

VIRGINIA:

IN THE CIRCUIT COURT FOR LOUDOUN COUNTY

OPENBAND MULTIMEDIA, L.L.C.
22461 Shaw Road
Dulles, Virginia 20166

Plaintiff,

v.

BOARD OF SUPERVISORS OF LOUDOUN
COUNTY, VIRGINIA

Serve: John R. Roberts, County Attorney
1 Harrison Street, S.E.
Leesburg, VA 20175

Defendant.

Civil Action No. _____

COMPLAINT

Plaintiff OpenBand Multimedia, L.L.C. (“Plaintiff” or “OBM”), by counsel, files this action seeking to invalidate a decision by the Board of Supervisors of Loudoun County, Virginia (“Defendant” or “the Board”), and alleges as follows:

OBM, Loudoun County’s only community-based open video system (“OVS”) service franchisee, brings this appeal of a decision of the Board denying it a new franchise to continue serving portions of the Loudoun community. The Board indefensibly denied OBM’s franchise despite OBM a) never being cited for violating the County’s OVS cable standards or accused of breaching its existing franchise agreement; b) being audited by the County’s independent OVS consultant and being found to provide service meeting or exceeding industry standards; c) being found by the County Staff to provide OVS services at prices substantially below those of three other major cable service providers in the County; d) providing service that according to a County report was more reliable than that of its competitors; e) being recommended for the grant

of a new franchise by the Board's Cable and Open Video Systems Commission (charged with overseeing the OVS industry in the County), County Staff, and the County's outside counsel; f) having high customer approval ratings and never having a customer invoke the dispute resolution provisions in the service agreements for challenging its prices or services; and g) agreeing to virtually every term and condition requested by the County in the proposed franchise agreement, including but not limited to, investing millions in capital to enhance its OVS capabilities. The Board's decision to deny OBM's franchise application is not reasonable and, as the foregoing list demonstrates, is contravened by the applicable objective, and non-political subjective, criteria and thus is violative of the law of the Commonwealth of Virginia.

PARTIES, VENUE, AND JURISDICTION

1. OBM is a limited liability company organized and existing under the laws of the Commonwealth of Virginia with its principal place of business located at 22461 Shaw Road in Dulles, Virginia.

2. Defendant is the supervisory body of Loudoun County, Virginia, formed under Title 15.2, Chapter 4 of the Code of Virginia.

3. This Court has jurisdiction over this action pursuant to § 8.01-184, § 15.2-2108.14, and § 17.1-513 of the Code of Virginia.

4. This Court has jurisdiction over Defendant pursuant to §§ 8.01-328 and 8.01-328.1(A)(1) and (3) of the Code of Virginia.

5. Venue is properly laid in this Court pursuant to § 8.01-262(2), (3), and (4) of the Code of Virginia because (1) the Board has appointed a County Attorney who is authorized to receive process, and that attorney is located in Loudoun County, (2) the Board is located in and regularly conducts substantial business activity in Loudoun County, and (3) most, if not all, of the events giving rise to these causes of action occurred in Loudoun County.

FACTS COMMON TO ALL COUNTS

6. OBM was formed in the absence of competition in the OVS market as population growth and demand for new housing spread to Loudoun County in the late 1990s. OBM's affiliated corporate entities entered into a series of agreements with the developers of various housing communities in Loudoun County intended to permit OBM to provide cutting edge open video, broadband internet, and telephone services at a price guaranteed to be better than comparable prevailing prices charged by the major cable providers dominating Northern Virginia and Loudon County.

7. In May 2005, Defendant granted OBM a non-exclusive franchise to operate an OVS in Loudoun County. That franchise was granted for a seven-year period commencing retroactively on the effective date of the Loudoun County OVS ordinance. That OVS ordinance is codified at Chapter 809 of the Loudoun County Ordinances and was enacted June 17, 2002. Therefore, the effective date of OBM's franchise was nearly three years before the date that it was granted by Defendant. Said initial "seven-year franchise" expired in June 2009, approximately four years after it had been awarded.

8. By letter dated November 11, 2009, Defendant, through its counsel, contacted OBM to notify it that its franchise had expired and to ask OBM whether it wished to renew its franchise. Following the receipt of that letter, OBM and Loudoun County's Cable and Open Video Systems Commission (the "Cable Commission") – the public body authorized to negotiate and recommend the final disposition of potential cable and OVS franchise agreements to the Defendant – began discussing a new franchise agreement.

9. On or about January 29, 2010, OBM tendered to Defendant a fee in the amount of twenty-five thousand dollars (\$25,000.00) as required by Defendant to cover Defendant's costs in processing the franchise renewal application.

10. On March 24, 2010, the Cable Commission conducted a Performance Evaluation Session (the “Session”) concerning OBM’s service. At that Session, nine customers provided public comments and fourteen additional customers offered written statements. Following the Session, OBM understands that approximately eighteen letters in support of OBM’s service were sent to the Cable Commission by residents who enjoyed and wished to retain that service.

11. Subsequently, the County issued a request for proposal seeking an independent assessment of OBM’s OVS. On or about April 14, 2010, Columbia Telecommunications Corporation (“CTC”), a nationally-respected telecommunications consulting firm, submitted a proposal entitled “Cable Network Testing, Inspection, and Comparison to State-of-the-Art.” CTC “proposed to assist Loudoun County” to “evaluate the OpenBand system.” According to the proposal, CTC’s “Scope of Work” entailed preparing a final report focused on testing and inspecting OBM’s cable plant and comparing OBM’s plant to current and projected state-of-the-art systems.

12. On May 28, 2010, through counsel, OBM voluntarily submitted a statement to the County in which it summarized in detail its efforts to investigate the concerns that were raised by certain customers at the Session. The statement also described OBM’s efforts to address the performance issues raised by some customers at the Session. As discussed in that statement, OBM’s own investigation had demonstrated that no pattern of persistent or unresolved problems existed with respect to its video services. Nonetheless, at the County’s request, OBM agreed to an unprecedented technical audit of its system – at its own expense – by CTC, as described in the preceding paragraph.

13. CTC thereafter conducted an analysis of, and prepared a report on, OBM’s open video system. In a report submitted to Defendant in August 2010 entitled *Technical Evaluation*

of the Openband Cable System in Loudoun County, Virginia, CTC concluded that OBM's open video system met or exceeded applicable industry standards, including those standards codified in the rules of the Federal Communications Commission. CTC further concluded that OBM's system compared favorably with those of other franchised cable systems in Loudoun County and that the OBM system was state-of-the-art. Defendant has never questioned or refuted those findings and conclusions.

14. Following a series of discussions between Defendant and OBM, on or about November 10, 2010, OBM filed with Defendant a franchise application.

15. By letter dated December 15, 2010, the County requested additional information and/or action from OBM in support of its franchise application. Among other things, the County sought information about OBM's key personnel, technology, anticipated costs of planned system improvements over the term of the requested franchise, plans to expand operations, and anticipated technology upgrades. The letter also stated that the County would require OBM to pay the maximum franchise application fee of \$50,000 and instructed OBM to remit payment of the additional \$25,000.

16. By letter dated December 29, 2010, OBM provided the information requested in the County's December 15, 2010 letter. OBM itemized the substantial anticipated costs to OBM associated with a then-contemplated ten-year franchise agreement ending in 2019. These costs included approximately \$2,500,000 for plant upgrade and maintenance of the existing video system plant, approximately \$1,000,000 for video system expansion into a proposed new service area, and approximately \$5,600,000 to upgrade and replace customer premise equipment.

17. The same day, OBM tendered to Defendant the requested payment of \$25,000.00 for the maximum franchise application fee.

18. During the next three months, the Cable Commission and OBM negotiated the terms of the proposed franchise agreement. In an effort to negotiate in good faith, OBM agreed to virtually all of the Cable Commission's requests. The final proposed franchise agreement recommended by the Cable Commission contained many commitments and concessions by OBM that went beyond those in all other OVS and cable television franchise agreements approved by the Defendant. Those concessions and commitments included, but were not limited to:

- i. a provision limiting the franchise agreement to twelve years;
- ii. unlimited liquidated damages and penalty provisions for OBM's failure to meet franchise requirements far beyond those imposed on any other franchisees;
- iii. commitments by OBM to replace set-top terminals with new customer premises terminal equipment;
- iv. expanded Video on Demand programming;
- v. enhanced subscriber reception monitoring capabilities;
- vi. planned system upgrades; and
- vii. commitments by OBM to materially increase the number of programming channels, including High Definition channels, to be carried on OBM's video programming system.

19. At a March 9, 2011 public meeting, the Cable Commission, on advice of its counsel, voted to recommend that Defendant approve the new franchise agreement negotiated between OBM and the Cable Commission. The final vote was six Commissioners in favor and three Commissioners opposed, with one Commissioner absent.

20. At its April 13, 2011 meeting, Defendant's Finance/Government Services and Operations Committee (the "Finance Committee") voted 4-0-1 to recommend that the proposed OBM franchise agreement be placed on the Board's June 13, 2011 Public Hearing agenda. On April 19, 2011, the full Board approved this recommendation.

21. Also at its April 13, 2011 meeting, the Finance Committee directed staff to bring back additional information regarding OBM's franchise application based on questions submitted by Supervisor Waters and Supervisor Miller.

22. In May, Defendant's outside counsel specifically advised that the proposed OBM franchise was "comparable to or more favorable to the County and residents than the existing Comcast and Verizon franchise agreements in practically every respect," and that "OpenBand has agreed to do things that Comcast and Verizon have refused to do and could not be legally required to do."

23. At the subsequent June 13, 2011 public hearing on OBM's franchise application, County staff made a recommendation – consistent with that of the Cable Commission – that the Board approve OBM's franchise agreement as negotiated. County staff's recommendation included the following:

In response to the concerns raised by the public and Commission members, the Commission asked staff to negotiate revisions to the draft franchise agreement, and requested that the County arrange for an outside review of the system by a qualified expert. Columbia Telecommunication Corporation (CTC), a nationally recognized communications engineering and analysis firm, conducted a physical plant inspection and performance test, and compared OpenBand's system to current cable state-of-the-art systems, including Comcast and Verizon.

CTC prepared a report and presented its findings to the Commission (Attachment. 2) [sic] CTC concluded that OpenBand's 100 percent fiber optic system is the highest capacity and most reliable cable plant available. OpenBand's system is more advanced than Comcast's but not as high capacity or future-proof as Verizon FiOS. CTC recommended that OpenBand replace problematic set top converters. Since picture quality problems can be

intermittent, CTC recommended installing “probe” devices in residences with repeated picture problems. OpenBand agreed to both improvements.

In addition, to address customer service concerns, staff negotiated improvements in certain customer service provisions, and increased liquidated damages amounts. Liquidated damages are in some cases 5 times higher than in the previous franchise. For example, the liquidated damage for failure to comply with the Cable Ordinance and the Franchise Agreement concerning subscriber complaints is now \$100 per day as opposed to \$20 per day in the previous franchise. The OpenBand agreement also contains many more instances of liquidated damages and contains more severe penalties than either Comcast or Verizon agreements. The agreement also provides for the County to conduct performance evaluations every two years.

Although the company had continued to comply with the 2005 Franchise, staff also required OpenBand to submit a full application in accordance with the initial application process in the OVS Ordinance, to ensure that all possible legal standards had been met.

OpenBand had made good faith efforts to renew their franchise or secure a new one. The proposed franchise agreement addresses many of the service complaints that fall within the purview of the franchise. Homeowners’ issues with exclusive easements and bulk service arrangements are not within the scope of the franchise.

24. At the June 13, 2011 public hearing, 31 speakers presented comments before the Board in opposition to the proposed franchise agreement. Among other things, the speakers criticized OBM for its pricing and service quality. In response, the Board voted to return the franchise agreement to the Finance Committee for further discussion at its July 13, 2011 meeting.

25. At the July 13, 2011 meeting of the Finance Committee, County staff produced a report challenging the criticism advanced by many of the speakers at the June 13, 2011 public hearing of the Board.

26. County staff conducted an independent analysis of non-promotional pricing for four video providers in Loudoun County. They found that OBM’s monthly cable rate is significantly lower than those of Comcast, Verizon, and DirecTV.

27. Indeed, OBM has not increased its rates since January 1, 2006 – an increase of 1.3%. One year later, on January 1, 2007, OBM lowered its monthly rate by 4 %. And, under the terms of the agreements OBM has with its customers in Loudoun County, OBM's rates are guaranteed to be at least 10% less than the average rates charged by its competitors.

28. County staff also reviewed the trouble tickets (reports regarding service complaints and concerns raised by customers) that had been filed with the Cable Commission for OBM and its competitors. The County staff's review found that OBM consistently received fewer trouble tickets per subscriber than the other providers willing to provide access to such information. In addition, the Cable Commission had in its possession the results from OBM's December 2009 customer service survey, as required by OBM's current franchise agreement, revealing that 96% of OBM's customers had rated the overall performance of the OBM Customer Service Team as Excellent, Above Average, or Average.

29. Despite these findings by County staff, in September 2011, staff recommended that the Board add a two-week termination clause to the previously-negotiated franchise agreement. The Board considered and approved inclusion of the termination clause at its September 7, 2011 meeting. The Board also accepted an amendment offered during the meeting to reduce the term of the franchise agreement from 12 years to 4 years – effectively terminating the franchise in June of 2013 because of the retroactive nature of the approval. County staff did not consult with OBM about these changes to the franchise agreement prior to presenting them to the Board and OBM did not consent to either of the changes.

30. On November 2, 2011, Defendant unlawfully voted to deny OBM's franchise application. The Board did not articulate any reason for the denial at that meeting, and as

discussed above, the decision to deny OBM's franchise was made against the prior advice of counsel and staff.

31. The decision to deny the franchise was announced in a News Release dated November 2, 2011. The only stated reasons for the denial are: i) OBM's rejection of the two-week termination clause; and ii) OBM's unwillingness to accept a franchise term limited to four years retroactive to June 2009. Neither of those conditions were presented to OBM as part of the negotiations of the franchise agreement. No further explanation of Defendant's reasons for denial of Plaintiff's OVS franchise has been provided.

32. Defendant denial of OBM's franchise application was not based on the record before it, nor on the factors contemplated in the OVS ordinance.

33. At no time has Defendant concluded that OBM has violated any federal, state, or local requirement governing the operation of its open video system. Indeed, at no time has Defendant ever accused OBM of any violation of federal, state, or local law, ordinance, or regulation, or investigated any such alleged violation.

34. The negotiated franchise agreement complied with the OVS Ordinance in every respect. The negotiated agreement also complied with all applicable state and federal laws. There is no basis in the OVS Ordinance for the Board's denial of the proposed agreement.

COUNT I
EQUITABLE AND INJUNCTIVE RELIEF PURSUANT TO
VIRGINIA CODE § 15.2-2108.14

35. OBM incorporates each of the allegations of paragraphs 1 through 33 above as if fully set forth herein.

36. Defendant's denial of OBM's franchise application exceeded the authority granted to it by Virginia Code § 15.2-2108.1, as it constitutes regulation of an open video system to a greater extent than federal law -- specifically, 47 U.S.C. § 573 -- permits.

37. 47 U.S.C. § 573(c) articulates the reduced regulatory burdens that Congress chose to place on OVS operators. Congress reduced regulation of OVS operators as a means to encourage telecommunications common carriers to provide multichannel video programming service in competition with established franchised cable operators, including, for example, the incumbent cable operators franchised to provide cable television service in Loudoun County. The Joint Senate-House Conference Report on the bill, which became the Telecommunications Act of 1996, described this purpose as follows:

There are several reasons for streamlining the regulatory obligations of such [OVS] systems. First, the Conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open [video] systems will be “new” entrants in established markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market forces mean that government oversight and regulation can and should be reduced.

H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 178 (1996).

38. As noted above, federal law is explicit: the authority of local governments to regulate OVS through the franchising process or otherwise is limited. Those limitations were imposed by Congress to encourage common carriers (*e.g.*, telephone companies such as OBM) to compete with incumbent cable operators in the provision of entertainment and information programming service; to streamline regulation of such entities due to their status as new entrants; and to ultimately reduce the need for government oversight and regulation of cable service and OVS service.

39. Virginia’s OVS statute (Virginia Code § 15.2-2108.1), which was enacted two years following Congressional enactment of 47 U.S.C. § 573, expressly recognizes the Congressionally-imposed limits on OVS franchises, since it allows for such regulation and franchising only “to the maximum extent permitted by federal law.” Under § 15.2-2108.1,

Defendant's authority to regulate OVS operators, including OBM, through the franchising process or otherwise, is limited to imposing gross revenue fees and providing public, educational, and governmental access channels.

40. By denying OBM's OVS franchise for the stated reasons that OBM has refused to accept a two-week termination provision and refused to accept a franchise term limited to four years, Defendant has acted in blatant disregard of the limits permitted by federal law and, accordingly, has acted in violation of Virginia Code § 15.2-2108.1.

41. The construction, maintenance, and operation of any multichannel video programming system, whether labeled as an OVS or as a cable system, is a capital-intensive endeavor, and it would be financially irresponsible for OBM to undertake such a commitment without assurances that its franchise would continue to operate during an agreed-upon franchise term comparable to those of other franchised providers, so long as the franchisee continued to operate in compliance with applicable legal requirements imposed by federal, state, and local law.

42. By demanding that OBM accept the disadvantage imposed on it – and only it – of a four year franchise term and that it alone among all franchised Loudoun County OVS and cable operators bears the risk of a two week termination requirement, Defendant, in contravention of the pro-competitive deregulatory purposes of the 1996 Telecommunications Act in general and 47 U.S.C. § 573 in particular, and in violation of the express limitations codified at Virginia Code § 15.2-2108.1, has discriminated against OBM and violated the franchising provisions of federal and Virginia law.

43. In addition, Defendant has failed to base its denial of OBM's franchise application on the standards codified in the Loudoun County OVS Ordinance, Chapter 809, Loudoun County Code.

44. OBM is therefore entitled to a grant of equitable and injunctive relief pursuant to Virginia Code § 15.2-2108.14.

COUNT II
DECLARATORY JUDGMENT THAT THE BOARD'S
DENIAL OF OBM'S FRANCHISE WAS UNREASONABLE, ARBITRARY, AND
CAPRICIOUS

45. OBM incorporates each of the allegations of paragraphs 1 through 32 above as if fully set forth herein.

46. Defendant's denial of OBM's franchise application was unreasonable, arbitrary, and capricious and constitutes an actual antagonistic denial of OBM's rights.

47. An actual controversy exists as to whether OBM may continue to provide open video services in Loudoun County.

PRAYER FOR RELIEF

WHEREFORE, OBM prays that this Court enter an order enjoining Defendant from terminating OBM's operations upon the expiration of its current franchise and compelling Defendant to grant OBM's new OVS franchise application for a term of not less than twelve years and without burdensome and punitive terms and conditions and granting such other relief as is equitable and just.

Dated: December 2, 2011

Respectfully submitted,



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