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

REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby submits its Reply Comments to the petitions for reconsideration and comments filed by other parties in response to the Commission's *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.[1]

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[1] On October 4, 1996, BellSouth filed a *Petition for Reconsideration* (the "BellSouth Petition") in response to the *Report and Order*. Seven other petitions for reconsideration also were filed. *See Joint Petition for Partial Reconsideration* of The Wireless Cable Association International, Inc., Bell Atlantic Corporation, CAI Wireless Systems, Inc., CS Wireless Systems, Inc., National Wireless Holdings, Inc., NYNEX Corporation, Pacific Telesis Group

INTRODUCTION

In its *Petition for Reconsideration*, BellSouth demonstrated that, although appropriate in overall framework, Section 1.4000 of the Commission's Rules[2] and the Commission's *Report and Order* implementing it require review, clarification and refinement. BellSouth showed that:

- 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;

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and People's Choice TV Corp. (the "WCA Petition"); *Petition for Clarification and Reconsideration* of the Consumer Electronics Manufacturers Association (the "CEMA Petition"); *Petition for Reconsideration and Clarification of August 6, 1996 Order* of DIRECTV, Inc. (the "DIRECTV Petition"); *Petition for Reconsideration and Clarification of August 6, 1996 Order* of Hughes Network Systems, Inc.; *Petition for Reconsideration and Clarification* of The Network Affiliated Stations Alliance (the "NASA Petition"); *Petition for Reconsideration* of Philips Electronics, N.A. Corporation and Thomson Consumer Electronics, Inc. (the "Philips/Thomson Petition"); *Petition for Reconsideration and Clarification* of the Satellite Broadcasting and Communications Association of America (the "SBCA Petition").

Four parties filed comments in response to the petitions for reconsideration. *See Comments of ITFS Parties in Support of Joint Petition for Partial Reconsideration* of Alliance for Higher Education *et al.* (the "ITFS Comments"); *Comments* of the Consumer Electronics Manufacturers Association (the "CEMA Comments"); *Comments* of the National Association of Broadcasters (the "NAB Comments"); *Comments* of the National Rural Telecommunications Cooperative (the "NRTC Comments").

[2] 47 C.F.R. § 1.4000 (1996).

- 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 locations which are *listed* in the National Register of Historic Places.[3]

- the Commission should have exclusive jurisdiction over adversarial proceedings interpreting and enforcing Section 1.4000.

As set forth below, there is virtual unanimity among all petitioners and commenters as to the need and importance of clarifying and strengthening Section 1.4000. The points of law and suggested revisions addressed in BellSouth's *Petition* are supported by other petitioners and commenters and there is no opposition to them. On several items, however, further amplification would assist the Commission in fashioning rules consistent with the Congressional mandate.

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

BellSouth demonstrated in its *Petition* that the Commission exceeded its statutory authority under Section 207 of the Telecommunications Act of 1996 (the "1996 Act")[4] in the *Report and Order* by wrongly "inferring" that Congress intended video reception to be impaired, in some circumstances, by local restrictions based on "safety" and "historic preservation"

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[3] BellSouth wishes to clarify and amend its previous comments to reflect that this proposal is directed at historic *districts* as set forth in the language of Section 1.4000(b)(2), not particular properties or buildings. BellSouth's previous comments referencing "property" and "buildings," *see BellSouth Petition* at 16-17, were not intended to urge any revision of the present application of Section 1.4000(b)(2) to historic districts. The Commission should modify its rule to provide that only historic districts *listed* on the National Register of Historic Places may be subject to restrictions that impair video reception.

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

objectives and by creating those exceptions to preemption without a sufficient record establishing the specific legitimate "safety" and "historic preservation" interests of local government and non-government entities.[5] 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*.[6]

BellSouth's position is supported by the Consumer Electronics Manufacturers Association ("CEMA"), which comments that:

> Section 207 plainly states that any restriction that impairs a viewer's ability to receive over-the-air video services is to be prohibited by the Commission . . . . [T]he Commission is not at liberty to translate (as it has done in the [*Report and Order*]) the statute's preemption of local restrictions into a preemption of all local restrictions *except* those addressing safety or historical concerns.[7]

Philips Electronics N.A. Corporation and Thomson Consumer Electronics, Inc. similarly argue that "[t]he incorporation of a reasonableness standard into the definition of impair impermissibly modifies the plain directive of Congress in the 1996 Act."[8] As these participants advocate, 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.

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[5] *See BellSouth Petition* at 4-7.

[6] *See id.* at 6-7.

[7] *CEMA Comments* at 9-10. CEMA concurs with BellSouth that "the more appropriate approach is to review local restrictions in the context of the waiver process." *Id.* at 10 (footnote omitted). No commenters have taken issue with BellSouth's position on this matter.

[8] *Philips/Thomson Petition* at 2, 10.

II. THERE IS CONSENSUS THAT THE COMMISSION'S DECISION AND THE RULE ARE FLAWED AND MUST BE REVISED PROPERLY TO PROTECT VIDEO RECEPTION.

Beyond the issue of the Commission's statutory authority, there is universal agreement in the record of petitions for reconsideration and comments in these proceedings that the *Report and Order* and Section 1.4000 do not adequately protect the reception of video programming from impairment by state and local government regulation and other restrictions.[9]

Other participants agree with BellSouth that some of the Commission's conclusions in the *Report and Order* lack an adequate record and are at odds with Section 1.4000, including its sanction of a portion of the Building Officials & Code Administrators International, Inc. (BOCA) National Building Code and misapplication of the "no more burdensome than necessary" standard of Section 1.4000.[10] For example, The Wireless Cable Association International, Inc. ("WCA") states that "the Commission, without benefit of a fully developed record, has prematurely addressed whether . . . particular restrictions are enforceable . . . and has incorrectly concluded that those restrictions are enforceable."[11]

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[9] *See CEMA Comments* at 2 ("[t]he other petitions for reconsideration reflect widespread agreement among the DBS, MMDS and TV broadcasting industries that the Commission can and should tighten its rules . . . ").

[10] *See BellSouth Petition* at 8-10.

[11] *WCA Petition* at 5-6. *See also ITFS Comments* at 3. For these reasons, BellSouth disagrees with the flat assertion by the Network Affiliated Stations Alliance ("NASA") that "provisions of existing model building codes define appropriate regulations for the placement of [antennas]." *NASA Petition* at 5. NASA provides no basis for this statement, which is unsupported in the record and, as shown by BellSouth and others in this proceeding, is flatly wrong.

BellSouth also demonstrated in its *Petition* that Section 207 compels the Commission to preempt permit and other advance approval requirements on the installation, maintenance and operation of wireless cable reception antennas and equipment inasmuch as the complexities and burdens of permit processes, if not preempted by the Commission, will significantly hinder the competitiveness of wireless cable systems versus cable and DBS operators.[12] DIRECTV, Inc. ("DIRECTV") concurs, noting that "the market shows, and the Commission has determined, that *no delay is reasonable*."[13]

BellSouth disagrees with the suggestion of NASA that regulations resulting in costs up to a "threshold of $250 or the cost of normal installation, whichever is less" presumptively should be permitted.[14] No such fixed numerical "threshold," nor one based on a vague concept of "normal" cost, can or should be established by the Commission. Whether a restriction imposes costs which constructively impair reception depends on particular circumstances and such a determination is not capable of being reduced to any fixed value or formula. BellSouth also takes issue with the statements by the Satellite Broadcasting and Communications Association of America ("SBCA") that the Commission should "define 'unreasonably' in its rule to mean 'in a manner different from other appurtenances of comparable size.'"[15] Such a

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[12] *See BellSouth Petition* at 10-13. At a minimum, Section 207 compels the Commission to limit substantially such requirements. *See id.* at 13.

[13] *DIRECTV Petition* at 7-8 (footnote omitted). *See also WCA Petition* at 13-18 (permit requirement is both more burdensome than necessary and discriminatory).

[14] *NASA Petition* at 5.

[15] *SBCA Petition* at 19, 20. DIRECTV similarly suggests that the Commission "examine the treatment of similar objects in the community to determine if an aesthetic regulation is reasonable." *DIRECTV Petition* at 9 (footnote omitted).

definition of "unreasonable" would be too limited. A restriction that applies to all appurtenances in an equal manner may nevertheless be *unreasonable* in the manner in which it affects video reception. BellSouth concurs with others in this proceeding that the Commission should not use "reasonableness" as a justification to permit restrictions that impair video service.[16]

To the extent Section 207 permits the reception of video services to be impaired in certain instances where a restriction is based on a clearly-defined "safety" objective, BellSouth has urged the Commission to prohibit non-government entities from impairing 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.[17] BellSouth urged the Commission to revise Section 1.4000 to preempt non-government restrictions that impair reception of video services on the basis of safety or other objectives.[18] In addition, BellSouth urged the Commission to modify Section 1.4000(b) to require a showing of a *compelling* safety objective, rather than one merely "clearly defined."[19] The National Rural Telecommunications Cooperative ("NRTC") supports this proposal, stating that "[i]n NRTC's experience, non-governmental restrictions can sometimes present even greater obstacles than government restrictions," and that "safety matters are for governmental authorities to determine, not non-governmental entities."[20] WCA similarly argues that "[b]y permitting nongovernmental entities to enforce 'safety-related' restrictions that

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[16] *See Philips/Thomson Petition* at 10-12; *CEMA Comments* at 6-7.

[17] *See BellSouth Petition* at 13-15.

[18] *See id.* at 15-16.

[19] *See id.*

[20] *NRTC Comments* at 2-3.

impair wireless cable service, the Commission has created an exception that can swallow the rule," thereby allowing non-governmental entities "to develop boilerplate 'safety' language to immunize otherwise impermissible restrictions from preemption."[21]

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

BellSouth also demonstrated in its *Petition* that the Commission must have exclusive jurisdiction over Section 1.4000 matters, consistent with the Commission's federal preemption mandate in the statute and to avoid more costly, inefficient and inconsistent proceedings and decisions in other forums.[22] To act otherwise ultimately would frustrate the intention of Congress and the Commission to enhance the unfettered reception of video services.[23] Nearly every petitioner and commenter supports exclusive Commission jurisdiction over Section 1.4000 matters and proceedings.[24] As SBCA correctly states, "[t]he Commission's optimism regarding the likelihood of local authorities taking their disputes to the Commission, while admirable, is likely misplaced."[25] With the Commission being unable to ensure that state and local courts

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[21] *WCA Petition* at 21-25.

[22] *See BellSouth Petition* at 18-19.

[23] *See id.*

[24] *See WCA Petition* at 25-27; *CEMA Petition* at 2-4; *DIRECTV Petition* at 14-17; *NASA Petition* at 6-9; *Philips/Thomson Petition* at 2-9; *SBCA Petition* at 4-11; *ITFS Comments* at 3; *CEMA Comments* at 8-9; *NAB Comments* at 3, 5; *NRTC Comments* at 3-4. BellSouth supports the proposal of DIRECTV and SBCA providing greater procedural protections for antenna users, including a grace period in which to comply prior to the imposition of fines or other penalties when an antenna installation is found to be non-compliant with a lawful regulation. *See DIRECTV Petition* at 5, 10, 11-14; *SBCA Petition* at 3, 14-16. *See also CEMA Comments* at 5-6; *NRTC Comments* at 4.

[25] *SBCA Petition* at 4.

refer such matters to it, the Commission runs the very substantial risk of falling into the same legal dilemma in which it found itself in *Town of Deerfield, New York v. FCC*[26] where the Commission was barred from reviewing the applicability of its previous antenna preemption rules.[27] At the very least, the result of allowing state and local courts to rule on such matters "will be a hodge-podge of inconsistent rulings,"[28] and an increase in both the burden and expense of adjudicating such matters as compared to the "paper-only" process established by the Commission in Section 1.4000.[29] DIRECTV correctly notes that a customer served with a complaint and subpoena to appear in court is more likely to default to cable television service than defend using his antenna.[30] State and local court adjudication of Section 1.4000 matters thus would result in a substantial competitive disadvantage to over-the-air video services *vis-a-vis* traditional cable television systems.[31] For all of the reasons set forth by BellSouth and the other petitioners and commenters, the Commission *must* retain exclusive jurisdiction on such matters.

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[26] 992 F.2d 420 (2d Cir. 1993).

[27] *See WCA Petition* at 26 n.45; *DIRECTV Petition* at 15; *NASA Petition* at 7; *Philips/Thomson Petition* at 7-9; *SBCA Petition* at 8-11; *CEMA Comments* at 3.

[28] *WCA Petition* at 26. *See also NASA Petition* at 7-8; *Philips/Thomson Petition* at 7; *CEMA Comments* at 3.

[29] *See WCA Petition* at 27; *DIRECTV Petition* at 16-17; *NASA Petition* at 9; *Philips/Thomson Petition* at 9; *SBCA Petition* at 7-8;

[30] *See DIRECTV Petition* at 16.

[31] *See WCA Petition* at 26; *SBCA Petition* at 8.

CONCLUSION

As set forth above and in BellSouth's *Petition for Reconsideration*, 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 revise the rule as set forth in BellSouth's *Petition* in order to fulfill more completely its objectives. For all of these reasons, the Commission must reconsider its decision in this proceeding.

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December 4, 1996

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CERTIFICATE OF SERVICE

I, Brett Kilbourne of BellSouth Corporation, do hereby certify that the foregoing "Reply Comments of BellSouth Corporation" was served on the parties listed below by first class mail, postage prepaid, this 4th day of December, 1996.

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