

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

RECEIVED

OCT - 6 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CS Docket No. 95-184

In the Matter of)
)
 Telecommunications Services)
 Inside Wiring)
)
 Customer Premises Equipment)
)
 In the Matter of)
)
 Implementation of the Cable)
 Television Consumer Protection)
 and Competition Act of 1992:)
)
 Cable Home Wiring)

MM Docket No. 92-260

REPLY COMMENTS OF OPTEL, INC.

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

DISCUSSION

I. The Commission Has Ample Legal Authority To Adopt The Procedures Outlined In The Further Notice.

Not surprisingly, the franchised cable interests have, in their comments, questioned the Commission's legal and constitutional authority to adopt the procedures outlined in the Further Notice. Their complaints, however, cannot pass even the most minimal level of scrutiny. As OpTel and others have explained in detail in the past, the Commission has ample legal authority not only to adopt transition procedures, such as those set forth in the Further Notice, but to move the cable demarcation point outright to the point at which the wire becomes dedicated to an individual subscriber's unit.¹ The statutory sections cited by the franchised cable interests are not to the contrary.

The opponents of the Commission's rules argue that the "joint-use" and "anti-buyout" provisions in the 1996 Act foreclose adoption of the proposed transition rules.

¹ See Comments and Reply Comments of OpTel, CS Docket 95-184.

As the Commission more than adequately explains in the Further Notice, however, the "joint-use" provision is not a cable home wiring rule at all, but an exception to the general prohibition against partnerships between cable operators and local exchange carriers. Further, with regard to the "anti-buyout" provision, the cable operators are correct to the extent that they assert that Congress adopted this ban in order to promote competition both in the MVPD and local exchange markets. Competition does not, however, mean that multiple providers must install overlapping, redundant, and unnecessary facilities "all the way to the subscribers' individual dwelling unit, including every last item down to the nail and the staple."² So long as the subscribers can switch between service providers with relative ease, consumers will benefit.

Finally, there simply is no taking issue raised by the Further Notice. The procedures outlined therein do not even apply when the incumbent has a legal right to remain on the premises and, when it does not, no property is taken from it unless it neglects to remove or sell the wire in question.³ Once the wiring is abandoned, the former owner has no claim to compensation under the Fifth Amendment.

II. Adoption Of The Proposed Procedures Will Encourage The Development Of Competition In The MDU MVPD market.

A. The Competitive Residential Real Estate Market, Operating In Conjunction With The Commission's Transition Procedures, Will Help To Promote Competition In The MVPD Market.

As GTE notes, undue emphasis on individual unit-by-unit competition actually will have the perverse effect of diminishing competition in the market.⁴ Few competitors will take the risk and go to the expense of installing facilities in an MDU solely to compete against an incumbent provider in the hopes of winning over a few subscribers. The risk/reward trade-off simply does not warrant the investment. The opportunity to provide service to an entire MDU, on the other hand, may be attractive enough to draw new entrants into the market to challenge the franchised cable monopolists. Indeed, it is precisely because of subscriber concentration in MDUs and the availability of exclusive contracts to serve them that this is the one and only segment of the local MVPD markets in which any significant level of competition exists.⁵

² Further Notice at 24-25 (quoting USTA Reply Comments at 3-5).

³ See also Comments of GTE at 15.

⁴ See Comments of GTE at 4-5.

⁵ Cf. US WEST Comments at 6-7 ("Unlike [other] environments, a mature and competitive market currently exists for the provision of video serve to MDUs.").

Thus, to encourage real competition, the Commission should reject suggestions that it urge Congress to adopt a nationwide mandatory access law or otherwise limit the procedures outlined in the Further Notice to those situations in which an MDU has allowed access to multiple providers.⁶ The record in this proceeding fully demonstrates the futility of such a course. Indeed, the only reason that there is some measure of competition in the MDU MVPD market is precisely because new entrants have been able to enter into service agreements with MDU owners for the mutual benefit of the new MVPD, the MDU owner, and the residents of the buildings involved.

MDU owners are in the business of renting, leasing, or selling units in their MDUs at the maximum rate the market will allow. If they provide clean common areas, attractive landscaping, secure access, and amenities such as pools and game rooms, they improve their occupancy rates and maximize the value of their units. It is no less true that the quality of services provided on the property, including video services, will affect occupancy rates and the profit the MDU owner can make from each unit. The amount of compensation typically paid for a right of access to an MDU is nominal in comparison to the revenue received from the rental or sale of individual units within an MDU. Thus, the economic interests of MDU owners, more often than not, will coincide with the interests of the residents of their buildings.⁷

OpTel's experience confirms that, in the vast majority of cases, MDU owners are predominantly interested in providing their residents with the highest quality services at the best possible rates. In point of fact, this is the very reason that new entrants have had some limited success in penetrating the MDU MVPD market. Competitive MVPDs provide service with the permission of the MDU owner. The MDU owner, in turn, is directly accountable to the residents of the MDU. Thus, unlike franchised cable operators, which may be insulated from such direct accountability by state access laws, competitive MVPDs immediately answerable for the quality of services provided on the premises. This accountability leads to real competition.

The efforts, therefore, of the franchised cable interests to once again demonize MDU owners are unavailing. Although there no doubt are instances in which an individual MDU owner has been short-sighted enough to value an MVPD service

⁶ E.g., Comments of Time Warner at 12 n.23.

⁷ In some cases, property managers are directly responsible and answerable to the residents of the property. See Comments of the Community Associations Institute at 6. In those cases, the invisible hand of the market is replaced by the equally diaphanous hand of the ballot box.

contract based on the consideration provided rather than the services rendered, those individual instances are not representative of the larger market. Nonetheless, these rare occasions provide the franchised cable interests with an opportunity to once again make the superficially appealing claim that the Commission should abandon its efforts to increase competition in the market generally in favor of an emphasis on unit-by-unit competition, knowing full-well that a requirement for unit-by-unit competition means no meaningful competition at all.⁸

B. There Is No Basis To Presume That Any Party Involved In A Video Service Transition Procedure Will Act In Bad Faith.

Ironically, the franchised cable interests have launched an attack on the Commission's rules premised entirely on the theory that MDU owners will act in bad faith in the transition process.⁹ According to Time Warner, for instance, MDU owners will attempt to coerce incumbents into abandoning their wiring in the hope of getting the wire for free.¹⁰ The result, according to Time Warner, will be that incumbents most often will remove their wiring and force the new entrant into installing new facilities. Although the net result will be no change in service or improved service to the unit because of the new facilities, Time Warner insists that this result contravenes congressional intent. This claim, however, is factually and legally flawed.

First, as a factual matter, there is no reason to assume that any one party, particularly not an MDU owner who usually will have the most at stake in the process, will act in bad faith or otherwise attempt to undermine the transition process. Just as the incumbent has an interest in selling the home run wiring rather than removing it or abandoning it, the MDU owner has an interest in avoiding service interruptions and unnecessary construction on the property, and the new entrant has an interest in buying the existing wire if it can save on installation expense. There is every reason to believe that the confluence of these interests will lead to a smooth transition process.¹¹

On this basis, the Commission should reject suggestions that it establish a default price for wiring transferred. By setting any "floor" on the transfer price the Commission will decrease the chances that the parties will agree on a price (*i.e.*, where

⁸ See, e.g., Comments of US WEST, Inc. at 7-8.

⁹ See, e.g., Comments of NCTA at 5; Comments of Adelphia Cable Communications et al., at 26-27; Comments of Cablevision Systems Corporation at 12-14.

¹⁰ Time Warner Comments at 13-15.

¹¹ See Comments of the Building Owners and Managers Association et al., at 9 (parties should be able to agree on a "fair and reasonable price").

the new entrant would be willing to pay something for the wiring, but not the default price) and increase the number of occasions when the incumbent would be required to abandon or remove the wiring — results the franchised cable interests elsewhere decry.

The concern of the franchised cable interests that MDU owners will not bargain in good faith is ironic given that, based on past performance, it is the franchised cable operators who can be expected to frustrate the Commission's proposed transition rules at every opportunity. For this reason, OpTel has supported the adoption of specific rules to punish those that act in bad faith in any particular instance.¹²

One of the most common tactics used by incumbents to thwart competition has been to assert a right to remain on the premises when they, in fact, have none. In these cases, the incumbent merely asserts, when pressed, that some prior agreement allows it to continue to have access to the MDU and cloaks its assertion with threats of litigation should the MDU owner attempt to terminate the relationship.¹³

The Commission should, therefore, adopt a rebuttable presumption that no legal right to remain on the premises exists. When an MDU owner seeks to terminate service in favor of a new entrant, the incumbent may, if it can, rebut the presumption with some showing of positive evidence that it has such a right; otherwise it must give way.¹⁴ Indeed, to discourage franchised cable operators from advancing plainly untenable legal arguments in support of their right to remain on the premises (*e.g.*, "implied easement" or "easement by estoppel"), the Commission should require them in every instance in which they claim a legal right to remain, to certify to the Commission the basis for such a right. Although the cable interests object to the adoption of any presumption on the ground that a presumption will "create or destroy property rights,"¹⁵ these objections are unavailing. A rebuttable presumption that can be

¹² In its comments, OpTel advocated the initiation of forfeiture proceedings against those found to have repeatedly or willfully mislead others regarding their intention to sell, remove, or abandon cable home wiring. In the alternative, OpTel supports the suggestion of GTE that incumbents should be required to compensate new entrants for the costs of the installation where they have deliberately misled the new entrant. *See* Comments of GTE at 10.

¹³ *See, e.g.*, Letter from Henry Goldberg to Chairman Reed Hundt (Feb. 4, 1997) (regarding franchised cable operators' threats of litigation).

¹⁴ *See* Comments of ICTA at 2-3. OpTel also supports the suggestion of ICTA that the Commission build in some overlap into its termination procedures to prevent incumbents from terminating service early in order to punish the residents of an MDU for switching service. *See* Comments of ICTA at 4-5.

¹⁵ *See* Comments of Adelphia Cable Communications et al., at 15; Comments of Time Warner at 27.

overcome in any individual instance merely creates a mechanism for resolving disputes with respect to the rights that already exist.¹⁶

Moreover, as a legal matter, the franchised cable interests have posited alternatives to the Commission's procedures that are wholly beyond the Commission's authority. Although they question the Commission's statutory authority to establish transition rules for MVPDs, over which the Commission has some explicit and implicit authority, they nonetheless suggest alternative procedures that would have the Commission regulate MDU owners' operation and maintenance of their buildings directly, which the Commission has no authority to do.¹⁷ Such an intrusion into matters far beyond the Commission's expertise or authority would not only be unnecessary, it would be unlawful.

C. The Commission Should Reject Suggestions That It Include A "Dormant Facilities" Exception To The Rules.

The franchised cable interests ask that the Commission build in various "dormant facilities" exceptions to the proposed rules.¹⁸ These exceptions would cover situations in which the MDU in question was in a "mandatory access" state or the incumbent had a contractual right to "retain dormant facilities on the building's premises even after the expiration of a service contract."¹⁹ It is unclear why, other than to limit the scope of the Commission's transition procedures and thereby inhibit the development of competition, an incumbent operator would care to have dead wire running to a unit, especially since the rules will apply in reverse if the subscriber ever switches back to the incumbent. The only partial explanation offered rests on cable operators' promises of future telephone and high speed internet access services. These promises have so often been recanted, however, that they now can be regarded as little more than straw men.

In any event, the Commission should reject these suggestions. First, although mandatory access laws may differ from state to state, the general principle underlying each of them is that landlords may not prevent a franchised cable operator from providing service to the residents of an MDU. Nothing in the Commission's rules

¹⁶ Cf. *Rogers v. United States*, 575 F. Supp. 4 (D. Mont. 1982) (statutory presumption destroyed property rights because plaintiff not allowed an opportunity to rebut the presumption).

¹⁷ See e.g. Comments of Time Warner at 38.

¹⁸ See, e.g., Comments of Adelphia Cable et al., at 4, 8; Comments of Time Warner at 24, 28.

¹⁹ Comments of Time Warner at 24.

would contravene that purpose. Each and every resident that desired service from a franchised cable operator in an access state could have service from that operator. The operator simply would not have a "right" to run dead wire through the MDU to subscribers that do not want service from the franchised cable operator. To the extent that any service provider wants to provide telephone or other services to a unit, it too will have to run wiring to the unit. There is no reason to grant franchised cable operators special status in this regard.

D. The Commission Should Not Interfere With The Private Contractual Relationships of MVPD providers and MDU owners.

Another "refinement" suggested by the franchised cable interests in their comments is that the transition rules should not apply "in any situation in which the MDU owner has received any form of excess consideration from the MVPD seeking entry, above and beyond the nominal just compensation paid for allowing broadband distribution to occupy the MDU property."²⁰ The Commission's proposed rules, however, are intended to increase the level of competition in the market, eliminate the need for regulatory involvement in the transition process and increase certainty with respect to the ownership and control of cable inside wiring. The suggestions of the cable interests run counter to each of these goals.

First, the suggested limitation is unworkable from a practical standpoint. How much is the "nominal just compensation paid for allowing broadband distribution to occupy the MDU property" and who is to make that determination? Because the determination would be based on the facts of any given installation, the proposed limitation would be easily circumvented by operators who would do so, while those that would abide by the Commission's rules would be disadvantaged.

Second, there is no reason to interfere with the private contractual relationships involved. MDU owners have a property interest in their buildings. As the courts have held time and time again, the right to exclude others is the paramount property right.²¹ Absent some showing that this property interest is being used to the detriment of the public generally, there is no basis to conclude that it is somehow evil or impermissible for an MDU owner to trade access for compensation; that is how free markets work.

²⁰ See, e.g., Comments of Time Warner at 35; Comments of Cablevision Systems Corporation at 17-18.

²¹ E.g., Nixon v. United States, 978 F.2d 1269, 1284 (D.C. Cir. 1992).

Finally, Time Warner's suggestion would further limit the situations in which the Commission's procompetitive rules would apply. Such a limitation would do nothing to increase competition or promote the public interest. Instead it would add an additional layer of complexity to the transition rules and increase Commission involvement in the process, neither of which were the Commission's intent.

E. The Rules Should Permit Parallel Wires To Be Installed Within Existing Molding Or Conduit.

OpTel fully agrees with those parties that have urged the Commission to modify its rules such that parallel wires may be installed in existing molding or conduit when an MDU opens its premises to multiwire competition. As DirecTV notes, the "incumbent provider is not the 'owner' of the empty space enclosed within the molding or conduit and surrounding its own wiring. As such, the incumbent has no right to exclude another provider from that space."²²

F. The Commission's Rules Should Eliminate Ambiguity With Respect To Whether A Particular Demarcation Point Is Physically Inaccessible.

OpTel supports the Wireless Cable Association International, Inc. ("WCA") with regard to the determination of whether a particular demarcation point is physically inaccessible.²³ Ambiguity with respect to this issue will lead to uncertainty and unnecessary litigation.

G. The Commission Should Not Require MVPDs To Transfer Ownership Of Home Run Wiring In Advance Of Providing Service.

The Commission has asked whether it should require MVPDs to transfer ownership of home run wiring to MDU owners at the commencement of service. OpTel opposes this suggestion. During the term of a service agreement, the MVPD has on-going line maintenance responsibilities. When MDUs or units within MDUs are modified, the wiring often must also be modified. Moreover, home run wiring regularly needs to be maintained and upgraded over the course of a service agreement. The Commission should not, therefore, adopt rules that will create additional difficulties and potential wiring disputes while MVPD services are being rendered.

²² Comments of DirecTV at 15-16.

²³ See WCA Comments at 14.

III. The Commission Should Not Prohibit Or Limit The Use Of Exclusive Contracts.

A few parties, including, Media Access Project ("MAP"), have suggested that the Commission limit the use of exclusive contracts in the MDU context. Specifically, MAP has suggested that only alternative MVPDs should be allowed to enter into exclusive agreements and that in no event should an exclusive contract exceed five years.²⁴ OpTel opposes these suggestions.

First, as OpTel has documented previously, the economics of the MDU marketplace favor the use of exclusive agreements. *De facto* exclusive franchising of cable systems occurs because of the "extraordinary expense of constructing more than one cable television system to serve a particular geographic area."²⁵ For similar reasons, exclusive agreements are the norm at MDUs. The small subscriber base at any one MDU limits the potential return on investment and makes it commercially impractical for more than one provider to wire most MDUs. Although MAP would permit exclusive arrangements of up to five years, OpTel's analysis indicates that an exclusive period of seven to ten years is the minimum required in most cases to recover the investment required to serve an MDU.²⁶

Second, MAP disregards the fact that exclusive rights-of-entry allow landlords to bargain with service providers for the best telecommunications services and products available.²⁷ Landlords can require service providers to make a significant investment in the technology and services for the MDU because they can guaranty access to a stable supply of customers over a long period of time. In short, the "engine of competition"²⁸ pumps as hard or harder when the "customer" exercises the bargaining power provided by a group of subscribers as it does when a lone subscriber seeks service. The Commission should not, therefore, intrude upon private exclusive arrangements.

It is only when an exclusive contract is perpetual, or perpetual in effect, that it becomes an impediment to competition. The comments filed in this proceeding fully

²⁴ Comments of MAP at 11.

²⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(2).

²⁶ Ex Parte Letter from Henry Goldberg to Michael Riordan, CS Docket No. 95-184 (July 22, 1997).

²⁷ See Comments of the Community Associations Institute at 3-5 (resident associations manage property for the maximum benefit and enjoyment of all residents).

²⁸ Comments of DirecTV at 2 n.4.

support this conclusion.²⁹ 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.³⁰ 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.

CONCLUSION

For the reasons set forth above and in its initial comments, the Commission should adopt the inside wire disposition procedures proposed in the Further Notice.

Respectfully submitted,

OPTEL, INC.



/s/ W. Kenneth Ferree

Henry Goldberg
W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900

Its Attorneys

Counsel:

Michael E. Katzenstein
OpTel, Inc.
1111 W. Mockingbird Lane
Dallas, TX 75247

October 6, 1997

²⁹ See, e.g., Comments of the Building Owners and Managers Association et al., at 3 ("Perpetual, 'evergreen,' and very long-term contracts in particular make it very difficult for building owners to introduce competition."); Comments of DirecTV at 6 ("Cable operators extracted these long-term contracts by exploiting market power than no other service providers enjoy.").

³⁰ See, e.g., 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).