

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
)  
Annual Assessment of the Status of ) CS Docket No. 95-61  
Competition in the Market for the )  
Delivery of Video Programming )

To: The Commission DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF OPTEL, INC.**

OpTel, Inc. ("OpTel"), submits these reply comments in response to the Notice of Inquiry ("NOI") in the above-referenced proceeding. OpTel, through its subsidiaries, operates private and franchised cable systems in several regions of the United States.

As the comments to the NOI make clear, large franchised cable operators continue to use their dominant position in the local multichannel video programming distribution market to inhibit the growth of competition and exclude new entrants.<sup>1</sup> To enhance competition and prevent anticompetitive conduct by franchised cable operators, OpTel suggests that the Commission: (1) reconsider its "inside wiring" decision; (2) recommend to Congress that it amend the Cable Act to prevent discriminatory and anticompetitive pricing; and (3) reiterate its recommendation to Congress that it expand the "private cable exemption" to permit the delivery of video programming to residents of a private subdivision without a cable franchise.

<sup>1</sup> See, e.g., Comments of DirectTV, Inc., CS Docket 95-61, at 2-3.

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List A B C D E

**I. EFFECTIVE ACCESS TO MDU CABLE INSIDE HOME WIRING IS NECESSARY TO THE DEVELOPMENT OF COMPETITION IN VIDEO PROGRAMMING SERVICE.**

As several parties noted in their comments, franchised "cable operators have frequently exploited the wiring used to provide cable service [in MDUs] as a weapon against emerging competition."<sup>2</sup> Under the Commission's current rules, cable home wiring is defined as "wiring located within the premises or dwelling unit of the subscriber" and the "demarcation point" in MDUs is "at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit."<sup>3</sup> Thus, in most MDUs, the demarcation point is buried in load-bearing walls or concealed in conduit and, therefore, not readily accessible without causing substantial damage to the building or the subscriber's apartment.<sup>4</sup>

Absent effective access to MDU inside wiring, new service providers are forced to rewire MDUs at substantial cost and inconvenience. As a result, MDU owners are reluctant to switch services and individual residents are barred from choosing an alternative provider. In effect, the Commission's inside wiring decision has helped to entrench already dominant franchised cable operators.

In order to provide practical access to cable home wiring in MDUs, the demarcation point must be a point outside of the subscriber's premises at which the individual subscriber's wires can be detached from the cable operator's common wires without damaging the MDU and without disrupting service to other customers (*i.e.*, home wiring in MDUs should include the entire "home run"). Such a demarcation point will allow customers to switch effortlessly between alternative service providers and thereby promote competition in the multichannel video programming marketplace.<sup>5</sup>

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<sup>2</sup> Comments of The Wireless Cable Association International, Inc. ("WCA"), CS Docket 95-61, at 22; accord Comments of Liberty Cable Company, Inc. ("Liberty"), CS Docket 95-61, at 18.

<sup>3</sup> Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring, 8 FCC Rcd 1435, 1437 (1993).

<sup>4</sup> See Comments of WCA at 23 (listing parties that have recognized the inaccessibility of the current MDU inside wiring demarcation point).

<sup>5</sup> Should the Commission determine that it is without authority to establish such a demarcation point, OpTel supports WCA's suggestion that the Commission seek additional authority from Congress to do so. See WCA Comments at 24.

## II. PREDATORY PRICING BY FRANCHISED CABLE OPERATORS IS INHIBITING THE GROWTH OF COMPETITION IN THE MARKET FOR MULTICHANNEL VIDEO PROGRAMMING.

Several parties to this proceeding share OpTel's concerns about predatory pricing by franchised cable operators.<sup>6</sup> Like OpTel, these parties have witnessed, first hand, discriminatory pricing practices used to thwart the introduction of competition. For instance:

Heartland is currently investigating the pricing practices of a competing incumbent cable operator which has been said to offer heavily discounted promotional rates, and free equipment and installation, to current Heartland subscribers....the franchised cable operator has not offered such promotions on a universal basis either to its own subscribers or to all potential subscribers within its franchise area.<sup>7</sup>

Similarly, Liberty reports that "both Time Warner and Cablevision continue to engage in selective predatory pricing and the offering of bulk rates designed to eliminate Liberty from the marketplace."<sup>8</sup>

These practices run directly contrary to the Cable Act and the Commission's implementing regulations.<sup>9</sup> They harm not only would-be competitors to franchised cable systems, but also the customers in areas where there are no incipient competitors who are made to cross-subsidize the targeted predatory discounts. To combat these practices, the Commission must closely scrutinize promotional offers and pricing differentials that franchised cable operators offer within a single community of service.<sup>10</sup>

In addition, the Commission should recommend to Congress that it amend the Cable Act to ensure that a recent decision by the United States Court of Appeals for the District of Columbia Circuit<sup>11</sup> does not "revive discriminatory 'rifle shot' marketing practices" by cable systems.<sup>12</sup> In its decision, the court exempted cable systems that face "effective competition" from the uniform pricing requirement. As

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<sup>6</sup> See, e.g., Comments of Heartland Wireless Communications, Inc. ("Heartland"), CS Docket 95-61; WCA Comments at 19-22; Liberty Comments at 9-11.

<sup>7</sup> Heartland Comments at 1-2.

<sup>8</sup> Liberty Comments at 9-10.

<sup>9</sup> See 47 U.S.C. § 543(d); 47 C.F.R. § 76.984.

<sup>10</sup> See Heartland Comments at 2.

<sup>11</sup> Time Warner Entertainment Co. v. FCC, 56 F.3d 151 (D.C. Cir. 1995).

<sup>12</sup> WCA Comments at 19.

WCA points out in its comments, the court's decision could substantially undermine the Commission's efforts to prevent predatory pricing, particularly if, as expected, Congress liberalizes the definition of "effective competition."

Diminishing the protection of the uniform rate requirement would inhibit the growth of competition in multichannel video programming and would leave cable ratepayers vulnerable to discriminatory pricing. For this reason, the Commission should oppose any legislative change that would facilitate price discrimination by franchised cable operators and retain its jurisdiction over the rates charged by franchised cable operators wherever possible.

**III. THE PRIVATE CABLE EXEMPTION SHOULD EXTEND TO ALL SYSTEMS THAT DO NOT USE PUBLIC RIGHTS-OF-WAY, REGARDLESS OF WHETHER SUCH SYSTEMS SERVE MDUS.**

Under the Communications Act, a cable system is defined as:

a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include... (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

Thus, private cable and wireless cable operators who serve subscribers in a single apartment building (an MDU) are exempt from federal cable regulation, but those who serve subscribers in a single trailer park (not an MDU), are not. This artificial distinction does not significantly advance any federal policy and it hamstring private cable operators seeking to compete with dominant franchised cable systems.

Recognizing that a distinction based on whether the subscribers of a private cable or wireless cable operator share common walls unreasonably hinders the development of competition in the market for video programming services, the Commission has suggested that Congress expand the private cable exemption to exempt from federal cable regulation "not only commonly-owned, but also separately-owned, dwellings interconnected by wires which do not cross public

rights-of-way.”<sup>13</sup> This revision would properly focus the need for a local franchise on the use by the operator of public rights-of-way.

Moreover, by expanding the private cable exemption, Congress would promote competition to dominant franchised cable systems in trailer parks, mobile home parks, and other private residential communities.<sup>14</sup> Thus, OpTel supports WCA’s suggestion that “the Commission should reiterate its proposal and again stress the important, pro-competitive benefits that will redound from an amendment of the ‘cable system’ definition.”<sup>15</sup>

#### CONCLUSION

The comments filed in this proceeding demonstrate that franchised cable operators still have the ability and incentive to inhibit the development of competition in the market for multichannel video programming. To thwart such anticompetitive behavior and to promote the development of competition, the Commission should take the steps advocated by OpTel herein and in its comments to the NOI.

Respectfully submitted,

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<sup>13</sup> See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 — Annual Assessment of the Status of Competition in the Market for the delivery of Video Programming, 9 FCC Rcd 7442, 7558 (1994).

<sup>14</sup> See *id.* To further enhance competition, the Commission should recommend to Congress that the private cable exemption should be made applicable to systems serving private communities or MDUs even if the system employs some *de minimis* crossing of a public right-of-way (e.g., a single street crossing to connect two commonly owned MDUs served by a single head-end).

<sup>15</sup> WCA Comments at 27.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Comments of OpTel, Inc., was sent by first-class mail, postage prepaid, this 28th day of July, 1995, to each of the following:

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