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

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In the Matter of	)	
	)	
Ameritech New Media, Inc.	)	RM No. 9097
Petition for Rulemaking	)	

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REPLY OF OPTEL, INC.

OpTel, Inc. ("OpTel"), submits this reply to the comments filed in response to the above-referenced petition for rulemaking (the "Petition") of Ameritech New Media, Inc. ("Ameritech").

DISCUSSION

The issues raised in the Petition are not new to OpTel or to the Commission. Although the Commission's program access rules encompass a wide variety of anticompetitive conduct, there are still programming providers seeking to skirt those rules. Such efforts have prompted OpTel to file two separate program access complaints. Although, in both cases, OpTel withdrew its complaints because it settled with its opponents to obtain access to the programming, OpTel found the Commission's complaint process to be substantially flawed. Since OpTel has raised these issues with the Commission in other contexts, OpTel did not repeat them in comments supporting the Petition.[1] After reviewing the comments filed in this proceeding, however, OpTel feels compelled to respond.

In particular, OpTel is concerned that the record of program access claims filed at the Commission has been mischaracterized. For example, one party has claimed that there has been "only one Section 628 complaint case in which the complainant prevailed."[2] Since many meritorious cases were settled prior to final Commission action, however, this claim grossly misrepresents the facts.

Similarly, other parties have pointed to the relative "paucity" of program access cases actually brought to the Commission as evidence that there are few program access violations in the market. Quite the contrary, the lack of filed cases speaks more to the ineffectiveness of the Commission's remedial process than it does to conditions in the

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[1] See, e.g., Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 96-133, Comments of OpTel (1996).
[2] Opposition of Home Box Office at 3.

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market. As detailed more fully below, the delays and expense of prosecuting a programming access claim, with no hope of obtaining damages at the end of the process, discourages new entrants in the multichannel video programming distribution ("MVPD") markets from bringing Section 628 cases to the FCC.

If competition ever is to develop in the MVPD market on a widespread basis, the Commission must augment its program access rules as suggested by Ameritech in the Petition.

I. Program Access Disputes Should Be Processed On An Expedited Basis.

As OpTel found in each of its program access complaints, the process is so time consuming that, effectively, it denies practical relief to the complainant. Both of OpTel's complaints remained pending for many months without Commission action while its subscribers clamored for the programming in question.[3] Based on the information in Ameritech's Petition, OpTel's experience was not unique.

A few commenters mistakenly associate program access disputes that were settled rather than decided by the Commission, with victories for the defendants.[4] In fact, because they were settled, there is no way to know how these cases would have been resolved by the Commission. However, there also is no way of knowing how long it would have taken the Commission finally to decide these cases. Moreover, in OpTel's cases at least, the result of the settlements was that OpTel was afforded the right to purchase and distribute the programming at issue, *i.e.*, OpTel obtained exactly the same relief by way of settlement that it would have obtained had it been victorious at the Commission.

That is not, however, to say that private resolution of these cases can be expected as a matter of course or, as some commenters do, to charge that the Commission should not "inject" itself into these controversies.[5] Because new entrants have very little bargaining power in these disputes aside from their rights granted by statute, there is little or no likelihood that these disputes would be resolved privately without at least the

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[3] See OpTel v. Century Southwest Cable, CSR-4736-P (filed Apr. 9, 1996) (pending over eight months when settled); OpTel v. Continental Cablevision, Inc., CSR-4858-P (filed Oct. 31, 1996) (pending over four months when settled). Several opponents to Ameritech's Petition have called for more "facts" regarding the harm that befalls subscribers as a result of programming access violations. E.g., Opposition of Time Warner Cable at 2-3; Opposition of NCTA at 3. OpTel refers the Commission to the hundreds of *ex parte* letters from subscribers filed in the two OpTel complaint proceedings complaining of their inability to receive the programming in question.

[4] See, e.g., Opposition of Home Box Office at 3.

[5] E.g., Opposition of Rainbow Media Holdings, Inc. at 1.

threat of Commission action. The threat can only go so far, however, as the inordinately long delays in resolving these cases demonstrates.

As the Commission has found, the MVPD market is highly concentrated.[6] The dominant, franchised cable operators have every incentive to place obstacles in the paths of new entrants, causing them to spend a substantial amount of time and money securing program access rights already conferred upon them by statute. Delays in the Commission's complaint process unwittingly serve the interests of the dominant MVPD providers by increasing barriers to new entrants and harming the new entrants' subscribers by depriving them of desired programming.

II. A Damage Remedy Is Required If The Commission's Program Access Rules Are To Have A Deterrent Effect.

OpTel agrees with Ameritech that the Commission's program access rules should provide for damage awards against parties found in violation of those rules. As OpTel explained in its reply comments on last year's video programming notice of inquiry, "[w]ithout the possibility of an award of damages to an aggrieved MVPD following successful prosecution of a complaint at the Commission, there is little practical incentive for an MVPD even to pursue a remedy at the Commission. Nor is there any real incentive for violators to comply with the rules."[7]

Opponents argue that the program access rules already are working well, as evidenced by the "paucity of complaints," and that a damage remedy is unnecessary.[8] The opponents have it exactly backwards. The fact that there is a "paucity of cases" is testament to the ineffectiveness of the Commission's remedial process, not an endorsement of programming practices in the market. Given the time and expense involved, and the lack of any hope of ever recovering damages for a violation, in many cases, it simply is not worth it for a new entrant to file a programming complaint at the Commission, even if legitimately wronged by a programmer. Thus, the Commission

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[6] The Commission has found that the HHI index for the overall MVPD market is 7905 (1800 being highly concentrated). Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 96-133 (1996) ¶ 121.

[7] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 96-133, Reply Comments of OpTel (filed Aug. 16, 1996) (quoting National Rural Telecommunications Cooperative).

[8] Opposition of the National Cable Television Association at 11. Similarly, Home Box Office claims that "more program access cases have settled than have gone to decision [and] defendants have won more cases that complainants [demonstrating] the complaint process does curtail anticompetitive abuses." Opposition of Home Box Office at 11.

should amend its rules to allow parties aggrieved by violations of the program access rules to obtain legal damages.

CONCLUSION

Congress conferred specific program access rights on new entrants into the MVPD market in an effort to promote the development of competition in this market. The Commission's program access rules embody the substantive rights provided by Congress, but, because of an inordinately long process and the lack of a damage remedy, they are, in practice, rights without a remedy. For the foregoing reasons, OpTel supports Ameritech's petition for rulemaking.

Respectfully submitted,

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July 16, 1997

CERTIFICATE OF SERVICE

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