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June 22, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

Magalie R. Salas, Secretary
Federal Communications Commission
The Portals Building
445 12th Street, SW
TW-A325
Washington, D.C. 20554

Re: CS Docket No. 95-184

Dear Ms. Salas:

On June 22, 1999, the attached "Declaration of Louis Brunel," President and Chief Executive Officer of OpTel, Inc., was sent to Royce Dickens and Carl Kandutsch of the Cable Services Bureau regarding the Bureau's consideration of issues in the above-referenced docket.

Sincerely,

W. Kenneth Ferree
Attorney for OpTel, Inc.

cc: Royce Dickens
Carl Kandutsch

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DECLARATION OF LOUIS BRUNEL

I, Louis Brunel, am President and Chief Executive Officer of OpTel, Inc. I am submitting this declaration in support of OpTel's various pleadings filed with reference to CS Docket No. 95-184. I hereby declare that the following statements are true and correct to the best of my knowledge, information, and belief.

1. In its pleadings, OpTel has referred on several occasions to "mandatory access" states. These are states that have laws of one form or another that require property owners to allow franchised cable operators onto their property to provide service to a requesting tenant.

2. Although there are about a dozen mandatory access states, OpTel currently operates private cable systems in only one such state — Illinois. OpTel also operates systems in Florida, which has a mandatory access statute limited to condominiums.

3. OpTel has no current intention of expanding its services into any other mandatory access states. Indeed, OpTel has decided to avoid certain otherwise-attractive urban markets precisely because they are located in mandatory access states. For example, within the last two years, OpTel attempted to initiate cable service to MDUs in Las Vegas, Nevada; a market that currently is underserved. Largely in response to threats by the incumbent operators to overbuild any properties served by OpTel and to sue OpTel and the related property owner based on the state mandatory access statute if OpTel displaced any incumbent operator or any existing MDU wiring, OpTel withdrew from the market at a significant cost to OpTel.

4. Building and wiring a system to serve an MDU property is a capital intensive process. Normally, in order to justify the investment required, OpTel seeks to negotiate an "exclusive" right-of-entry agreement with the MDU owner or

manager. Although these agreements generally provide that the MDU owner will not suffer the property to be wired by another MVPD for video services, they do not bar residents from using wireless or DBS antennae to receive video programming to the extent permitted by law.

5. There is a direct correlation between the term of exclusivity and the size of the investment that OpTel can afford to make in any single MDU. Although the economics vary from MDU to MDU, it is our experience that an exclusive period of seven to ten years is the minimum required to recover the investment required to serve most MDU properties if significant rewiring is involved. Any regulatory cap on the term of exclusive contracts, therefore, would act as a cap on the investment that a new entrant can afford to make in any given MDU and would significantly impair OpTel's competitiveness.

6. In turn, the more that a new entrant can afford to invest in a property, the more successful it will be in competing against the entrenched incumbent cable provider. Exclusive agreements allow new entrants to invest in state-of-the-art communications equipment capable of providing a wide range of products and services (*e.g.*, voice, video, and data services) along with top-of-the-line customer service capabilities (*e.g.*, on-site customer service representatives). Consequently, limitations on exclusivity, including state mandatory access laws, favor the incumbent franchised cable operators.

7. Further, because franchised cable operators often take the position that state mandatory access laws give them the right to maintain cable home run wiring to every unit in MDUs, they resist application of the FCC's pro-competitive inside wiring disposition rules. This obstructionism, in combination with the MDU owners' understandable reluctance to incur the expense of litigation with the franchised cable operators, has substantially impaired the expansion of OpTel's

systems in the mandatory access state in which it competes. In fact, OpTel's cable growth in this state has been slower than it is in any other large market.

8. State mandatory access laws and the threat of possible federal mandatory access requirements have had an impact on OpTel's efforts to obtain capital in the financial markets. Indeed, the existence of this proceeding alone has long been an extensively disclosed risk factor in OpTel's financing and disclosure documents. Further, certain debt obligations have been expressly tied to OpTel's ability to enter into exclusive arrangements for video service and, when OpTel recently began to explore the possibility of offering stock to the public, there was concern expressed by analysts that federal access regulation might undermine OpTel's ability to enter into exclusive rights-of-entry for video programming services.

9. The motivation for limiting exclusive video service contracts, though well-intentioned, is based on a flawed premise. It is presumed that property owners do not have an interest in providing their residents with the most appealing set of residential amenities, or that they would trade those interests for some access payment by a video service provider. In OpTel's experience, those cases are the exception rather than the rule. 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.

10. In that regard, OpTel's right-of-entry agreements almost always are tied to our commitment to provide — throughout the term of the agreement — competitive services and features at a price that is equal to or less than that generally available in the market. Failure to abide by this covenant can be an event of default, ending OpTel's service rights on the property. To meet its contractual obligations, OpTel to date has upgraded, at substantial capital expense, the network and wiring to approximately 70% of all the units to which it provides video services.

11. Long-term exclusive arrangements present a competitive problem only when they result from the exercise of market power. In a free market, with MDU owners competing for residents and MVPD's competing to provide service to MDUs, one would expect, and OpTel finds, that the parties to the transaction will bargain to a mutually beneficial outcome: residents get high-quality services at competitive rates, MDU owners are able to increase the marketability of their units, and MVPDs are able to attract the investment required to build-out their systems and compete with the incumbent operators.

12. By contrast, <u>perpetual</u> contracts are the product of a time when there was no significant competition to cable. Most perpetual contracts were contracts of adhesion — if an MDU owner wanted multichannel video service, he or she had no choice but to take cable service on the terms and conditions offered by the franchised cable operator. Thus, perpetual contracts rarely, if ever, include service standards and they normally provide that the franchised cable operator will own the inside wiring in perpetuity. Today, MDU owners understand that there are competitive choices and will not be coerced into signing perpetual agreements where there is competition. Nonetheless, in some areas — notably Southern California, Phoenix, Arizona, and Southern Florida — large segments of the MDU market are foreclosed to competitive entry by perpetual contracts that still are being enforced.

Executed on June 22, 1999

Louis Brunel