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

In the Matter of)	
)	
Implementation of the Cable)	CS Docket No. 97-248
Television Consumer Protection)	
and Competition Act of 1992)	
)	
Petition for Rulemaking of)	RM No. 9097
Ameritech New Media, Inc.)	
Regarding Developments of Competition)	
and Diversity in Video Programming)	
Distribution and Carriage)	

REPLY OF OPTEL, INC.

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

DISCUSSION

I. The Commission Should Make The Pro-Competitive Changes To Its Program Access Rules Suggested In OpTel's Comments.

Not surprisingly, the comments filed in this proceeding fall neatly into two groups. New entrants into the multichannel video programming distribution ("MVPD") market support: (1) expedited handling of programming access complaints; (2) expanded discovery for complainants; and (3) the availability of damage remedies. The programming suppliers and incumbent franchised cable interests (the "cable interests"), on the other hand, oppose any modifications to the Commission's program access rules. This split reflects the interests of the two groups. The new entrants are seeking to obtain substantially equal access to the same programming that currently is provided to the cable interests so that the former can compete with the latter. If competition in the MVPD market is the ultimate goal, therefore, the comments of the new entrants should be credited accordingly.

The differences between the two groups are most pronounced with regard to the question of whether changes to the program access rules are necessary or desirable. The

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cable interests note that “program access complaints are rarely brought to the Commission” and, in a startling twist of logic, argue that this demonstrates that the current rules are working effectively.¹ To the contrary, the relative paucity of complaints evidences only the ease of evasion of the program access rules.

Similarly, while the cable interests complain that the addition of a damage remedy or discovery rights will “complicate and delay the resolution of program access proceedings,”² they likewise oppose the adoption of any time limit on the resolution of program access complaints because such a limit would “prevent the Commission from giving program access cases the full and thorough consideration that they may require.... [given that they] vary widely in their complexity.”³

The Commission can, however, enhance the effectiveness of its rules while helping to speed the resolution of complaints. As OpTel explained in its comments, rapid resolution of program access complaints is not inconsistent with limited discovery as a matter of right or the availability of a damage remedy, if damages are determined in a second penalty phase of complaint proceedings.

II. OpTel Agrees With Those Parties Who Have Urged The Commission To Address The Use Of Terrestrial Delivery To Evade The Program Access Rules.

As several parties pointed out in their comments, “terrestrial evasion rapidly is becoming a marketplace reality that could gut the effectiveness of the program access law and undermine progress made thus far in developing alternatives to incumbent cable systems.”⁴ Today, more and more programming is migrating to terrestrial distribution. As a result, a broad cross-section of cable programming services may be excluded from the program access rules.

A recent example illustrates this point. ChicagoLand Television News, Inc. (“CLTV”), recently announced that it would be carrying 47 Chicago Cubs baseball games this season. Naturally, this programming is extremely popular in the Chicago area and OpTel has sought to obtain rights to CLTV programming for its Chicago private cable systems. CLTV, however, has refused.

¹ E.g., Comments of Time Warner Cable at 6.

² E.g., Comments of Encore Media Group LLC at 12.; Comments of NCTA at 7-8.

³ E.g., Comments of Time Warner Cable at 5.

⁴ E.g., Comments of BellSouth Corporation at 19-20.

Although CLTV will license its programming to franchised cable systems, including OpTel's franchised systems, it will not license its programming to OpTel's private cable systems. CLTV claims that it is prohibited from doing so by exclusive agreements that it has with other franchised cable operators. Nonetheless, because CLTV claims that it is not satellite delivered, the restrictions in the program access rules on exclusive distribution agreements may be inapplicable. Consequently, subscribers in the Chicago area seeking full access to Chicago Cubs baseball games are compelled to take service from the local franchised cable operator, and competitive video programming distributors are denied the opportunity to compete on equal footing in the market.

CONCLUSION

Thus, for the foregoing reasons and those set forth in OpTel's comments, the Commission should modify its program access rules to speed the processing of complaints, make discovery available as a matter of right, and add a damage remedy for violations. Further, the Commission should make every effort to prevent the evasion of its program access rules through terrestrial distribution.

Respectfully submitted,

OPTEL, INC.



/s/ W. Kenneth Ferree

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