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COUNSEL

November 20, 1996

**EX PARTE SUBMISSION**

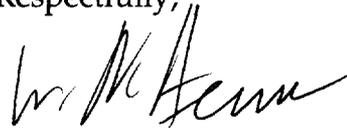
William F. Caton  
Acting Secretary  
1919 M Street NW, Room 222  
Washington, D.C. 20554  
Federal Communications Commission

Re: CS Docket No. 95-184

Dear Mr. Caton:

On November 20, 1996, the attached materials, which include a copy of an *ex parte* letter filed in this proceeding by OpTel, a sample "perpetual" contract, and a copy of one of OpTel's performance-based contracts, were forwarded to James W. Olson, Chief, Competition Division of the Office of the General Counsel.

Respectfully,

  
/s/ W. Kenneth Ferree  
\_\_\_\_\_  
Attorney for OpTel, Inc.

cc: Mr. James W. Olson

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JUL 23 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

July 23, 1996

**EX PARTE**

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

Re: CS Docket No. 95-184: Application of  
"Fresh Look" to Cable Perpetual Contracts

Dear Ms. Jones:

This letter follows-up on the discussion that we had when Mike Katzenstein of OpTel, Inc., ("OpTel") and Don Simons of MultiTechnology Services, L.P. ("MTS") met with you and your staff on June 27, 1996. That discussion dealt with the application of the Commission's "fresh look" policy to perpetual service contracts between franchised cable operators and multiple dwelling unit ("MDU") owners and ownership associations. In addition, OpTel's recent comments in CS Docket No. 96-133 discuss application of the fresh look policy as a means of reducing the dominance of franchised cable operators in the multichannel video programming distribution ("MVPD") market.<sup>1</sup>

**BACKGROUND**

By way of background, with the above-referenced Notice of Proposed Rulemaking ("NPRM"), the Commission has initiated a review of the rights of service providers to obtain access to MDUs. One possibility raised by the Commission in the NPRM is the establishment of a federal right of "mandatory access," which would require property owners to open their property to all service

<sup>1</sup> See Comments of OpTel, Inc. in CS Docket No. 96-133, filed July 19, 1996.

Ms. Meredith Jones  
July 23, 1996  
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providers. OpTel and MTS, and the Independent Cable & Telecommunications Association ("ICTA"), the industry association of the private cable industry, strongly oppose such a requirement, as set out fully in their respective comments in response to the NPRM.

Briefly summarizing those comments, Commission-imposed mandatory access would inhibit, rather than promote, the development of competition in the MVPD market.<sup>2</sup> The economics of the MDU marketplace require the use of exclusive service agreements, which are the norm at MDUs, both for franchised cable operators and private cable companies, such as OpTel and MTS, but are particularly important for private cable. Private cable companies must install and maintain an entire distribution network at each property. Although a franchised cable operator can amortize the cost of serving an MDU over its entire franchise area, private cable companies must recoup their investment through each MDU served. Thus, exclusivity, for a reasonable period of years, is essential to the ability of alternative video programming distributors to compete.

The availability of exclusive rights-of-entry also allows MDU property owners and ownership associations to bargain with service providers for superior video and telecommunications services for MDU tenants and residents. These services enhance the property's attractiveness to tenants and residents, which is a competitive necessity in today's marketplace. Owners and ownership associations are charged with ensuring the highest level of video and telecommunications services at their properties. They are well aware of the marketplace for these services and bargain for one-stop-shopping options that the private cable industry provides today. Owners know that to provide these enhanced services, the service providers often must have a fixed period of exclusivity, subject to maintaining strict performance and price standards, which are set out in the service contracts, to amortize their substantial investments. A mandatory access requirement would deprive property owners and ownership associations of an essential tool in the competition for MDU residents.

It is not exclusive contracts that are the problem in the MVPD market, but perpetual, exclusive contracts. By perpetual contracts, we mean contracts that effectively have no fixed term, but are open-ended and bind the parties in perpetuity.<sup>3</sup> Typically, the exclusive contracts used by the franchised cable operator between 1970 and 1990 run for the term of the cable operator's franchise and any renewals or extensions thereof. Because franchise renewals and extensions

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<sup>2</sup> Mandatory access requirements also would constitute a *per se* "taking" of private property. Lacking clear statutory authority, the Commission may not effect such a taking. See *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994).

<sup>3</sup> It also should be noted that these perpetual agreements, unlike the contracts typical in the private cable industry, contain no contractual performance standards requiring the cable operator to maintain state-of-the art technology and "state-of-the market" pricing.

are all but automatic, the terms of these contracts are, for all practical purposes, perpetual.

In this regard, perpetual, exclusive contracts foreclose a large segment of the MDU market, and access to countless consumers, to competitors of the franchised cable operators. Even in states in which there is a general public policy against perpetual contracts, the franchised cable operators' threats of litigation over breach of contract and over tortious interference with contract exercise a kind of *in terrorem* control over competitive access to the MDU; making it uneconomic for both the MDU owner and the competitor to challenge the legality of the perpetual contract.

In today's informed and competitive marketplace, virtually no property owner or ownership association signs perpetual contracts. Most perpetual contracts were executed in the 1970s and 1980s before competitive alternatives to franchised cable were available. At that time, franchised cable operators were able to approach MDUs with a deal that only a monopolist can offer: Take our service on our terms, exclusively, in perpetuity, or leave your residents entirely without television service. Given their unequal bargaining power, MDU managing agents were compelled to accept service on these terms.

Now, when there are an increasing number of competitive alternatives to the franchised cable operators to serve the telecommunications needs of MDU residents, the established base of perpetual, exclusive contracts represents a substantial barrier to competitive entry. It is this barrier to entry, made up of old contracts, that the Commission should deal with on a one-time basis and not affect the present and future contracting ability and private property rights of MDU owners and service providers in an increasingly competitive marketplace.

Although a mandatory access requirement would eliminate perpetual contracts, it also would sweep in a wide variety of pro-competitive, non-perpetual exclusive contracts. Consequently, OpTel and MTS suggest that, rather than impose a mandatory access regime, the Commission should apply a "fresh look" policy to those perpetual contracts that now are in effect and then allow parties to contract as they see fit in response to consumer demands and needs in the marketplace.

#### FRESH LOOK

The Commission previously has imposed "fresh look" obligations on dominant telecommunications providers to prevent them from using their market power in anticompetitive ways.<sup>4</sup> "Fresh look" allows customers committed to long-term contracts with a dominant provider to take a fresh look at the marketplace

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<sup>4</sup> See Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd 2677, 2678 (1992); Expanded Interconnection with Local Tel. Co. Facilities, 8 FCC Rcd 7341, 7342-43 (1993), vacated on other grounds, Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (1994).

once competition is introduced and to escape or renegotiate those contracts if they so desire. This approach "makes it easier for an incumbent provider's established customers to consider taking service from a new entrant.... [and] obtain ... the benefits of the new, more competitive ... environment."<sup>5</sup>

Application of the "fresh look" doctrine generally involves two steps. First, the entity subject to fresh look requirements is prohibited from engaging in some future conduct that might defeat or substantially delay the introduction of competition.<sup>6</sup> Second, the entity is required to allow its customers who are committed to contracts that extend into the competitive era to opt-out of those contracts during a "fresh look" period, with little or no termination liability.<sup>7</sup>

In this case, there is little doubt that the franchised cable operator has a dominant position in the market. The Commission, the Department of Justice, and the courts repeatedly have found, franchised cable operators are the dominant providers in the MVPD market.<sup>8</sup> The existence of perpetual contracts, moreover, allows franchised cable operators to maintain their dominant position, particularly because most private cable operators do not even attempt to compete for MDUs that are bound up in perpetual contracts. There will not be significant competition in the MDU market until the barrier to entry represented by perpetual contracts is eliminated.

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<sup>5</sup> Expanded Interconnection with Local Tel. Co. Facilities, 9 FCC Rcd 5154, 5207 (1994).

<sup>6</sup> For instance, in Competition in the Interstate Interexchange Marketplace, the Commission found that, because 800 numbers were not portable (*i.e.*, customers could not change from one 800 service provider to another without also changing 800 numbers), AT&T could improperly leverage its market power in 800 services in its contract negotiations. Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd at 5880, 5905. Thus, until 800 number portability became available, the Commission prohibited AT&T from bundling 800 service with any other service.

<sup>7</sup> For example, in Competition in the Interstate Interexchange Marketplace, the Commission required AT&T to allow customers that had contracted for 800 service prior to the implementation of 800 number portability to terminate those contracts during a "fresh look" period without termination liability. 7 FCC Rcd at 2677-78. Similarly, in Expanded Interconnection with Local Tel. Co. Facilities, the Commission found that local exchange carriers' "long-term access arrangements [raised] potential anticompetitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment." 7 FCC Rcd at 7463. The Commission, therefore, decided that customers with such long-term access arrangements could terminate those contracts during a "fresh look" period with limited liability and "avail themselves of a competitive alternative."

<sup>8</sup> 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).

Despite the dominance of the franchised cable operator, OpTel and MTS are not seeking to implement the first step of the "fresh look" doctrine and prohibit perpetual right-of-entry agreements between franchised cable operators and MDU owners. Rather, OpTel and MTS are prepared to rely on the marketplace and not regulation to govern the relationship between MDU owners and ownership associations on a going-forward basis. Imposition of the second step of the "fresh look" doctrine, however, is essential to achieve this deregulatory outcome. Therefore, the Commission should require franchised cable operators with perpetual contracts to allow their customers to opt-out of those contracts with no adverse contractual consequences.

As in previous "fresh look" instances in which the fresh look doctrine has been applied, the customers of dominant service providers should be given a fixed period of time within which to opt-out of their contracts. In Competition in the Interstate Interexchange Marketplace, the Commission determined that a ninety-day "fresh look" period was sufficient for long-distance customers to evaluate their options and negotiate new contracts when 800 numbers became portable.<sup>9</sup> When the Commission later confronted expanded interconnection to local exchange facilities, it provided for a 180-day "fresh look" window, recognizing that it would take longer than ninety days for the market to respond to expanded interconnection opportunities.<sup>10</sup>

The characteristics of the MVPD marketplace require that the "fresh look" window in this case should be at least 180 days. As the Commission's decision in the Expanded Interconnection proceeding makes clear, the duration of the "fresh look" period should, in part, be predicated on the time it will take competitors to add capacity and meet increased demand in the particular market. In the MVPD market, it may take a new entrant several months to obtain necessary approvals and construct the facilities needed to serve any given MDU. Thus, a three month "fresh look" window would be inadequate.

Further, the fact that franchised cable operators hold a series of dispersed monopolies rather than a single national monopoly requires that the "fresh look" window be tailored to the local MVPD markets. For instance, in previous applications of the "fresh look" doctrine, the Commission has initiated the "fresh look" period when the dominant national service provider was first subject to competition. In this case, however, MDU owners and ownership associations must be freed from their perpetual contracts in order to create competition in each locality.

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<sup>9</sup> See 6 FCC Rcd at 5906.

<sup>10</sup> See 8 FCC Rcd at 7353 & n.48.

Thus, prior to the time when the franchised cable operator is subject to "effective competition" under Section 623 of the Communications Act,<sup>11</sup> the "fresh look" window should be "opened" at any given MDU upon the request of a private cable company able to serve the MDU in question. Moreover, once a franchised cable operator is subject to "effective competition" under the Act, even if there has been no specific request from a private cable company, the fresh look window should be opened six months from the date that there has been an "effective competition" determination. During this period, the property owner or ownership association could renegotiate or terminate its contract with the franchised cable operator free from contractual penalties or breach of contract litigation.

Application of the "fresh look" doctrine will allow the Commission to cease to regulate in this area entirely once there is actual or "effective" competition. At that point, MDU owners and ownership associations which enter into disadvantageous service contracts for their buildings do so, presumably, with full knowledge that competitive alternatives exist. The residential real estate market will self-regulate against MDU owners and ownership associations prone to such an error.

#### LEGAL AUTHORITY

The Commission has ample authority to apply its "fresh look" doctrine in the MVPD context. Under Title VI, the Commission is required to ensure that the rates charged to subscribers by cable systems not subject to effective competition are reasonable.<sup>12</sup> Although previous "fresh look" cases involved the regulation of common carriers under Title II of the Communications Act, the Commission's responsibility to regulate cable rates under Title VI is comparable.<sup>13</sup>

In its "fresh look" proceedings under Title II, the Commission has held that the use of long-term contracts to leverage market power from a non-competitive market into a competitive one, or from a market that is not yet competitive into the future, is an unjust and unreasonable practice.<sup>14</sup> It is no less unreasonable in the Title VI context. Application of the "fresh look" doctrine is necessary to eliminate the market barrier erected by franchised cable operators between their captive customers and competing MVPD service providers.

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<sup>11</sup> 47 C.F.R. § 543(l).

<sup>12</sup> 47 U.S.C. § 543(b).

<sup>13</sup> Cf. Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, 8 FCC Rcd 5631, 5723 (1993) (analogizing rate prescription under Title VI to rate prescription under Title II).

<sup>14</sup> See Competition in the Interstate Interexchange Marketplace, 7 FCC Rcd at 2682; Expanded Interconnection with Local Tel. Co. Facilities, 8 FCC Rcd at 7348.

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Page 7

In addition, application of the "fresh look" policy to the perpetual service contracts of franchised cable operators would help the Commission to fulfill its obligations under Section 257 of the Communications Act, supplemented by the Telecommunications Act of 1996, which requires that the Commission identify and eliminate market entry barriers for entrepreneurs and small businesses.<sup>15</sup> Only by opening up the perpetual service contracts of the franchised cable operators will new entrants into the MVPD market have an opportunity to compete.

For the reasons set forth above, OpTel and MTS urge the Commission to restrict future perpetual contracts for MDU video programming service by any cable operator not subject to effective competition and to apply its "fresh look" policy to all such existing perpetual contracts.

Respectfully,

/s/ Henry Goldberg

cc: William F. Caton  
William E. Kennard, Esq.  
Robert M. Pepper

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<sup>15</sup> 47 U.S.C. § 257(a).



Revised  
12-9-

Copley/Colony  
Cablevision of Costa Mesa, Inc.  
200 Paulinho Avenue  
Costa Mesa, CA 92626  
714-549-4242

CABLE TV WIRING AGREEMENT

THIS AGREEMENT is entered into between COPLEY/COLONY CABLEVISION and the parties identified below.

Property Name VILLA MARTINIQUE

Address 2855 Pinecreek Drive, Costa Mesa, CA 92626 # of Units 714

COPLEY/COLONY CABLEVISION is hereby granted an exclusive license to construct, operate, and maintain the System, and to provide both Basic and Premium Services. Owner shall not, during the term of this Agreement, allow, construct for, or provide any other cable television service or pay television service at the Complex, or any portion thereof, without the prior written consent of COPLEY/COLONY.

The term of this Agreement shall commence on the date hereof and continue in effect consistent with the term of the Franchise and renewal of the Franchise as granted by the City of Costa Mesa or the County of Orange.

COPLEY/COLONY at all times shall retain title to and control of the System installed, maintained or used pursuant to the terms of this Agreement at no cost to the property or the owner. It is specifically agreed that the System so described shall not be considered as fixtures to the complex. At the expiration or termination of this Agreement, COPLEY/COLONY shall retain title to and control of the distribution equipment comprising the System, and at its option may either remove same from the Complex, or abandon such equipment in place.

COPLEY/COLONY CABLEVISION accepts full responsibility for any and all damage that may result from the construction and installation of its equipment, and will provide proof of full liability and worker's compensation coverage upon request prior to beginning work.

Subscription of the cable service by individual residents shall be on a voluntary basis, and all billing will be the responsibility of COPLEY/COLONY CABLEVISION.

The owner/manager of the property described below agrees that access will be provided at all reasonable hours to authorized personnel of COPLEY/COLONY CABLEVISION for the express purpose of installation, service, maintenance, and marketing of the cable TV service. Reasonable hours are defined as: For Marketing, from 9 A.M. to 9 P.M.; for Installation, Maintenance and Service, 9 A.M. to 5 P.M., unless specifically requested by a resident.

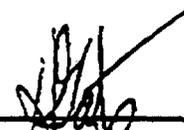
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Pa. 2 (Two)  
Cable TV Wiring Agreement

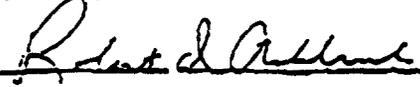
Owner understands that COPLEY/COLONY has made a significant capital investment in installing the System in the Complex, and agrees that, during the term hereof, Owner will cause any purchaser of the Complex to assume, as assignee of this agreement, all of the obligations of the Owner hereunder; COPLEY/COLONY will likewise cause any purchaser of the cable television system to assume all the obligations of COPLEY/COLONY hereunder. This contract may not be otherwise ~~by~~ assigned except by written consent of the other party hereto, which consent shall not be unreasonably withheld. The promises, covenants, benefits, and burdens hereunder shall run with the property constituting the Complex which is the subject of this agreement.

The party signing below is authorized to execute this agreement on behalf of the owner(s) and/or management.

\* This agreement is contingent upon final installation plan approval by authorizing party prior to construction.

 2/18/87  
Authorizing Signature - Property Date

Henry L. Gacs, President  
Print Name & Title

 2-12-87  
Authorizing Signature - Copley/Colony Date

Robert D. Ashbrook, General Manager  
Print Name & Title

Property Mgr: Mr. Henry L. Gacs On Site Contact: \_\_\_\_\_  
Address: 1425 Village Way Address: \_\_\_\_\_  
City: Costa Mesa, CA Zip: 92626 City: \_\_\_\_\_ Zip: \_\_\_\_\_  
Phone No.: \_\_\_\_\_ Phone No.: \_\_\_\_\_  
Best time to contact: \_\_\_\_\_ Best time to contact: \_\_\_\_\_

2/16/96

# COMMERCIAL RIGHT OF ENTRY AGREEMENT

THIS AGREEMENT is made and entered into as of this 22nd day of February, 1996, by and between Olea Development Corporation ("OWNER"), and Cable TV of Coral Springs, its successors and assigns ("CATV").

1. OWNER hereby grants CATV the exclusive right to construct, own, operate and maintain a cable television system ("SYSTEM") within and for the residents of the apartment or condominium or commercial building or buildings consisting of 240 units located at the northeast corner of Atlantic Blvd. and Lakeview Drive, in the project known as Club Mira Lago Phase II ("DEVELOPMENT"), in the City of Coral Springs, State of Florida.

2. OWNER shall grant to CATV the exclusive right of access for construction, installation, maintenance, sales and disconnections in and for the SYSTEM for the term of this Agreement. The term of this Agreement shall coincide with the term of CATV's franchise with the City of Coral Springs.

3. CATV shall construct, own and maintain the SYSTEM in the DEVELOPMENT at its own expense. The ownership of all parts of the SYSTEM shall be and remain the property of CATV throughout the term of this Agreement.

4. The residents of the DEVELOPMENT opting to subscribe to the cable television service will be billed individually by CATV at the same rate applicable for other residential subscribers in the City of Coral Springs.

5. OWNER'S electrical contractor will prewire a cable tv outlet in each bedroom and one outlet in the living room of each unit, along with installing an individual service drop and 3/4" PVC conduit from each unit to a central point outside each building. In exchange for this service, and the above stated grants and rights CATV will:

a. Reimburse OWNER - \$120 per unit.  
Payment schedule - \$14,400 at execution of this agreement,  
\$14,400 within 2 wks of last certificate  
of occupancy.

b. CATV will supply sufficient RG-6 cable, face plates, and 3/4" PVC conduit to OWNER'S electrical contractor to complete the CATV prewire portion of this project.

c. CATV will construct its distribution system to a position outside each building that is predetermined by the OWNER.

6. Also, in exchange for this Agreement, CATV makes the following offerings to OWNER:

a. A free advertising panel on Channel #11 (our local community channel) for a year. Your panel would come up about once an hour, twenty four hours a day for a year.

b. If OWNER furnishes CATV a 30 second video ad for this project, CATV agrees to run the ad twice a day for 90 days. It will air at random on the following channels: CNN, VH-1, USA, A & E, Discovery, Sunshina, MTV, Lifetime, ESPN, TNT, Nashville Network and Headline News.

c. A basic cable outlet will be offered at no charge to the resident manager's unit, and one other employees unit as designated by the resident manager.

d. A basic cable outlet will be offered at no charge to the recreation room.

e. A free install will be offered to all  $\emptyset$ 1 customers, ( $\emptyset$ 1 = 1<sup>st</sup> customer in each unit).



## EXHIBIT \_\_\_\_\_

### ADDITIONAL SERVICE AGREEMENT TERMS

The provisions contained in this exhibit shall control to the extent of any conflict with any provision of the body of this agreement.

1. **COMPETITIVE RATES.** OpTel agrees that its rates for the Services, in the aggregate, shall be competitive with the average rates for comparable services generally charged by other full service providers of cable television services to "Comparable Projects" (excluding lower rates offered for special promotions of limited duration and rates of any provider operating without a meaningful net margin in order to gain subscribers). As used herein, "Comparable Projects" shall mean those multi-unit residential projects in the market area of the Property comparable in quality and size to the Property.
2. **COMPETITIVE PROGRAMMING.** OpTel agrees that the quality and quantity of its programming line-up for the Services, in the aggregate, shall be competitive with the programming line-up offered by other full service providers of cable television services to "Comparable Projects" (excluding channels offered for special promotions of limited duration). As used herein, "Comparable Projects" shall mean those multi-unit residential projects in the market area of the Property comparable in quality and size to the Property. The foregoing shall not require that OpTel provide any particular channel provided that it otherwise satisfies the requirements of this section.
3. **COMPETITIVE TECHNOLOGY.** OpTel agrees to maintain and upgrade the System as necessary to keep the System in good and operating condition and substantially current with widely prevalent technologies being utilized by other full service providers of cable television services to "Comparable Projects"; provided, however, the foregoing shall not hold OpTel to a standard based on providers who are providing technologies that are unique, proprietary or experimental or which OpTel reasonably believes could not be provided to the Property on a commercially reasonable basis. As used herein, "Comparable Projects" shall mean those multi-unit residential projects in the market area of the Property comparable in quality and size to the Property.
4. **REPAIR RESPONSE AND COMPLETION.** OpTel shall respond within a reasonable time to any request for a repair of the System (a "Service Request"). Any Service Request for an outage which similarly affects less than eight Units served by the System shall be considered a "Minor Problem". OpTel shall respond to a Service Request for a Minor Problem not later than twenty-four hours (excluding weekends and holidays, - i.e., from 5:00 p.m. Friday to 8:00 a.m. Monday) after its receipt of a Service Request from Owner or a Subscriber, and shall thereafter pursue the completion of such repair with all reasonable diligence. Any Service Request for an outage which similarly affects eight or more Units served by the System shall be considered a "Major Problem". OpTel shall respond to a Service Request for a Major Problem not later than eight hours (excluding weekends and holidays) after its receipt of a Service Request from Owner or a Subscriber, and shall complete such repair not later than forty-eight hours (excluding weekends and holidays), unless the Major Problem is such that it cannot reasonably be repaired within such time, in which event OpTel shall proceed with diligence to complete such repair as soon as reasonably possible. Any Minor or Major Problem not fully cured within the above applicable designated time frame will be considered a "Material Failure" under this agreement, unless such delay is due to any event of force majeure (as described in the body of this agreement); provided, however, that even if such delay is due to an event of force majeure, OpTel shall continue with diligence to cure the problem. Notwithstanding the preceding sentence, with respect to any failures by OpTel to cure a Minor or Major Problem within the applicable time frame that occur within any ten day period, all such failures shall be considered as only one "Material Failure" for the purposes of this section. In order to be considered a "Material Failure", Owner shall be required to provide written notice to OpTel of each problem and failure to cure within ten days of the occurrence of such alleged failure. If OpTel commits a "Material Failure" more than (i) six times in a three month period for a Minor Problem or (ii) three times in a three month period for a Major Problem, no further cure periods provided for herein shall apply and Owner shall have the option to terminate this agreement upon sixty days written notice to OpTel; provided that such notice must be given not more than ten days following the notice of the Material Failure that gives Owner the right to so terminate. The repair response and completion requirements of this section are subject to delays caused by events of force majeure (as described in the body of this agreement).
5. **OWNER'S RIGHT TO AUDIT.** Upon providing OpTel with fifteen days prior written notice of Owner's desire to do so, Owner, at its expense, may audit the records of OpTel relating to revenues generated from Subscribers at the Property during the immediately preceding two year period. Such audit shall be conducted during OpTel's business hours at the office where such records are normally kept. If Owner's audit discloses an underpayment of Owner's Revenue Share, OpTel shall, subject to its right to contest Owner's audit, forward such underpayment to Owner. If such underpayment exceeds five percent of the actual amount of Owner's Revenue Share for the last year, then, subject to OpTel's right to contest Owner's audit, OpTel shall reimburse Owner for all reasonable third-party costs of Owner's audit. If OpTel elects to contest Owner's audit, OpTel and Owner shall mutually agree on an independent auditor to reaudit the Total Gross Receipts from Subscribers at the Property for the applicable period. The determination of such independent auditor shall be binding. If such independent auditor determines that OpTel underpaid Owner's revenue share by more than five percent of Owner's Revenue Share for the last year, then OpTel shall pay the cost of the second audit; otherwise, Owner shall pay the cost of the second audit.
6. **ADDITIONAL INSURANCE REQUIREMENTS.** [OpTel shall cause Owner to be named as an additional insured in the commercial general liability insurance policy required to be maintained by OpTel pursuant to subsection 10.a of the body of this agreement. Further, upon request, OpTel shall provide Owner with a certificate evidencing that such insurance coverage is in full force and effect.] [Notwithstanding Section 10.a(i) of the body of this agreement, OpTel shall maintain commercial general liability insurance on an occurrence basis with limits of liability of not less than \$2,000,000.] [All insurance to be maintained by OpTel pursuant to Section 10.a of the body of this agreement shall be issued by insurance companies having a rating of A-VIII or better according to the current issue of Best's Insurance Reports.]
7. **CONFIDENTIALITY.** Neither party, nor any of its partners, officers, employees, agents or consultants, shall disclose any of the financial or service terms of this agreement to any person or entity without the prior written consent of the other party; provided,

however, that such terms may be disclosed to either party's attorneys or accountants (so long as such parties agree to keep the terms of this agreement confidential), to the extent required by law, to the extent necessary to enforce the terms of this agreement and by Owner to its lender as necessary to obtain the Lender's Consent. Provided that Owner instructs all such parties that the information contained in this agreement is confidential, Owner may disclose any of the terms and provisions of this agreement to any prospective purchaser of the Property or prospective lender of Owner or subsequent owner of the Property without being in violation of the foregoing provision. Further, neither party shall be in violation of the foregoing provision as it pertains to said party's employees or agents to the extent that such party undertakes reasonable good faith efforts to preclude its employees or agents from making such unauthorized disclosures. Provided that OpTel instructs all such parties that the information contained in this agreement is confidential, OpTel may disclose any of the terms and provisions of this agreement to any prospective purchaser of OpTel or any of its assets or any prospective lender of OpTel or to any entity now or hereafter affiliated with OpTel without being in violation of the foregoing provision.

8. **RENEWAL; COMMENCEMENT DATE.** OpTel or an entity affiliated with OpTel is currently providing Services to the Property pursuant to that \_\_\_\_\_ Agreement dated \_\_\_\_\_, 19\_\_ originally between \_\_\_\_\_ as the owner of the Property, and \_\_\_\_\_ as operator (the "Existing Agreement"). This agreement is in renewal, but not extinguishment, of the Existing Agreement; provided, however, all terms and conditions governing the subject matter hereof shall be governed by the terms and conditions contained in this agreement. This agreement constitutes the entire agreement between the parties with respect to the Services. Notwithstanding Section 2 of the body of this agreement, the "Activation Date" and the date that the Term of this agreement commences shall be the date this agreement is fully executed by Owner and OpTel.
9. **SYSTEM COMPATIBILITY.** All parts of the System installed by OpTel will be compatible with any local services that are required to operate with the System.
10. **NEW CONSTRUCTION.** Owner, with respect to the construction of the improvements on the Property, and OpTel, with respect to the installation of the System, each agree reasonably to cooperate with the other in an effort to speed construction and reduce costs. In particular, Owner agrees to coordinate with OpTel so that OpTel can make use of the common utility trenching in connection with OpTel's installation of the System. OpTel shall install the number of cable television outlets in each Unit as required by Owner's construction plans; however, if Owner desires more than 3 outlets in any Unit, Owner shall be responsible for the cost of the installation of such additional outlets.
11. **PAYMENT OF OWNER'S REVENUE SHARE.** Notwithstanding Section 3 of the body of this agreement, Owner's Revenue Share shall be paid in arrears to Owner's address for notices within forty-five days after the end of each quarter.
12. **OPTEL'S WAIVER OF INSPECTION.** Section 4.a.(iii) of the body of this agreement, "OpTel's Inspection", is hereby deleted from the agreement. OpTel has reviewed the physical condition of the Property and has determined that it is technically feasible for OpTel to deliver the Services to the Property.
13. **ACTIVATION DATE.** Notwithstanding Section 2 of the body of this agreement, the "Activation Date" shall be the earlier to occur of (a) the actual date that the System begins transmission of the Services (which date shall be evidenced by the date reflected on the first billing of Subscribers), and (b) \_\_\_\_\_ days after the Effective Date. [OpTel shall send Owner written notice of the Activation Date.]
14. **OPTEL'S RIGHT TO ASSIGN.** Notwithstanding Section 11 of the body of this agreement, Owner shall have the right to withhold its consent to any proposed assignment of this agreement by OpTel (other than an assignment to any agent, subsidiary or affiliated corporation or entity, or any corporation resulting from the consolidation or merger of OpTel into or with any other entity, or to any person, firm, corporation or other entity acquiring a majority of the issued and outstanding capital stock of OpTel or a substantial part of OpTel's assets) if Owner reasonably and in good faith determines that the proposed assignee cannot perform the obligations of OpTel under this agreement. In no event shall Owner be entitled to receive any consideration or remuneration in connection with any assignment of this agreement by OpTel, regardless of whether Owner's consent may be required in connection with any such assignment.
15. **ELECTRICAL SUBMETER.** Notwithstanding Section 4.a.(ii) of the body of this agreement, Owner shall have the right to submeter the electricity used by the System, and, if the cost of the electricity used by the System exceeds \$20 per month, OpTel shall pay the actual electrical charges for the electricity used by the System and shall reimburse Owner for the cost and installation of the electrical submeter.
16. **RETRANSMISSION.** If OpTel installs any retransmission antenna on the Property to retransmit signals to another property (but excluding any property owned by Owner or an affiliate of Owner or any entity controlled by Owner or any affiliate of Owner), then OpTel shall pay to Owner \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) per month for each retransmission antenna so installed.