02-70 ("Consumer Group Comments"), at 19.

<sup>5</sup> *Id.* at 23.

remarkably similar to the anti-competitive tactics employed by Comcast and detailed in RCN's Petition. Specifically, Everest alleges that KCCP: has engaged in predatory pricing;<sup>6</sup> has sought to deny Everest building access through the use of exclusive contracts to serve multiple dwelling units;<sup>7</sup> and has denied Everest access to non-substitutable, critical local sports programming.<sup>8</sup> These facts reinforce the pervasiveness of the anti-competitive tactics that RCN has brought to the Commission's attention in its submissions, and suggest that AT&T is no stranger to similar behavior.

**The Proposed Merger of AT&T and Comcast Threatens To Significantly Impede Competing Providers' Access to Must-Have Programming**

Everest states specifically that KCCP has withheld from it access to MetroSports programming, while allowing Comcast to carry it in adjacent communities where there is no cable competition.<sup>9</sup> But, Everest is not the only other commenter to note that the merger of AT&T and Comcast will dramatically increase the likelihood that competitors could be squeezed out of the market by virtue of the merged entities' control over must-have programming assets. SBC asserts that "AT&T and Comcast both have tentacles reaching far upstream into vertically related businesses, providing control over content that MVPD providers wishing to challenge cable's hegemony need to compete. And, make no mistake, each of the merging parties has a

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<sup>6</sup> Comments of Everest Midwest Licensee, LLC, DBA Everest Connections, dated April 29, 2002, in MB Docket No. 02-70, at 3.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 5-6.

<sup>9</sup> *Id.*

well-established history of abusing that control to disadvantage competitors.”<sup>10</sup> BELD Broadband has filed comments stating that AT&T has caused New England Cable News, an important regional programming asset, to be withheld, apparently because BELD Broadband competes with AT&T.<sup>11</sup>

EchoStar reminds the Commission of the need to close the terrestrial loophole<sup>12</sup> that has enabled Comcast to deny EchoStar and DirecTV access to important regional programming, noting, as has RCN, that by combining, AT&T Comcast will have far greater ability than at present to “cluster” cable systems and migrate to terrestrial delivery additional programming that AT&T Comcast controls.<sup>13</sup> EchoStar also expresses the concern, which RCN shares, that the cable behemoth that will result if AT&T and Comcast are allowed to merge “would have the leverage to extract even greater cost concessions from video programmers,” putting DBS providers (and, presumably, other competitors) “at an even larger competitive disadvantage.”<sup>14</sup>

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<sup>10</sup> Comments of SBC Communications, Inc., dated April 29, 2002, in MB Docket No. 02-70, Executive Summary at i.

<sup>11</sup> Letter Comments of Braintree Electric Light Department/BELD Broadband, dated April 26, 2002, in MB Docket No. 02-70, at 2.

<sup>12</sup> SBC notes the even larger potential loophole that will open when video programming, in digital format, can be distributed to cable head-ends via the Internet, enabling AT&T Comcast to migrate virtually all of its programming away from satellite delivery. Comments of SBC, *supra*, at 31-32.

<sup>13</sup> Comments of EchoStar Satellite Corporation, dated April 29, 2002, in MB Docket No. 02-70, at 5. It is RCN’s understanding that the merger will unite AT&T and Comcast franchises in close proximity in the following markets: Atlanta, Denver, Ft. Myers, Harrisburg, Wilkes-Barre, Hartford, Richmond, Toledo, Lansing, Mobile, and Sacramento.

<sup>14</sup> *Id.* at 7-8.

The American Cable Association, in excessively polite terms driven, perhaps, by its members' dependence upon AT&T's HITS service and other programming controlled by AT&T and Comcast, asks that the Commission question AT&T Comcast's commitment to make programming available to small cable operators, noting the following important points: both Comcast and AT&T advocate the unqualified sunset of the program access regulations that currently afford access to affiliated programming;<sup>15</sup> the merged entity will control a significant amount of regional programming, nearly all of which is terrestrially delivered;<sup>16</sup> and, AT&T has in the past, and AT&T Comcast can be expected in the future, to prevent smaller cable operators from accessing even third-party programming, through the use of exclusive contracts.<sup>17</sup> ACA thus concludes that "AT&T Comcast will have ultimate leverage over many smaller cable businesses and smaller market consumers."<sup>18</sup>

RCN agrees. So does Qwest, which states "AT&T Comcast will . . . have the ability and motivation to deny programming it controls, through ownership or otherwise, to competing MVPD and broadband systems (including Qwest)."<sup>19</sup> Verizon also concurs: "AT&T Comcast could deny competing video distribution platforms access to affiliated programming, hindering their ability to offer subscribers national and increasingly popular regional programming.

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<sup>15</sup> Comments of the American Cable Association, dated April 29, 2002, in MB Docket No. 02-70, at 11.

<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> Comments of Qwest Communications International, Inc., dated April 29, 2002, in MB Docket No. 092-70, at 15.

Because much of this programming is or could be terrestrially delivered, it would not be subject to the existing program access rules even if those rules were extended.”<sup>20</sup>

### **The Merged Entity Will Have Monopsony Power Over Third-Party Programming Providers**

Numerous commenters are united in the view that AT&T Comcast will exert monopsony purchasing power in the market for third-party programming. The consumer groups state that AT&T Comcast would “be one of the largest purchasers of content from both video and potentially Internet content providers. They exercise monopsony power as a buyer and have repeatedly engaged in anticompetitive and discriminatory behaviors that leverage their monopsony power in these markets.”<sup>21</sup> SBC, supported by the extensive declarations of two notable economists, concludes that “A combined AT&T Comcast would have the incentive and the ability to foreclose competition in both the video and Internet content markets . . . .”<sup>22</sup> The enormous bargaining power of the combined entity “would not only diminish the amount and diversity of video programming, it also would increase the costs of rival distribution networks, both in- and out-of-region” SBC states.<sup>23</sup> SBC also reports the example of WSNet, which, in its negotiations with SBC, stated that HITS would not allow WSNet to sell services to overbuilders that compete with AT&T.<sup>24</sup> This is precisely the kind of exclusive arrangement with a third-

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<sup>20</sup> Petition to Deny of Verizon Telephone Companies and Verizon Internet Solutions D/B/A/ Verison.Net, dated April 29, 2002, in MB Docket No. 02-70, at 14.

<sup>21</sup> Consumer Group Comments, *supra*, at 15-16.

<sup>22</sup> Comments of SBC, *supra*, at 2.

<sup>23</sup> *Id.* at 12.

<sup>24</sup> *Id.* at 14,

party vendor that RCN warns of in its Petition. As SBC points out, “with AT&T practically doubling the size of its geographic footprint, more of the same can be expected – but across a much wider territory.”<sup>25</sup>

Qwest says much the same: “Economics literature and pronouncements by U.S. antitrust enforcement agencies and this Commission confirm that a ‘sufficiently large’ buyer in a market will be able to exert bargaining power over sellers, and use that power to harm consumers and competitors. . . [A] large cable operator like AT&T Comcast will have a significant buying threat: programmers must agree to its terms, or risk forgoing carriage to nearly one-third of MVPD subscribers.”<sup>26</sup> BellSouth observes “cable programmers would have fewer opportunities to sell their programming after the transaction and will therefore be more likely to enter into exclusive (or highly favorable) agreements with the largest MSO, AT&T Comcast.”<sup>27</sup> Verizon also believes that “AT&T Comcast will enjoy monopsony power in the market for the purchase of video programming.”<sup>28</sup> This same monopsony power, as RCN points out in its Petition, would allow AT&T Comcast, if unconstrained, to control the market for other essential inputs, such as video on demand technology.

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<sup>25</sup> *Id.*

<sup>26</sup> Comments of Qwest, *supra*, at 5-6.

<sup>27</sup> Comments of BellSouth Corporation, et al., dated April 29, 2002, in MB Docket No. 02-70, at 30.

<sup>28</sup> Comments of Verizon, *supra*, at 11.

**The Commenters Are Generally In Agreement That  
The Application for the Transfer of Licenses and Authorizations to the Merged Entity  
Should Be Denied Or, At a Minimum, Conditioned**

The Commission now has before it several hundred pages of comments and statements from AT&T Comcast's most credible competitors, consumer groups, and respected economists. As illustrated in this brief summary, there is remarkable consistency in the evidence and viewpoints presented: AT&T and Comcast have a demonstrated history of misusing their market power to impede competition; their market power will grow much larger with the merger; and, absent appropriate constraints, the merged entity can be expected to withhold programming it controls and exercise its monopsony power over third party vendors to demand exclusive arrangements and preferential deals that will squeeze out AT&T Comcast's competitors. So, again, RCN urges that the Commission, should it conclude that the transfers of licenses to AT&T Comcast can be approved under the requisite statutory standards, impose at least the following 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 Reply Comments of RCN Telecom Services, Inc., were served on May 21, 2002, on the following parties, via e-mail, as indicated below:

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