

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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

To: The Commission

**REPLY COMMENTS**

**TIME WARNER CABLE**

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## **SUMMARY**

OpTel, Inc. ("OpTel") and other private cable operators ("PCOs") have not made the case that the Commission should permit them to use frequencies in the 12.7-13.2 GHz Cable Television Relay Service ("CARS") band. On any ground they have raised, be it technical, regulatory parity, or costs, the PCOs' showings fall woefully short.

The PCOs argue that they should be permitted into the 12 GHz band because 18 GHz frequencies limit the distance their signals can travel significantly more than 12 GHz band frequencies. However, they supply no technical data to support this claim. The Commission has already concluded that the effective range difference between the two bands is very small. Likewise, RCN attaches a "Technical Statement" to its Comments, purporting to demonstrate how use of 18 GHz frequencies in New York City is far inferior to the 12 GHz band. However, this attachment is not signed or verified, nor does it contain any engineering data or other documentation. It consists merely of unsupported conclusory statements. Such anecdotal evidence is an insufficient basis to amend the Commission's rules.

Several PCOs also argue that they should be permitted to use the CARS band on the basis of regulatory parity with cable operators. However, while they seek parity in terms of perceived regulatory advantages, they do not seek to be subject to any of the costly regulatory obligations imposed upon cable operators, including local franchise requirements; franchise fees up to five percent of gross subscriber revenues; leased access; must-carry; and basic rate regulation. Thus, any claims of so-called regulatory parity ring hollow.

Furthermore, the PCOs have failed to demonstrate that using CARS band frequencies would be cost effective. They claim that, unless they are eligible for CARS band frequencies, they would need to construct additional headends or incur additional costs as they expand. However, as with their technical claims, they again supply no data to support these claims.

Any business should expect to face increased equipment, rent, insurance, power and other costs as it expands. This does not justify special favors from a regulatory agency. At minimum, PCOs who desire to use 12 GHz band frequencies must provide a detailed cost showing as to why CARS is necessary rather than, for example, fiber optic cable or television receive-only facilities used in conjunction with additional headend facilities. Thus far, the PCOs have failed to provide such a showing.

The PCOs also claim that several Commission rulemakings may restrict their use of existing frequencies. In particular, OpTel points to the Commission's rulemaking regarding the Digital Electronic Messaging Service. However, this rulemaking impacts only two cities, Denver and Washington, DC. Such an isolated geographic effect does not rise to a national problem requiring a nationwide spectrum giveaway.

Should the Commission decide to make the 12 GHz band available to PCOs, such use should be secondary to cable system usage. Where, as the Commission recognizes, cable operators are generally required by their franchises to serve an entire community, while PCOs may cherry pick part the highest density or highest income portions of the community, secondary use for PCOs maximizes spectrum efficiency. Secondary use for PCOs also maximizes service to customers, by ensuring that cable operators who are required to serve an entire community have access to CARS frequencies necessary to do so. Finally, secondary status for PCOs eliminates the need for spectrum auctions, a result desired by Congress, the Commission, and commenters on all sides of this proceeding.

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**REPLY COMMENTS**

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.<sup>1/</sup> In its Comments,<sup>2/</sup> Time Warner requested that the Commission deny the petition of OpTel, Inc. ("OpTel") to amend the Commission's rules to allow private cable operators ("PCOs" or "SMATV" [Satellite Master Antenna Television] operators) to use the frequencies in the 12 GHz Cable Television Relay Service ("CARS") band for the delivery of video programming on a primary basis.<sup>3/</sup> Time Warner explained that PCOs should not have equivalent access to

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<sup>1/</sup>Notice of Proposed Rulemaking, CS Docket No. 99-250, FCC 99-166 (rel. July 14, 1999) ("NPRM").

<sup>2/</sup>Comments of Time Warner Cable, CS Docket No. 99-250, filed August 16, 1999 ("Time Warner Comments"). References herein to the "Comments" of other parties also refer to Comments filed on August 16, 1999 in this proceeding, unless otherwise indicated.

<sup>3/</sup>Petition for Rulemaking of OpTel, Inc., filed April 1, 1998 ("OpTel Petition.")

CARS frequencies absent public interest responsibilities that are equivalent to those faced by cable system CARS licensees.<sup>4/</sup> Time Warner also agreed with the Commission's concern that expansion of CARS band eligibility to PCOs could "interfere with existing users."<sup>5/</sup> Accordingly, Time Warner pointed out that it is the PCOs' burden to demonstrate that such interference would not occur, and thus far they have not done so.<sup>6/</sup>

More fundamentally, as Time Warner explained, PCOs have the burden to demonstrate why their eligibility for use of 18 GHz and 23 GHz Operational Fixed Service ("OFS") frequencies is inadequate to meet their needs, and thus far they have failed to meet this burden.<sup>7/</sup> Likewise, Time Warner indicated that the PCOs have failed to prove that the use of CARS band frequencies is more cost effective, and less wasteful of spectrum, than constructing cable headends using television receive-only equipment.<sup>8/</sup>

Time Warner also explained that PCOs should not be permitted to carry local television broadcast signals on CARS band frequencies without an "if carry one, must carry all" requirement.<sup>9/</sup> In addition, Time Warner noted that it would premature for the Commission to act on OpTel's request at this time, while several rulemaking proceedings that could impact

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<sup>4/</sup>Time Warner Comments at 2-8.

<sup>5/</sup>Time Warner Comments at 9, citing NPRM at ¶ 5.

<sup>6/</sup>Time Warner Comments at 17-18.

<sup>7/</sup>Time Warner Comments at 11-12.

<sup>8/</sup>Time Warner Comments at 14-16.

<sup>9/</sup>Time Warner Comments at 9-10.

this proceeding are pending at the Commission.<sup>10/</sup> Additionally, Time Warner contended that, should the Commission decide to permit PCOs to use CARS band frequencies, such use should be secondary to cable operator use.<sup>11/</sup> Finally, Time Warner stressed that any permitted use by PCOs of 12 GHz band frequencies should be limited to paths of over 10 miles.<sup>12/</sup> The PCOs' Comments contain no evidence that would warrant changing these conclusions.

## ARGUMENT

### I. THE PCOs HAVE NOT MADE THE CASE FOR CARS BAND ELIGIBILITY

#### A. The PCOs Have Not Made a Persuasive Technical Showing.

Several parties filed Comments supporting OpTel's Petition. However, these parties have not made the case why existing frequencies available to PCOs, such as the 18 GHz band, are inadequate to meet their needs. For example, OpTel's Comments merely claim, with no supporting documentation, that "the useful range of a 12 GHz path is substantially greater than that of an 18 GHz path."<sup>13/</sup> The Commission has already concluded that this is not the case.<sup>14/</sup> Similarly, RCN Telecom Services, Inc.'s ("RCN") Comments contain an attachment purporting to explain why it is technically necessary for PCOs to utilize the 12 GHz band. However, RCN's attachment is not signed or verified in any way. It contains no engineering

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<sup>10/</sup>Time Warner Comments at 14.

<sup>11/</sup>Time Warner Comments at 17-20.

<sup>12/</sup>Time Warner Comments at 16-17.

<sup>13/</sup>OpTel Comments at 3.

<sup>14/</sup>NPRM at ¶ 18 ("[w]e do not believe, based upon our experience, that the range differences are as significant as OpTel and RCN suggest") (footnote omitted).

showings or other documentation. It merely contains unsupported conclusory statements. Such anecdotal evidence cannot be the basis for a major amendment to the Commission's rules.<sup>15/</sup>

Indeed, in the body of its Comments, RCN concedes that "rain fade" occurs in frequencies beginning "at about 10 GHz."<sup>16/</sup> Likewise, whereas RCN claimed in its previous Comments in this proceeding that its 18 GHz signals have only a 2-3 mile range,<sup>17/</sup> RCN now states that "[t]here is no doubt that an 18 GHz signal will travel significantly further than three miles on a clear day."<sup>18/</sup> Both of these statements severely undercut its argument that the technical superiority of the 12 GHz band versus the 18 GHz band is so great as to warrant amending the Commission's rules and disrupting the allocation of the CARS band. In short,

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<sup>15/</sup>See, e.g., Amendment of Part 61 of the Commission's Rules, Memorandum Opinion and Order, 7 FCC Rcd 6632 at ¶ 8 (1992):

Finally, we reject the petitioners' proposal to amend our rules to require carriers to calculate differences between the API and PCI. In our view, the petitioners' unsubstantiated assertion that the data is needed to evaluate a carrier's performance under price caps is insufficient to justify price cap rule changes prior to our comprehensive review of this regulatory scheme. We conclude that the petitioners have not met their burden in this regard.

See also, Cable Television Syndicated Program Exclusivity and Carriage of Sports Telecasts, Memorandum Opinion and Order, 59 RR 2d 191 at ¶ 6 (rel. Sept. 13, 1985) (denying reconsideration of decision denying petition for rulemaking) ("[h]ere, however, as in the earlier proceedings, the Leagues have only presented anecdotal evidence of alleged harm from the importation of sports programming.")

<sup>16/</sup>RCN Comments at 5.

<sup>17/</sup>RCN Telecom Services, Inc., Supplemental Comments in RM 9257, filed Nov. 17, 1998, at 2.

<sup>18/</sup>RCN Comments at n.16.

neither OpTel, RCN nor any other PCO has demonstrated with sufficient evidence that use of the 12 GHz band is technically necessary for PCOs and other MVPDs, or that the 18 GHz and 23 GHz bands are technically inadequate to meet their needs.

**B. The PCOs' Regulatory Parity Arguments are Specious.**

Some commenters argue, as they have done earlier in this proceeding, that the principle of regulatory parity dictates that PCOs should be eligible to use 12 GHz band frequencies "on terms equal to all other service providers eligible under Section 78.13 of the Commission's rules."<sup>19/</sup> Indeed, this regulatory parity argument is a principal argument of OpTel.<sup>20/</sup> However, as was the case in their previous filings in this proceeding, these parties do not suggest that they be subject to the numerous regulatory obligations imposed on cable operators, including franchising, universal service, must-carry, and others.<sup>21/</sup> Yet, according to OpTel's logic, these myriad Commission cable rules "favor one group of competitors," *i.e.*, PCOs and other non-cable MVPDs such as OpTel, over another -- franchised cable operators. The effort by these commenters to gain the perceived regulatory advantages of cable operators without the accompanying regulatory responsibilities rings hollow.

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<sup>19/</sup>See RCN Comments at 4 (footnote omitted).

<sup>20/</sup>See, *e.g.*, OpTel Comments at 5 ("there is no room for asymmetric microwave regulations that favor one group of competitors over another . . . .")

<sup>21/</sup>See Time Warner Comments at 2-8.

**C. The PCOs Have Not Demonstrated the Cost Effectiveness of Utilizing CARS Band Frequencies.**

While the NPRM solicits comments regarding "the costs for PCOs associated with the use of multiple frequency bands that they could use under existing rules,"<sup>22/</sup> the more fundamental issue is whether construction of CARS facilities is less expensive than a separate TVRO facility at the location to be served. If not, then the Commission's spectrum conservation policy dictates that CARS facilities should not be constructed.<sup>23/</sup> In seeking so-called competitive parity with cable operators, OpTel and the other PCOs have failed to establish that CARS would be more cost effective than constructing an additional headend with simple television receive-only ("TVRO") facilities.

Nor have the PCOs demonstrated that their own operating costs warrant use of the CARS spectrum. They merely claim, without any supporting documentation, that it would be more expensive to use 18 GHz frequencies or construct cable headends than to use the 12 GHz band.<sup>24/</sup> However, unsubstantiated allegations regarding increased costs cannot justify the relief requested by OpTel and the other PCOs.<sup>25/</sup>

Furthermore, these commenters ignore business realities. As Time Warner explained in its Comments, any competitor should expect to face increased operational costs for equipment, rent, insurance, power and other items as it expands its service to more customers.

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<sup>22/</sup>NPRM at ¶ 14.

<sup>23/</sup>See, e.g., Memorandum Opinion and Order, BC Docket No. 82-536, 55 RR 2d 1607, 1613 (1984) (footnote omitted) ("we must strive for economy in the use of spectrum.")

<sup>24/</sup>See, e.g., RCN Comments at 8.

<sup>25/</sup>See footnote 15, *supra*.

This natural business consequence, however, in no way justifies special favors from a regulatory agency.<sup>26/</sup> At minimum, therefore, if PCOs seek CARS band eligibility based in part on alleged cost concerns, they must be required to submit detailed cost justifications including evidence regarding any alleged increased costs. Thus far, they have failed to do so.

**D. Related Commission Proceedings Do Not Warrant Grant of OpTel's Request.**

Several commenters argue that "recent and proposed FCC rule changes threaten to undermine the continued value of the 18 GHz band for video delivery."<sup>27/</sup> For example, OpTel notes that the Commission "has established permanent exclusion zones for microwave operations at 18 GHz in Denver and Washington, DC."<sup>28/</sup> However, as Time Warner stated in its Comments, "the impact of the DEMS [Digital Electronic Messaging Services relocation] proceeding is too geographically isolated to warrant OpTel's efforts to bootstrap a nationwide spectrum giveaway for PCOs."<sup>29/</sup>

The Commission has previously stated that an isolated geographic effect does not rise to the level of a national problem requiring a national solution. For example, in the Commission's 1995 proceeding allocating spectrum in the 4660-4685 MHz band, the Association of Public-Safety Communications Officers-International ("APCO") requested that a

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<sup>26/</sup> See Time Warner Comments at 15-16

<sup>27/</sup> OpTel Comments at 3.

<sup>28/</sup> OpTel Comments at 3, citing NPRM at ¶ 19 (footnote omitted).

<sup>29/</sup> Time Warner Comments at 13 (footnote omitted).

portion of the band be designated for public safety mobile and aeronautical video operations.<sup>30/</sup>

However, the Commission rejected APCO's request, stating:

The current record does not, however, provide a sound basis for concluding that any or all of the 4660-4685 MHz band should be assigned as APCO suggests. . . . Moreover, it is unclear whether these needs, to the extent they are not currently met and could not be met using current broadcast auxiliary allocation, require nationwide channel assignments. APCO's request appears to be based primarily on the needs of the Los Angeles County Sheriff's Department. The extent of the need for public safety mobile and aeronautical video channels in other parts of the Nation is unclear.<sup>31/</sup>

As Time Warner indicated in its Comments, the same consideration applies here.

Accordingly, the DEMS proceeding provides no justification for the nationwide rule amendment that OpTel seeks.

## **II. ANY USE BY PCOs OF CARS BAND FREQUENCIES MUST BE SECONDARY**

### **A. Secondary Use Maximizes Spectrum Efficiency.**

In the NPRM, the Commission states, "[w]e also seek comment on the possible drawbacks of expanding CARS eligibility, particularly with respect to issues of spectrum management and allocation."<sup>32/</sup> In particular, the Commission raised the issue of the inefficient use of the spectrum that could result from "permitting a PCO with a small number of subscribers to use a CARS station that could have been licensed, instead, to a cable system

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<sup>30/</sup> Allocation of Spectrum Below 5 MHz Transferred from Federal Government Use, Second Report and Order, ET Docket No. 94-32, 11 FCC Rcd 624, 629 (1995) ("Second Report and Order").

<sup>31/</sup> Second Report and Order at 637.

<sup>32/</sup> NPRM at ¶ 4.

serving significantly more subscribers."<sup>33/</sup> The NPRM itself recognizes that "more efficient use of channels" in the CARS band is an important goal.<sup>34/</sup> Similarly, the Walt Disney Company, Inc. ("ABC") stated that it "completely agrees with SBE [Society of Broadcast Engineers] that further loss of spectrum required for production of broadcast programming will surely impede the digital broadcasting transition."<sup>35/</sup>

With these types of concerns in mind, the NPRM sought comment, in the event the Commission grants OpTel's request, on "whether, after becoming a CARS licensee, PCO systems or other MVPDs should be designated as co-primary users with incumbent cable system operators or as secondary users."<sup>36/</sup> Several commenters rejected the idea that any PCO use of 12 GHz band frequencies should be secondary to currently authorized users. For example, according to RCN, "[T]he ICOs [sic] requests are actually quite modest . . . ."<sup>37/</sup>

However, Sprint Corporation ("Sprint") joined Time Warner in arguing first that the Commission should deny OpTel's Petition,<sup>38/</sup> and, alternatively, should the Commission grant the Petition, that any PCO use of CARS band frequencies should be secondary to incumbent CARS licensees and future cable service providers.<sup>39/</sup> As Sprint states, PCOs "already have

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<sup>33/</sup>NPRM at ¶ 24.

<sup>34/</sup>NPRM at ¶¶ 25-26.

<sup>35/</sup>Walt Disney Company, Inc. ("ABC") Comments at 2.

<sup>36/</sup>NPRM at ¶ 5 (footnote omitted).

<sup>37/</sup>RCN Comments at 14-15.

<sup>38/</sup>Sprint Corporation Comments at 2-4.

<sup>39/</sup>Sprint Corporation Comments at 4.

spectrum allocated to their services."<sup>40/</sup> The Wireless Communications Association International, Inc. ("WCA"), whose MDS and ITFS members compete with franchised cable operators, also agreed, stating that:

[b]y proceeding in such a fashion, the Commission can assure that the 12 GHz band, which already hosts more than 105,000 terrestrial facilities (*see NPRM*, at ¶ 23 n. 69), will not become overly congested just as demand is growing for 12 GHz backbone facilities.<sup>41/</sup>

In this regard, the Commission correctly expressed concern that expansion of CARS band eligibility to more users could "interfere with existing users."<sup>42/</sup> As the Commission's Common Carrier and Mass Media Bureaus have stated in denying a telephone cooperative's request to construct and operate 30 microwave radio stations to expand telephone service into more remote areas,

We have taken a "hard look" at Leaco's request and we find that Leaco has not met its burden of proving a grant of its waiver to use ITFS spectrum would not obstruct the foreseeable growth of instructional television. While there currently are no ITFS applicants or licensees for these frequencies in Leaco's service area, plans for extensive use of the ITFS spectrum are well along.<sup>43/</sup>

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<sup>40/</sup>Sprint Corporation Comments at 3.

<sup>41/</sup>WCA Comments at n.2. See also Sprint Corporation Comments at n.5 ("[a]s the Commission notes in the NPRM, and, as noted in the NGSO 12 GHz NPRM, '12.75-13.25 GHz is currently subject to heavy usage. Optel's request for use of the 12 GHz CARS band and that of Sky Bridge, if granted, could greatly increase the terrestrial use of the 12 GHz band'") (quoting NPRM at ¶ 23, citing Notice of Proposed Rulemaking, FCC 98-310, ET Docket No. 98-206, at ¶ 35 (rel. Nov. 24, 1998)).

<sup>42/</sup>NPRM at ¶ 5.

<sup>43/</sup>Leaco Rural Telephone Cooperative, Inc., Memorandum Opinion and Order, 4 FCC Rcd 5341 at ¶ 23 (Comm. Carr. & Mass Media Burs., 1989) (footnote omitted).

This issue becomes even more critical where, as is apparent from the Comments, other services desire to use the 12 GHz band as well. According to EchoStar, for example, the Commission should also open up this spectrum to satellite downlinks.<sup>44/</sup> EchoStar favors exclusive use of the spectrum, to be determined by Commission auction.<sup>45/</sup> At the same time, EchoStar favors use of this spectrum by yet another service, to be provided by Northpoint Technology, instead of Northpoint's requested use of the DBS band currently occupied by EchoStar.<sup>46/</sup>

Rather than advocating that the Commission expand CARS band eligibility endlessly, Time Warner agrees with SkyBridge L.L.C., which states,

SkyBridge cautions the Commission, however, against expanding the terrestrial users of this band to include dissimilar terrestrial operations, such as point-to-multipoint distribution systems (i.e., transmissions to multiple, uncoordinated receiving locations), or use of wide-beam antennas, or to introduce different licensing regimes, such as wide-area licensing.<sup>47/</sup>

While Time Warner agrees that the Commission should limit its actions in this proceeding to the specific request of OpTel,<sup>48/</sup> Time Warner believes that SkyBridge's logic also favors denying CARS band eligibility to OpTel and other PCOs who operate point-to-point systems. Should the Commission grant OpTel's request, especially as a primary user, there is no end to the list of service providers such as EchoStar who will then line up to request permission to

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<sup>44/</sup>EchoStar Satellite Corporation Comments at 2.

<sup>45/</sup>EchoStar Satellite Corporation Comments at 3.

<sup>46/</sup>EchoStar Satellite Corporation Comments at 3.

<sup>47/</sup>SkyBridge L.L.C. Comments at 3.

<sup>48/</sup>SkyBridge L.L.C. Comments at 3-4.

use the CARS band, even though they have been allocated frequencies in other bands. The potential for further, continuous disruption and congestion in the CARS band is enormous.

**B. Secondary Status for PCOs Would Maximize Service to Consumers.**

The NPRM expresses the goal that use of the CARS band by PCOs or other MVPDs not “unduly constrain future growth of incumbent cable services.”<sup>49/</sup> OpTel argues that the Commission should be just as concerned with the future growth of cable’s competitors.<sup>50/</sup>

However, as the Commission notes in the NPRM:

franchised cable systems that are currently eligible for CARS licenses generally are required to provide service to an entire community. In contrast, PCOs can select those areas and buildings where they wish to provide service and ignore less desirable areas or buildings.<sup>51/</sup>

Accordingly, the Commission correctly identifies “the conflict that could arise where a franchised cable system may be unable to serve a part of a community which it is required to serve because a PCO already has the CARS license for those frequencies.”<sup>52/</sup> PCOs and other MVPDs who, unlike cable operators, can cherry pick only the most desirable, high-income MDUs or neighborhoods should not be rewarded with additional spectrum at the expense of cable operators, especially where the result may be the type of “conflict” envisioned by the Commission, in which service to viewers in less desirable neighborhoods is delayed or denied. The best way to ensure that all viewers are able to receive multichannel video programming is

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<sup>49/</sup>NPRM at ¶ 5.

<sup>50/</sup>OpTel Comments at 5.

<sup>51/</sup>NPRM at ¶ 16.

<sup>52/</sup>NPRM at ¶ 16.

to require that any use of 12 GHz band frequencies by PCOs or other MVPDs be secondary to cable system use.

**C. Secondary Status for PCOs Eliminates the Need for Spectrum Auctions.**

As the NPRM notes, "if the Commission determines that opening the CARS band to PCOs and other MVPDs creates mutually exclusive applications, the CARS spectrum would be subject to auction."<sup>53/</sup> However, the Commission has an "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."<sup>54/</sup> RCN argues against secondary status for PCOs in the 12 GHz band, stating that frequency coordination avoids the type of congestion or regulatory dilemmas mentioned by the Commission, and thus eliminates the need for spectrum auctions.<sup>55/</sup> According to RCN, the current "system is very well established and works quite well at alleviating harmful interference between microwave facilities."<sup>56/</sup>

Time Warner disagrees that frequency coordination alone will alleviate all potential conflicts and eliminate the need for auctions. For example, OpTel presents a scenario "in which simultaneous applications are made through different frequency coordinators."<sup>57/</sup> The

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<sup>53/</sup>NPRM at ¶ 24.

<sup>54/</sup>47 U.S.C. §309(j)(6)(E). See also WCA Comments at n.3, citing H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. 572 (1997).

<sup>55/</sup>RCN Comments at 12. OpTel also argues against secondary status for PCOs, claiming that it "is effectively no status." OpTel Comments at 8.

<sup>56/</sup>RCN Comments at 12.

<sup>57/</sup>OpTel Comments at 9.

likelihood of this type of situation occurring will increase should the Commission permit additional users, such as PCOs or other MVPDs, into the 12 GHz band. There are also other potential circumstances where frequency coordination alone will not cure potential interference conflicts between applicants.

Commenters such as OpTel and RCN do not propose any solutions for cases where frequency coordination cannot resolve the problem. If there are instances where frequency coordination is unworkable, the best solution is for PCOs to assume secondary status in their use of the 12 GHz band. The only alternative is an auction, which Congress has instructed the Commission to try to avoid. Time Warner thus agrees with the commenters from all sides, including RCN and OpTel, who argue "that auctioning licenses in the fixed operational microwave services, including CARS, would be a grave error."<sup>58/</sup> However, only Time Warner's proposal that any CARS spectrum used by PCOs and other MVPDs be secondary to cable operator use "would avoid mutual exclusivity and the auctioning of the CARS spectrum."<sup>59/</sup> Moreover, if, as some PCOs contend, frequency coordination will resolve potential interference conflicts and guarantee use of the spectrum by all applicants in almost all cases, then secondary use of these frequencies by PCOs will not disadvantage PCOs -- they will still have access to the frequencies.

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<sup>58/</sup>RCN Comments at 13. See also OpTel Comments at 8-9.

<sup>59/</sup>NPRM at ¶ 24, citing 47 U.S.C. §309(j)(6)(E).

**CONCLUSION**

A petitioner urging the Commission to amend its rules must offer more than mere anecdotal evidence as to why the policy change is warranted. Whether on technical, economic or regulatory parity grounds, the PCOs who request that the Commission waive or amend its rules to permit them to utilize the 12 GHz frequency band have utterly failed to meet this burden.

WHEREFORE, Time Warner respectfully submits that OpTel's petition requesting that PCOs be permitted to use frequencies in the 12 GHz band be denied.

Respectfully submitted,

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