

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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)
)
Petition for Rulemaking of)
Ameritech New Media, Inc.)
Regarding Developments of Competition)
and Diversity in Video Programming)
Distribution and Carriage)

CS Docket No. 97-248

RM No. 9097

COMMENTS OF OPTEL, INC.

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

INTRODUCTION

As a competitive provider of multichannel video programming distribution services, OpTel has, on several occasions, been denied access to critical programming services.¹ Most recently, OpTel has learned that ChicagoLand Television News, Inc. ("ChicagoLand"), which holds rights to certain Chicago Cubs baseball games, has refused to license its programming to OpTel's Chicago affiliate for distribution on private cable systems in the Chicago area. Although ChicagoLand professes a desire to license its programming to OpTel, it claims to be bound by an exclusive agreement with Tele-Communications, Inc. ("TCI"), which has, thus far, refused to waive exclusivity. Thus, as in the previous instances in which OpTel was compelled to file a program access complaint with the Commission, an entrenched franchised cable operator is using purportedly exclusive rights to prevent OpTel from providing popular programming to its subscribers.

¹ See OpTel v. Century Southwest Cable, CSR-4736-P (filed Apr. 9, 1996); OpTel v. Continental Cablevision, Inc., CSR-4858-P (filed Oct. 31, 1996).

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In the Notice the Commission has requested comment on several proposed amendments to its program access rules designed to enhance the Commission's ability to address such anticompetitive practices. Specifically, the Commission has asked whether it should expedited processing of program access complaints, whether it should make limited discovery available to complainants as a matter of right, and whether damages should be available as a remedy for violations of the program access rules. For the reasons set forth below, OpTel supports these proposed rule changes.

DISCUSSION

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

OpTel's experience has been that delays in the processing of program access complaints undermines the effectiveness of the Commission's substantive program access rules. OpTel's two previous program access complaints each remained pending for several months after the close of briefing without Commission action while OpTel's subscribers were denied access to the programming in question. Although OpTel was ultimately able to settle its programming disputes, these cases should not be regarded as evidence that the rules are working effectively.

In fact, at the end of the process, the settlements OpTel obtained only afforded it the right to purchase and distribute the programming at issue. OpTel was never made whole for the damage done to it while the programming was withheld, and its subscribers were in no sense compensated for the programming services that they had been denied. At minimum, therefore, the Commission should adopt the proposal set forth in the Notice to process program access complaints on an expedited schedule.

First, OpTel supports the proposal to shorten the program access complaint pleading cycle. Answers to a complaint normally should be filed within 20 days and replies should be due within 7 days of an answer. This one change alone will, when a program access violation is later found, reduce the time that subscribers are unlawfully denied access to programming by nearly one month in many cases.

Second, OpTel supports the suggestion that discovery requests and responses/objections thereto should be submitted along with the initial pleadings in a complaint proceeding. Although there may be rare cases in which the complainant will not have a basis on which to make discovery requests prior to reviewing the respondent's answer, in most cases the nature of the defense and the information or documents that will

be relevant to it are well known to the complainant prior to the filing of the complaint. For instance, if the programmer has denied access to particular programming based on the purported existence of a grandfathered exclusive agreement, the aggrieved party normally will know of this defense beforehand and be able to fashion appropriate discovery requests. In those cases in which the complainant is not able to anticipate the defense, the staff may grant a proper request for further post-pleading discovery.

Further, given that discovery requests in these matters normally are limited to the production of a few relevant documents and answers to relatively few interrogatories, there is no reason that production can not be accomplished within the initial pleading cycle. Thus here again, by compressing two phases of the proceeding into one, the complaint process can be substantially abbreviated without material prejudice to either party.

Following the initial pleading and discovery cycle, the Commission should establish a briefing schedule consistent with the expeditious disposition of the case. Although briefing schedules necessarily will vary depending on the nature and scope of the matter, they should, in most cases, mirror the initial pleading cycle. Finally, the Commission should establish a time limit from the close of all discovery and briefing of 45 days in which it will decide program access complaints.

Alone or in combination, each of these rule changes will greatly help to speed the resolution of program access complaints and ensure that subscribers are not unfairly deprived of popular programming. As set forth in the following two sections, however, developing an expedited process for handling program access complaints is but the first step to reforming the Commission's program access rules.

II. Parties To A Program Access Complaint Should Have Limited Discovery Available To Them As A Matter Of Right.

OpTel's position on this point, like its position on the proposal to expedite processing of program access complaints, is informed by its own experience as a former complainant. In each of the complaints filed by OpTel, the respondents defended their refusal to license programming to OpTel on the basis of purported grandfathered exclusive agreements with other distributors. In neither case, however, was OpTel able to obtain complete copies of the documents supposedly evidencing the grandfathered agreement. Without these documents, which are only in the possession of the programmer/respondent, it may be impossible to obtain the information necessary either

to establish a *prima facie* case or to rebut affirmative defenses (*e.g.*, grandfathered status) asserted by the respondent.

As a result, OpTel supports the adoption of a rule that would allow the parties to a program access complaint proceeding limited discovery as a matter of right. To prevent these matters from becoming mired in “process,” however, the discovery as of right provided should be significantly more narrow than full civil discovery and should be limited to a reasonable number of interrogatories (*e.g.*, 30) and requests for production of documents (*e.g.*, 5). In most cases, this limited discovery will allow MVPDs denied programming a realistic opportunity to challenge the lawfulness of such a denial without unduly burdening the parties or interfering with the expeditious handling of the complaint. In those rare cases in which additional discovery is requested and required, the Commission would, of course, have discretion to permit it. Parties making such requests, however, must be cognizant of the fact that such a request is likely to slow the processing of the complaint.

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

Finally, as OpTel has advocated in the past, the Commission’s program access rules should provide for a damage remedy against parties found to be in violation.² In this regard, however, the speed with which the Commission processes program access complaints must remain a critical consideration. OpTel supports, therefore, the proposal to bifurcate program access complaint proceedings into two phases — a “violation” phase and a “penalty” phase.

Working within the framework outlined above, the Commission should be able to resolve the “violation” phase of a program access complaint within a relatively few months. At that point, if the denial of access is found to have been unlawful, the programmer will be required to make the subject programming immediately available to the complainant.

² E.g., 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) (“[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.”) (quoting National Rural Telecommunications Cooperative).

Further, however, the complainant should then be permitted to demonstrate actual damages flowing from the denial in a second "penalty" phase. Because the underlying denial will have been remedied and subscribers will be receiving the programming, there is no need to establish expedited processing procedures for this second phase. The victorious party should, therefore, be allowed ample time and discretion to make its damage showing.

This bifurcated complaint process would allow the Commission to make a determination on the substance of a program access complaint in a timely manner and help to ensure that subscribers are not unlawfully deprived of valued programming, while also preserving the Commission's ability to remedy harms to competition and to competitors, and to deter future misconduct.

CONCLUSION

For the foregoing reasons, OpTel supports the amendments to the Commission's program access rules proposed in the Notice to the extent that they would speed the processing of complaints, make limited discovery available for complainants as of right, and add the availability of a damage remedy for violations.

Respectfully submitted,

OPTEL, INC.



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