

September 1, 1995, OCTA, along with two other cable television association petitioners, filed a Consolidated Petition to Deny six Ameritech Section 214 applications, including the Ameritech application to construct cable television facilities for Columbus, Ohio. The petitioners argued that Ameritech was precluded from relying upon Section 63.16 to the extent that Ameritech had not obtained a cable television franchise as required by that rule and because its proposed cable system was not, in fact, a "stand-alone" system.

3. By letter dated September 7, 1995, the Bureau notified Ameritech of possible deficiencies in its application, specifically noting the applicant's failure to satisfy the cable franchise requirement under Section 63.16.³ This notification prevented the application from being deemed approved under the automatic, fourteen-day review process. On September 28, 1995, the Bureau released an order granting the above-captioned application subject to the condition that Ameritech obtain a cable television franchise to operate in the proposed service area.⁴ In that order, the Bureau also granted Ameritech special temporary authority, pursuant to Section 63.04 of the Commission's rules, to construct cable television facilities during the pendency of its franchise negotiations with the City of Columbus. This temporary authority was made subject to the conditions set forth by the City of Columbus in its letter granting Ameritech temporary authority, dated August 1, 1995.

III. APPLICATION FOR REVIEW

4. In its Application for Review, OCTA requests review of the Order of September 28, 1995, in which the Bureau conditionally granted Ameritech permanent Section 214 authority as well as special temporary authority pursuant to Section 63.04 of the Commission's rules to construct and operate cable television facilities in the City of Columbus. OCTA contends that the Bureau lacked authority to grant Ameritech's application for two reasons.⁵ First, OCTA argues, once the Ameritech application was deemed to be non-compliant with the certification requirements of Section 63.16, the Commission, rather than the Bureau, was required by the terms of that section to act upon the application.⁶ Second, OCTA argues that the Bureau exceeded the scope of its delegated authority, under Section 0.291 of the Commission's rules, to the extent that the Commission has never addressed the law and policy surrounding the

32.2410-32.2441) with the carrier's regulated telephone business."

³ Letter from John S. Morabito, Deputy Chief, Network Services Division, Common Carrier Bureau, to Renee Martin, Vice President and General Counsel, Ameritech New Media Enterprises (Sept. 7, 1995).

⁴ Ameritech New Media Enterprises, Inc., File No. W-P-C-7106, DA 95-2067 (Com. Car. Bur., Released Sept. 28, 1995).

⁵ Application for Review at 3.

⁶ Id. at 6-7.

franchise requirement as applied to carriers proposing to construct cable television facilities in their telephone service areas.⁷ Thus, OCTA concludes, whether Ameritech's application satisfies the requirements of Section 63.16 represents a novel question of law or fact as to which the Bureau was without authority to resolve, pursuant to Section 0.291.⁸

5. Assuming *arguendo* that the Bureau had authority to act, OCTA maintains that the Bureau nevertheless erred in failing to conduct a full Section 214 review of Ameritech's application, pursuant to Section 63.01 of the Commission's rules, once it determined that the application failed to meet the requirements of Section 63.16.⁹ OCTA also asserts that the Bureau erred in refusing to investigate OCTA's allegations that the proposed cable television system is not a "stand-alone" system within the meaning of Section 63.16 and that Ameritech engaged in unlawful construction of cable television facilities prior to obtaining Section 214 authorization.¹⁰ Accordingly, OCTA asks the Commission to reverse the Bureau's order and revoke Ameritech's Section 214 authorization.¹¹

IV. POSITIONS OF THE PARTIES

6. In its opposition, Ameritech asserts that the Bureau acted with legitimate authority in granting Ameritech's Section 214 application.¹² Ameritech takes issue with OCTA's suggestion that its application presented novel questions of law merely because it was among the first applications filed under Section 63.16.¹³ In response to OCTA's argument that only the Commission may act on an application once the Bureau determines that it does not comply with the Section 63.16 certification requirements, Ameritech suggests that if "additional imprimatur by the Commission itself is necessary, then the Commission should provide it" in the present order.¹⁴ Ameritech contends that it fully satisfies the franchise requirements of Section 63.16 since, by virtue of the conditions imposed by the Bureau on its Section 214 authorization, it must have a cable television franchise before that grant of

⁷ Id. at 5-6.

⁸ Id.

⁹ Id. at 7-8.

¹⁰ Id. at 7-19.

¹¹ Id. at 20.

¹² Ameritech Opposition at 4-6.

¹³ Id. at 4.

¹⁴ Id. at 6.

authority is finalized.¹⁵ Until that time, Ameritech states that it is operating pursuant to a valid grant of special temporary authority for which a cable television franchise is not a requirement.¹⁶ Ameritech disputes OCTA's claims that the proposed cable television system will not be "stand-alone," stating that the proposed facilities fully comply with the definition of a "stand-alone" cable system as set forth in Section 63.16(b) of the Commission's rules.¹⁷ Ameritech denies that it engaged in unlawful construction of cable television facilities prior to receiving Section 214 authorization, indicating that the structures OCTA refers to are not "lines of communication" and, therefore, are not subject to Section 214.¹⁸ Finally, Ameritech argues that OCTA's pole attachment concerns represent merely an attempt to seek clarification of the Commission's Fourth Report and Order¹⁹ and, therefore, are not properly raised in an Application for Review.²⁰

7. OpTel, Inc., ("OpTel"), a company that operates private cable television systems throughout the United States through its subsidiaries, filed a Motion to Accept Late-Filed Comments. OpTel contends that, by granting Ameritech's application notwithstanding Ameritech's apparent failure to comply with the Commission's Section 63.16 certification requirements, the Bureau has established a "dangerous precedent."²¹ OpTel maintains that incumbent local exchange carriers proposing to offer video programming distribution services must be required to comply strictly with the Section 63.16 certification requirements in order to promote fair competition in the video programming distribution marketplace and to prevent incumbent local exchange carriers from improperly shifting costs at the expense of telephone service ratepayers.²² Accordingly, OpTel urges the Commission to revoke Ameritech's Section 214 authorization pending resolution of the issues raised in OCTA's Application for Review.²³

¹⁵ Id. at 7.

¹⁶ Id. 6-7.

¹⁷ Id. at 8-12.

¹⁸ Id. at 12-14.

¹⁹ Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, *Fourth Report and Order*, FCC 95-357 (1995).

²⁰ Ameritech Opposition at 14-16.

²¹ OpTel Comments at 3.

²² Id. at 2-3.

²³ Id. at 3.

V. DISCUSSION

8. Upon reviewing the record established in this proceeding and in recognition of the enactment of the Telecommunications Act of 1996,²⁴ we hereby dismiss as moot OCTA's Application for Review. On February 8, 1996, the President signed into law the Telecommunications Act of 1996 (the "1996 Act"). Section 302(a) of the Act (which added new Section 651(c) to the Communications Act of 1934, as amended) provides that common carriers "shall not be required to obtain a certificate under Section 214 with respect to the establishment or operation of a system for the delivery of video programming." This provision reflects Congress' intent to relieve carriers of the obligation to obtain Section 214 authorization in order to establish a system for the delivery of video programming. In addition, on March 11, 1996, the Commission rescinded Section 63.16, the rule under which Ameritech received its Section 214 authorization, in the *Open Video System* proceeding that was initiated to implement Section 302 of the 1996 Act.²⁵ Given that the system for which Ameritech received Section 214 authorization to construct constitutes "the establishment or operation of a system for the delivery of video programming," and in light of the rescission of former Section 63.16 of the Commission's rules, we find that further review of the Section 214 issues raised by the applicant is no longer necessary.

9. Regarding OCTA's arguments that Ameritech violated the Commission's rules by constructing cable television facilities prior to obtaining Section 214 authorization, we note that forfeiture actions are not available as of right to parties involved in Commission proceedings. Instead, enforcement proceedings are initiated solely within the discretion of the Commission. In addition, regarding OCTA and OpTel's arguments that the Commission's pole attachment rules are inadequate to prevent incumbent local exchange carriers from granting preferential pole attachment rates and conditions to their cable television affiliates, we find that these arguments are not properly raised in an application for review of a Section 214 authorization. Accordingly, we do not address the premature construction and pole attachment arguments raised by the parties in the present order.

²⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

²⁵ Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems, *Report and Order and Notice of Proposed Rulemaking*, CS Docket No. 96-46, FCC No. 96-99, paras. 75-76 (Released March 11, 1996). Pursuant to Section 302(b)(3) of the 1996 Act, the Commission stated in the report and order portion of that proceeding: "We also hereby terminate the docket in which our video dialtone rules and policies were promulgated (CC Docket No. 87-266)." *Id.*, para. 75. Former Section 63.16 was among the rules adopted in CC Docket No. 87-266 that since were removed pursuant to Sections 302(a) and 302(b) of the 1996 Act.

VI. ORDERING CLAUSES

10. Pursuant to Section 4(i) of the Communications Act of 1934, as amended, Section 302(a) of the Telecommunications Act of 1996 (which added new Section 651(c) to the Communications Act of 1934, as amended), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, IT IS ORDERED that the Application for Review filed by the Ohio Cable Telecommunications Association IS DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED that the Motion to Accept Late-Filed Comments filed by OpTel, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary