

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

JUN - 4 1996

In the Matter of)
)
Implementation of the Cable Reform Provisions) CS Docket No. 96-85
of the Telecommunications Act of 1996)

COMMENTS OF OPTEL, INC.

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OpTel, Inc. ("OpTel"), submits these comments in response to the notice of proposed rulemaking ("NPRM") in the above-referenced proceeding. OpTel, through its subsidiaries, operates private and franchised cable systems in several regions of the United States. In many of these regions, OpTel's systems are providing competition to established franchised cable operators.

In the NPRM, the Commission requests comment on several issues related to the cable reform provisions of the Telecommunications Act of 1996 (the "1996 Act"), including: (1) the extent to which a LEC-affiliated video programming distributor is deemed to be providing "effective competition" to the cable operator; and (2) the application of the revised uniform rate restrictions of Section 623(d).

OpTel's comments speak to these issues. In OpTel's experience as a new entrant into the multichannel video programming distribution ("MVPD") market, franchised cable operators have gone to great lengths to retain their monopoly status.¹ Consequently, the Commission's resolution of the implementation issues raised in the NPRM is of critical importance to OpTel and other alternative MVPD providers. Only by providing a meaningful check on cable operator anticompetitive conduct can the Commission hope to encourage the development of competition in the MVPD market.

¹ OpTel has been the target of predatory pricing campaigns in which franchised cable operators have offered dramatically reduced prices or other financial and service inducements solely to customers in multiple dwelling units ("MDUs") at which OpTel was attempting to offer a competing service. See OpTel, Inc. v. Jones Intercable, Inc., CSR-No. 4620, Petition for Special Relief (filed Nov. 7, 1995); OpTel, Inc. v. Multimedia Cablevision, Inc., Petition for Special Relief (filed Dec. 15, 1995). Both complaints remain pending.

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DISCUSSION

I. THE COMMISSION SHOULD ESTABLISH A MEANINGFUL "EFFECTIVE COMPETITION" STANDARD REGARDING VIDEO PROGRAMMING PROVIDED BY A LEC-AFFILIATED VIDEO PROGRAMMING DISTRIBUTOR.

Cable systems are subject to rate regulation, including the uniform rate requirement, only in those areas in which they do not face "effective competition." Under Section 623(1)(1) of the Communications Act, cable operators are deemed to be subject to "effective competition" if: (1) fewer than 30% of the households in the franchise area subscribe to cable service; (2) at least two other video programming distributors offer service to 50% or more of the households in the franchise area and 15% of the households actually subscribe to services of other video programming distributors; or (3) the franchising authority operates its own video programming distribution service to which at least 50% of households in the franchise area subscribe.

Section 301(b)(3) of the 1996 Act adds a fourth option for cable operators seeking to demonstrate that they face "effective competition." Under the new test, a cable operator may demonstrate that it is subject to "effective competition" if a LEC-affiliated video programming distributor offers video services to subscribers, by any means other than direct-to-home ("DTH") satellite services, that are comparable to those offered by the franchised operator. In the NPRM, the Commission seeks comment on the implementation of this new subsection.

A. Cable Operators Should Be Required To Demonstrate That They Face Actual Effective Competition In Order To Be Released From Rate Regulation.

When Congress mandated additional cable rate regulation in 1992, it recognized that most franchised cable operators exercise market power in the MVPD market and that they are able to charge rates that are not constrained by competition.² Congress also recognized, however, that the time may come when cable operators will not possess market power and that "[w]hen there are alternative sources of programming reasonably available to the consumer, there will be little need, if any, to regulate a cable system's rates."³ Thus, the 1992 Cable Act framed a regulatory model pursuant to which

² See generally S. Rep. No. 102-92, 102d Cong., 1st Sess. 1991; H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 1992.

³ S. Rep. No. 102-92, 102d Cong., 1st Sess. 1991.

franchised cable operators are subject to rate regulation, unless they can demonstrate that “the [competitive] alternatives [are] sufficient to eliminate cable’s market power.”⁴

Nothing in the 1996 Act evidences a Congressional intent to deviate from this fundamental framework. On the contrary, by adding a fourth “effective competition” test, Section 301 merely recognizes that, because of their extensive financial resources, network facilities, and consumer marketing expertise, many incumbent LECs likely will, at some future time, be vigorous competitors to franchised cable. That time has not yet come. Until it does, the purpose of cable rate regulation will be thwarted if cable operators are allowed to avoid regulation through the “effective competition” escape hatch at the mere appearance of a LEC on the competitive horizon.

Consequently, OpTel urges the Commission to require that cable operators seeking to be deemed to face “effective competition” from a LEC-affiliated provider affirmatively demonstrate that the availability of the LEC provider’s programming actually is having a restraining effect on cable rates.

In order to effectuate this requirement, OpTel suggests that the Commission build upon the approach adopted in the Commission’s interim rules pursuant to which “a cable operator seeking to prove effective competition will have to show that the competitor is physically able to offer service to subscribers in the franchise area.... and establish that potential subscribers in the franchise area are reasonably aware that they may purchase the competitor’s service.”⁵ That is, the cable operator seeking to escape rate regulation should be required to show that it faces “actual effective competition” from a LEC-affiliated provider.

In the alternative, the Commission also should establish a bright line rule, resembling the absolute subscriber pass and subscription rates applicable under the other “effective competition” tests, for determining the point at which a LEC-affiliated programming distributor is providing effective competition to a franchised operator. For instance, the Commission could, in lieu of an absolute pass rate, use some relative measure of service availability and subscriber access (e.g., the LEC-affiliated video programming distributor might be deemed to be providing “effective competition” to a franchised operator when the number of households in the franchise area that it serves is at least 15% of the number of households served by the franchised operator). Thus, a

⁴ Id.

⁵ NPRM ¶¶ 10-11.

cable operator with minimal penetration in a franchise area would face effective competition from a LEC-affiliated provider shortly after the competing service was introduced. Such a test for effective competition would not turn upon some non-statutory absolute pass rate for the LEC-affiliated provider, but it would ensure that the LEC-affiliated entity can provide a real check on the competitive practices of the franchised operator seeking to escape rate regulation.

B. LEC-Affiliated SMATV Systems Should Be Deemed To Be DTH Systems For Purposes Of Section 623.

The Commission also seeks comment on whether satellite master antenna television ("SMATV") systems constitute DTH services and, thus, are not among the class of providers that can be a source of "effective competition" under the new test. OpTel urges the Commission to classify SMATV systems as DTH services for these purposes.

SMATV systems are, in the MDU context, DTH services. The most basic SMATV architecture includes a satellite receive antenna for the entire MDU and a cable feed to each of the units to be served. These SMATV systems provide DTH-like service to residents that, because of the physical characteristics of their individual units (*e.g.*, northern exposure), cannot otherwise receive satellite programming. LEC-affiliated SMATV services should, therefore, be deemed to be DTH systems for purposes of Section 623.⁶

II. THE UNIFORM RATE REGULATIONS SHOULD PROVIDE MEANINGFUL PROTECTION AGAINST ANTICOMPETITIVE CABLE PRICING PRACTICES.

A second set of issues that are of great concern to OpTel are those presented by the changes made in the 1996 Act to the uniform rate requirement of Section 623(d). The purpose of the uniform rate requirement is to "ensure that ... no group of subscribers within a franchise area is required to pay more for the same service than another group" and to prevent cable operators from "undercutting potential competitors by offering lower rates only in areas where competitors seek to offer a competing service."⁷

⁶ Likewise, an MMDS operator should not be deemed to "offer" broadcast programming unless such programming is retransmitted from the MMDS operator's central transmission facility along with its other microwave delivered signals. This issue is discussed more fully in the comments filed in this proceeding by the Independent Cable & Telecommunications Association ("ICTA"), of which OpTel is a member.

⁷ SBC Media Ventures, Inc., 9 FCC Rcd 7175, 7177 (1994).

Prior to the 1996 Act, cable operators were required to have a rate structure “that [was] uniform throughout the geographic area in which cable service [was] provided over [their] cable system[s].”⁸ The Commission’s implementing regulations further clarified that, “the rates charged by cable operators for basic service, cable programming service, and associated equipment and installation [were required to] be provided pursuant to a rate structure that [was] uniform throughout each franchise area in which cable service [was] provided.”⁹ To the extent that cable operators wished to offer discounts to MDUs, they could do so “only as long as the same rate [was] offered to buildings of the same size with contracts of similar duration.”¹⁰

In the 1996 Act, Congress modified, but did not eliminate, the uniform rate requirement. First, Section 301(b)(2) of the 1996 Act makes it clear that the uniform rate requirement does not apply to cable operators that are subject to effective competition. Further, new Section 623(d) provides that bulk discounts to MDUs are exempt from the requirement, except that bulk discounts that are “predatory” are prohibited. The Act states that, “[u]pon a *prima facie* showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discount price is not predatory.”¹¹

Thus, the Congress sought to strike a delicate balance with the 1996 changes to the prior provisions regarding the uniform rate requirement: Congress sought to provide cable operators with greater pricing flexibility to respond to actual competitive pressures while retaining the protection for competition provided by the uniform rate requirement.

Some of the proposed implementing rules set out in the NPRM threaten to upset this balance. For instance, the Commission has asked whether it should expand the definition of “bulk discounts,” subject to the new pricing flexibility provided by Section 623(d), to include discounts offered to MDU residents who are billed individually rather than on a bulk basis. The Commission also has asked whether it should amend its definition of MDUs to include all multiple residential facilities located wholly on private property, thus further expanding the freedom of franchised cable operators to lower prices only in those areas in which they face competition. Finally, the Commission has indicated that it intends to apply federal antitrust standards to complaints alleging

⁸ 47 U.S.C. § 543(d).

⁹ 47 C.F.R. § 76.984(a).

¹⁰ 47 C.F.R. § 76.984(b).

¹¹ Communications Act, § 623(d).

predation by a cable operator under Section 623(d). As demonstrated below, each and all of these rules, if adopted, would reduce dramatically the Commission's ability to respond to anticompetitive practices of franchised cable operators.

A. The Exemption For "Bulk Discounts" Should Not Apply To Services That Are Billed On An Individual Basis.

The Commission should not include within the definition of "bulk discounts" discounts that are offered to MDU residents on an individually-billed basis. As the Commission has recognized, the exemption from the uniform rate requirement for bulk discounts was not intended to apply where cable operators "offer discounted rates on an individual basis to subscribers simply because they are residents of an MDU."¹² Yet the proposal to allow cable operators to bill "bulk discounts" on an individual basis will create a loophole that will allow cable operators to do just that.

"Bulk discounts" long have been defined, both by the industry and the Commission, as discounts offered to building owners and managers for "bulk" service to an MDU.¹³ Congress is presumed to have incorporated this meaning into the new uniform rate requirement when it amended Section 623(d) in the 1996 Act.¹⁴ Indeed, the use of this term by Congress is more than mere form; it provides an important definitional limitation on the ability of franchised cable operators to target "discounts" discriminatorily to consumers who have competitive choices. If the Commission were to allow cable operators to bill "bulk discounts" on an individual basis, it would eviscerate this Congressionally imposed limitation. Consequently, to remain consistent with the text and purpose of the uniform rate provisions, the Commission should limit the phrase "bulk discounts" to include only those situations in which a discount is deducted from a bulk payment paid by a property owner, manager, or other responsible agent, on behalf of the residents of an MDU.

¹² NPRM ¶ 98.

¹³ These discounts typically represent the savings that cable operators can expect on billing and collection costs that they otherwise would incur if they were required to bill residents on an individual basis. In addition, cable operators benefit from bulk agreements in that they are guaranteed a stream of income from the MDU being served.

¹⁴ E.g., NLRB v. Town and Country Elec., Inc., 116 S. Ct. 450, 455 (1995) (it is presumed, absent some indication to the contrary, that Congress means to incorporate the established meanings of terms in its legislative enactments).

B. The Commission Should Not Modify Its MDU Definition.

For many of the same reasons, the Commission should reject suggestions that it expand the MDU definition to include all private residential communities. To begin with, the suggested change in the MDU definition would be inconsistent with the 1996 Act. Congress modified the “cable system” definition in the 1996 Act by deleting the requirement that private cable operators serve MDUs.¹⁵ As a result, private cable operators now are permitted to compete with franchised cable operators for subscribers in all private residential communities, not just MDUs.

At the same time that it expanded the “private cable exception” to the cable system definition, Congress modified the uniform rate provisions as described above. In so doing, however, Congress continued to use the MDU limitation when describing those bulk discounts that are exempt from the uniform rate requirement. Thus, under well-established canons of statutory construction, it should be inferred from these simultaneous statutory amendments that Congress intended to retain the MDU limitation on exempt bulk discounts while deleting the MDU limitation on the private cable exception.¹⁶ The Commission should not now change the application of the uniform rate provision in ways that Congress rejected.

Moreover, the suggested change in the MDU definition would have an adverse effect on competition in the MVPD market. By expanding the private cable exception, Congress cleared the way for private cable operators to begin to provide competitive service in mobile home parks, military installations, and other private residential communities. The uniform rate restrictions are necessary to provide these private cable operators, and other new entrants into the MVPD market, with protection against anticompetitive pricing by franchised cable operators. In OpTel’s experience, franchised cable operators have time and time again used targeted pricing to stifle OpTel’s efforts to compete. If competition is to flourish in this market, the Commission must not abandon

¹⁵ See 1996 Act § 301(a)(2).

¹⁶ E.g., Russello v. United States, 464 U.S. 16, 23 (1983) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); United States v. Rutherford, 442 U.S. 544, 554 & n.10 (1979) (when Congress does not alter a statutory provision, but amends the statute in other respects, it is to be presumed that Congress intended the unchanged provisions to continue to be interpreted as they were prior to the statutory amendments).

its statutory obligation to protect new entrants from the substantial market power of “monopoly”¹⁷ franchised cable operators.

C. The Commission Should Not Render New Section 623(d) Nugatory By Defining Predation To Include Only Those Acts And Practices Already Proscribed By Federal Antitrust Laws.

In the NPRM, the Commission tentatively concluded that “allegations of predation should be made and reviewed under principles of federal antitrust law as applied and interpreted by the federal courts.”¹⁸ In addition, the Commission has asked for comment on the “standards [that] should be applied to determine whether a complainant has made out a *prima facie* case that there are reasonable grounds to believe that the discounted price is predatory.”¹⁹ OpTel strongly disagrees with the Commission’s tentative conclusion regarding the substantive content of the uniform rate restriction and it urges the Commission to adopt a modest *prima facie* predatory pricing standard so that it will have an opportunity to address the wide range of franchised cable anticompetitive practices that occur in the market.

First, the Commission should not limit abuses that can be reached under its rules to those already forbidden by federal antitrust law. Indeed, the interpretation suggested in the NPRM would render nugatory the statutory section prohibiting predatory cable pricing. As described more fully above, Congress intended for the uniform pricing provisions to protect against anticompetitive conduct by cable operators. Such additional protection was needed, it was assumed, because federal antitrust law did not effectively deter such behavior. Under the Commission’s proposed interpretation, however, complainants will be compelled to seek recourse under precisely those standards that were thought by Congress to be insufficient for these purposes. By adopting the Commission’s proposed standard, the Commission would, in effect, be taking away competitive protection for new entrants conferred by Congress.

Moreover, “predatory pricing,” as it is understood in the antitrust context, has been unlawful at least since the enactment of the Sherman Act in 1890. There is no

¹⁷ The Department of Justice, the courts and the Commission have recognized that franchised cable operators are monopolists in most geographic markets. 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); 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).

¹⁸ NPRM ¶ 100.

¹⁹ Id. (quotation omitted).

reason, therefore, to infer that Congress enacted an entirely duplicative and superfluous statutory provision when it amended Section 623(d) of the Communications Act. If it is to have meaning, the restriction on “predatory” cable rates must address something other — and something more — than that prohibited already under federal antitrust law.

For these reasons, OpTel suggests that, for purposes of enforcing Section 623(d), the Commission use a bright-line test that would allow parties (complainants and cable operators) to determine easily what level of pricing is acceptable and what level is predatory. For instance, the Commission could establish rules pursuant to which bulk discounts to MDUs of greater than 25% off the rates charged by the system in the franchise area to other MDUs of similar size and with contracts of similar duration would be deemed to be predatory.²⁰ Discounts of greater than 25%, it can be assumed, are not offered for procompetitive reasons, but to eliminate incipient competition in a particular geographic region.²¹

In any event, the Commission should require a simple and relatively modest *prima facie* showing for complainants alleging predatory pricing. As the Commission knows, the substantiation of federal antitrust claims requires extensive discovery, expert testimony, and full witness examination and cross-examination. The streamlined procedures outlined in the NPRM for predatory pricing complaints under Section 623 simply do not provide for the level of inquiry needed to make out a full federal antitrust claim. Thus, the Commission should avoid imposing on claimants an overly rigorous *prima facie* standard.

OpTel suggests, instead, that any MDU bulk discount that is “non-uniform,” as that term was understood under the Commission’s former rules,²² should be *prima facie* evidence of predatory pricing. The burden then would be the cable operator’s to rebut the *prima facie* showing of predation by demonstrating that the non-uniform bulk discounts did not result in rates that were below its costs. This process would be

²⁰ Based on OpTel’s calculations, a 25% discount would reduce normal operating margins by approximately 50%.

²¹ As suggested in the Comments of ICTA, a lesser discount (e.g., 10%) off rates charged to similarly situated MDUs should be sufficient to shift the burden to the cable operator to demonstrate that its pricing is not predatory.

²² Under former Section 623(d), “cable operators [could] offer different bulk rates to MDUs of different sizes and [could] vary bulk rates based on the duration of the contracts, provided the operator [could] justify the rate differences based on relative cost savings. Operators [were required], however, [to] offer the same rates to MDUs of the same size with contracts of similar duration.” Warner Cable Communications, Inc., v. Wadsworth, Ohio, 10 FCC Rcd 9966 (1995).

minimally burdensome on the parties and the Commission alike, and would provide adequate protection to incipient competitors seeking to enter the multichannel video programming market.

Respectfully submitted,

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