

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

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.

June 5, 2002

REPLY TO OPPOSITION TO PETITION TO DENY

Introduction

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

Threatened Withholding of Access to Programming

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

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

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

² AT&T Comcast Comments, at 102.

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

Predatory Pricing By The Merger Partners

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

³ AT&T Comcast Comments, at 113.

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

The Merger Partners’ History of Anti-Competitive Behavior

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

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

Employment of Contractors. RCN cited in its Petition interference by Comcast and, prior to its acquisition by Comcast, Suburban Cable, with fifteen construction and installation contractors in the Philadelphia area market, and reports of similar interference recently occurring in the Washington, D.C., area market. Significantly, Comcast does not deny that the interference occurred, but rather asserts that there are pro-competitive reasons in favor of its efforts to preclude contractors from performing work for RCN and Starpower. The Applications state further that “RCN cites no specific examples to buttress its claims.” Again, this is simply untrue. As promised in footnotes 30 and 32 of its Petition, RCN has filed with the Commission pursuant to Protective Order⁶ the names of contractors in both the Philadelphia and Washington, D.C., area markets who were threatened by Comcast with loss of their work for Comcast if they did business with RCN or Starpower, together with additional detail regarding those instances. Out of concern that the contractors involved could experience further reprisals by Comcast, RCN

⁴ A&T Comcast Comments, at 118.

⁵ AT&T Comcast Comments, at 118-119.

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

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

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

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

Conclusion

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

- 1) access for competitors to AT&T Comcast affiliated programming on non-discriminatory pricing and terms;

2) a prohibition on exclusive arrangements between AT&T Comcast and third-party suppliers of programming, essential technologies, and other essential services; and

3) a requirement for uniform subscriber pricing, to deter AT&T Comcast from engaging in predatory pricing, sales, and marketing tactics.

Respectfully submitted,

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.

CERTIFICATE OF SERVICE

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

Qualex International (via e-mail)

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

Stanley L. Wang (via Federal Express)

Joseph W. Waz, Jr.
Comcast Corporation
1500 Market Street
Philadelphia, PA 19102

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

James R. Coltharp (via Federal Express)

Comcast Corporation
2001 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20006

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

Mark C. Rosenblum (via Federal Express)

Stephen C. Garavito
AT&T Corp.
Room 1131M1
295 North Maple Avenue
Basking Ridge, New Jersey 07920

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

Douglas Garrett (via Federal Express)

AT&T Broadband, LLC
188 Inverness Drive West
Englewood, CO 80112

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

A. Richard Metzger, Jr. (via Federal Express)
Regina M. Keeney
Charles W. Logan
A. Renee Callahan
Lawler, Metzger & Milkman, LLC
1909 K Street, N.W.
Suite 820
Washington, D.C. 20006

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

James L. Casserly (via Federal Express)
Thomas G. Krattenmaker
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, PC
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

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

David Carpenter (via Federal Express)
David Lawson
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

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

Michael H. Hammer (via Federal Express)
Francis M. Buono
Willkie Farr & Gallagher
1155 21st Street, N.W.
Washington, D.C. 20036

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

L. Elise Dieterich

EXHIBIT A

**to RCN Telecom Services, Inc.,
Reply to Opposition of AT&T and Comcast
to Petition to Deny Applications or Condition Consent**



June 26, 2001

1130 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

By Facsimile Transmission and First Class Mail

Barbara L. Holtz, Esq.
Deputy Chief Administrative Officer
Prince George's County Government
Office of the County Executive
14741 Governor Oden Bowie Drive
Upper Marlboro, Maryland 20772

Re: Application of Starpower Communications, LLC for a Cable Franchise

Dear Ms. Holtz:

On behalf of Starpower Communications, LLC ("Starpower"), I am writing in response to your letter of May 7, 2001 to Gregory K. Wells, Counsel to Starpower, concerning proposed revisions to the proposed cable franchise agreement between Starpower and Prince George's County (the County") (copy attached).

Your letter proposes, as an additional condition of approval to Starpower's cable franchise agreement, to modify the terms of the cable franchise approved by the County Council on November 21, 2000 to require Starpower to make an initial capital contribution in the amount of \$400,000 to be paid by Starpower over a four-year period and credited against future revenue-based fees owing under the franchise. This recent condition would be in addition to other substantial monetary and in-kind services earmarked for public, educational and government access support in the proposed cable franchise agreement that was approved by the County Council on November 21, 2000.

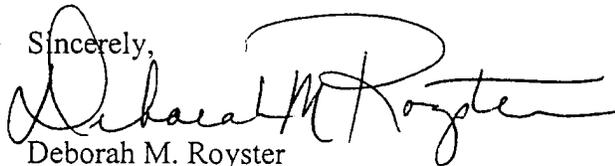
After careful consideration of this most recent proposal, we are unable to agree to your request for substantial up front capital contributions by Starpower. Most importantly, from a level playing field perspective, it is unfair and unreasonable to impose upon Starpower, as a new entrant, burdensome capital contributions that were not required in the incumbent monopoly cable provider's renewed franchise. Such up front capital contributions are particularly inappropriate here, where Starpower has not had fifteen years as a monopoly provider in Prince George's County to build up a significant revenue base from which to fund such a capital contribution. The franchise agreement that was approved by the Council obligated Starpower to match the incumbent monopoly cable provider's commitment to pay three percent of its revenues on an ongoing basis over a period of fifteen years to support public, educational, and government access, and we believe that obligating Starpower to contribute considerable amounts of such contributions in advance of receiving revenues to support them would significantly hamper its ability to enter the market and to compete with its entrenched competitor.

As you know, Starpower commenced negotiations with Prince George's approximately over three years ago (see attached chronology). With the passage of time since the commencement of franchise negotiations, the further delay since the agreement was approved by the County Council, and the deteriorating market conditions in the high technology market sector during that time, we have to be very mindful of our fiduciary obligation to proceed cautiously and deliberately before undertaking additional commitments that exacerbate the challenges that Starpower already faces as a new market entrant competing against an entrenched incumbent monopoly cable provider. For these and the other reasons stated herein, we must inform you that we have decided to delay finalizing a cable franchise agreement with Prince George's County until we can proceed in a more prudent manner. Starpower remains hopeful of providing the citizens of Prince George's County the high quality advanced telecommunications services that they deserve and that Starpower is capable of providing.

In the interim, Starpower will continue to construct its advanced telecommunications network in the Washington, D.C. metropolitan area where, to date, the company has approximately 650,000 homes under franchise, including the cities of Washington, D.C., Gaithersburg, Maryland and Falls Church, Virginia as well as Montgomery County and Arlington County. Starpower is backed by two healthy and capable companies, The Potomac Electric Power Company (Pepco) and RCN Corporation, both of which remain committed to Starpower's mission and to providing the products and services that are being very well received by consumers in this region. Indeed, Starpower currently provides bundled telecommunications services, including video, local and long distance telephone, and Internet services to more than 200,000 customers in the Washington, D.C.-Baltimore region.

Please do not hesitate to contact me (202-250-7868) if you have further questions or if I can be of additional assistance.

Sincerely,



Deborah M. Royster
General Counsel

cc: The Honorable Wayne Curry
Prince George's County Executive

The Honorable Ronald Russell
Chair, Prince George's County Council

The Honorable Audrey Scott
Vice-Chair, Prince George's County Council

Barbara L. Holtz, Esq.

June 26, 2001

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The Honorable Walter H. Maloney
Prince George's County Council

The Honorable Peter A. Shapiro
Prince George's County Council

The Honorable Thomas R. Hendershot
Prince George's County Council

The Honorable Marvin F. Wilson
Prince George's County Council

The Honorable Dorothy F. Bailey
Prince George's County Council

The Honorable Isaac J. Gourdine
Prince George's County Council

The Honorable M.H. Jim Estepp
Prince George's County Council

Mr. Patrick Messam
Chair, Prince George's County Cable Administration

Sandra F. Peaches, Esq.
Executive Director, Office of Business and Regulatory Affairs

Starpower Communications, LLC

Chronology of Cable Franchise Process in Prince George's County

- October 1997 Representatives of Starpower and Prince George's County initially met on October 1, 1997 to discuss Starpower's interest in providing competitive cable services in Prince George's County.
- January 1998 Starpower filed an open video system ("OVS") application with the Federal Communications Commission ("FCC") to provide competitive video services in the Washington, D. C.-Baltimore metropolitan area, including Prince George's County. This application was approved by the FCC on January 26, 1998.
- June 1998 to August, 2000 Representatives of Starpower and Prince George's County negotiate a cable franchise agreement to provide competitive cable services to Prince George's County. However, this process was slowed during Fall 1998 and Spring 1999 by County representatives pending completion of the cable franchise renewal process involving the incumbent cable operator. The County's negotiating team included the cable administrator, representatives of the County Executive's staff and other government agencies, and representatives from the participating municipalities. In addition, the County was represented by Messrs. Nick Miller and Rick Ellrod of the law firm of Miller and Van Eaton, a leading firm representing municipalities in cable franchise negotiations locally and nationally.
- September 22, 1999 Public Hearing on Starpower's Cable Application held by Prince George's County Cable Television Commission ("Cable Commission").
- September 1999 to February 2000 Remaining issues on franchise agreement negotiated by Starpower and the County.
- March 22, 2000 Starpower's proposed cable franchise agreement was presented to the Cable Commission for consideration. Following presentations by Starpower and other interested parties, including the incumbent cable provider, the Cable Commission unanimously approved the proposed cable franchise agreement.

- May 9, 2000 Starpower's proposed cable franchise agreement was introduced to the Prince George's County Council and referred to the Public Safety and Fiscal Management Committee for further consideration.
- June 19, 2000 A hearing on Starpower's cable franchise application was cancelled at the request of the County Executive as a result of objections raised by the incumbent cable provider.
- August 30, 2000 The County Executive instructed the Cable Commission, by letter dated August 30, 2000, to provide an opportunity for further public comment on Starpower's cable franchise application.
- September 20, 2000 The Cable Commission considered the merits of Starpower's application for a cable franchise a second time, hearing arguments —again— from Starpower, the incumbent cable provider, and members of the public.
- October 18, 2000 The Cable Commission again voted unanimously to approve Starpower's proposed cable franchise agreement as originally submitted. The Commission incorporated its findings into a detailed written report that addressed and rejected specific objections raised by the incumbent cable operator.
- November 2, 2000 The Public Safety and Fiscal Management Committee held a public hearing on Starpower's proposed cable franchise agreement. Again, public comment was heard by the Committee from interested parties, including representatives of Starpower and the incumbent cable provider. The final report and recommendation of the Prince George's County Cable Commission was unavailable to the Committee for its consideration at this meeting.
- November 13, 2000 By letter dated November 13, 2001, the County Executive formally transmitted to the Prince George's County Council the final report and recommendation of the Prince George's County Cable Commission recommending approval of Starpower's cable franchise application.
- November 21, 2000 On November 21, 2000, the Prince George's County Council held a public hearing on the proposed cable

franchise agreement. Once again, public comment was received by Starpower, Comcast, and members of the public. As a result of additional negotiations with the County Executive, representatives of Starpower made significant additional concessions, including agreeing to extend the proposed coverage area pursuant to the request of the County Executive. With these modifications, staff to the County Executive advised the Prince George's County Council that the County Executive fully endorsed the proposed cable franchise agreement between Starpower and Prince George's County. After full consideration of the relevant issues, the County Council unanimously approved Starpower's cable franchise application.

February 23, 2001

By letter dated February 23, 2001, the County Executive requested additional commitments, including capital contributions in lieu of constructing certain institutional network sites identified in the proposed cable franchise agreement. This request could potentially involve initial capital contributions totaling approximately \$4,350,000 prior to completing significant construction of the network or activating service.

April 2, 2001

By letter dated April 2, 2001, Starpower agreed to additional requests regarding the franchise area; the effective date of the franchise; and offices. In addition, Starpower also agreed to make an initial capital contribution of \$150,000 payable over three years to be applied against future PEG fees.

May 7, 2001

By letter dated May 7, 2001, the County Executive proposed capital contributions by Starpower in the amount of \$400,000 payable over four years, with an initial payment of \$200,000 payable upon execution of the cable franchise agreement.

EXHIBIT B

**to RCN Telecom Services, Inc.,
Reply to Opposition of AT&T and Comcast
to Petition to Deny Applications or Condition Consent**

Cable Firm Pulls Plug On Deal in Maryland

Provider Won't Enter Pr. George's Because Of 'Unfair' Demands

By Paul Schwartzman
Washington Post Staff Writer
Monday, August 27, 2001; Page B01

The Prince George's County Council approved a cable television franchise last fall that for the first time would have offered many residents an alternative to Comcast, the county's sole provider.

But nine months later, the applicant, Starpower Communications, has notified county officials that it will not enter the Prince George's market for the foreseeable future.

The two sides split after Starpower said it was unwilling to meet a new demand from the administration of County Executive Wayne K. Curry (D) that it pay an additional \$400,000 for technological improvements in the county.

In a recent letter to the Curry administration, Starpower counsel Deborah M. Royster called the county's request "unfair and unreasonable" and said it would "significantly hamper [the company's] ability to enter the market and to compete with its entrenched competitor."

Starpower officials also said they regarded the timing of the request -- it came after the council's vote -- as unusual compared with negotiations they've had with other counties.

"We're at a loss to explain why additional requirements were proposed after the fact," said Patricia MacEwan, a Starpower spokeswoman.

Council member Walter H. Maloney (D-Laurel) said the administration should have signed off on the agreement that the council had approved with its vote.

"A deal is a deal -- it's not appropriate to keep negotiating," Maloney said. "We need the competition in this county, and we need it badly."

Barbara Holtz, a senior aide to Curry who led the negotiations with Starpower, referred questions to James Rogers, Curry's spokesman.

Rogers said the administration views Starpower's decision as temporary. "It would be a surprise if they weren't coming," he said. "We think it's a delay."

Asked to respond to the questions raised about the timing of the administration's latest request, Rogers said, "That's in their estimation. Have they come back with another proposition?"

Comcast, which serves 180,000 homes in Prince George's County, as well as neighboring areas, offers more than 85 channels for \$39.95 a month. Starpower, whose subscribers include Montgomery County and District residents, offers more than 90 channels for \$34.95 a month.

Curry (D) had signed off on the Prince George's agreement with Starpower before the council's vote last November. The vote followed weeks of vigorous lobbying by both Comcast and Starpower.

Comcast's advocates included lobbyist Bruce C. Bereano and Ervin Reid, a Curry campaign strategist in 1994.

Last fall, before the council's vote, Comcast contributed \$10,000 in postage to the unsuccessful campaign to overturn term limits in Prince George's. The repeal effort was endorsed by Curry and six of the council's nine members.

Starpower's representatives included lobbyist Michael Arrington, a former state delegate, and Greg Wells, a lawyer who is a longtime Curry friend. They argued that the new franchise would mean price competition and additional service options for subscribers.

But Comcast officials countered that Starpower's agreement -- which included paying the county 5 percent of its revenue in franchise fees -- was superior to the one Comcast had gotten two years before.

Prince George's Cable Television Commission ruled that Starpower's agreement was on a par with Comcast's.

After the cable commission's ruling, Comcast officials complained to Curry, who asked that the panel review the agreement for a second time. Again, the commission pronounced the agreement fair.

The council then voted 8 to 0 to ratify the agreement. Chairman Ronald V. Russell (D-Mitchellville) was absent.

In interviews last week, several council members said they were surprised by the Curry administration's decision to extend negotiations beyond their vote.

"I thought it was a done deal," said council member Audrey E. Scott (R-Bowie). "We now have one provider, and it's the consumer who suffers."

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