Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	
Restrictions on Over-the-Air Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service	)	

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To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

BellSouth Corporation ("BellSouth") welcomes the Commission's action, pursuant to its statutory mandate, preempting state and local government and non-government regulation that impairs the installation, maintenance and use of video reception antennas and equipment or the reception of acceptable quality over-the-air video services. Although the overall structure of Section 1.4000, the new rule implementing this preemption, is appropriate, both the rule itself and the Commission's *Report and Order* implementing it require review, clarification and refinement.

Contrary to the clear statutory directive in Section 207 of the Telecommunications Act of 1996 that the Commission prohibit restrictions impairing over-the-air reception of video services, Section 1.4000 as presently adopted allows impairment in certain circumstances involving restrictions based on "safety" and "historic preservation" interests. There is no basis for the Commission to "infer" for itself authority to allow restrictions that impair video reception, and the Commission exceeded its legal authority under Section 207 in doing so. The Commission must revise Section 1.4000 to comply with the statute and prohibit *all* restrictions that impair video reception.

Even if the Commission were to have authority to allow restrictions that impair video reception, Section 1.4000 and the *Report and Order* are flawed and must be reconsidered. Without an adequate record and in conflict with Section 1.4000 itself, the Commission inappropriately gives its sanction to elements of a particular model building code, the Building Officials & Code Administrators International, Inc. (BOCA) National Building Code. The portions of the BOCA code condoned by the Commission in its *Report and Order* are arbitrary

and do not meet the requirement in Section 1.4000 that such regulations be no more burdensome than necessary.

The Commission also failed to recognize the disproportionate burden and anticompetitive impact upon wireless cable systems of regulations requiring approvals or permits prior to antenna installation. By their nature, such requirements impose onerous procedures and costs only on wireless cable operators, and subject wireless customers to delays and complications which can undermine the competitiveness of wireless cable service. Section 1.4000 should be revised to preempt such permit or other requirements of advance approval or, at a minimum, limit substantially such regulations.

Section 1.4000 also should be revised to prevent the potential for abuse by non-government entities which justify restrictions on the pretense of safety. The principal objectives of restrictions promulgated by homeowners' associations, condominium associations and other non-governmental entities are aesthetic or business-related, inasmuch as safety regulation is largely a function of state and local government. The present rule provides non-governmental entities an opportunity to mask rules based on aesthetic or other concerns under a safety rationale to avoid preemption. Section 1.4000 should be modified to preempt non-governmental restrictions premised upon safety objectives.

The Commission must require more from proponents of safety-based restrictions than merely that the objective be "clearly defined." Rather, a safety objective must be shown to have merit. If the Commission were to have authority to allow such restrictions which impair video reception, Section 1.4000 must require that the restrictions be justified by a *compelling* safety objective.

Assuming the Commission has the statutory authority to allow impairment of video reception based on historic considerations, the Commission should define more properly in Section 1.4000 which buildings may be subject to such restrictions. The inclusion of buildings that are merely "eligible for listing" on the National Register of Historic Places is inconsistent with the manner in which, and purpose for which, such status is obtained.

Only the Commission should have jurisdiction over proceedings interpreting and enforcing Section 1.4000. The rule implements a federal policy that would be undermined by varying and possibly inconsistent or arbitrary interpretations and application by the thousands of local, state and federal courts. Even if such proceedings were properly conducted, local adjudication of these matters would result in far greater cost to the parties than the "paper" procedure that the Commission has adopted. As wireless cable operators seek to protect their right to compete and serve their customers, the cumulative effect of such costly proceedings could put them at an economic and competitive disadvantage. Section 1.4000 should be revised to give the Commission exclusive jurisdiction over such matters.

TABLE OF CONTENTS

Page

SUMMARY i

INTRODUCTION 2

I. THE COMMISSION IS WITHOUT AUTHORITY TO ADOPT A RULE THAT ALLOWS ANY IMPAIRMENT OF WIRELESS CABLE RECEPTION 4

II. EVEN IF THE COMMISSION WERE TO HAVE AUTHORITY TO ALLOW IMPAIRMENT OF RECEPTION, THE COMMISSION'S DECISION AND THE RULE ARE FLAWED 7

A. The Commission's Analysis Was Based On An Incomplete Record, Is At Odds With The Rule Itself, And Must Be Partially Vacated 8

B. Permit Requirements For Installations Must Be Prohibited Or Substantially Limited By The Commission Because They Impair Reception Of Wireless Cable Service 10

C. Only Government Entities Should Be Allowed To Impose Safety-Related Restrictions 13

D. Antennas Should Be Restricted For Safety Reasons Only Upon A Showing Of A Compelling Safety Objective 15

E. Only Buildings Listed On The National Register Of Historic Places Should Be Subject To Restrictions Based On Historic Considerations . . 16

III. THE COMMISSION MUST HAVE EXCLUSIVE JURISDICTION OVER SECTION 1.4000 DETERMINATIONS 18

CONCLUSION 19

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To: The Commission

PETITION FOR RECONSIDERATION

BellSouth Corporation ("BellSouth"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider portions of its *Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, FCC 96-328, released August 6, 1996 ("*Report and Order*") in the above-captioned proceedings, and to revise Section 1.4000 as set forth in Exhibit 1 hereto.[1]

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[1] BellSouth and its subsidiary BellSouth Interactive Media Services, Inc. together previously submitted formal comments in CS Docket No. 96-83, and thus BellSouth has standing to file this petition pursuant to Section 1.429.

INTRODUCTION

BellSouth, through its subsidiaries, provides telecommunications, wireless communications, video programming, directory advertising and publishing, and information services to more than 25 million customers in 17 countries worldwide. BellSouth Wireless Cable, Inc. ("BellSouth Wireless"), a BellSouth subsidiary, is in the process of acquiring the wireless cable television system in the New Orleans, Louisiana area and has interest in operating additional wireless cable systems.

BellSouth's interest in wireless cable is part of its strategic plan to expand its involvement in the home entertainment services industry and, to that end, it is evaluating four principal service delivery platforms: wireless cable, cable television, open video and satellite-based systems. BellSouth also is in the process of real-world testing of new video technologies and ancillary services such as high-speed personal computer-related services. Based on cost and other competitive factors, BellSouth ultimately will choose the best delivery platform in a given market. Although wireless cable has attractive attributes, including lower capital cost and the ability to enter the marketplace more rapidly than cable television systems, BellSouth and others may be forced to reevaluate and curtail their wireless cable plans if regulatory restrictions imposed on wireless cable equipment and services are overly burdensome or result in a competitive handicap.

BellSouth welcomes the statutory directive to the Commission preempting state and local government and non-government restrictions that impair the ability to receive wireless cable service. The Commission's new antenna preemption rule appropriately prohibits restrictions that unreasonably delay, increase the cost of, discriminate against, or otherwise impair or prevent

the installation, maintenance and use of wireless cable equipment and the reception of acceptable quality wireless cable service.[2] Although BellSouth believes that the overall framework of Section 1.4000[3] is appropriate, both the rule itself and the Commission's *Report and Order* implementing it require review, clarification and refinement. In particular:

- the Commission is without authority to adopt a rule that allows any impairment of wireless cable reception;
- even assuming the Commission were to have authority to allow any impairment of reception, the *Report and Order* and Section 1.4000 are flawed insofar as:
    - the Commission's analysis in the *Report and Order* was based on an incomplete record, is at odds with Section 1.4000 itself, and must be partially vacated;
    - Section 1.4000 must be revised to prohibit or substantially limit individual permit requirements for wireless cable installations;
    - only government entities should be allowed to impose safety-related restrictions;
    - antennas should only be restricted for safety reasons upon a showing of a compelling safety objective; and
    - restrictions for historic purposes should be limited in application to only those buildings which are *listed* in the National Register of Historic Places.
- the Commission should have exclusive jurisdiction over adversarial proceedings interpreting and enforcing Section 1.4000.

As set forth below, BellSouth urges the Commission to reconsider its *Report and Order* and revise Section 1.4000 as set forth in Exhibit 1.

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[2] Such restrictions have the greatest impact upon the reception of wireless cable service which, unlike cable television, Direct Broadcast Satellite (DBS) and all other multichannel video sources, relies upon line-of-sight terrestrial transmission paths.

[3] 47 C.F.R. § 1.4000 (1996).

I. THE COMMISSION IS WITHOUT AUTHORITY TO ADOPT A RULE THAT ALLOWS ANY IMPAIRMENT OF WIRELESS CABLE RECEPTION.

The Commission acted in this proceeding pursuant to the directive of Section 207 of the Telecommunications Act of 1996 (the "1996 Act"),[4] requiring the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services..." including wireless cable.[5] Section 207 directs the Commission to do so "pursuant to Section 303 of the Communications Act," the section of the Communications Act of 1934, as amended (the "Communications Act")[6] that gives the Commission its basic authority to promulgate rules regulating communication by radio transmission.[7]

In adopting Section 1.4000, the Commission correctly noted the "two complementary objectives" of the antenna preemption rule:

> (a) to ensure that consumers have access to a broad range of video programming services, and (b) to foster full and fair competition among different types of video programming services.[8]

The Commission went beyond this, however, in stating that:

> We believe that in invoking Section 303 of the Communications Act, which authorizes the Commission to issue rules and regulations "as public convenience, interest, or necessity requires," Congress intended that we consider and incorporate appropriate local concerns. In the *DBS Order and Further Notice* we noted that "we think it *reasonable to infer* that Congress did not mean...to prevent the Commission from preserving reasonable local health and safety regulations;

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[4] Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56 (1996).

[5] *Id.*; *Report and Order* at 2 (¶¶ 1-2).

[6] Communications Act of 1934, as amended, § 303, 47 U.S.C. § 303 (1996).

[7] *See Report and Order* at 2 n.1 (¶ 1).

[8] *Id.* at 6 (¶ 6).

> or from granting waivers where unusual circumstances require specialized local regulation." Thus, while the statute requires that we prohibit restrictions that impair viewers' ability to receive the signals in question, it also permits the Commission to minimize any interference caused to local governments and associations as a result.[9]

Other than as indicated above, the Commission does not explain how it "infers" what Congress meant, or adequately define the specific basis upon which the Commission determined that Section 207 allows it to circumscribe over-the-air video reception in order "to minimize any interference caused to local governments and associations." Thus, BellSouth disagrees with the Commission's argument that reference to Section 303 of the Communications Act permits the Commission to *infer* that other interests should be considered. As a matter of statutory construction, the reference to Section 303 ("...the Commission shall, pursuant to Section 303 of the Communications Act, promulgate...") modifies the word promulgate. As acknowledged by the Commission, Section 303 establishes the Commission's *general* authority to regulate radio communications and facilities and contains specific provisions regarding the Commission's regulation of direct-to-home satellite services.[10] By its simple, plain meaning, the phrase is a mere cross-reference to the Commission's regulatory promulgation authority. It is unreasonable for the Commission to read any more into this benign statutory cross-reference, especially in view of the fact that neither Section 207 itself nor its legislative history gives any indication that

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[9] *Id.* (footnotes omitted and emphasis added). In the "*DBS Order and Further Notice*," the Commission previously determined, with no elaboration on the matter, that "[b]ecause Congress invoked the Commission's normal rulemaking authority, and because Congress did not prohibit all regulations but rather only those that impaired reception, we think accommodation of local concerns remains permissible under [Section 207]." *Report and Order, Further Notice of Proposed Rulemaking*, IB Docket No. 95-59, 2 CR 723, 738-39 (1996).

[10] *See* Subsections 303(f) and (v) of the Communications Act, 47 U.S.C. § 303(f), (v).

other interests should be addressed.[11] Thus, there is *no* support to draw the inference either in the express language of Section 207 of the 1996 Act or any of its legislative history. Accordingly, the *Report and Order* is not supported by any discussion of legislative history or other record material to substantiate the Commission's position that Congress intended video reception to be impaired, in some circumstances, by local restrictions.[12]

BellSouth also disagrees that it is "'reasonable'" for the Commission to infer authority to allow such impairment -- contrary to the express language of Section 207 -- on the basis of its generalized belief in the interests of local government and non-government restrictions.[13] The language of Section 207 is plain and unambiguous: *any restriction that impairs a viewer's ability to receive over-the-air video services is to be prohibited by the Commission*. If Congress intended the Commission to consider other factors, surely it would have included them in the statute itself or discussed them in its legislative history. In the absence of such, the Commission is charged with implementing Section 207 as it appears:

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[11] In resolving differences between the two versions of the 1996 Act, the House-Senate Conferees stated that "the conference agreement adopts the House provision with modifications to extend the prohibition to devices that permit reception of multichannel multipoint distribution services," *without any discussion of any intention that the Commission balance other government or non-government interests*. *Joint Explanatory Statement of the Committee of Conference* in H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 166 (1996) (excerpt attached for reference as Exhibit 2). The report of the House on the bill (H.R. 1555) from which the provision originates also says nothing about the Commission balancing any other interests in protecting video reception. H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 123-24 (1995) (excerpt attached for reference as Exhibit 3).

[12] *See Report and Order* at 6-7, 9-12 (¶¶ 6, 13-17).

[13] By its terms, Section 1.4000 allows restrictions that "impair" over-the-air video services nevertheless to be permitted under circumstances involving a "clearly defined safety objective" or preservation of an historic district. *See* Subsection 1.4000(b), 47 C.F.R. § 1.4000(b); *Report and Order* at 13-14, 17 (¶¶ 21, 26).

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[14]

In going beyond the express directive of Section 207, the Commission has exceeded its statutory authority in adopting Section 1.4000.[15] Even if the Commission were to have legislative authority to implement Section 1.4000 as presently constituted, it failed to do so on the basis of a sufficient record establishing the specific legitimate "safety" and "historic preservation" interests of local government and non-government entities.

The Commission must revise Section 1.4000 to comply with Section 207 and prohibit *all* restrictions that impair the reception of over-the-air video services including wireless cable.[16]

II. EVEN IF THE COMMISSION WERE TO HAVE AUTHORITY TO ALLOW IMPAIRMENT OF RECEPTION, THE COMMISSION'S DECISION AND THE RULE ARE FLAWED.

Even if the Commission were to have authority to allow restrictions that impair the reception of video services, which it does not, the *Report and Order* and Section 1.4000 are flawed and must be reconsidered.

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[14] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). *See also Florida Public Telecommunications Association v. F.C.C.*, 54 F.3d 857 (D.C. Cir. 1995).

[15] *Id.*

[16] The Commission might best accomplish this by eliminating Subsection 1.4000(b) in its entirety and relettering the subsections following it. Exhibit 1 details the specific changes to Section 1.4000 recommended by BellSouth.

A. The Commission's Analysis Was Based On An Incomplete Record, Is At Odds With The Rule Itself, And Must Be Partially Vacated.

Beyond the issue of the Commission's statutory authority, some of the Commission's conclusions in the *Report and Order* lack an adequate record and are at odds with Section 1.4000. The Commission has sought to "distinguish clearly the sort of restrictions that impair reception from those that do not,"[17] and "provid[e] examples of which local restrictions are prohibited and which are not."[18] However, the Commission's evaluation of these examples is flawed because the record in this regard is incomplete.

Under Section 1.4000, a restriction that impairs reception must be demonstrated to: a) have a clear safety objective (or be an historic preservation restriction) that does not discriminate when compared to other appurtenances; and b) be no more burdensome than necessary.[19] Seeking to add definition to the rule, the Commission gives its sanction to a portion of the Building Officials & Code Administrators International, Inc. (BOCA) National Building Code, one of four model building codes used in the United States. In the *Report and Order*, the Commission stated that:

> Because we believe the model antenna height and antenna restrictions in the BOCA code are safety related, they will be enforceable under our rule. We do not believe it will be *overly burdensome* to require, as is provided in the BOCA code, that antenna users obtain a permit in cases in which their antennas must extend more than twelve feet above the roofline to receive signals.[20]

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[17] *Report and Order* at 11 (¶ 16).

[18] *Id.* at 7 (¶ 7).

[19] *See id.* at 5, 12, 16-17 (¶¶ 5, 17, 25-26).

[20] *Id.* at 24 (¶ 37) (emphasis added).

The Commission inappropriately stated its "belief" that the BOCA code restriction is safety related without an adequate record upon which to judge the matter. For example, the record does not sufficiently address the BOCA code's twelve foot standard, or what particular safety concerns (*e.g.*, wind loading, structural integrity, electrical protection) are its predicates. The record provides no reasoned basis for restricting all antennas to twelve feet absent a permit[21] and such a requirement is thus arbitrary.[22] Further, there is no indication when this portion of the BOCA code was last reviewed, much less revised or updated. Because the current BOCA code restriction apparently has remained unchanged for more than 40 years, it fails completely to take into consideration the unique design and requirements of wireless cable antennas as well as state-of-the art materials, construction and mounting techniques. Such developments may alter or eviscerate the safety bases, if ever there were any, of the BOCA code restrictions.

More importantly, the Commission's calculation that the restriction is not "overly burdensome" is a misapplication of Section 1.4000. The test under Section 1.4000 is not whether a restriction is overly burdensome or imposes an unreasonable burden, but rather whether the particular restriction is *no more burdensome than necessary*. Here the Commission has performed no such analysis and has an inadequate record upon which to do so.[23]

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[21] BellSouth knows of no sound basis in actual practice for such a limitation.

[22] In the same discussion, the Commission stated that "we would find unenforceable any restriction that establishes specific *per se* height limits." *Id.* As set forth below, permit requirements can, in actuality, act as a bar to the marketing and provision of wireless cable service. To the extent this occurs when the BOCA permit requirement is applied in local jurisdictions, the BOCA code will function as a *de facto* if not *per se* height limit.

[23] BellSouth believes the BOCA code requirement of a building permit for installation of every antenna over twelve feet is certainly more burdensome than necessary. Inasmuch as permit requirements for antenna installations impose an unreasonably heavy and discriminatory burden on wireless cable systems *viz.* other services such as DBS as set forth below, they should

Because the Commission in applying the limitation of the BOCA code failed to follow the analysis it itself requires in Section 1.4000, the Commission must vacate those portions of the *Report and Order* that find the BOCA code to comply with Section 1.4000.[24]

B. Permit Requirements For Installations Must Be Prohibited Or Substantially Limited By The Commission Because They Impair Reception Of Wireless Cable Service.

In the increasingly competitive multichannel video services business, service providers -- particularly nascent competitors such as wireless cable providers fighting to win market share from incumbent cable system competitors -- must be able to offer service to new customers that is instantaneously and effortlessly available and provides good value. BellSouth's own market studies show that consumers are largely indifferent to the technology that delivers their video service. Quality reception is the most important feature in the decision to purchase wireless cable, DBS or cable services. Regulatory requirements and practical hardships of one provider and its distribution system versus another are lost on potential customers. Therefore, any delay in the provision of service by wireless cable operators resulting from permit requirements will disadvantage wireless cable operators versus cable and DBS operators.

To the extent that Section 1.4000 allows local entities to subject wireless cable operators and their potential customers to an approval or permit process prior to antenna installation, it

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be prohibited or substantially limited by the Commission.

[24] Even if the Commission's reconciliation of the BOCA code with the Commission's rule were sound, analysis of the BOCA code is of limited usefulness inasmuch as the BOCA code is in use, at least on a statewide basis, in only seventeen states. Within the BellSouth local telephone service region, for example, only one of nine states (Kentucky) uses the BOCA code.

threatens to frustrate the statutory objective of the 1996 Act to promote availability of competitive video services.[25] Although the Commission states in the *Report and Order* that "[a]ny...permit application should be handled expeditiously,"[26] the Commission fails to specify what is meant by "expeditiously" or otherwise to elaborate. This vagueness and uncertainty could impose significant burdens and costs only on wireless cable operators.[27]

Permits invariably take time to process and may involve fees that directly increase the cost of providing service.[28] Some entities may not have sufficient or knowledgeable staff to process numerous permit applications which may be necessary as wireless cable systems expand their service. Still others may use the permit process to initiate extensive legislative or other

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[25] *See id.* at 6 (¶ 6). The Commission has recognized that:

> Procedural requirements -- provisions requiring the approval of community associations or local zoning boards prior to the installation of [antennas for video reception], for example -- can, in practical terms, "prevent" the viewer's access to video programming signals as surely as outright prohibitions, by creating an extra hurdle for consumers to overcome. Similarly, requirements for permits and/or fees may provide a disincentive for potential consumers, if those requirements apply to one programming signal provider but not another.

Id. at 11-12 (¶ 17) (footnote omitted).

[26] *Id.* at 24 (¶ 37).

[27] Their principal competitors, cable television systems, do not face such issues inasmuch as cable franchises may generally permit installation of system plant within the franchise area including customer locations. Moreover, antennas for DBS reception, particularly the 18-inch dishes now being sold in large numbers, generally do not require permits for installation. Many potential customers, faced with a choice between immediate availability from the local cable operator and DBS or delayed availability from the wireless cable system, will choose the one they can have "now."

[28] Fees charged for such permits may or may not be reasonable and may not be limited to recovery of the cost of permit processing. Some may be "sham" processes in which no review takes place and that operate solely as a source of revenue to the entity and of prejudicial delay to the wireless cable operator and its customers.

review proceedings to establish the "safety" rationale allowed under Section 1.4000, delaying permit issuance indefinitely.

The permit process also imposes substantial indirect costs on wireless cable operators and frustrates their ability to provide quality service. For example, in situations requiring a permit, two "truck rolls" may have to be dispatched to the location to effectuate a single installation (once to ascertain that a permit is required and, assuming the permit process is negotiated without the customer losing interest, at least another to make the installation), disturbing the potential customer at least twice and delaying the initiation of service. Even within a single market, a wireless cable operator will have to be familiar with and manage the application/permit processes before dozens of municipal and county governments as well as countless homeowners' and condominium associations. In addition, the costs associated with any administrative processes or litigation must be borne by wireless cable operators, either passed on to customers or otherwise absorbed by the operator, in either case reducing any cost advantage upon which wireless cable so heavily relies to compete with cable.[29]

The nearly infinite complexities and burdens of the permit processes, including uncertainties as to time and cost, if not preempted by the Commission, will significantly hinder the competitiveness of wireless cable systems. Absent Commission prohibition of this aspect of local regulation of customer antenna and equipment installation as required by statute, wireless cable operators will have a disincentive, or may be economically unable, to serve certain areas of their markets or enter markets in the first place. The Commission should

[29] Even the duration of the permits can vary significantly. For example, does a permit "run with the land" whereby it continues to be valid through a change from one customer to another at that location? Or is a new permit be required with customer turnover?

recognize that the new statute requires it to preempt local entities' ability to impose permit or other requirements of advance approval on the installation, maintenance and operation of wireless cable reception antennas and equipment or, at a minimum, requires the Commission to limit substantially their ability to do so.[30]

C. Only Government Entities Should Be Allowed To Impose Safety-Related Restrictions.

Section 1.4000 permits reception of video services to be impaired in certain instances where a restriction is based on a clearly-defined safety objective.[31] However, the Commission does not distinguish between restrictions imposed by governmental bodies and non-governmental entities such as homeowners' associations.[32] To the extent Section 207 permits such restrictions at all, BellSouth believes that only governmental authorities should be authorized to impose and enforce restrictions on the basis of safety objectives.

The promulgation and enforcement of safety regulations has long been a province of state and local government authorities, which have the resources and expertise available to consider such matters and an established system of laws for public safety. Private entities, such as homeowners' or condominium associations, generally have no expertise on which to formulate, adopt or enforce safety restrictions and have limited experience and authority in such areas. Allowing both government authorities and non-governmental entities to impair video reception

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[30] BellSouth urges the Commission to take any such action by revising Section 1.4000 itself, as set forth in Exhibit 1, rather than issuing a statement of policy in its decision.

[31] *See* Subsection 1.4000(b)(1), 47 C.F.R. § 1.4000(b)(1).

[32] *Id.*

on the basis of safety objectives can result in redundant and possibly inconsistent and conflicting restrictions, imposing substantial additional administrative cost and burdens on wireless cable systems and their potential customers.

Inasmuch as safety matters routinely are addressed by state and local laws and regulations, homeowners' associations, condominium associations and other non-governmental entities principally focus on aesthetic and business considerations. The present Commission rule invites such parties to make mischief by masking rules based on aesthetic or business concerns as being safety-related.[33] Even some aesthetic restrictions which the Commission considers innocuous may have the effect of impairing video reception. In the *Report and Order*, the Commission suggested that a requirement of painting an antenna and structure to match its surroundings "in a fashion that will not interfere with reception...would likely be acceptable." *Id.* at 13 (¶ 19). The Commission simply has no adequate record to opine on whether an antenna could, in fact, be painted without impairing antenna performance. Moreover, even if such painting did not impair actual antenna performance, such a requirement might impose an unreasonable burden on the wireless cable operator and the customer. Left unanswered are questions concerning the additional costs of painting antennas a variety of colors, the additional

[33] For example, a homeowners' association that seeks to discourage the installation of antennas because it believes them to be unattractive could issue a rule restricting them, cleverly cloaked under a stated safety rationale of avoiding risk of injury from electrical storms or dislodgment by wind. Because the association has expressly stated a safety objective for its policy, it could enforce such a restriction, regardless of its lawfulness, during the pendency of any challenge of it. *See Report and Order* at 17, 33 (¶ 25, 53). It is only after the wireless cable operator goes through the effort, expense and delay of bringing a successful challenge to the restriction that it may be disregarded. Such a process may not be economical for a wireless cable operator, resulting in a real loss of alternative video service and competition in the affected area.

time necessary for such painting and the burden of maintaining the antennas as the paint weathers. Depending on the particular requirements of different neighborhoods -- and there are many neighborhoods within the service area of a single wireless cable system -- these factors may indeed excessively burden wireless cable operators. Without an analysis, the Commission's sanction of any painting requirement is arbitrary, and any conclusions as to the reasonableness of such requirements are not based on the record. Suffice it to say, the FCC is not in the aesthetics business, and it should avoid being needlessly brought into consideration of such matters. Prohibiting non-government entities from the use of safety rationales to justify their rules would help avoid this result.

The Commission simply must not permit non-government entities to impair video reception, in the name of safety, with even more onerous restrictions than those of state and local governments that regulate and protect public safety. Accordingly, the Commission should revise Section 1.4000 to preempt non-government restrictions that impair reception of video services on the basis of safety or other objectives.

D. Antennas Should Be Restricted For Safety Reasons Only Upon A Showing Of A Compelling Safety Objective.

Section 1.4000 permits state and local government and non-government entities to impose restrictions that impair video reception where "it is necessary to accomplish a *clearly defined* safety objective..."[34] However, as BellSouth has previously set forth in this proceeding, whether a purported safety objective is clearly defined should not and cannot determine the legitimacy

[34] Subsection 1.4000(b)(1), 47 C.F.R. § 1.4000(b)(1) (emphasis added).

of such an objective.[35] Simply put, a state or local government restriction may be capable of *clearly defining* a safety objective, even though the stated objective may lack merit. The Commission has overlooked the simple requirement that a safety objective must be compelling, not merely clearly defined. Without such a requirement, that portion of Section 1.4000 allowing restrictions based on "safety" interests is transparent and without any rational basis.[36]

If the Commission were to have authority to adopt any restrictions that impair service reception, BellSouth once again urges the Commission to allow restrictions only where the safety objective sought to be protected is demonstrated to be a *compelling* one.[37] Insofar as subsection 1.4000(b) is not deleted in its entirety, as set forth in Exhibit 1 hereto, the Commission should in subsection 1.4000(b)(1) at least replace the phrase "clearly defined" with "compelling."

E. Only Buildings Listed On The National Register Of Historic Places Should Be Subject To Restrictions Based On Historic Considerations.

Assuming *arguendo* it were to have the authority to adopt such rules, the Commission should amend Section 1.4000 to define more properly which buildings may be subject to restrictions for historical purposes. Section 1.4000 permits video reception to be impaired by restrictions if a building is either "listed or eligible for listing" on the National Register of

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[35] *See Comments of BellSouth Corporation and BellSouth Interactive Media Services, Inc.* in CS Docket No. 96-83, filed on May 6, 1996, at 4.

[36] *Id.* at 5, *citing City of Brookings Mun. Tel. Co. v. F.C.C.*, 822 F.2d 1153, 1156 (D.C. Cir. 1987).

[37] The Commission failed in the *Report and Order* to respond to this argument by BellSouth. *Id.*

Historic Places.[38] The Commission's inclusion of buildings which merely are *eligible* for listing either is an oversight or reflects a fundamental lack of understanding by the Commission of the historic designation process.[39]

Property is listed on the National Register of Historic Places only after it has been nominated by a state or federal agency.[40] If the property meets the criteria and the property owner has not objected to listing, the Secretary of the Interior then adds the property to the National Register. However, if the property owner objects to the listing, the property is not listed, and instead is designated as "eligible for listing."[41]

Property owners generally object to National Register listing in order to avoid being subject to restrictions, including limitations on alterations and improvements under state and local laws. Where a property owner does not want to be affected by such restrictions, objects, and thus the property is designated merely as "eligible for listing," it is bewildering for the Commission, based on historical considerations, to subject such property to restrictions impairing video reception. To avoid this entirely nonsensical result, BellSouth urges the Commission to modify its rule to provide that only properties listed on the National Register of Historic Places may be subject to restrictions that impair video reception.

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[38] *See* Subsection 1.4000(b)(2), 47 C.F.R. § 1.4000(b)(2).

[39] The *Report and Order* does not discuss why the rule includes buildings that are merely eligible for listing.

[40] *See* National Historic Preservation Act of 1966, as amended, § 470a(a)(1), (3)-(4), 16 U.S.C. § 470(a)(1), (3)-(4) (1996).

[41] *Id.* at § 470a(a)(6), 16 U.S.C. § 470a(a)(6).

III. THE COMMISSION MUST HAVE EXCLUSIVE JURISDICTION OVER SECTION 1.4000 DETERMINATIONS.

Section 1.4000 provides that either the Commission "or a court of competent jurisdiction" may determine whether a particular restriction is permissible or prohibited under the rule.[42] In adopting the rule, the Commission rejected the suggestion of some commenters that the Commission retain exclusive jurisdiction, stating that "we see no reason to foreclose the ability of parties to resolve issues locally."[43]

BellSouth respectfully disagrees with this conclusion. Although the notion of resolving issues locally may appeal to the Commission in the abstract, allowing local courts to interpret and apply Section 1.4000 will almost certainly result in a chaotic patchwork of decisions variously interpreting Section 1.4000 that ultimately would frustrate the intention of Congress and the Commission to protect the reception of video services. Allowing local courts to resolve these issues is inconsistent with the Commission's federal preemption mandate under Section 207.

Section 207 implements a federal policy, a policy not to be undermined by varying and possibly arbitrary local interpretations and application. Across the United States there are thousands of local, state and federal courts, that vary widely in procedures, size and sophistication, administered by any manner of decision-makers from Justices of the Peace and Aldermen to federal judges. It is unreasonable to assume that all of these tribunals would

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[42] Subsection 1.4000(d), 47 C.F.R. § 1.4000(d). *See Report and Order* at 33, 35 (¶¶ 53, 56-58).

[43] *Report and Order* at 36 (¶ 58).

properly interpret an intricate rule from a federal agency and appropriately apply legal and equitable remedies in a manner consistent with the Commission's exercise of its own powers.[44] When a local court fails to do so, it may severely disrupt the business operations of a wireless cable system, perhaps irreparably. Moreover, unlike the "paper hearing" procedure established by the Commission for Section 1.4000 matters, a local proceeding -- even if properly conducted -- would invariably involve far greater costs to the parties to the extent that such proceedings include a hearing or other formal procedure. The cumulative effect of such costly proceedings upon wireless cable operators could put them at a considerable economic and therefore competitive disadvantage.

For all of these reasons, the Commission should revise Section 1.4000 as set forth in Exhibit 1 to state that the Commission has exclusive jurisdiction over Section 1.4000 matters.

CONCLUSION

It is vitally important to the wireless cable industry that the Commission's antenna preemption rule meet the objectives set forth by Congress to ensure that consumers have access to a broad range of video programming services and to foster full and fair competition among different types of video programming services. The burden imposed by state and local regulation of antennas and related equipment substantially limits the development of competitive video services driven by real consumer choice. It also threatens to perpetuate the virtual

[44] Indeed, the Commission's own inability to execute properly the analysis prescribed in Section 1.4000, as set forth above, suggests the difficulties inherent in a court's analysis, interpretation and application of Section 1.4000.

monopoly status of cable television systems and delays the long-sought goal of "effective competition" among multichannel video providers, an essential component of U.S. telecommunications policy. Wireless cable systems are the hardest hit by arbitrary and cumbersome restrictions, because their antennas must achieve clear terrestrial line-of-site reception paths.

As set forth above, the Commission has exceeded its statutory authority in adopting the present rule and must revise it to prohibit all restrictions that impair the reception of over-the-air video services including wireless cable. Even assuming the Commission acted within the scope of its authority, the Commission's decision was based on an incomplete record, is inconsistent with the rule itself, and must be partially vacated. In addition, the Commission must further