

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

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
 )  
Annual Assessment of the Status of ) CS Docket No. 97-141  
Competition in the Market for the )  
Delivery of Video Programming )

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**COMMENTS OF OPTEL, INC.**

OpTel, Inc. ("OpTel"), submits these comments in response to the Notice of Inquiry ("NOI") in the above-referenced proceeding.

In the NOI, the Commission has asked for comment on a wide range of subjects relating to the multichannel video programming distribution ("MVPD") market, including the extent to which there is competition in the provision of MVPD services to multiple dwelling units ("MDUs") and the need for changes to the Commission's rules in order to best implement the provisions of the Telecommunications Act of 1996 ("the 1996 Act"). Although these issues are implicated in several other on-going Commission proceedings, OpTel herein responds to the Commission's inquiry.

**I. The MDU Sub-Market Is The Most Highly Competitive Segment Of The MVPD Market.**

In the NOI, the Commission has asked the industry to comment on various issues relating to the state of competition in the MDU sub-market. OpTel's position on many of these issues is a matter of public record and well known to the Commission. Nonetheless, a recap of those positions will help to put them into context and to inform the Commission's decision-making on the larger issues shaping the MVPD market.

In response to market demand, alternative video programming services have begun to emerge in the MVPD markets. Most importantly, private cable operators have developed enhanced SMATV-like systems, some using microwave radios to link widely separated MDUs, which can provide service superior to that of franchised cable operators at extremely competitive rates. Because of the nature of these systems, however, and the need to recover costs within a five to ten year period, private cable systems provide service primarily to MDUs and private communities where high concentrations of potential subscribers reside. In essence, each private cable system is a self-contained

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cable system for the individual property being served. By providing service on an MDU-by-MDU basis, private cable operators can provide programming tailored to the needs of their subscribers and the MDUs in which they live. Further, because these private cable systems generally have on-site managers, they can offer to their subscribers enhanced customer service capabilities.

As a result of the superior service and programming offered by private cable systems, private cable operators have experienced a rapid increase in demand for their services.<sup>1</sup> Once one MDU begins to offer the high-end MVPD services that are provided by private cable operators such as OpTel, other local MDU managers and homeowner associations seek out similar services. Thus, while most local video distribution markets remain highly concentrated,<sup>2</sup> the MDU sub-market is one of the most highly competitive segments of the larger MVPD market.

Indeed, it is the one segment of the MVPD market in which competition is helping to drive down prices and spur product and service development. Despite the promise held-out by the Telecommunications Act of 1996 (the "1996 Act"), there is no more competition today in the general MVPD market than there was eighteen months ago. The telephone companies largely have abandoned their plans to enter the MVPD markets and the franchised cable companies have backed off of their promises to provide "full service" cable/telephone networks.<sup>3</sup> The only segment of the MVPD market in which competition is beginning to develop is the MDU sub-market. Unfortunately, large franchised cable interests are making every effort to subvert competition in this niche of the market as well.

## **II. The Commission Should Work To Eliminate The Remaining Barriers To Full Competition In The MDU Sub-Market.**

Notwithstanding the tremendous strides that private cable operators have made, significant barriers to full and fair competition in the MDU sub-market remain. Today

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<sup>1</sup> Last year subscribership on private cable systems increased 10.5% nationwide. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 96-133 (rel. Jan. 2, 1997) ¶ 4.

<sup>2</sup> The Commission has found that the HHI index for the overall MVPD market is 7905 (1800 being highly concentrated). Id. ¶ 121.

<sup>3</sup> See, e.g., "SBC Reveals Huge Cost of PacTel Merger," Wall Street Journal (June 20, 1997) at A3 (SBC announcing that it would shutdown PacTel's wireless, fiber-optic, and coaxial cable video network); Eben Shapiro, "Time Warner to Pull the Plug at year End on Interactive-TV Network in Florida," Wall Street Journal (May 1, 1997) at B5 ("Time Warner, Inc. said it plans to unplug its much-hyped .... Full Service Network [which] was initially the centerpiece of Time Warner's ambitious plans to dominate the information superhighway.... Other cable companies and phone companies also largely dropped such plans").

there are over 13.2 million MDU units in the United States, in which approximately 19% of Americans live.<sup>4</sup> That number is expected to grow as population density increases and metropolitan areas are revitalized. Thus, the ability of the Commission to promote an environment in which competition for telecommunications services to MDUs can flourish will, in large part, determine the success of the current efforts to break the monopolies held by service providers at the local level.

**A. Mandatory Access Laws Reduce Competition.**

Several states have passed "mandatory access" laws, which generally require MDU owners to open their properties to the franchised cable operator so that it may provide service to the residents of the MDU.<sup>5</sup> The FCC, too, is considering MDU access issues in its cable inside wiring proceeding.<sup>6</sup> Although well-intentioned, such access laws dramatically inhibit the development of competition in the MDU sub-market. Mandatory access laws assume a market in which the franchised cable operator is a regulated monopoly. Indeed, many state "mandatory access" laws apply only to franchised cable operators. As a result, competitors to franchised cable are subject to asymmetrical access rights; the franchised operator may have an exclusive agreement with an MDU, but its competitors may not. Needless to say, competitors are not anxious to compete with franchised cable on these terms.

Even where access laws are drafted in a less discriminatory fashion, however, they tend to discourage entry. The costs of installing a video distribution system in an MDU are substantial. Depending upon a variety of factors, including the amount of installed wire that is salvaged, the costs of installing an entire distribution system in an MDU can run from \$400-\$500 per unit. As noted above, competitive providers must recover the costs of their system installations in each MDU they serve. Thus, as a matter of pure economics, the cost of overbuilding an MDU cannot be recouped within an reasonable time if the new entrant must compete subscriber-by-subscriber with the incumbent franchised cable operator.

For this reason, OpTel strongly opposes any federal right of "mandatory access" that would require property owners to open their property to all service providers. In order to promote competition in the MDU sub-market all service providers, but most particularly new entrants, must be allowed to enter into exclusive right of entry

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<sup>4</sup> See Direct Marketing News (Jan. 8, 1996) at 18.

<sup>5</sup> E.g., N.Y. Exec. Law § 828; Del. Code tit. 26, § 613; Kan. Stat. Ann. § 58-2553(5).

<sup>6</sup> Telecommunications Services Inside Wiring, CS Docket No. 95-184.

agreements with the MDUs that they would serve. Although the competition that results in a non-mandatory-access environment is MDU-by-MDU rather than subscriber-by-subscriber, the viewer/subscriber is the ultimate beneficiary of this competition. Today's exclusive agreements typically are for a fixed term of years and include performance standards regarding quality of service, price, channel selection, special services, and service response times. That is, the fruits of the competition for the right to serve an MDU are enjoyed by the residents of the MDU. OpTel's subscriber penetration rates, which climb 10% or more after it begins serving an MDU that has previously been served by a franchised cable operator, demonstrate this fact most convincingly.

**B. Local Franchising, Zoning, And Antenna Siting Restrictions Inhibit The Development Of Radio-Based Competitors To Franchised Cable.**

Local zoning restrictions on microwave and telecommunications equipment also serve as a barrier to entry into this market. Numerous local jurisdictions throughout the U.S. have imposed antenna siting moratoria or otherwise restricted the installation and construction of new antennae.<sup>7</sup> As a result, communications networks that would support more widely dispersed and cost-effective competitive cable systems cannot be built. To ensure continued access to necessary antenna siting locations, the Commission should, therefore, expand the scope of federal antenna preemption doctrines to include microwave or other antennae used to deliver video programming.

Similarly, local franchising requirements have been used to keep competitors out of the MVPD markets. Local jurisdictions, fearful that the growth of competition to franchised cable will lead to a reduction in franchise fees payable to the jurisdiction, have attempted to impose special fees or taxes on new providers of video services to make up for lost franchise revenues.<sup>8</sup> The Commission should stand ready to closely scrutinize any local "fee" or "tax" imposed on competitive video programming providers to ensure that it is not a pretext for an unlawful franchise fee.

**C. The Commission Should Impose "Fresh Look" Obligations On MVPD Providers That Use "Perpetual" Contracts.**

Although exclusive contracts can help to promote competition in the MDU sub-market, perpetual, exclusive contracts have the opposite effect. 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,

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<sup>7</sup> See e.g., City of Pembroke Pines Florida, Ord. No. 1179 (Sept. 4, 1996).

<sup>8</sup> See e.g., Crain's Chicago Business (Jan. 13, 1997) at 4.

exclusive contracts represents a substantial barrier to competitive entry. OpTel estimates that it has been excluded from serving some 41,000 MDU units in OpTel's primary markets because of perpetual agreements.

To combat the anticompetitive affects of perpetual exclusive agreements, OpTel has suggested that the Commission impose "fresh look" obligations on all MVPDs that provide service pursuant to perpetual exclusive agreements with MDUs.<sup>9</sup> Fresh look would allow MDU owners bound by perpetual service agreements to opt out of those agreements during a "fresh look" window and contract for service in the current, more competitive marketplace.

### **III. Program Access Restrictions Still Are Being Used To Impede Competition.**

As the Commission well knows, vertically integrated cable MSOs have inordinate control over the most popular programming. Nearly half of the most popular cable networks are affiliated with a cable MSO.<sup>10</sup> Further, franchised cable operators exercise monopsony buying power in the video programming market. Thus, even where the MSO is not affiliated with a programmer, the MSO often can have considerable influence over whether the programmer makes its programming available to competing providers. In the NOI, the Commission has asked for information on the "effectiveness of [its] program access rules" in ensuring that these factors do not undermine the growth of competition in the MVPD markets.<sup>11</sup>

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 caused OpTel to file two separate program access complaints. Fortunately, in both cases, OpTel was able to reach a private agreement with the programmer and to obtain access, ultimately, to the programming that it was seeking. Nonetheless, two flaws in the Commission's program access rules became evident in the course of pursuing OpTel's complaints.

First, the process is far too time consuming. In both cases in which OpTel sought relief under the Commission's program access rules, OpTel's complaint remained

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<sup>9</sup> See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, Comments of OpTel (filed Sept. 27, 1996).

<sup>10</sup> See Third Annual Assessment of the Video Programming Market, CS Docket No. 96-133 (rel. Jan. 2, 1997) ¶ 144.

<sup>11</sup> NOI ¶ 21.

pending for many months without Commission action.<sup>12</sup> This, apparently, is not unusual in these cases. Ameritech reports that "the average length of time it takes the FCC to render a decision on a Section 628 complaint appears to be slightly more than one year."<sup>13</sup> In the meantime, consumers are denied access to popular programming and competition in the MVPD market is inhibited. In these cases, justice delayed truly is justice denied. For that reason, OpTel urges the Commission to expedite review of programming access complaints.

Second, 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 NOI, "[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."<sup>14</sup> Thus, the Commission should amend its rules to allow parties aggrieved by violations of the program access rules to obtain legal damages.

Respectfully submitted,

OPTEL, INC.



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<sup>12</sup> 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).

<sup>13</sup> See Petition for Rulemaking of Ameritech New Media, (filed May 16, 1997) at 12.

<sup>14</sup> 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).