EX PARTE OR LATE FILED

WILKINSON, BARKER, KNAUER & QUINN

LAW OFFICES
1735 NEW YORK AVENUE, N.W.
WASHINGTON, D. C. 20006-5209
(202) 783-4141

TELECOPIER
(202) 783-5851
(202) 833-2360

GERMAN OFFICE
GOETHESTRASSE 23
60313 FRANKFURT A.M. GERMANY
011-49-69-20876
011-49-69-297-8453 (TELECOPIER)

October 2, 1996

RECEIVED
OCT - 2 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Ms. Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: *In the Matters of Telecommunications Services: Inside Wiring and Customer Premises Equipment, and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring — CS Docket No. 95-184 and MM Docket No. 92-260*

Dear Ms. Jones:

We are writing on behalf of The Wireless Cable Association International, Inc, ("WCA"), the trade association of the wireless cable industry, in support of the proposal advanced by OpTel, Inc. ("OpTel") and MultiTechnology Services, L.P. ("MTS") that the Commission apply its "fresh look" policy to exclusive contracts entered into between franchised cable operators and multiple dwelling unit ("MDU") building owners and operators prior to the emergence of competition in the multichannel video programming distribution marketplace.[1/]

While, as will be discussed below, WCA believes that the OpTel/MTS proposal requires fine-tuning in order to assure fairness to all competitors in the marketplace, application of the Commission's "fresh look" policy will serve the public interest by providing MDU building owners/operators an opportunity to choose from among the numerous alternative video service providers that are just now emerging. As you know, over the past several years the Commission has taken a variety of steps designed to promote wireless cable as a viable alternative to franchised cable. Unfortunately, industry growth has been slower than expected due to delays in the development of digital technology.[2/] Now, and particularly thanks to the July 10, 1996 Commission decision establishing policies to govern the transition of wireless cable from an

---

[1/] Letter from Mr. Henry Goldberg, Counsel to OpTel, Inc. and MultiTechnology Services, LP to Ms. Meredith Jones, Chief, Cable Services Bureau, Federal Communications Commission (filed July 23, 1996).

[2/] *See* Comments of WCA, CS Docket No. 96-133, at 3-6 (filed July 19, 1996).

analog to digital service,[3] wireless cable is poised to launch digital wireless cable systems just as soon as the Commission can process the necessary applications and manufacturers can provide the necessary equipment.

Of course, wireless cable will not be alone in competing with traditional cable systems. Several Direct Broadcast Satellite ("DBS") services are already providing viable competitive services, and additional DBS offerings are planned. The Commission will soon be authorizing Local Multipoint Distribution Service ("LMDS") licensees to enter the multichannel video programming distribution marketplace. Open Video Systems ("OVS") may also become a viable vehicle for competitive entry. Unfortunately, unless the Commission applies its "fresh look" policy, the benefits of competition from these new entrants will be lost to a significant portion of the nation.

As OpTel and MTS have demonstrated, a significant portion of MDU buildings are served by franchised cable operators pursuant to exclusive right of entry agreements entered into before competitive alternatives had emerged. Like OpTel and MTS, wireless cable operators are frequently finding that MDU building owners/operators are refusing access, not because they do not desire to provide wireless cable services to their residents, but because they entered into exclusive contracts with the local cable operator before the emergence of a competitive marketplace. These contracts now represent a substantial barrier to competitive entry that the Commission can eliminate through application of the "fresh look" policy.

While we generally support the OpTel/MTS "fresh look" proposal, we are concerned that their approach, which focuses on the circumstances of the private cable industry, requires fine tuning in two respects. First, OpTel would apply "fresh look" only to those agreements that "effectively have no fixed term, but are open-ended and bind the parties in perpetuity." Given the general philosophy behind "fresh look" — that consumers who entered into long-term agreements when there was no competition should be entitled to enjoy the benefits once competition emerges — WCA believes that the policy should logically be applied more broadly. Wireless cable operators have encountered a variety of exclusive contracts that, while not "perpetual" as defined by OpTel and MTS, nonetheless foreclose competition for the foreseeable future. The record before the Commission in this proceeding establishes that wireless cable operators and others have been refused access to buildings because the owner/operator entered into an agreement giving the franchised cable operator exclusive access for the life of its cable franchise and any renewals or extensions.[4] While these arrangements are not be "perpetual" in

---

[3] *See Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, FCC 96-304 (rel. July 10, 1996).

[4] *See* Comments of Independent Cable & Telecommunications Ass'n, CS Docket no.

(continued...)

the literal sense, their impact is the same given how infrequently franchise renewals are denied. In effect, these agreements foreclose building owners or operators from providing residents access to competitive video services for so long as the franchised cable operator is in business. In other cases, franchised cable operators took advantage of the lack of competitive alternatives to secure contracts assuring them exclusive access to MDU properties for an extended period of years, foreclosing the possibility of competition for some time to come.

Therefore, WCA asks the Commission to apply its "fresh look" policy not only to the type of contracts identified by OpTel and MTS, but to any exclusive access arrangement between a franchised cable operator and an MDU owner/operator that extends either: (i) for the life of the franchise and any renewals or extensions; or (ii) for 3 years or longer. This comports with the Commission's decision in the *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64 (1992) *affd.* 8 FCC Rcd 7341, 7345 (1993), where the Commission determined that the existence of certain contracts with access arrangements of three years or more raised potential anticompetitive concerns by tending to "lock up" the market and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. Adoption of WCA's proposed approach will assure that MDU building owners and operators have a fair opportunity to provide residents with access to newly-emerging competitive offerings, no matter what form their exclusive agreement with the franchised cable operator took.

Second, the OpTel/MTS proposal would establish a separate "fresh look" period for each MDU building, closing the "fresh look" window 180 days after a private cable company requests to provide service to the owner or operator of the MDU building in question. This proposal is problematic for several reasons. First, because of the plethora of competitors entering the marketplace, it makes little sense to tie the closing of the "fresh look" window to the conduct of a private cable operator or any particular competitor. The objective of the "fresh look" policy is to provide consumers a reasonable opportunity to abrogate contracts entered into prior to the emergence of competition once competitive alternatives emerge. Since wireless cable, LMDS, OVS and a variety of other technologies will be able to provide competitive services to the MDU market, the timing of the "fresh look" window should be dependent on the emergence of competition, not on whether a private cable operator desires to provide service to the MDU building in question.

Moreover, a building-by-building approach to the "fresh look" policy would likely prove to be a nightmare for competitive service providers and the Commission's staff alike. Since no competitor other than the one making the initial contact with the MDU would necessarily know about the initial contact, it will be impossible for competitors or the Commission to know when the "fresh look" period closed for any particular building. The Commission will undoubtably

---

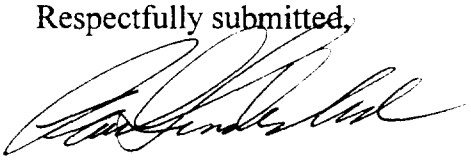
[4/] (...continued)
95-184 (filed Mar. 18, 1996).

find itself embroiled in disputes between franchised cable operators, MDU owners/operators and competitors as to when the "fresh look" period for any particular building occurred.

An alternative approach, one that yields more certainty, is called for. Thus, WCA proposes that the "fresh look" period remain open until 180 days after the Commission determines that the franchised cable operator serving the MDU faces "effective competition."[5/] Because the Commission cannot find "effective competition" to exist until competitive alternatives are generally available in the marketplace, WCA's approach will assure that MDU owners/operators have a reasonable opportunity to avail themselves of truly competitive alternatives. Moreover, MDU building owners/operators, franchised cable operators, and all emerging competitors will know with precision when the "fresh look" period expires. Thus, the Commission should not find itself embroiled in the disputes that would be inevitable under a building-by-building approach.

Therefore, WCA urges the Commission to apply the "fresh look" doctrine in the manner proposed above so that MDU owners/operators will have the opportunity to fully enjoy the benefits of the emerging competitive video distribution marketplace.

Respectfully submitted,



Paul J. Sinderbrand
Jennifer A. Burton

Counsel to The Wireless Cable Association International, Inc.

cc: Office of the Secretary (2 copies)
Hon. Reed E. Hundt
Hon. James H. Quello
Hon. Rachelle B. Chong
Hon. Susan Ness
William E. Kennard
John Logan

[5/] In cases where the Commission finds that a franchised cable operator is subject to "effective competition" prior to adoption of the "fresh look" policy, the 180 day "fresh look" window should remain open until 180 days after the Commission adopts the "fresh look" policy.