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May 8, 1997

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Federal Communications Commission  
Office of Secretary

EX PARTE

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

Re: CS Docket Nos. 95-184

Dear Mr. Caton:

OpTel, Inc. ("OpTel"), by its attorneys, hereby submits this *ex parte* letter regarding the above-referenced proceeding, copies of which have been sent to the persons listed below.

It has come to our attention that the Commission staff has further questions regarding a compromise proposed by the Independent Cable & Telecommunications Association ("ICTA") regarding the location of the cable demarcation point in MDUs. The proposed compromise is described fully in an *ex parte* presentation filed by ICTA on April 16, 1997. In short, rather than move the demarcation point, ICTA has suggested that incumbent providers be required, upon service termination, to sell, remove, or abandon the wiring — where they have an ownership interest in the wire — inside of MDUs.

As we understand it, the staff's question regarding the ICTA proposal relates to its applicability in states that have cable operator mandatory access laws ("Access States"), where there may be some concern that the proposal would work a "taking" or otherwise preempt state law. OpTel believes this concern to be unfounded.

In non-Access States, where cable operators have no state-created right to enter private MDUs, the ICTA compromise provides that, upon notice by an MDU owner, the incumbent cable operator must elect either to sell all the wire

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inside the MDU to the new operator at a negotiated price or to remove or abandon the wire. In Access States, where cable operators have a right to access MDUs and to provide service to any resident who requests it, the only wire that would be subject to the sell, remove, or abandon options would be the wire dedicated to the individual subscriber's unit (the "Subscriber Wire") and the procedure would be initiated, not by notice of the MDU owner, but by notice from the subscriber.

This process is entirely consistent with state and federal legal principles. Once a subscriber has elected to switch service providers, the Subscriber Wire of the incumbent provider, even if left in place, is dead wire as far as the incumbent is concerned unless and until the subscriber switches back. There can be no "taking" when the cable operator has the option of removing the wire. The incumbent has the option of selling the wire to the new provider at a negotiated price or removing the wire. If the incumbent decides to do neither, the wire is abandoned voluntarily.

There also is no preemption issue raised by this procedure. The cable operator's right to enter the MDU and to provide service to any tenant desiring it is fully protected. Cable operators would not be required to divest themselves of riser cable or any other wiring necessary to serve residents of the MDU who would subscribe to the incumbent's service. The cable operator simply would not have the right to run dead wire to units in which the resident does not want the operator's service. If the time comes when the resident (or a subsequent resident) wishes to switch back to the original service provider, the process would be repeated.

For these reasons, the ICTA compromise would facilitate competition both in Access States and non-Access States without preempting state laws or taking private property. No better solution has been suggested.

Respectfully,



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Attorney for OpTel, Inc.

cc: Gretchen Rubin  
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