

RECEIVED

DOCKET FILE COPY ORIGINAL

MAY 18 1998

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
OpTel, Inc. Petition for Rulemaking)
to Amend 47 C.F.R. § 101.603 and) RM No. 9257
Related Rules to Allow the Use of)
12 GHz OFS Frequencies for the)
Delivery of Video Programming Material)

**RCN TELECOM SERVICES, INC.
COMMENTS IN SUPPORT OF PETITION FOR RULEMAKING**

RCN Telecom Services, Inc. ("RCN"), by counsel, hereby files Comments in support of the Petition for Rulemaking filed by OpTel, Inc. ("OpTel") requesting that the Commission initiate a rulemaking proceeding to amend Parts 78 and 101 of its regulations to permit operational fixed microwave service ("OFS") licensees to use frequencies in the 12 GHz band for the delivery of video programming.¹ RCN, through subsidiaries, provides video and telecommunications services via microwave distribution networks in various markets throughout the United States. RCN typically uses microwave networks that operate in the 18 GHz band, but given the inherent technical constraints of that band, would seek to operate in the 12 GHz band, if permitted. In fact, RCN has contemplated filing with the Commission a Petition for Waiver of 47 C.F.R. § 101.603, which fails to include the 12 GHz band among those listed as bands in which licensees may provide any product or service, including video programming. As such, RCN has a substantial interest in the Commission's response to OpTel's petition. RCN respectfully urges the Commission to issue the requested Petition for Rulemaking and ultimately, to amend its regulations to enhance competition in the video and telecommunications markets by expanding the scope of services that OFS licensees may provide.

¹ 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; filed by OpTel, Inc. (Apr. 1, 1998) ("OpTel Petition"); *Public Notice*, RM No. 9257 (rel. Apr. 15, 1998).

No. of Copies rec'd 024
List A B C D E MMB

DISCUSSION

I. Description of RCN's Services and Interests in this Proceeding

RCN, through subsidiaries and in combination with other entities, provides competitive video and telecommunications services to customers located in numerous states, including Massachusetts, Pennsylvania, New Jersey and New York, and intends to enter several additional markets in the near future, including the Washington, D.C.-metro area.²

RCN uses microwave technology, fiber optic conduit, or some combination of both to deliver its services in its markets.³ RCN's wireless provision of video programming employs microwave distribution networks that operate in the 18 GHz band to deliver the programming from its central headend to multiple distinct facilities located at individual multiple dwelling unit ("MDU") buildings. The video programming then is delivered over fiber optic or coaxial cable to individual subscribers within the various MDU buildings.⁴ These systems often are referred to as "private cable systems," or systems that do not require a local cable franchise because no public rights-of-way are crossed. The 18 GHz wireless microwave band enables RCN to deliver a competitive package of 72 channels of video programming, which RCN typically offers in a branded package with local and long distance telephone service and high-speed Internet access that typically exceeds the services offered by traditional wireline cable operators in terms of both quality and price.

In the New York City market, for example, RCN currently serves numerous customers in Manhattan, and has business plans which call for extending its service to Queens, Brooklyn, the Bronx and additional areas in 1999, including metropolitan New Jersey. However, as discussed

² On January 26, 1998, the Commission granted Starpower Communications, LLC, an enterprise jointly owned by RCN and Potomac Electric Power Company, certification to operate an open video system in the Washington, D.C.-metro area.

³ The Commission also has granted RCN certification to operate a facilities-based open video system in New York, and granted RCN-BeCoCom, LLC, an enterprise jointly owned by RCN and Boston Edison Company, certification for the Boston, Massachusetts-metro area.

⁴ The same general architecture applies to other types of MDU structures, such as garden style apartments, universities and hotels.

more fully below, technical constraints of the 18 GHz band make this expansion cost-prohibitive or simply impossible. RCN thus supports OpTel's request that the Commission initiate a rulemaking proceeding aimed towards permitting private cable operators or multiple video program distributors ("MVPDs") to use the 12 GHz band to deliver video programming. The propagation characteristics of the 12 GHz band, which already is available to RCN's franchised competitors, would enable RCN to deliver its signals over significantly longer distances without degradation and without the costly expense of installing additional central headends. In addition, use of the 550 MHz of spectrum available in the 12 GHz band would allow RCN to expand from 72 to 82 channels of programming, thereby making its service very competitive. Use of the 12 GHz band would allow RCN to extend its service to the targeted neighborhoods and to offer its comprehensive package of video programming, telephone service and Internet access on the same superior terms and conditions enjoyed by RCN's current customers in Manhattan. As a result, RCN could continue its efforts to achieve the goals of the Telecommunications Act of 1996 to "promote competition . . . [and] to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid [private sector] deployment of new telecommunications technologies."⁵

II. The 18 GHz Band Cannot Accommodate RCN's Expansion

With its existing 18 GHz architecture within New York City, RCN can deliver its video programming to MDU buildings located in Manhattan, and through the expensive multiple relay of its signals, to additional MDU buildings located in nearby areas. RCN has installed state-of-the-art relay stations to extend the range of its signals. However, even under the best of circumstances and with the use of multiple relay stations, the propagation constraints of the 18 GHz band prohibit RCN from delivering a signal of sufficient quality any farther than eight miles from its central headend. Viewers outside this range would receive a noisy signal and an inadequate picture.

As a result, RCN is faced with the Hobson's Choice between installing additional central

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56; approved Feb. 8, 1996 (the "1996 Act"); S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

headends in order to offer service to customers in New York City's other boroughs or simply abandoning altogether its plans to offer service to consumers in these additional neighborhoods. Unfortunately, in many such cases the costs of installing additional headends would be cost-prohibitive, forcing RCN to forsake these potential customers. Moreover, even if economic circumstances warranted the multi-million dollar investment in additional headends, aeronautical constraints and other interference factors associated with urban areas such as New York City would bar RCN from installing additional headends in certain areas, including Queens. Notwithstanding the expense, RCN faces economic and technical constraints ultimately impeding its ability to deliver a competitive package of video programming to certain customers due to the confinement of using microwave distribution networks that operate in the 18 GHz band.

III. The 12 GHz Band Can Accommodate RCN's Expansion

RCN agrees with OpTel that the Commission should consider amending its rules to allow OFS licensees to use the 12 GHz band to deliver any of their own products and services, including video programming.⁶ From a technical viewpoint, the 12 GHz band offers several advantages. First, signals delivered via microwave distribution networks using the 12 GHz band can travel up to 12 miles without degradation, and relay stations can be used to send the signal even further. RCN thus could deliver its services to the targeted customers outside Manhattan without the costly installation of additional central headends. RCN also could avoid the aeronautical and other technical obstacles related to providing service in a congested area. Second, the 550 MHz of bandwidth available at 12 GHz would permit carriers such as RCN to become more competitive by increasing the number of programming channels from 72 to 82. Third, because the 12 GHz band has long been available to licensees in the Cable Antenna Relay Service ("CARS"), efficient and economical equipment is available for use by MVPDs. Finally, as OpTel notes, allowing private cable operators to use the 12 GHz band would be consistent with the CARS licensees' current use of the band; therefore, the Commission's technical rules for operation in the 12 GHz band would not need to be amended.

⁶ OpTel Petition at 1; 47 C.F.R. § 101.603(a)(2).

IV. Allowing Private Cable Operators to Use the 12 GHZ Band Is Pro-competitive

As described above, the inherent constraints of the 18 GHZ band raise barriers to competition for RCN and other private cable operators. In addition, the Commission's current rules do not allow private cable operators to use the more accommodating 12 GHZ band to provide video programming. Under the Commission's rules, video programming may be provided via the 12 GHZ band only by licensees in the CARS service, which is defined as:

[a] fixed or mobile station used for the transmission of television and related audio signals, signals of standard and FM broadcast stations, signals of instructional television fixed stations, and cablecasting from the point of reception to a terminal point from which the signals are distributed to the public.⁷

Only franchised cable operators and licensees of channels in the Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS") and Instructional Television Fixed Service ("ITFS") are eligible for CARS licenses.⁸ RCN submits that private cable operators are equally deserving of eligibility for CARS licenses.

First, in light of the 1996 Act's general mandate to remove competitive obstacles and foster competition, it would seem particularly anti-competitive for the Commission to preserve an outdated policy that permits a franchised cable operator to use the 12 GHZ band to expand its service area, but prohibits similarly situated private cable operators from doing so. The Commission has not modernized its rules in this regard in eight years.⁹ During this interval, two major developments have occurred. First, Congress enacted the 1996 Act in part to promote competition to incumbent,

⁷ *Id.* § 78.5(a).

⁸ *Id.* § 78.13.

⁹ See *Report and Order*, In re Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHZ Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service, 5 FCC Rcd 6410 (1990) ("1990 Report and Order").

franchised cable operators.¹⁰ Second, the private cable industry has entered the competitive landscape for the delivery of multichannel video programming. As noted in OpTel's comments, the Commission has recognized the private cable industry's competitive effect on cable operators' services and prices, and has endorsed its potential to become an even more significant competitor to traditional cable service.¹¹ RCN urges the Commission to allow private cable's continued growth by updating its rules to permit private cable operators to operate in the 12 GHz band in order to expand their service areas.

Second, Commission precedent would support such an action. For example, in the Commission's 1990 Report and Order where it extended CARS eligibility to MDS licensees, the Commission found that MDS licensees are entitled to CARS licenses "on the same basis as [franchised] cable operators" because "cable and wireless cable operators have similar needs for CARS . . ."¹² RCN's need for CARS licenses and use of the 12 GHz band certainly equates to that of franchised cable operators and MMDS operators. Given the breadth of service offerings provided by RCN and other private cable operators, RCN's need for CARS spectrum at least equals that of franchised cable operators. In fact, given the severe competition RCN encounters from franchised cable operators that have enjoyed long-standing monopolies, RCN's need for flexibility in the manner in which it delivers its services more likely exceeds that of franchised cable operators.

¹⁰ See, e.g., 47 U.S.C. § 573 (permitting telephone companies and other entities to compete with franchised cable operators via open video systems).

¹¹ OpTel Petition at 3 citing *Fourth Annual Report*, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141, 13 FCC Rcd 1034, 1086-87 (1998).

¹² 1990 Report and Order, 5 FCC Rcd at 6423.

Finally, RCN would operate in the 12 GHZ band for similar purposes as franchised cable operators. In that same 1990 Report and Order, the Commission described use of the CARS band:

[t]he CARS band is used to relay programming from remote sites to cable system headends and to connect various parts of a cable system. It is also used in lieu of coaxial cable to traverse obstacles such as rivers and superhighways, and where use of coaxial cable would be expensive or impractical, such as urban areas¹³

The Commission describes some of the exact same uses to which RCN would put microwave distribution networks that operate in the 12 GHZ band. In the New York City area, for example, the many waterways and other geographic or technical (*i.e.*, aeronautical) obstacles greatly complicate, if not make it impossible, for RCN to use its existing 18 GHZ band operations to reach many parts of the New York City area. RCN thus would seek to use the 12 GHZ band because it would enable RCN to economically deliver its signals from its upper Manhattan central headend to customers located in Queens, Brooklyn and other Boroughs of New York City.

CONCLUSION

The Commission has stated:

Since we believe that competitive markets are the most direct and reliable means for ensuring that consumers receive the benefits described in the Communications Act, we have evaluated the need for spectrum licensing restrictions in terms of whether the restrictions are necessary to promote competition in the telecommunications marketplace and whether these restrictions are otherwise consistent with our obligation to promote the public interest.¹⁴

¹³ 1990 Report and Order, 5 FCC Rcd at 6441, n.68.

¹⁴ *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate The 27.5-29.5 GHZ Frequency Band, To Reallocate the 29.5-30.0 GHZ Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services; Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, PP-2, 12 FCC Rcd 12545, 12614 (1997).

RCN urges the Commission to take this opportunity to fulfill this aim by granting OpTel's Petition, with an eye towards ultimately amending Parts 101 and 78 rules to allow OFS licensees to deliver video programming over microwave networks in the 12 GHZ band. Such an action will promote competition among video programming distributors and provide consumers with the resulting benefits. Issuance of a Notice of Proposed Rulemaking will serve the public interest by providing interested parties an opportunity to inform the Commission in this regard, and by allowing the Commission to render a decision based on a complete record.

Wherefore, RCN Telecom Services, Inc. respectfully requests that the Commission grant the Petition for Rulemaking filed by OpTel, Inc.

Respectfully Submitted,



Eliot J. Greenwald
Lawrence A. Walke
SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W.
Washington, D.C. 20007
(202) 424-7500

Attorneys for
RCN Telecom Services, Inc.

Dated: May 18, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 1998, copies of the foregoing Comments of RCN Telecom Services, Inc. were served by first class mail, postage prepaid, or by hand, on the following:

Magalie R. Salas
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Henry Goldberg*
W. Kenneth Ferree
Goldberg, Godles, Wiener & Wright
1229 19th Street, N.W.
Washington, D.C. 20036
Attorneys for OpTel, Inc.

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

* By first class mail

By:

