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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)
)
Petition for Rulemaking)
To Amend 47 C.F.R. § 101.603 and)
Related Rules — To Allow the use of)
12 GHz OFS Frequencies for the Delivery)
of Video Programming Material)

RM — _____

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PETITION FOR RULEMAKING OF OPTEL, INC.

OpTel, Inc. ("OpTel"), pursuant to Section 1.401 of the Commission's rules, 47 C.F.R. § 1.401, hereby submits this petition for rulemaking (the "Petition") requesting that the Commission issue a Notice of Proposed Rulemaking to amend Parts 78 and 101 of its rules to allow licensees in the operational fixed microwave service ("OFS") to use frequencies in the 12 GHz band (12.7 GHz to 13.25 GHz) for the delivery of video programming material.

Specifically, Section 101.603(a)(2) should be amended to add the 12 GHz frequency band to those listed in which licensees may deliver any of their own products and services, and Section 101.603(b)(3) should be amended to include the 12 GHz frequency band among those that may be used to provide the final RF link in the chain of transmission of program material to cable television systems, multipoint distribution systems, or master antenna TV systems. In addition, because the 12 GHz band currently is available to licensees in the Cable Antenna Relay Service ("CARS"), corresponding changes must be made to Part 78 of the Commission's rules. In particular, Section 78.18 should be amended to include OFS operation in the band.

These changes will help to encourage more robust competition in the local exchange and multichannel video programming distribution ("MVPD") marketplaces,

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and promote spectrum efficiency by increasing the range of services that can be provided by OFS licensees.

DISCUSSION

I. OpTel's Interests.

OpTel, through subsidiaries, operates private cable/telecommunications systems and franchised cable systems that provide service to over 314,000 homes in nine major U.S. cities. Normally, OpTel uses microwave distribution networks, which typically operate in the 18 GHz (18.142-18.580 MHz) band,¹ to interconnect individual "private cable systems" (*i.e.*, no franchise is required because these systems do not use public rights-of-way) to a central headend facility.²

OpTel's private cable systems compete directly with incumbent franchised cable operators and the dominant local exchange carriers. On the video programming side, OpTel's private cable systems use the 18 GHz microwave architecture to provide channel capacity that is equal to, or greater than, the channel capacity provided by "hardwired" cable operators. In most markets, OpTel bundles this service with private telephony, data, Internet, and other enhanced services.

Technical limitations of the 18 GHz band, however, significantly restrict the expansion of the private cable systems that rely on this system architecture and/or raise the costs of competing over a large area. Because of the relatively high frequencies involved, 18 GHz transmissions have an effective range of approximately 5 to 8 miles. Consequently, as OpTel seeks to compete on a broader scale and its private cable

¹ OpTel has, on occasion, used other bands, including 23 GHz, and it currently has pending a request for waiver of Section 101.603 to allow it to use the 10.7 GHz - 11.7 GHz frequencies for fixed point-to-point microwave transmission of video entertainment material. Its request, however, has been pending at the Commission for nearly a year (see Attachment A hereto), and that request was itself filed over a year after an earlier OpTel request for clarification of the OFS rules was filed, which sought essentially the same relief (see Attachment B hereto).

² OpTel normally leases this microwave capacity on systems licensed to Transmissions Holdings, Inc. ("THI"), the networks of which have been constructed specifically to provide service to private cable operators.

systems within a city become more dispersed, OpTel is required either to install relay sites or construct new headends to serve the outlying systems. Naturally, the addition of these facilities raises the total cost of providing service to subscribers and thereby limits OpTel's ability to compete.

Further, as set forth more fully below, recent changes in the Commission's rules and policies relating to the use of 18 GHz frequencies threaten to impair the continued use of that band by private cable operators such as OpTel. Thus, OpTel requests that the Commission amend its rules and policies as set forth herein to allow private cable operators to use the 12 GHz band, which already is open to use by OpTel's franchised cable competitors, to deliver video programming material to its subscribers.

II. Private Cable Provides An Important Competitive Check On The Market Power Of The Incumbent Franchised Cable Operators.

Most local video distribution markets remain highly concentrated. In the most recent FCC study, the Commission found that the HHI for this market is an astounding 7567.³ A market with an HHI of 1800 is regarded by the Department of Justice as highly concentrated.

The one segment of the market in which competition to the monopoly franchised cable operators is thriving, however, is in the sub-market for MVPD services delivered to MDU residents. As a result of the superior service and programming offered by private cable systems, using fixed microwave facilities, private cable operators have experienced an increase in demand for their services and appear to be gaining a competitive toe-hold against the incumbent franchised cable operators. The Commission concluded in its 1997 Video Competition Report that the private cable industry "appears to have considerable growth potential and is becoming a more significant competitor to traditional cable service."⁴

³ See 1997 Video Competition Report, CS-97-141 (rel. Jan. 13, 1998) ¶ 121.

⁴ Id. ¶ 84. According to the FCC's report, private cable subscribership has increased by approximately 21% over the past two years alone.

This was precisely the Commission's intent when it first opened the 18 GHz band for use by private cable systems, which it considered at that time to be a "significant step in furtherance of [its] effort to encourage more robust competition in the multichannel video delivery marketplace."⁵ Indeed, the Commission concluded, the prospect of incipient competition provided "the most effective safeguard against the specter of market power abuse" by the incumbent franchised cable operators.⁶

These considerations carry even more weight now that private cable operators are expanding the range of services provided by their systems. Thus, for all of the pro-competitive reasons identified in the 18 GHz Decision, the Commission should again take action to promote the competitive potential of alternative service providers that rely upon the microwave spectrum.

III. The 18 GHz Band Cannot Support All Of The Competitive Services Provided By The Private Cable Industry.

Although 18 GHz networks have been critical to the early development of private cable services, a new era has dawned that will see private cable expand, both in geographic scope and in terms of the range of services offered, such that the 18 GHz band can no longer support all of the competitive services provided by the private cable industry.

A. The propagation characteristics of the 18 GHz band make it unsuitable for widely distributed systems.

As noted above, the 18 GHz band suffers from technical limitations relating to the propagation characteristics of transmissions at these frequencies. Generally, a single 18 GHz microwave link cannot exceed approximately 8 miles under the best of

⁵ See In re Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, 6 FCC Rcd 1270 (1991) (the "18 GHz Decision").

⁶ Id. at 1271.

circumstances. This limitation artificially inhibits the growth of private cable system competitors.

Normally, using a hub and spoke microwave architecture, a private cable operator can serve numerous individual communities or MDUs from a single headend. When the customers to be served, however, live beyond the range of the 18 GHz facilities, the operator must choose between: (1) constructing a new headend closer to the unserved customers, (2) adding microwave relay stations to interconnect hubs, or (3) abandoning the project altogether. In either of the first two cases, the cost of serving subscribers at the new locations is increased, perhaps beyond the point at which the operator can provide service at a competitive price. This may drive the operator to the third option — abandoning the project — thereby diminishing competition at the subject site and in the market generally. Thus, the 18 GHz frequencies simply are not adequate to support broad-based competitive entry by alternative service providers.

B. Recent and pending rule changes have, and threaten to, impair the use of the 18 GHz band by private cable operators.

In addition to the technical limitations of the 18 GHz band, recent regulatory changes also have impaired the future use of the band for private cable services. First, on October 14, 1997, the FCC released an Order in a docket relating to the relocation of the Digital Electronic Message Service (“DEMS”) from the 18 GHz to the 24 GHz band.⁷ Although earlier proceedings in that docket had affected only DEMS and low-power, omnidirectional non-DEMS 18 GHz users, the October 14th Order established new “quiet zone” rules for the 18 GHz bands in order to protect Department of Defense facilities from interference. Under the new rules, no new applications will be accepted in the 17.8–19.7 GHz OFS bands within the Denver and Washington, D.C., quiet zones. As a result, the ability of private cable operators to compete in the Denver and Washington, D.C., markets has been severely restricted.

⁷ See Order, In the Matter of Amendment of the Commission’s Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band, ET Docket No. 97-99 (rel. October 14, 1997).

Second, several of the new Ka-band satellite licensees have urged the Commission to issue blanket licenses for FSS operations throughout the 17.7-20.2 GHz band.⁸ The Commission is expected to issue a notice of proposed rulemaking on this issue sometime this Spring. At this time, OpTel has not had an opportunity to analyze fully the impact of the blanket licensing proposal. However, even a preliminary analysis suggests that the use of the 17.7-20.2 GHz bands for satellite downlink services may negatively impact terrestrial microwave services, including those of private cable operators.

V. Opening The 12 GHz CARS Bands To OFS Licensees For The Delivery Of Video Programming Material Would Enhance Competition And Promote Spectrum Efficiency.

By opening the 12 GHz CARS band to OFS licensees for the delivery of video programming material, the Commission would enhance competition in the local MVPD markets, promote more efficient use of the radio spectrum and, generally, satisfy its obligation to "encourage the larger and more effective use of radio in the public interest."⁹

From a technical perspective, the proposed use of the band is consistent with the current channelization scheme for 12 GHz CARS licensees. Thus, the technical rules relating to operations in the band need not be modified to accommodate video operations. In addition, because the band already is available to CARS licensees, there currently is available affordable equipment designed for operation in these frequencies.

Moreover, use of the 12 GHz band by private cable operators would help to alleviate the competitive disparity that results from the range limitations of 18 GHz transmissions. Whereas 18 GHz links tend to be no more than 5 to 8 miles, 12 GHz

⁸ See Public Notice, IN Report No. 97-27 (rel. Sept. 5, 1997).

⁹ 47 U.S.C. § 303(g).

microwave facilities have almost double that effective range and can be used for links of 10 to 13 miles.

As set forth above, the range limitations of 18 GHz transmissions create, in effect, a barrier to competition because private cable operators must make unnecessary and duplicative capital investments in order to compete with the franchised cable incumbents. There is no reason for the Commission's rules to allow only those cable service providers who have obtained franchises to use the microwave frequencies best suited to interconnect video systems.¹⁰ By opening the 12 GHz band to OFS licensees, alternative MVPDs will be able to expand their operations and increase their market presence.

Third, there no longer is any reason to restrict the use of the frequencies below 21 GHz for video programming distribution. As the Commission recognized when it opened the 18 GHz band to use by OFS licensees for the carriage of video programming material:

the basis for our initial decision to prohibit OFS licensees from using spectrum below 21.2 GHz for the distribution of video entertainment material has eroded.... In [the FCC's initial decision], we indicated our belief that the delivery of video entertainment material would not be feasible in bands below 21.2 GHz because of the anticipated heavy occupancy of those bands by existing point-to-point operators. Significantly, our concern with the heavy occupancy of bands below 21.2 GHz (in particular, 13.2-13.25 GHz and 18.36-19.04 GHz) stemmed in substantial part from the anticipated migration to these bands of numerous OFS licensees displaced from 12.2-12.7 GHz by the reallocation of this spectrum to the Direct Broadcast Satellite (DBS) Service. As noted in the comments and in the Notice, however, the extent of anticipated migration has not materialized.¹¹

In short, adoption of the proposal set forth herein to eliminate the restrictions in Section 101.603 of the Commission's rules on the use of the 12 GHz bands for video

¹⁰ See generally In re Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, Joint Comments of the National Satellite Programming Network, Inc., et al., PR Docket No. 90-5 (filed Apr. 18, 1990).

¹¹ 18 GHz Decision at 1271. The special provisions designed to accommodate displaced 12 GHz OFS licensees terminated on September 9, 1988.

distribution services will further the public interest "by promoting spectrum efficiency and increasing the flexibility of licensees."¹²

CONCLUSION

In light of the continued dominance of the franchised cable operators in the local MVPD markets, the Commission should grant OpTel's Petition and amend the Commission's rules to allow OFS licensees to use the 12 GHz bands for the delivery of video programming materials. Continued application of the video programming restrictions in Sections 101.603(a) and (b), on the other hand, would be inequitable, unduly burdensome, and contrary to the public interest.

Respectfully submitted,

OPTEL, INC.



/s/ W. Kenneth Ferree

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April 1, 1998

¹² Id. at 1273.

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In the Matter of the Petition of)
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OPTEL, INC.) File No:
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For Waiver of Section 101.603)
of the Commission's Rules)

To: Chief, Wireless Telecommunications Bureau

**PETITION OF OPTEL, INC.
FOR WAIVER OF SECTION 101.603 OF THE COMMISSION'S RULES**

Pursuant to Section 101.23 of the Commission's rules, OpTel, Inc. ("OpTel") hereby applies for a waiver of Section 101.603 of the Commission's rules. These rules limit the frequencies that private operational fixed microwave licensees may use to transmit video entertainment material. Specifically, OpTel, which through subsidiaries operates private cable/telecommunications systems and franchised cable systems in several major U.S. cities, seeks waiver of Section 101.603 to allow it to use frequencies in the 10.7 GHz - 11.7 GHz frequencies (the "11 GHz frequencies") for fixed point-to-point microwave transmission of video entertainment material on a private carriage basis.¹

INTRODUCTION AND BACKGROUND

On February 29, 1996, the Commission released a Report and Order in which it promulgated a series of new rules for the fixed microwave services to be consolidated in Part 101 of the Commission's rules.² Among the rules adopted in the Part 101 Order is Section 101.147(a), which lists the frequencies available for assignment to fixed point-to-point microwave stations, including the 11 GHz frequencies.

¹ There are currently pending applications to assign all of the private operational fixed microwave authorizations held by OpTel and its various subsidiaries to a single entity, Transmission Holdings, Inc. ("THI"). Accordingly, OpTel requests that any relief granted by the Bureau in response to this waiver request extend to THI as well, once the assignment to THI is completed.

² See In re Reorganization and Revision of Parts 1, 2, 21, and 94 of the Commission's Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, 11 FCC Rcd 13449 (1996) (the "Part 101 Order").

Prior to the promulgation of its new consolidated microwave rules, the 11 GHz frequencies were available for assignment both for common carrier point-to-point microwave under Part 21 and for private fixed microwave under Part 94. The use of 11 GHz frequencies for private fixed microwave service, however, was limited in that a footnote to the frequency table stated that these frequencies could not be used to transmit video entertainment material.³ The frequency table contained in new Section 101.147(a) no longer contains the footnote that previously carried the restriction.

However, for reasons that are not clear on the face of the Part 101 Order, the text of the private microwave rules contained in Section 101.603 appears to retain the prior restriction by limiting the frequencies on which a private carrier may transmit video entertainment material. Recognizing this anomaly, OpTel wrote to the Chief of the Wireless Telecommunications Bureau in March of 1996, requesting clarification that the change in the frequency table was deliberate or, in the alternative, requesting that the Bureau eliminate the limitation on carriage of video entertainment material.⁴

Thereafter, prior to action on OpTel's request for clarification, several parties sought reconsideration of the Part 101 Order, including Subpart H which includes Section 101.603.⁵ Because resolution of the issues raised in the petitions for reconsideration regarding Subpart H of Part 101 would necessarily encompass the restriction on the carriage of video programming material contained in Section 101.603, OpTel was advised that its request for clarification would be dealt with in the context of the Bureau's reconsideration order.

Nearly a year has passed since petitions for reconsideration of the Part 101 Order were filed and no action has been taken on the petitions. Moreover, it does not appear likely that all of the issues for which reconsideration was sought will, or can, be resolved anytime soon. As a result, and because OpTel is preparing to move quickly into the local exchange market, OpTel now seeks waiver of Section 101.603 so that it may, on a private carriage basis, use the 11 GHz frequencies for fixed point-to-point microwave transmission of video entertainment material.

³ See 47 C.F.R. § 94.61(b) & n. 21 (1994).

⁴ See Letter from Henry Goldberg, counsel for OpTel, to Michelle Farquhar, Chief, WTB (filed Mar. 29, 1996) (attached).

⁵ See, e.g., Petition for Partial Reconsideration of CAI Wireless Systems, Inc., WT Docket No. 94-148, CC Docket No. 93-2 (filed June 27, 1996).

DISCUSSION

Pursuant to Section 101.23 of the Commission's rules, the Bureau should grant a request for a waiver of the rules if "the underlying purpose of the rule will not be served...by its application in a particular case, and grant of the waiver is otherwise in the public interest."⁶ In this instance, this standard is satisfied.

First, grant of the waiver requested would be consistent with the underlying purposes of the Part 101 revisions, which were to eliminate "unnecessary and outdated rules and reduc[e] regulatory burdens."⁷ The new frequency table set forth in Section 101.147(a) advances these purposes by eliminating the unnecessary distinction between private carrier and common carrier use of the 11 GHz frequencies for the transmission of video entertainment material.

The hold-over restriction in the text of Section 101.603, by contrast, is an outdated rule that serves no present purpose. Common carrier licensees may use these very same 11 GHz frequencies, for example, for carriage of video programming material. Under the Part 101 rules, private authorizations may be readily converted into common carrier or hybrid private/common carrier microwave authorizations. Thus, as a practical matter, the rule is little more than a formality. By granting OpTel's waiver request, the Bureau would further harmonize the private and common carrier microwave rules by waiving this formal distinction and thereby help to realize the purposes underlying the Part 101 Order.

Second, grant of OpTel's waiver request would otherwise serve the public interest by promoting "more efficient use of the microwave spectrum."⁸ OpTel currently uses 18 GHz private fixed microwave stations to transmit video entertainment material to its private cable (SMATV) systems. OpTel's systems also provide telephone services to MDUs on a shared tenant services basis. As OpTel's systems expand and it begins to provide off-site switched telephone services, it will be using microwave equipment to backhaul telephone traffic from the system MDUs to central interconnection points.

Given the technical limitations of 18 GHz microwave, OpTel intends to use 11 GHz frequencies for its telephone traffic. However, absent waiver of Section 101.603

⁶ 47 C.F.R. § 101.23 (1996).

⁷ 11 FCC Rcd at 13452.

⁸ *Id.* at 13452-53.

this would entail the operation of parallel microwave facilities — 11 GHz for telephone traffic and 18 GHz for private video traffic. Obviously, it would be most efficient for OpTel to use a single set of facilities to provide both the video and telephone components of its integrated service package.

By granting the instant waiver request, the Bureau will help to avoid unnecessary duplication of facilities, optimize use of microwave frequencies and conserve spectrum. Naturally, any such waiver would be contingent upon the Bureau's final resolution of the petitions for reconsideration in this proceeding. Nonetheless, grant of the requested waiver would allow OpTel to begin to order microwave equipment and to coordinate 11 GHz paths while it is awaiting a reconsideration decision. This would, in turn, allow OpTel to meet its customers' needs in the rapidly changing telecommunications marketplace.

CONCLUSION

Accordingly, OpTel requests that the Commission allow OpTel, on a private carriage basis, to use the 11 GHz frequencies for fixed point-to-point microwave transmission of video entertainment material.

Respectfully submitted,
OPTEL, INC.

/s/ W. Kenneth Ferree
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April 23, 1997

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ATTACHMENT B

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March 29, 1996

Ms. Michelle Farquahr
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
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Dear Ms. Farquahr:

I am writing on behalf of OpTel, Inc. ("OpTel"), which, through its subsidiaries, operates private cable/telecommunications systems and franchised cable systems in several major U.S. cities. OpTel welcomes the Wireless Telecommunications Bureau's effort, reflected in the Public Notice of March 26, 1996, to clarify and streamline its rules. The Bureau also invited additional suggestions from the public to eliminate outdated rules and requirements.

In this regard, OpTel wishes to bring to your attention an anomaly in the rules resulting from one aspect of the Commission's Report and Order (released Feb. 29, 1996) in WT Docket No. 94-148; CC Docket No. 93-2; and RM-7861 ("Report and Order"). In the Report and Order, the Commission promulgated a series of new rules for the fixed microwave services to be consolidated in new Part 101 of the Commission's rules. Among the rules adopted in this proceeding is Section 101.147(a), which lists the frequencies available for assignment to fixed point-to-point microwave stations, including 10.7 GHz - 11.7 GHz (the "11 GHz frequencies").

The 11 GHz frequencies previously were available for assignment both for common carrier point-to-point microwave under Part 21 and for private fixed microwave under Part 94. The use of 11 GHz frequencies for private fixed microwave service, however, was limited in that a footnote to the frequency table stated that these frequencies could not be used to transmit video entertainment material.¹ The new Part 101 rules deleted the footnote to the frequency table but seemed to retain the video limitation in Subpart H of the rules.

¹ See 47 C.F.R. § 94.61(b) & n. 21 (1994).

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Ms. Michelle Farqua
March 29, 1996
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OpTel is not sure whether this change was a deliberate, if incomplete, effort on the Commission's part to streamline its microwave rules and to promote "more efficient use of the microwave spectrum by permitting more intensive use of microwave equipment"² or whether the change was inadvertant. If the former, OpTel requests clarification to that effect. If the latter, OpTel urges the Bureau to move quickly to eliminate the limitation on carriage of video entertainment material as a prime example of an outdated rule.

By way of background, OpTel currently uses 18 GHz private fixed microwave stations to transmit video entertainment material to its private cable (SMATV) systems. OpTel's systems also provide telephone services to MDUs on a shared tenant services basis. As OpTel's systems expand and it installs more advanced distributed communications facilities, OpTel will be using microwave equipment to backhaul telephone traffic from the system MDUs to a central interconnection point with a local exchange carrier or competitive access provider.

Given the technical limitations of 18 GHz microwave, OpTel intends to use 11 GHz frequencies for its telephone traffic. Obviously, it would be most efficient for OpTel to use a single set of facilities to provide both the video and telephone components of its integrated MDU services. Consequently, the Commission's opening of the 11 GHz frequencies for video traffic will help to avoid unnecessary duplication of facilities, optimize use of microwave frequencies and conserve spectrum — not to mention reduce regulatory burdens both for the Commission and for microwave users.

Accordingly, OpTel requests clarification, or a determination, that it may use 11 GHz frequencies for fixed point-to-point microwave transmission of video entertainment material.

Respectfully submitted,



Henry Goldberg
Attorney for OpTel, Inc.

cc: Robert H. McNamara
Robert James

² Report and Order at ¶ 5.