Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Petition for Rulemaking	)	CS Docket No. 99-250
To Amend Eligibility Requirements in	)	RM-9257
Part 78 Regarding 12 GHz Cable	)	
Television Relay Service	)	

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") hereby files its reply comments in the above-captioned proceeding.

In its comments, NCTA stated that it would defer judgment on whether so-called "Private Cable Operators" ("PCOs") should be allowed to use the 12 GHz band pending PCO responses to a number of critical questions the Commission raised in the Notice of Proposed Rulemaking in the above-captioned proceeding. Those questions included requests for the submission of a detailed cost analysis, including equipment costs, comparing the use of the 18 GHz or 23 GHz bands which the PCOs currently use versus use of the 12 GHz CARS band and a conclusive demonstration of the PCOs' need for 12 GHz spectrum.

Despite the Commission's explicit call for this information, the PCO commenters have offered little more than rhetoric. The Commission should respond by promptly rejecting the proposal. If the Commission nevertheless believes it is appropriate to authorize PCOs to use the 12 GHz band, it should be only on a strictly circumscribed secondary basis.

I. THE COMMISSION SHOULD REJECT THE PCOs' REQUEST FOR ADDITIONAL FREQUENCIES BECAUSE THEY HAVE NOT SUBMITTED THE ESSENTIAL COST JUSTIFICATION SOUGHT BY THE COMMISSION

PCOs currently are using frequencies in the 18 GHz and 23 GHz bands that enable them to serve their customers efficiently. In this proceeding, the Commission offers PCOs and other interested parties an opportunity to justify their request for additional frequencies at 12 GHz currently used primarily by franchised cable systems. Before PCOs were awarded these additional frequencies, the Commission required that proponents provide detailed record information to support their request.

The Commission sought specific comment on the costs associated with the provision by PCOs of services utilizing various frequency bands. It required that proponents submit "a detailed analysis and comparison, including equipment costs, comparing use of 18 GHz or 23 GHz versus use of the 12 GHz CARS band." [1] This requirement is analogous to the need showing generally called for by the Commission's rules in comparative proceedings for contesting applications for radio frequencies.

OpTel and other advocates of PCO use of the 12 GHz band have made only a scant and ultimately ineffective effort to respond to the Commission's inquiry. Relying upon rhetoric rather than substance, they ignore the Commission's reasonable call for detailed information. On this basis alone, the request for 12 GHz frequencies should be denied.

Indeed, OpTel, without a trace of irony, justifies its need for additional frequencies by reference to the Commission's 1991 decision which permitted PCO use of the 18 GHz band.[2] But, despite OpTel's failure to explain why 18 GHz spectrum is not sufficient for its operations,

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[1] Petition for Rulemaking To Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service, FCC 99-166, rel. Jul. 14, 1999 ("Notice"), at para. 14.

[2] Comments of OpTel, CS Docket No. 99-250, Aug. 16, 1999 at 3 ("OpTel").

it again maintains that despite the availability of facilities operating at 18 GHz (and 23 GHz), there is still a "pressing need" for more spectrum because it claims 18 GHz spectrum has weaker propagation characteristics than does the 12 GHz spectrum.[3] But the mere assertion of a pressing need is no substitute for a testable analysis.

OpTel's representations are particularly suspect because they appear to rest upon a simplistic comparison of the relative strengths of the 12 GHz and 18 GHz frequencies, and, by extension, the additional "costs" allegedly incurred using the 18 GHz frequencies. According to OpTel, PCOs employing 18 GHz frequencies "normally will use no single link greater than 8 miles."[4] OpTel argues that the 12 GHz band, by comparison, has significantly greater range, able to reach 12 miles or more. This increase in the radius of a microwave station, it is claimed, can significantly increase the number of customers that can be served by a single hub, and this will translate into significant cost savings.

But no matter the extent to which this is true in theory, these merely theoretical assertions are no substitute for the "detailed analysis and comparison"[5] explicitly sought in the Notice. Without this information, the Commission is forced to rely upon OpTel's generalized assertions.

RCN's effort to respond to the critical questions raised by the Notice is no more availing. Its direct response to the Commission's request for detailed information on cost differences at different frequencies is, like the assertions of OpTel, theoretical and not substantive. RCN asserts that the higher frequency bands require more equipment to serve the same number of customers and this may necessitate the construction of an additional headend. The company argues that "to the extent that PCOs and OVS providers are limited to the use of 18 GHz bands,

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[3] Id.

[4] Id.

[5] Notice at para. 14.

they are also limited in the size and speed of buildout of their desired service areas. This has the effect of slowing the pace of the development of competition in the MVPD industry."[6]

The Commission is often faced with the responsibility of allocating scarce spectrum among users and uses. It is common in these proceedings for proponents to argue that if they are awarded more spectrum, they will be able to operate more efficiently and at a lower cost per unit.[7] In this particular proceeding, OpTel and RCN argue that by employing 12 GHz frequencies they will be able to operate with fewer hubs and possibly fewer head-ends. Therefore, they claim the resulting reduction in costs will facilitate competition between PCOs and other providers of multichannel video services.

But the arguments advanced by OpTel and RCN are purely theoretical. There is no basis in the record for the Commission to compare the real benefits (if any) of granting the PCO companies' request against the "costs" of providing service at 18 GHz or 23 GHz. The Commission cannot, for example, judge, based upon the information provided, how much of a spectrum efficiency benefit 12 GHz frequencies will be to PCOs, and specifically how the award of those frequencies will translate into reduced operating costs for these companies. Without such data, the Commission is unable to take the crucial step of analyzing the benefits and costs of granting PCOs the additional frequencies they seek.

The 12 GHz band sought by PCOs plays an important role in the provision of video services by franchised cable operators and cable networks. These frequencies have been used for decades to supplement the cable industry's wire-based facilities. If PCOs are allowed to use

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[6] Comments of RCN Telecom Services, Inc. at 8 ("RCN"). While RCN does attach to its comments a "Technical Statement," that statement is a series of conclusions without in-depth analysis, is not in the form of a declaration or affidavit, and is not signed by an engineer or other expert – or, for that matter, anyone.

[7] See e.g., Cellular Communications Systems, 86 F.C.C. 2d 469, 475 (1981) (In cellular proceeding, AT&T argued that a larger spectrum allocation would result in decreased per subscriber costs.)

these frequencies, they may seriously disrupt the ability of franchised cable operators and cable networks to provide the services which they are bound to provide pursuant to local franchises. The failure of PCOs to respond to the call for detailed cost and related information constitutes an omission of an essential threshold requirement posed by the Commission in the Notice in this proceeding and warrants denial of the proposal.

II. IF THE PCOs' PROPOSAL IS NOT REJECTED OUTRIGHT, PCOs, AT MOST, SHOULD BE ACCORDED SECONDARY STATUS

If the Commission nevertheless decides to allow PCOs access to 12 GHz frequencies, it should be under strict conditions consistent with secondary status. Secondary status will offer these companies an opportunity to use the 12 GHz band, while at the same time offering protection to existing users.

Secondary status is appropriate, first, because PCOs, unlike franchised cable operators, do not have legal obligations to serve entire communities. Instead, they may pick-and-choose from among the most lucrative customers. They are not even bound to serve all MDUs within an urban area, or all potential customers within a particular MDU. Cable operators' more comprehensive service obligations fully justify ensuring that they have access to all of the 12 GHz frequencies they require before these frequencies are taken by PCOs.

PCOs operate outside of the comprehensive regulatory framework established by the Cable Communications Policy Act of 1984, as amended. They are not obligated to pay franchise fees to localities, to offer PEG channels, to satisfy must carry requirements, or to comply with renewal and transfer procedures. Since they are not subject to these requirements, PCOs should not be granted equal status in obtaining access to 12 GHz frequencies.[8]

[8] The 12 GHz band is currently shared by cable operators, cable networks and MDS licensees. Some have argued that since MDS licensees have been permitted to share 12 GHz spectrum with franchised cable operators, there is no Commission policy that only franchised cable operators have access to 12 GHz spectrum. See Optel at 5;

Second, in the process of crafting a secondary status classification appropriate to the use of the 12 GHz band by PCOs, the Commission should ensure that PCOs fully utilize frequencies in the previously-authorized 18 GHz and 23 GHz bands before they are allowed to use 12 GHz frequencies. The Commission should establish a mechanism by which PCOs demonstrate in individual jurisdictions that 18 GHz and 23 GHz frequencies are fully utilized and not adequate for a particular PCO's needs before it is granted secondary access to 12 GHz spectrum.

This procedure is particularly important because, as Time Warner Cable points out in its Comments in response to OpTel's Petition for Rulemaking, neither OpTel nor RCN had demonstrated "with any engineering data" that 18 GHz transmissions have a significantly shorter range than 12 GHz frequencies.[9] Time Warner further highlighted the Commission's finding that, in its experience, "CARS stations in the 12 GHz band can transmit programming 11-15 miles, while the 18 GHz band is effective for 8-11 miles."[10] Neither OpTel nor RCN provided persuasive data to the contrary in their comments.[11] In the face of serious questions regarding the actual range differences between 12 GHz and 18 GHz frequencies, it is not too much to require PCOs to demonstrate the need for 12 GHz spectrum over 18 GHz spectrum in particular locations if they seek access to the CARS band frequencies.

RCN at 4, n. 10. But, as the Wireless Communications Association explains in its Comments, prior to 1990, MDS licensees were required to operate as common carriers and were able to obtain access to ample common carrier point-to-point spectrum located quite near 12 GHz. By 1990, however, the situation had changed. MDS licensees by that time were classified as non-common carriers, and therefore not eligible to use common carrier frequencies. As a result, they were very much in need of additional point-to-point spectrum, which led the Commission to make MDS licensees eligible for 12 GHz frequencies. In contrast, the spectrum available to PCOs is plentiful and they do not have the same "equities" that convinced the Commission to make MDS licensees eligible for CARS frequencies in 1990. See Comments of The Wireless Communications Association International, Inc., CS Docket No. 99-250, Aug. 16, 1999, at 8, n. 12, citing MDS/ITFS CARS Eligibility Order, 5 FCC Rcd at 6423.

[9] Comments of Time Warner Cable, CS Docket No. 99-250, Aug. 16, 1999, at 11.

[10] Id., citing NPRM at para. 18. "We do not believe, based upon our experience, that the range differences are as significant as OpTel and RCN suggest." (footnote omitted).

[11] As noted earlier, while RCN submitted a "Technical Statement" attached to its Comments, it was seriously deficient. See note 6, supra.

Third, after ensuring that PCOs cannot satisfy their needs by using previously authorized frequency bands, if the Commission chooses to allow them into the 12 GHz band, it should do so under conditions that prevent the warehousing of spectrum. If PCOs are able to control spectrum before they demonstrate an identifiable need, the frequencies may not be available when cable operators, cable networks and other primary users require their use. As secondary users, PCOs should not be allowed to control frequencies potentially needed by primary users unless and until they show an actual need for these frequencies.

A fourth element of secondary status should be the limitation of PCOs to hub-to-hub operation. Cable operators use 12 GHz facilities for transmissions between hubs. PCOs should be similarly limited. If PCOs were authorized to expand the use of these frequencies to include "hub and spoke" transmissions, the demand on scarce spectrum space would increase dramatically. If significant frequency congestion resulted, the primary users of the spectrum – and their customers – would be at risk.

Fifth, as secondary users, PCOs should not be allowed to offer data and voice services on any 12 GHz spectrum they use. Cable operators as primary users employ 12 GHz frequencies almost exclusively to carry video transmissions. If PCOs were allowed to offer data and voice in addition to – or in lieu of – video over 12 GHz capacity, the use of the band would be fundamentally altered. In the process, the available 12 GHz spectrum in a particular area would be diminished, if not eliminated. If PCOs are allowed to use 12 GHz frequencies, they should be limited to using that spectrum for video programming transmissions.

Finally, we reiterate that secondary users, like primary users, must abide by the Commission's licensing procedures by obtaining a license before they commence transmitting.[12] And, they must coordinate their use of the band in conjunction with a reputable frequency coordination and protection company possessing the requisite engineering resources to perform the necessary tasks. The effective performance of these tasks is needed if PCOs are to share the 12 GHz band.

[12] We agree with the comments of OpTel and others that, "consistent with its obligations under Section 309(j)(6)(E), the Commission should avoid mutual exclusivity in this service by continuing to license 12 GHz paths on a coordinated, site-by-site basis." OpTel at 9.

CONCLUSION

The Commission should reject the proposal of PCOs to allow them to utilize 12 GHz frequencies. The Notice expressly and specifically requested a detailed analysis comparing the costs associated with the use of the 18 GHz or 23 GHz band versus the 12 GHz band. This information was needed to permit the Commission to assess whether the cost differences at 12 GHz and 18 GHz/23 GHz are as stark as the PCOs claim. The failure of the PCOs to provide the required information constitutes grounds for the rejection of their proposal.

If the Commission nevertheless believes that PCOs should be allowed to utilize the 12 GHz band, it should be as secondary users. Secondary user status as defined in these comments is particularly warranted because PCOs, unlike franchised cable operators who are the principal primary users of the band, do not have franchise obligations to, among other things, serve entire communities. Instead, PCOs should be required to abide by the conditions described herein.

Respectfully submitted,

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