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Before the
FEDERAL COMMUNICATIONS COMMISSION FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 OFFICE OF SECRETARY

In the Matter of)
)
Telecommunications Services)
Inside Wiring)
)
Customer Premises Equipment)

CS Docket No. 95-184

and

In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992:)
)
Cable Home Wiring)

DOCKET FILE COPY ORIGINAL

MM Docket No. 92-260

CONSOLIDATED REPLY COMMENTS OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits this consolidated reply to the comments filed in response to the notices of proposed rulemaking in the above-referenced proceedings. Rather than reiterate positions taken in OpTel's initial comments, this consolidated reply highlights the two most important issues presented in these proceedings for the private cable industry — possible imposition of a requirement of mandatory access to multiple dwelling units ("MDUs"), with its concomitant prohibition on exclusive right of access contracts, and placement of the cable demarcation point.

The franchised cable operators support a mandatory access regime and favor retention of the present cable demarcation point. If adopted by the Commission, both of these positions would entrench further the market power of franchised cable operators, which the Commission, the Department of Justice, and the courts have found to be virtual monopolists in the highly concentrated multichannel video programming distribution ("MVPD") market.¹ OpTel, other private cable companies, and the property owners and

¹ See In re Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, PP Docket No. 93-253, Comments of the United States Department of Justice at 2 (filed Nov. 20, 1995);

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managers, whose MDUs all MVPD providers seek to serve, have opposed mandatory access and retention of the present cable demarcation point and, therefore, support a fully competitive MVPD market.

DISCUSSION

I. THE COMMISSION SHOULD NOT REQUIRE MANDATORY MVPD ACCESS TO MDUs.

OpTel and other private cable parties have strongly opposed mandatory access requirements, both on legal and policy grounds. Aside from the comments filed by the franchised cable operators seeking to protect their current favored status with respect to MDU access, the parties agree that state mandatory access laws have inhibited the development of competition and that Commission-imposed federal mandatory access requirements likewise would harm consumers and competition.

A. Mandatory Access Laws Depress The Level Of Competition, Diminish The Quality Of Service, And Detract From The Property Value Of MDUs.

The comments filed in these proceedings demonstrate that state mandatory access laws have slowed the growth of competition in the MVPD market.² Such laws typically guarantee access only to franchised cable operators and, therefore, unfairly advantage the dominant players in the local video programming distribution market. As a result, most competitive providers of video programming services, such as OpTel, avoid mandatory access states whenever possible. Moreover, because franchised cable operators in these states have a legal right to gain access to MDUs, property owners are understandably reluctant to permit access to alternative MVPD providers knowing that they likely will have their properties overbuilt by the franchised operator.

The competitive imbalance created by these statutes, however, is only one of the negative aspects of MVPD mandatory access. As OpTel pointed out in its comments, even competitively neutral mandatory access laws will depress the level of competition, diminish the quality of services available to consumers, and detract from the property value of MDUs.

see also In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, ¶ 215 (rel. Dec. 11, 1995); Turner Broadcasting v. FCC, 910 F. Supp. 734, 740 (D.D.C. 1995).

² See, e.g., Comments of Multimedia Development Corp. (CS-95-184) at 3-7; Comments of Wireless Cable Association International, Inc., (CS-95-184) at 6-10.

The small subscriber base at any one MDU limits the potential return on investment and makes it commercially impractical for more than one provider to wire most MDUs for enhanced cable and telephone services.³ Therefore, the economics of the MDU marketplace favor the use of exclusive service agreements for the provision of multichannel video programming services.⁴ The franchised cable companies are being disingenuous when argue that residents in MDUs deserve “facilities-based competition”⁵ and the “benefits of two-wire competition.”⁶ These cable operators know full well that banning exclusive agreements will not lead to “two-wire competition,” but to single, monopoly cable provider service to most MDUs because, without exclusivity, it is cost-prohibitive for a new MVPD to rewire an entire MDU with state of the art facilities capable of providing the most advanced cable television and telecommunications services.

A new MVPD entrant cannot recover the cost of the installation through monopoly rents as the franchised cable operators have been able to do over the years. Ironically, these same franchised cable operators complain that MDU owners act as “gatekeepers” when they decide which MVPDs will provide service to their buildings. If the Commission prohibits exclusive service agreements, however, there will be no need for a “gatekeeper” — the local franchised cable operator will be the only service provider at the gate. In short, competition has developed in MDUs precisely because exclusive arrangements make it economically possible for a new entrant “Davids” to take on the franchised cable “Goliaths.”

B. Exclusive Right-Of-Entry Contracts Ensure High Quality Services At Competitive Prices.

The availability of exclusive rights-of-entry allows landlords to bargain with service providers for the best telecommunications services and products available. As Multimedia Development Corporation explained in its comments, “as a matter of direct interest, the condominium association or landlord seeks to provide the best possible building environment at the most reasonable cost.... The property owner may have

³ This at least is true of alternative MVPD providers, which cannot amortize the cost of wiring an MDU over an entire community as a franchised cable operator or local exchange carrier can.

⁴ See, e.g., Comments of the National Housing Partnership (CS-95-184) at 2.

⁵ E.g., Comments of Cox Communications at 27.

⁶ E.g., Comments of Continental Cablevision, Inc., (CS-95-184) at 9.

market power to derive extra value from the MVPD through discounts, bulk pricing or other arrangements.”⁷

OpTel, for instance, provides a variety of enhanced services to the MDUs it serves, including property management channels and security surveillance channels. In addition, OpTel uses its MDU facilities to provide competitive shared tenant telecommunications services which, alone, would not justify installation of the systems. Franchised cable operators generally do not offer these services and even where they do, OpTel delivers them to MDUs cheaper, faster, and more reliably than the franchised operator. Without exclusive agreements to use as a *quid pro quo*, MDU residents cannot take advantage of their collective bargaining power to obtain top quality communications and multichannel video services at the most competitive prices. Without exclusive agreements, market forces will dictate that the minimum level of service will be provided at most MDUs.⁸

C. Mandatory Access Would Constitute A *Per Se* Taking Of Private Property.

As the many comments filed by MDU owners and their associations demonstrate, requiring federally-mandated MVPD access to MDUs for all service providers would constitute a *per se* taking of private property without just compensation. Aside from the questionable lawfulness of such a taking, the comments provide abundant insight into why such a taking would be unwise as a matter of policy. As several property owners explained, unlimited access to MDUs would interfere with the management of the buildings and undermine efforts to provide residents with a safe and secure environment.⁹

The advocates of mandatory access principally are the franchised cable operators, who would be the only beneficiaries of such a policy. For instance, NCTA complains that

⁷ Comments of Multimedia Development Corp. (CS-95-184) at 15; see also Comments of Ameritech (CS-95-184) at 20 (MDU “owners will have an incentive to grant reasonable access rights if the company seeking access provides high quality, low cost services to which the owners, or their tenants, want to subscribe”); Comments of Home Builders Association of Maryland (CS-95-184) (“Since property owners are in the business of renting their property, to remain competitive, they will provide the services the market demands. There is no need to require property owners to provide access to every vendor who wants to place their equipment in the owner’s property.”).

⁸ Cf., e.g., Comments of Time Warner Cable (MM-92-260) at 7-8 (explaining that it continues to install in MDUs outdated, non-addressable loop-through wiring that cannot provide tiered or interactive services).

⁹ See, e.g., Comments of the Atlanta Apartment Association (CS-95-184) at 1; Comments of the National Housing Partnership (CS-95-184) at 2-3.

property owners “fiercely resist competitive access by franchised cable operators in order to exact tolls of no benefit to their residents” and that MDU owners “hold their tenants hostage to operators who provide sufficient kickbacks to the landlord.”¹⁰ NCTA’s position distorts the reality of the real estate marketplace.

No tenant is held “hostage” by any MVPD right-of-entry agreement. Tenants freely negotiate leases with MDU owners and they may, so long as they do so in accordance with the terms of their leases, vacate their units if any aspect of the MDU or their living arrangements, including the video and communications services available at the unit, are not acceptable to them. Indeed, it is precisely this fluidity in the residential real estate market that ensures that MDU owners will seek out the highest quality video and communications services that their buildings will support in order to maintain high occupancy rates.

Franchised cable operators, moreover, cannot be heard to decry “kickbacks” to property owners, when they frequently are the source of such so-called kickbacks and use “perpetual” exclusive agreements for anticompetitive purposes — practices that provide no benefits to MDU residents.¹¹ OpTel and other private cable companies are invited to serve MDUs for only one reason: They provide superior services and facilities at the most competitive prices. If they do not, they are at risk of forfeiting the right to serve the property. As explained above, however, private cable companies can afford to make the investment required to upgrade existing cable wiring in MDUs to provide state-of-the-art services only if they can obtain, for some reasonable term, exclusive service agreements with the MDU owners. Otherwise consumers will be left with “plain old video services” from a franchised cable operator.

II. THE CABLE DEMARCATION POINT IN MDUS SHOULD BE MOVED TO THE POINT AT WHICH THE BROADBAND LINE BECOMES DEDICATED TO AN INDIVIDUAL SUBSCRIBER’S USE.

The current demarcation point for cable inside wiring is 12 inches outside of the subscriber’s premises, which makes it extremely impractical for alternative MVPD providers to compete for subscribers in MDUs. As many parties pointed out in their comments, wire located within twelve inches of a subscriber’s premises may be buried in load-bearing walls or concealed in conduit and, therefore, not readily accessible without

¹⁰ Comments of NCTA (MM-92-260) at 2; see also Comments of NCTA (CS-95-184) at 16-21.

¹¹ See Comments of OpTel (CS-95-184) at 7-8; Comments of GTE (CS-95-184) at 20-23 (advocating a ban on the use of exclusive agreements by incumbent franchised cable operators).

causing substantial damage to the building or the subscriber's unit. This discourages MDU owners from providing access to alternative MVPD providers and raises the cost to those that seek to provide competing service to MDU residents.¹²

A. Enhancing Access To Subscriber "Separate Wire" Will Promote Competition And Facilitate Consumer Choice.

OpTel and most other commenting parties have urged the Commission to move the cable demarcation point in non-loop-through MDUs to the point 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.¹³ By allowing cable subscribers access to all of their "separate wire," the Commission will promote freedom of choice and the subscribers' ability to change service providers with ease. In MDUs in which there is no exclusive service provider, subscribers will be able to connect their dedicated line to the common wiring of whichever service provider they choose. In MDUs at which a single service provider has an exclusive right-of-entry, such provider will not be required to engage in extensive demolition and reconstruction in the MDU to reach every subscriber's dwelling unit.¹⁴

Further, to promote orderly turnover of the wire from one resident or tenant to the next, the MDU property owner (as property owners are in the single family unit context) should be given the option to acquire the cable inside wiring. As noted by OpTel and others, rental apartment tenants may have little interest in maintaining the MDU common areas or in enhancing the service options available to future tenants of the building.¹⁵ The MDU owner, by contrast, has a long term interest in the building and the services available to it. In this context, therefore, the long term interests of the residents of a rental apartment MDU are better served by a rule that vests the owner of the MDU with control over the wiring and broadband services in the building. Once the MDU owner has such ownership and control over the inside wiring, new tenants easily can be connected for service from the previous provider or, where an alternative service

¹² See, e.g., Comments of the Media Access Project and the Consumer Federation of America ("CFA") (CS-95-184) at 5-7; Comments of USTA (CS-95-184); Comments of WCA at 10-12.

¹³ See, e.g., Comments of CFA at 10; Comments of Ameritech at 3-4; Comments of the State of New Jersey (CS-95-184) at 6-7; Comments of GTE (CS-95-184) at 4; Comments of WCA at 11-12.

¹⁴ For many of these same reasons, OpTel and others have advocated treating the entire MDU as a single premises for inside wiring purposes when the MDU is wired with loop-through wiring. See, e.g., Comments of Ameritech New Media; Comments of GTE (MM-92-260) at 5.

¹⁵ See Comments of OpTel (CS-95-184); Comments of the Independent Cable and Telecommunications Association (CS-95-184).

provider has installed a common wire in the building, the new service provider can be given easy access to the residents without undue delay.

A few franchised cable companies have filed comments complaining that the Commission does not have statutory authority to move the cable demarcation point to the point at which the cable wire becomes dedicated to the individual unit.¹⁶ Others have argued that the proposed “separate wire” demarcation point would be elusive and cause confusion in the marketplace.¹⁷ Several franchised cable companies even have insisted that the preference in the Telecommunications Act of 1996 for facilities-based competition limits the Commission’s discretion to move the cable demarcation point.¹⁸ None of these objections has merit.

The proposed cable “separate wire” demarcation point is entirely consistent with the Commission’s statutory authority. Under the Communications Act, the Commission is required to establish rules concerning the disposition of cable installed by a cable operator “within the premises of [the] subscriber.”¹⁹ Because a dedicated line is merely an extension of the individual premises to which it is dedicated, it should not be regarded as part of the MDU commons. Indeed, to do so would “turn Congressional intent on its ear.”²⁰ The point of the cable inside wiring rules was to give subscribers reasonable access to their cable wire so that rewiring of structures would not be necessary in order for the subscriber to switch MVPD providers.²¹

Further, there is nothing elusive or confusing about the proposed “separate wire” demarcation point. As the Commission found with regard to the telephone demarcation point, which also varies from building to building, a functional definition of the demarcation point is sufficiently clear to allow operators and customers certainty with respect to their wiring rights and responsibilities.²²

¹⁶ See, e.g., Comments of Cox Communications, Inc. (CS-95-184) at 13-17.

¹⁷ See Comments of Tele-Communications, Inc. (CS-95-184) at 6.

¹⁸ See, e.g., Comments of NCTA (CS-95-184) at 6-15.

¹⁹ 47 U.S.C. § 544(i). Wiring within the premises was intended by Congress to exclude, in MDUs, only “common wiring.” H.R. Rep. No. 628, 102d Cong., 2d Sess. at 118 (1992) (emphasis added). Separate wire is, by definition, not common wiring.

²⁰ Comments of CFA (CS-95-184) at 12.

²¹ See S. Rep. No. 92, 102d Cong., 2d Sess. 23 (1992).

²² See In re Sections 68.104 and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd 4686, 4706 & n.25 (1990).

B. A “Separate Wire” Cable Demarcation Point Promotes Congress’ Goal Of Facilities-Based Competition.

The claim that, in the 1996 Act, Congress limited the Commission’s discretion to move the cable demarcation point to a point that would include all subscriber separate wire is baseless. To begin with, the franchised cable interests have claimed that Section 652(d)(2), which authorizes cable operators to lease cable lines from “the last multiuser terminal to the premises of the end user,” demonstrates that Congress did not intend for the Commission to extend the demarcation point in MDUs to include all subscriber separate wire.²³ As explained in ICTA’s comments, this contention begs the question.²⁴ Section 652(d)(2) does not govern the disposition of subscriber inside wire.²⁵ Instead, Section 652(d)(2) provides local exchange carriers with access to the cable wire running from the street or public right-of-way up to the point at which the wire becomes subscriber inside wire. Section 652(d)(2) does not help to define that point.²⁶

Second, several cable operators have claimed that the Commission’s placement of the cable demarcation point in MDUs at the point at which the cable becomes dedicated to an individual subscriber’s unit would thwart the development of facilities based competition in contravention of the purposes of the 1996 Act. The proponents of this view, however, never explain why a “separate wire” cable demarcation point any more undermines the goal of facilities-based competition than does the current telephone demarcation point, which also includes customer separate wire and which may be located at the minimum point of entry (“MPOE”), further from the customer’s individual unit than the proposed cable demarcation point.²⁷

More fundamentally, the argument misconstrues the very purpose of promoting facilities-based competition. The goal, of course, is to maximize consumer welfare by increasing the number of competitive options available to consumers. The issue with

²³ See, e.g., Comments of NCTA at 10.

²⁴ See Comments of ICTA (CS-95-184) at 28-29.

²⁵ See S. Rep. No. 104-230, 104th Cong., 2d Sess. 1996.

²⁶ Ironically, the interpretation of Section 652(d)(2) advocated by the franchised cable interests would exclude, in the MDU context, the segment of wire running from the public right-of-way to the building, which is precisely the portion of wire that was intended to be covered by the cable lease provision.

²⁷ See Review of Sections 68.104 and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, 5 FCC Rcd 4686 (1990). Despite the clear intent of the rule, many LECs continue to maintain that the telephone demarcation point in the MDUs they serve is at the first jack in each individual unit. OpTel has urged the Commission to put an end to this anticompetitive practice and to make explicit that LECs are required to place the telephone demarcation point in MDUs, both new and existing, at the minimum point of entry as defined by the property owner.

respect to the location of the cable demarcation point is not whether there will be two or more providers actually running cables into each subscriber's unit, but whether subscribers will be able to choose among various providers and physically switch among them with ease. By moving the cable demarcation point to include all subscriber separate wire, the Commission would facilitate the ability of customers to connect their inside wire to the common wire of any video programming distributor.²⁸

Indeed, a "separate wire" cable demarcation point will do more to promote facilities-based competition than the current 12-inch rule which, perversely, allows each subscriber access only to part of the wire actually dedicated to the subscriber's premises. Under the current rule supported by the franchised cable companies, subscribers are required to cut and splice their dedicated subscriber line in order to switch to an alternative service provider. Franchised cable operators, therefore, would have MDU owners allow multiple MVPDs to enter onto their property, break into their walls and conduits, run a few extra feet of "separate wire" to each unit (along side the existing separate wire), and cut into the existing separate wire at some arbitrary mid-point between the common wire and the subscriber's CPE in order to splice into that separate wire to provide service. It is hard to imagine a more burdensome, inefficient, and anticompetitive scheme.

CONCLUSION

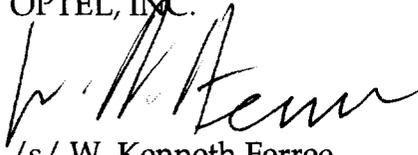
For the reasons set forth above and in its comments in these proceedings, OpTel urges the Commission not to require mandatory access to MDUs and to move the cable demarcation point to the point at which the cable wire becomes dedicated to an

²⁸ CATA predicts that a "separate wire" cable demarcation point will put cable companies out of business. See Comments of CATA (CS-95-184) at 6. CATA does not explain why cable companies, with virtually every imaginable competitive advantage at this point in time, will not be able to compete successfully for the right to provide service to their subscribers and thereby retain access to the inside wiring. Similarly unavailing are the complaints of some cable operators that expansion of subscriber inside wire in MDUs will require them to rewire MDUs in order, in the future, to provide telephone service. Allowing subscribers access to their inside wire does not disadvantage the cable company vis-a-vis other competitors. To the contrary, all providers need access to the inside wire to provide service. Thus, removing control of that wire from a single provider merely places all service providers on equal competitive ground.

individual subscriber's unit (*i.e.*, inside wire in non-loop-through MDUs should include all subscriber separate wire).

Respectfully submitted,

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April 17, 1996