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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	

FURTHER COMMENTS OF OPTEL, INC.

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

INTRODUCTION

The Commission has released the Further Notice to supplement the record in this proceeding, particularly with regard to its proposal to adopt cable inside wiring disposition rules for wiring in multiple dwelling units ("MDUs") substantially similar to a proposal first made by the Independent Cable & Telecommunications Association ("ICTA"). The procedures outlined in the Further Notice are intended to alleviate some of the confusion over the ownership of MDU inside wiring, which has hampered the development of competition to the franchised cable operators by other multichannel video programming distributors ("MVPDs").[1]

Specifically, the Commission tentatively has proposed a procedure to determine, upon service termination, the ownership and control both of the cable home run wiring in MDUs (the wire dedicated to an individual unit, but outside of the demarcation point) and the cable home wiring in MDU units (the wire between the demarcation point and the subscriber's television). For the reasons set forth below, OpTel generally supports the Commission's new cable inside wire disposition rules.

1 See Further Notice ¶ 31.

DISCUSSION

I. Disposition of Home Run Wiring

In the Further Notice, the Commission has proposed a procedure for the disposition of home run wiring on an MDU-by-MDU basis (where the MDU owner decides to convert the entire building to a new service provider) and on a unit-by-unit basis (where the MDU owner will allow multiple service providers to have access to the property).[2] The procedures proposed in the Further Notice for the disposition of cable inside wiring will apply only when the incumbent provider has no contractual, statutory, or common law right to maintain its home run wiring on the property.[3]

In OpTel's experience, incumbent franchised cable operators often claim to have an enforceable legal right to remain on the property, but refuse to provide any evidence to substantiate that claim. Consequently, incumbents should be required, when service termination is requested, to make an affirmative good faith showing of any contract or other legal basis that would allow the incumbent to remain on the property.

In addition, the Commission has asked whether it should presume that an incumbent provider's desire to "win the subscriber back" upon termination will compel the provider to cooperate during the transition period, or whether it should promulgate a general rule requiring the parties to cooperate.[4] Although some incumbent operators do cooperate fully with OpTel when OpTel begins serving an MDU, many do not. In those cases, the incumbent has made a determination that it is more important to damage its competitor in the market than it is to win back a particular set of subscribers. Consequently, OpTel supports the suggestion that the Commission promulgate a general rule requiring cooperation during the transition to a new service provider.[5]

A. MDU-by-MDU Dispositions

When an incumbent provider has no legal right of access to an MDU and the MDU owner seeks to terminate service with the incumbent, the MDU owner may give the incumbent 90 days' notice that its access to the MDU will be terminated. The

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2 As the Commission recognized in the Further Notice the installation of a second wire in many MDUs raises substantial concerns regarding building aesthetics, space utilization, safety, and tenant inconvenience. Further Notice ¶ 25. For those reasons, many MDU owners are reluctant to open their properties to multiple MVPD providers.

3 Id. ¶ 34.

4 Id. ¶ 48.

5 See n.7, infra.

incumbent then will have 30 days to notify the MDU owner in writing of its election to either: (1) remove the inside wiring by the end of the 90 day period; (2) abandon it by the end of the 90 day period; or (3) sell the wire to the MDU owner.

The Commission has asked for comment on, among other things: (1) whether it should impose penalties on incumbent providers that elect to remove their home run wiring and then fail to do so; (2) whether market forces will provide an adequate incentive for the parties to reach a reasonable price for the wiring where it is to sold to the new provider; and (3) the means by which the price of the wire should be established if the parties cannot agree on a price.

1. OpTel supports the home run wiring disposition procedures.

OpTel supports the proposed disposition procedure. OpTel has, from the beginning of this proceeding, urged the Commission to allow cable subscribers access to all of their "separate wire" (the home and home run wire) and thereby promote subscribers' ability to change service providers. The goal, of course, is to maximize consumer welfare by increasing the number of competitive options available to consumers.

As the Commission recognizes in the Further Notice, for practical reasons, requiring MDU owners to open their premises to multiple MVPDs is not a viable option.[6] That does not, however, mean that it is impossible to bring the benefits of MVPD competition to the residents of MDUs. The issue is not whether there will be two or more providers actually running cables into each subscriber's unit, but whether competitive providers are available in the marketplace to help contain prices, and spur product and service development. A single competitor waiting to serve an MDU with superior programming or a more affordable programming package will do more to protect the residents of the MDU than any amount of regulation.

By establishing a procedure to govern the disposition of cable home run wiring when the entire MDU converts to a new MVPD, the Commission will facilitate the ability of the new MVPD to quickly and efficiently provide service to the residents of the MDU. This, in turn, will reduce entry barriers and increase the level of competition, on an MDU-by-MDU basis, in the marketplace.

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[6] Further Notice ¶ 62. Significant statutory and constitutional bars also preclude the adoption of such a "mandatory access" regime.

2. **OpTel supports the imposition of penalties in appropriate cases and believes that market forces should determine the transfer price of cable home run wiring.**

OpTel supports the Commission's suggestion that penalties are appropriate for incumbents that affirmatively mislead MDU owners and competitors regarding the incumbent's intentions with respect to its wiring. Based on OpTel's experience in the market, incumbent cable providers have been willing to use a wide variety of anticompetitive tactics to thwart new entrants seeking to compete in the market. Sanctions for abusing the Commission's disposition procedures will help to ensure that the Commission's new rules do not provide cable operators with yet another tool to slow the introduction of competition. Therefore, upon a proper showing that an MVPD has willfully or repeatedly mislead others with respect to the disposition of the home run wiring, the Commission should make an affirmative public finding that the MVPD in question has engaged in anticompetitive behavior and, in addition, the Commission should initiate forfeiture proceedings to assess a financial penalty for each violation.

Second, market forces should be allowed to determine the appropriate price of any home run wire that is transferred between MVPDs. For the incumbent, the cost of removing the home run wire or abandoning it completely will provide motivation to price the wiring competitively. Similarly, the new provider will be motivated to reach agreement on the existing wiring to the extent that it can save on the costs of a new installation. In combination, these interests should help to ensure that regulation of the transfer price of the wire should be unnecessary.

B. Unit-by-Unit Dispositions

When the incumbent owns the home run wiring in an MDU and does not have a legally-enforceable right to maintain its home run wiring on the premises, the MDU owner may permit multiple service providers to compete on a unit-by-unit basis in the building. In that case, under the rules proposed in the Further Notice, the MDU owner may give the incumbent service provider 60 days' notice that it intends to allow such competition. The incumbent service provider then would be required to make an election within 30 days as to whether, for all of the wires dedicated to individual units, it will upon service termination: (1) remove the wiring within 7 days; (2) abandon the wire; or (3) sell the wire to the MDU owner. In addition, the Commission's proposed rule would allow alternative providers or the MDU owner to act as the subscriber's agent for purposes of ordering a service change.

OpTel supports application of the disposition procedure on a unit-by-unit basis when the property owner has granted access to the premises to more than one MVPD. In those instances, no interest is served by requiring each MVPD provider to install home run wire to each unit. Instead, the MVPD that is actually providing service to the unit should be allowed to use the wiring in place. The Commission's proposed disposition procedure accomplishes this end.

Further, OpTel agrees that alternative providers or the MDU owner should be permitted to act as the subscriber's agent for purposes of ordering a service change under appropriate circumstances. In order to promote competition, the transition process should be as simple as possible for the consumer, *i.e.*, consumers should be able to switch service providers with a single telephone call.

By allowing the MDU owner or the alternative service provider to terminate service from the incumbent and manage the transition, the Commission will ease the burden on subscribers seeking to switch service providers and help to ensure that the transition is effectuated smoothly and without service interruptions.[7] On the other hand, there is little risk of "slamming" in this context because, unlike telecommunications services, the actual programming service provided by MVPDs is not transparent to the subscriber.

C. Ownership of the Home Run Wiring

In both of the above contexts, the proposed rules would allow the MDU owner the initial option of acquiring the home run wiring if the incumbent elects to sell or abandon it. OpTel fully supports this proposal.

MDU owners have significant and legitimate interests in controlling the facilities located on their premises. The vast majority of MDU owners seek to provide safe, clean and desirable dwelling units to the residents of their MDUs at the lowest possible cost. Naturally, this involves a balancing of costs and benefits so that not every possible benefit is provided to every MDU resident. In a competitive environment, however, market forces act as a check on choices that minimize or ignore resident welfare. The

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[7] For these same reasons, OpTel supports the adoption of a general rule requiring the parties to cooperate to ensure a seamless transition. As the Commission well knows, the local MVPD markets have been slow to see the growth of competition and, when new entrants have sought to compete for subscribers in MDUs, incumbents have resorted to a host of anticompetitive tactics to thwart their efforts. A "good faith cooperation" requirement would provide new entrants with some protection against conduct that would not otherwise be reached, for technical reasons, by the Commission's rules.

Commission can rely on the competitive real estate market to govern the extent to which MDU owners can limit access to their properties to the detriment of MDU residents.

In addition, the Commission's proposed rules account for the practical problem of vesting ownership of wiring in a resident who only is renting his or her unit. Naturally, tenants who rent their units generally have less of an interest in maintaining MDU common areas or in enhancing the service options available to future tenants than do MDU owners. In this context, therefore, the long term interests of the residents of a rental apartment MDU are better served by a rule that will allow the owner of the MDU to gain ownership and control over the home run wiring in the building.

Finally, OpTel supports the Commission's proposal to allow the new service provider to purchase the home run wiring when the MDU owner declines to do so. Once the subscriber has terminated service, the home run wire is useless to the former MVPD. Nonetheless, the former service provider should not be required to remove or abandon the wire merely because the MDU owner declines to purchase it. The length of wire involved may be useful to the new service provider and it would be uneconomic to require it to be removed only to have the new service provider install an identical section of wire. Thus, rather than abandon the wire to a competitor, the former service provider should be allowed to sell the wire to the new service provider at a negotiated price. This will promote the most fair and efficient use of existing MDU home run wiring.

II. Disposition of Home Wiring

In the single family home context, the subscriber is given the option of purchasing "home wiring" upon service termination. As OpTel and others have noted, this rule often does not make sense in the MDU context where the subscriber has no continuing interest in the premises. In recognition of this fact, the Commission has tentatively concluded that the MDU owner should be deemed to be acting on behalf of all subscribers in the MDU when it has the authority to terminate service for the entire building and does so. In those cases, and upon 90 days' notice by the MDU owner, the incumbent provider must offer to sell to the MDU owner any home wiring within the individual units in the MDU at the per-foot replacement cost of the wiring.

When the MDU owner does not have the authority to terminate service for the entire MDU, the proposed rule would allow MDU owners to purchase the home wire if the resident elects not to following the resident's decision to terminate service. As in the case of the home run wiring, the alternative provider may purchase the home wiring in either case if the MDU owner chooses not to.

OpTel supports these proposals. As the Commission has recognized in the Further Notice, the proposed procedures will, in many cases, provide incumbent MVPDs with a single point of contact when an MDU is changing service providers. This will promote an seamless transfer of service within an MDU and avoid unnecessarily burdening individual MDU residents. Where MDU units are terminated on a unit-by-unit basis, individual subscribers will retain the right to purchase their home wiring. They presumably will purchase the home wiring, however, only when they have an on-going interest in the unit. Where they have no such interest, MDU owners should be permitted to purchase that wire to further facilitate future service changes within the building.

III. Additional Proposals

Finally, the Commission has sought comment on rules that would: (1) allow alternative providers to share conduit space with the incumbent where authorized to do so by the MDU owner, even if the incumbent objects; (2) move the demarcation point beyond the current "12 inch" (outside of the premises) point to the point at which the wire first becomes physically accessible; and (3) in the future, require video service providers to transfer ownership of all cable home wiring and home run wiring within an MDU to the MDU owner upon installation. OpTel supports the first two of these proposals, but reserves comment on the last.

The Commission's inside wiring rules have one overriding purpose — to facilitate the introduction of competition into the MVPD markets. One key feature of these rules is the establishment of a demarcation point in MDUs that will allow alternative providers, when they are permitted on the premises by the owner of the premises, to access the subscriber's home wire.

For these reasons, OpTel supports the proposal to move the demarcation point in MDUs from its current location at or about 12 inches from the subscriber's unit to the point at which the wire first becomes physically accessible, and the related proposal to allow MVPDs to share conduit space for home run wiring where authorized to do so by the MDU owner. These proposals, in combination, will help to ensure that the demarcation point is physically and practically accessible to alternative service providers.

CONCLUSION

The current rules, as amended by the proposals outlined in the Further Notice, will enhance competition, encourage the introduction of advanced networks, and speed the introduction of new products and services. MVPDs can expect to recoup a some of their network investment in each MDU while a service contract is in place and, upon termination, sell the home wiring and home run wiring to recover a large measure of the balance. There is no reason, if all parties involved act in good faith, that this system cannot fully meet the Commission's goals.

For the reasons set forth above, OpTel generally supports the inside wire disposition procedures proposed in the Further Notice.

Respectfully submitted,
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