

Bell Atlantic Network Services, Inc.
1133 20th Street, N.W.
Suite 800
Washington, DC 20036
202 392-6980
FAX 202 392-1687

Patricia E. Koch
Assistant Vice President
Federal External Affairs and Regulatory Relations

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Ex Parte

July 25, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

**Re: CS Docket 96-83 -- "Restrictions on Over-the-Air Reception Devices:
Television Broadcast and Multichannel Multipoint Distribution Service"**

Bell Atlantic has filed comments in the above referenced proceeding supporting the Commission's proposal to preempt regulation of MMDS antennae and associated reception devices. Current state and local regulations and non-governmental restrictions that prohibit the placement of MMDS antennae hinder the ability of consumers to receive video programming services offered by MMDS operators. Moreover, it is not only outright prohibitions on antennae that limit consumer access to wireless video services, but also restrictions and regulations -- such as application and review processes -- that impose undue delay and additional cost on such access. A broad preemption policy, as proposed by the Commission, is necessary to ensure that a viewer's ability to receive MMDS is not impaired, and that consumers have a competitive alternative to wired cable systems. Such a policy is necessary to ensure that the Congressional mandate under Section 207 of the the Telecommunications Act of 1996 is satisfied.

While Bell Atlantic believes that the Commission's proposed rules are both necessary and appropriate, we are willing to consider certain modifications to these rules to assist the Commission in resolving its rulemaking proceeding in a manner that is acceptable to both the wireless cable industry and state and local governments. These proposed modifications were presented to the Cable Bureau and representatives from each of the Commissioners' offices by Bell Atlantic, NYNEX, Pacific Telesis, Cross Country Wireless Cable, the University of Southern California, the California State University System, and the United Homeowners Association in meetings held on July 24 and July 25, 1996. A description of these proposed modifications follows.

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State and Local Governmental Regulations

The Commission's presumptive approach for preempting state and local regulation, which presumes that all regulations are unreasonable and places the burden of proving otherwise on the local regulator, is appropriate. Placing the burden of proof on consumers would impede access to the service, and severely undermine the viability of MMDS. We also agree with the Commission that such a presumption should be rebutted only upon a showing that the regulation in question is necessary to accomplish a clearly defined health or safety objective. A presumption cannot, and should not, be rebutted on aesthetic grounds.

The Commission is also correct in proposing rule language that applies the preemption to any regulation "that affects the installation, maintenance, or use of" MMDS devices. Such a broad policy is necessary to ensure unimpaired access to MMDS. However, some parties are concerned that such a broad application of the Commission's preemption authority will usurp local authorities' rights to enforce reasonable, and industry accepted, building codes and procedures. For example, the National Electric Code specifies, among other things, the appropriate procedures for safely grounding antenna installations. Bell Atlantic agrees that application of such a widely accepted standard is important and necessary to ensure the safety of consumers and the general public, and is not suggesting that such a standard be preempted.

On the other hand, some building codes and/or regulations may include elements that would unnecessarily restrict access to wireless cable services. For example, the BOCA building code which is used by many states and municipalities includes a limit on antennae mast height of 12 feet. Mast heights greater than 12 feet require permits. History has shown that the requirement to file applications seeking advance approvals and permits acts as a considerable deterrent to consumers gaining access to wireless cable services. Consumers will simply elect not to buy these services if they must "jump through hoops" to get them. Consequently, a height limit, above which consumers would be required to seek advance approvals, would effectively restrict access to MMDS.

Rough estimates of the Hampton Roads, Virginia market (Bell Atlantic's first planned deployment of MMDS) indicate that the average mast height is approximately ten feet. Estimates indicate that approximately 40% of potential customers would require antennae installed at heights of 12 feet or greater above the roof line, and approximately 25% would require antennae at 20 feet or greater. Thus, a substantial portion of Bell Atlantic's potential market could not be served if antennae could not be installed above 12 feet (the BOCA standard), or if customers had difficulty obtaining approvals for such heights. Even with a 20 foot limit, Bell Atlantic would be foreclosed from a substantial portion of the potential market. Of course, this is only one example of a single market. Markets with more difficult terrain and foliage conditions would require higher mast heights.

While Bell Atlantic would prefer that the Commission specify no limit or standard for mast height, we are willing to agree to a reasonable standard to facilitate an acceptable resolution of this matter. Specifically, Bell Atlantic recommends adoption of a 25 foot mast height standard. Antenna masts of 25 feet or less above the roof line could be installed without prior approval from some state or local authority. Masts exceeding 25 feet may require a review and approval process, at the discretion of the local regulating authority. The Commission should require that, when performing such a review, the promulgating authority must act on the request within 30 days.

Concerns of a Highly Specialized or Unusual Nature

Bell Atlantic recognizes that there may be exceptional cases where it may serve the public interest to allow local authorities to regulate MMDS antennae based on aesthetic factors. However, the Commission should avoid establishing guidelines for granting such waivers that are overly broad. For example, the inclusion of “waterfront property” as an area warranting exemption, as suggested by the Commission’s Notice, would impair access to MMDS by a substantial number of consumers without any justifiable reason. Moreover, its vagueness would likely invite numerous legal challenges.

Bell Atlantic recommends that the Commission adopt guidelines which are narrowly defined to ensure that consumers have access to wireless cable services in the widest circumstances possible. We recommend that waivers of the Commission’s rules be considered for areas where, to protect the historical appearance and value of an area, there is a general ban on visible modern accoutrements (e.g., telephone poles, overhead wires and cables, pay telephones, electrical lighting, transformers, and air conditioners). MMDS antennas are simply another example of modern American culture. If other modern accoutrements are permitted, then MMDS antennas should also be permitted.

Non-Governmental Restrictions

The Commission correctly concludes that its preemption policy should include non-governmental entities such as homeowners’ associations. The legislative history clearly supports such a conclusion. The Commission is also correct in according such entities less deference than it gives governmental entities. Restrictions imposed by non-governmental entities are often more onerous than state and local governmental regulations. Moreover, because safety and health concerns can, and should, be addressed through local governmental regulations, the Commission’s proposed rule preempting non-governmental restrictions and denying them the rebuttal and waiver provisions afforded state and local governmental entities is appropriate.

While we support the Commission’s proposal to adopt a per se preemption of regulation by non-governmental entities, we believe the Commission’s proposed rules should be amended to make clear this intention. Specifically, the Commission should preempt any regulation that “affects the installation, maintenance, or use of” MMDS devices as opposed to those that “impair a viewer’s ability to receive” MMDS. This

change would more closely comport with the language addressing state and local governmental regulation, and would eliminate needless ambiguity of the rules. Whichever language is chosen, however, the Commission should make clear that restrictions imposing an economic burden or delay on consumers “impair” or “affect” the use of MMDS antennae, and therefore are preempted.

Instructional Television Fixed Service

As the Commission is aware, licensees in the instructional television fixed service (ITFS) are an integral part of any wireless cable service. ITFS licensees lease excess capacity on their channels to MMDS operators to supplement their own channels in the provision of commercial service. MMDS operators simply could not offer a competitive service without the additional channel capacity that ITFS licensees provide. The partnerships that have developed between MMDS operators and ITFS licensees, most of which represent educational institutions, have also yielded considerable benefits to the advancement of public education. These partnerships provide educators with a valuable distribution channel for making educational programming available to a wider audience. Since ITFS channels are leased by MMDS operators, they also provide educators with a significant revenue stream which can be reinvested in the development of additional quality programming.

The Commission should ensure that its rules do not undermine the important MMDS-ITFS partnership. Section 207 of the Telecommunications Act requires the Commission to preempt regulations impairing access to MMDS. While this provision does not specifically mention ITFS, we believe it was Congress’ intent to apply the provision to all channels utilized by MMDS operators. Moreover, such a policy is consistent with the public interest, since there would be no wireless cable business without ITFS channels. To avoid any possible ambiguity, Bell Atlantic recommends that the Commission explicitly include ITFS in its proposed rules.

In conclusion, Bell Atlantic believes that the recommendations outlined here would ensure that consumers have access to MMDS while reasonably accommodating legitimate concerns of state and local governments. Therefore, we urge their adoption.



Attachment

cc: Chairman Reed E. Hundt
Commissioner Rachelle B. Chong
Commissioner Susan Ness
Commissioner James Quello

Ms. Randi Albert
Ms. Jackie Chorney
Mr. James Coltharp
Mr. William Johnson
Ms. Meredith Jones
Mr. Gary Laden
Mr. David Siddall
Ms. Jacqueline Spindler
Ms. Suzanne Toller

**Recommended Modifications to the Proposed Rules on MMDS Antennae
(Appendix A of NPRM; CS Docket 96-83)**

Proposed Rule:

- (a)(1) With the exception noted in paragraph (a)(3), any state or local zoning, land-use, building, or similar regulation, that affects the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals, [“multi-channel” omitted] multipoint distribution service, or instructional television fixed service shall be presumed unreasonable and is therefore preempted subject to paragraph (a)(2). No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this presumption unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (b), or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to paragraph (a)(2).
- (2) Any presumption arising from paragraph (a)(1) of this section may be rebutted upon a showing that the regulation in question:
- (A) is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;
 - (B) is no more burdensome to television broadcast service, [“multichannel” omitted] multipoint distribution service, or instructional television fixed service reception device users than is necessary to achieve the health or safety objective; and
 - (C) is specifically applicable on its face to devices designed for over-the-air reception of television broadcast signals, [“multichannel” omitted] multipoint distribution service, or instructional television fixed service.
- (3) Antenna masts exceeding 25 feet in height above the roof line may be regulated to ensure the safety of such installations, and the use of such masts may require review and approval by some state or local authority. In performing such a review, the promulgating authority must notify the applicant of its decision, including any special conditions or requirements, within 30 days of receiving applicant’s request.

- (b) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant of local concerns of a highly specialized or unusual nature. No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or amended regulations by the local authority unless the Commission expressly orders otherwise.
- (c) No restrictive covenant, encumbrance, homeowners' association rule, or other non-governmental restriction shall be enforceable to the extent that it affects the installation, maintenance, or use of devices designed for over-the-air reception of television broadcast signals, ["multichannel" omitted] multipoint distribution service, or instructional television fixed service.