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

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AUG 27 1999

In the Matter of )  
)  
Promotion of Competitive Networks )  
in Local Telecommunications Markets )  
)  
Wireless Communications Association )  
International, Inc. Petition for Rulemaking to )  
Amend Section 1.4000 of the Commission's )  
Rules to Preempt Restrictions on Subscriber )  
Premises Reception or Transmission )  
Antennas Designed to Provide Fixed Wireless )  
Services )  
)  
Cellular Telecommunications Industry )  
Association Petition for Rule Making and )  
Amendment of the Commission's Rules )  
To Preempt State and Local Imposition of )  
Discriminatory And/Or Excessive Taxes )  
and Assessments )  
)  
Implementation of the Local Competition )  
Provisions in the Telecommunications Act )  
of 1996 )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
WT Docket No. 99-21

CC Docket No. 96-98

**BELLSOUTH COMMENTS**

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## SUMMARY

It is impossible to have a “bottleneck” over the “market for interconnection services.”

The Commission’s announcement that it will not consider implementing the deregulatory policies of the Telecommunications Act of 1996 with respect to incumbent local exchange carriers (ILECs) until this “market” becomes competitive is therefore unwarranted. The Commission’s observation that it may not even consider the deregulation of incumbent LECs in a competitive interconnection market betrays a “re-regulatory” bias against incumbent LECs.

BellSouth opposes the expansion of the term’s “right-of-way” and “conduit” as used in section 224 to include private easements and indoor, above ground private property, respectively, and shows that plain meaning of those terms do not permit the Commission’s attempts to fashion new definitions. BellSouth opposes the expansion of the Commission’s regulatory authority over classes of persons not regulated by the Communications Act, but suggests ways in which building owners can facilitate access by multiple service providers to multiple tenant environments (MTE) through adequate support structure planning. Access to an incumbent LEC’s intrabuilding network distribution facilities can also be made available through the incumbent’s interconnection agreements.

BellSouth adamantly opposes a mandatory MPOE demarcation point for multi-unit premises, and shows how such a policy would not be in the best interests of building owners, end-users and carriers. BellSouth explains its experience in MTEs, including its demarcation policies, its investment in intrabuilding network distribution facilities, and its service experiences with both MPOE and non-MPOE demarcation points.

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

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	

**BELLSOUTH COMMENTS**

BellSouth Corporation, by counsel and on behalf of its affiliated companies,<sup>1</sup> comments in response to the Notice of Proposed Rulemaking in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98.<sup>2</sup>

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<sup>1</sup> BellSouth Corporation (BSC) is a publicly traded Georgia corporation that holds the stock of companies which directly or indirectly offer local exchange, exchange access and toll telephone services, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and provide mobile communications and other network services world-wide.

<sup>2</sup> *Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular*

## INTRODUCTION

In its NPRM, the Commission expresses its policy preference for facilities-based competition to local services provided by incumbent local exchange carriers (LECs).<sup>3</sup> Accordingly, the Commission seeks here and elsewhere to remove “various possible impediments,” or barriers, to facilities-based competitive entry.<sup>4</sup> The specific focus of this proceeding is to implement the Commission’s policy of bringing “the benefits of competition, choice and advanced services to all consumers of telecommunications, including both businesses and residential customers, regardless of where they live or whether they own or rent their premises.”<sup>5</sup> Thus, the Commission seeks to “address problems of access to multiple tenant

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*Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission’s Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, WT Docket No. 99-217, CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (released July 7, 1999) (NPRM). Where BellSouth quotes the NPRM in footnotes, reference is made to the paragraph number of the NPRM only.

<sup>3</sup> “[W]e believe that, in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LEC’s bottleneck control over local networks and provide services without having to rely on their rivals for critical components. Moreover, only facilities-based competition can fully unleash competing providers’ abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.” (¶ 4). The Communications Act of 1934, as amended by the Telecommunications Act of 1996, expresses no preference for one form of competition over the other.

<sup>4</sup> “In this proceeding, we focus specifically on eliminating certain barriers to facilities-based competition.” (¶ 19). “Because of the unique benefits that facilities-based competition can confer upon the public, we seek to eliminate barriers to the development of competitive networks.” (¶ 5). “[O]ur consideration of these issues here is part of our ongoing effort to examine various possible impediments to such competition that come to our attention.” (¶ 1). In addition to ensuring that our own rules and practices do not unnecessarily inhibit carriers from developing competitive networks, facilitating competitive networks may in some circumstances require us to take proactive measures to relieve barriers to competition created by third parties.” (¶ 27).

<sup>5</sup> NPRM at ¶ 6.

environments, such as apartment and office buildings, office parks, shopping centers and manufactured housing communities.”<sup>6</sup>

While focusing on these particular issues in its NPRM, the Commission makes clear that it does not mean to imply that it views problems of access to multiple tenant environments (MTEs) as “the principal impediments to facilities-based competition in local telecommunications markets.”<sup>7</sup> According to the Commission, the major economic obstacle to the development of competitive facilities-based networks, at least if pursued through a traditional wireline model, is the extensive investment necessary to duplicate the existing wireline networks.<sup>8</sup> However, the Commission anticipates that the most successful future networks may be those that use a variety of transmission technologies.<sup>9</sup> The Commission states that in order for competitive networks to flourish and convey the greatest benefits to consumers, competitors must be free to introduce different service, architectural, and technological approaches, and the market should determine which of these approaches succeed for different purposes.<sup>10</sup>

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<sup>6</sup> *Id.* at ¶ 7. “Specifically, in a notice of proposed rulemaking, we make proposals and seek comment on issues relating to competitive providers’ access to multiple tenant environments.” (¶ 17). “Specifically, we initiate a notice of proposed rulemaking regarding: section 224 of the Communications Act and its application to riser conduit and privately granted rights-of-way in multiple tenant environments that utilities “own or control;” Section 251’s unbundled access requirements in the context of riser cable or wiring that the incumbent LEC owns or controls in these environments; and certain other issues related to facilitating competitive access to these locations.” (¶ 7, citations omitted).

<sup>7</sup> *Id.* at ¶ 1.

<sup>8</sup> *Id.* at ¶ 19.

<sup>9</sup> “In order to combine technologies in the most efficient fashion, carriers may seek to acquire different technological capabilities, either through merger and acquisition or through internal development.” (¶ 25). “Alternatively, independent network providers with different technological specialties may establish cooperative arrangements among themselves.” (*Id.*).

<sup>10</sup> *Id.* at ¶ 26.

The NPRM's specific proposals are based (1) on expanding the plain terms of the Pole Attachments Act of 1978, which the Commission declined to do as recently as 1996;<sup>11</sup> (2) on requiring unbundling of facilities owned by the incumbent LEC on the end-user's side of the demarcation point, which the Commission refused to do as recently as 1996;<sup>12</sup> and (3) on finding inherent authority to regulate non-carrier private property owners as reasonably ancillary to the Commission's power to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary to carry out the provisions of [the Communications Act]."<sup>13</sup>

Because the Commission's proposals lack specific statutory, regulatory or judicial authority, the Commission is forced to resort to its "inherent, ancillary" authority to propose

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<sup>11</sup> NPRM at ¶¶ 36-48. *But cf.* Local Competition First Report and Order, 11 FCC Rcd 15499, 16058-104, ¶¶ 1119-1231 (1996).

<sup>12</sup> NPRM at ¶¶ 49-51. *But cf.* Local Competition First Report and Order, 11 FCC Rcd at 15697-99, ¶¶ 392-396; *final rule codified at* 47 C.F.R. § 51.319(b) (1997); *see also* NPRM at app., Statement of Commissioner Michael K. Powell, Concurring, (Powell Statement) (expressing concern about adding yet another possible "network element" to a list that the Supreme Court struck down because it lacked the thorough and thoughtful interpretation and application of the "necessary" and "impair" standards of section 251(d)(2)); NPRM at app., Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part (Furchtgott-Roth Statement) at 1-2 (the better course of action would be to consider all issues pertaining to unbundled network elements in one proceeding).

<sup>13</sup> NPRM at ¶¶ 52-63. *But cf.* Kennard, A New FCC for the 21<sup>st</sup> Century, app. D(10) (August 12, 1999) (recommending that Congress enact new legislation to enable the FCC to remove entry barriers and expand consumer access to competing providers of multichannel video programming and non-video telecommunications and information services to apartment houses, condominium buildings and other multiple dwelling units when a resident requests service from the service provider, at the same time providing a mechanism to compensate property owners for the use of their property); *see also* NPRM at app., Separate Statement of Commissioner Susan Ness (Ness Statement) at 1 (building owners are not regulated by the FCC; courts do not favor the imposition of obligations by federal administrative agency which relies on ancillary jurisdiction); Furchtgott-Roth Statement at 1 (proposal, if adopted by the Commission, may stray outside the agency's jurisdictional boundaries); Powell Statement at 1 ("In the context of a likely takings under the Fifth Amendment, this is not an area where we should be pushing the envelope of our 'ancillary' statutory authority without, at least, being certain we have exhausted other

additional regulation and on incumbent LECs alone.<sup>14</sup> In apparent justification, the Commission posits a “market for interconnection” to the public switched telephone network (PSTN), and states for the first time that incumbent LECs exert “bottleneck control over interconnection, an essential input to the carriage of telecommunications.”<sup>15</sup> The Commission declares without any basis that “the incumbent LECs’ networks may be technically unable to support certain innovative and advanced service offerings as a result of this ‘bottleneck’.”<sup>16</sup> The Commission announces that it will consider any deregulation of incumbent LECs only when the market for interconnection (not the market for local exchange and exchange access service) becomes competitive.<sup>17</sup>

BellSouth concurs with the United States Telephone Association’s analysis that it is theoretically and legally impossible, under the Telecommunications Act of 1996, to exert

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alternatives.”).

<sup>14</sup> “With the exception of access to certain utility facilities under section 224, however, we do not address in this proceeding issues of whether, and the conditions under which, owners of existing networks other than LECs should be required to make access to those networks available to third parties.” NPRM at ¶ 19.

<sup>15</sup> NPRM at ¶ 21.

<sup>16</sup> NPRM at ¶ 18.

<sup>17</sup> “In time, it is likely that the incumbent LECs will cease to be viewed as the presumptive primary providers of interconnection, and indeed they will begin to seek interconnection and other arrangements with their challengers. These circumstances would strengthen the case for substantial deregulation of the incumbent LECs.” NPRM at ¶ 22. Further elaborating, the Commission advises that it does not “decide specifically what market conditions, or other factors, would establish grounds for *any* degree of deregulation. For example, *even in a competitive market for interconnection, the incumbent LECs might exercise market power over termination that would necessitate some form of regulation.* We simply observe that the case for substantial deregulation is stronger to the extent that the market for interconnection becomes competitive.” NPRM at n.55 (emphasis added).

bottleneck control over local interconnection.<sup>18</sup> Notwithstanding the NPRM's free use of economic and antitrust terminology, the Commission fails to demonstrate how the growth of facilities-based competition will flow from the breaking of its newly-minted interconnection "bottleneck." The Commission merely speculates that it will, and then describes the fruits of competition that should result if the Commission simply were to implement existing law as Congress intended.<sup>19</sup>

#### **I. "THE PROBLEM" OF COMPETITIVE ACCESS TO BUILDINGS AND ROOFTOPS**

Four competing telecommunications carriers and their trade association have apparently persuaded the Commission that "both building owners and incumbent LECs have obstructed competing telecommunications carriers from obtaining access on reasonable and nondiscriminatory terms to necessary facilities located within multiple unit premises."<sup>20</sup> Incumbent LEC obstruction is alleged to be related to demarcation point practices as well as formal and informal exclusive arrangements with building owners. Apparently, none of these practices rose to the level of a violation of the Communications Act, or presumably formal or informal complaints would have been filed and decided long ago. Nevertheless, the Commission requests that incumbent LECs provide additional evidence of their experiences regarding the

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<sup>18</sup> Comments of the United States Telephone Association (USTA) (August 27, 1999) at 1-5.

<sup>19</sup> The agency condemns incumbent LECs to a Promethian fate. For as long as the Commission perpetuates its fiction of an interconnection bottleneck (or that of incumbent market power over "terminating calls" despite a "competitive market for interconnection"), it will justify binding incumbent LECs alone with pernicious regulation, paving the way for "deregulated" CLECs to consume the "reregulated" ILECs' network assets.

<sup>20</sup> The carriers are Allegiance Telecom, KMC Telecom, Inc., OpTel, Inc. and WinStar Communications, Inc.; their trade association is the Association for Local Telecommunications Services (ALTS). See NPRM at notes 62-64, and accompanying text.

provision of telecommunications services in multiple tenant environments.<sup>21</sup> BellSouth begins with a description of its MTE experience, before addressing the Commission's proposals.

## II. BELLSOUTH LOCATES ITS NETWORK DEMARCATION POINTS WHERE SPECIFIED BY THE PROPERTY OWNER, WHICH IS TYPICALLY AT THE END-USER'S PREMISES

BellSouth Telecommunications, Inc. (BST or BellSouth), is an incumbent LEC in parts of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. There are other incumbent LECs serving parts of each of these states, including GTE, Sprint, AllTel, and a number of other, generally small to mid-size, carriers. BST has long served, and continues to serve, business and residential end-user customers in multiple tenant environments, including multiple-unit buildings, campuses and manufactured housing communities.

Notwithstanding the Commission's dismissive generalizations about the quality of incumbent LEC networks,<sup>22</sup> BellSouth prides itself on the timely and efficient delivery of state-of-the-art telecommunications at a high level of network reliability to all of its customers.<sup>23</sup> In the case of a customer requesting telephone exchange services in any of these environments, BellSouth has long had a nondiscriminatory policy and practice of locating the demarcation point of network services where specified by property owners and end-users. Typically, these parties

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<sup>21</sup> *Id.* at ¶ 31.

<sup>22</sup> NPRM at ¶ 23 (incumbent LECs' networks may be technically unable to support certain innovative and advanced service offerings; incumbents may lack incentives to rapidly develop and introduce innovative products, upgrade their systems and offer a broader array of desired service options to meet customers' demands).

<sup>23</sup> For the fourth consecutive year, BellSouth was ranked the nation's top residential local phone company in customer satisfaction, and highest among all LECs in the categories of customer service and corporate image/communication. J.D. Power and Associates 1999 Residential Local Telephone Service Satisfaction Study (1999 award shared with Southern New

desire that the demarcation point be located at the end-user's premises. This policy is animated by MTE owners' and end-users' desire that BellSouth maintain full responsibility for network reliability in the most seamless and integrated manner possible, thereby avoiding the disjointed responsibility that results from remotely located demarcation points. End-users want their chosen carrier, not a third party, to be the entity that installs, maintains, administers, upgrades, and provides cost-effective access to the PSTN. To this end, BellSouth actively and successfully negotiates with building owners and end-users for access to pathways and spaces within multi-tenant properties that enable BellSouth to deliver its services directly to end-users.<sup>24</sup>

It has been nearly a decade since the Commission gave building owners the option to designate a MPOE demarcation point in multiunit premises in which wiring was installed after August 13, 1990.<sup>25</sup> During this time, building owners in BellSouth's operating territories rarely have insisted upon MPOE demarcation and generally do not desire to assume the responsibility, directly or indirectly, for intrabuilding wiring. In the very few cases where an MPOE demarcation point has been chosen by the building owner, end-user (tenant) complaints about untimely and inefficient service delivery have increased dramatically. Even though the problems stem from a delay or failure of services from the building MPOE to the end-user's premises,

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England Telephone).

<sup>24</sup> Even on the end-user's side of the premises demarcation point, BellSouth has, in the absence of any state or federal requirements mandating wire quality standards, been active in encouraging customers and builders to install the highest quality inside wire that will support the most advanced telecommunications services available and eliminate unnecessary network cross-talk. See Comments of BellSouth in Support of Petition of BICSI for Inside Wire Quality Standards. As with sub-standard premises wiring systems installed by third parties, incumbent LECs are unfairly held accountable by end-users for service problems beyond their control whenever sub-standard inside wire is installed.

<sup>25</sup> *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Correction of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association, Report and*

these complaints are rarely directed at the building owner, but rather flood BellSouth's repair offices. Customers do not like to be told that the trouble they are experiencing is not within BellSouth's power to fix. End-user customers simply will not accept what they perceive to be BellSouth's abjuration of responsibility for what they assume is a matter of bad "telephone company" service. As a result, at these limited number of MPOE properties, BellSouth has suffered an unwarranted increase in customer dissatisfaction, and expends unnecessary time and resources in solving troubles that are the proper responsibility of the building owner or her agents and subcontractors.

In sum, BellSouth's demarcation policies in general, and its MTE policies in particular, reflect BellSouth's belief that the manner in which its customers receive network services, as well as their perception of how easy it is to do business with the company, are directly affected by the extent to which BellSouth is able to maintain the facilities needed to deliver its network to them.

### **III. THE COMMISSION HAS NO LEGAL BASIS TO EXPAND THE DEFINITIONS OF "CONDUIT" AND "RIGHT-OF-WAY" UNDER SECTION 224**

The Commission should not reconsider its holding that section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a transmission tower, or that section 224 does not confer a general right of access to utility property.<sup>26</sup> These tentative conclusions are grounded both in law and in common sense. Less clear is the legal basis for the Commission's proposal for an overly broad interpretation of the

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Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 4686, 4693 (1990).

<sup>26</sup> NPRM at ¶ 40.

meaning of the terms “right-of-way” and “conduit” under Section 224 of the Communications Act.

The Commission states for the first time that “it appears that the obligations of utilities under section 224 encompass access to rights-of-way, conduit and risers on private property, including end-user premises in multiple tenant environments, that utilities own or control.”<sup>27</sup> The Commission finds that nothing in section 224 limits its application to “public” rights-of-way,<sup>28</sup> and that the term therefore encompasses a publicly or privately granted right to place a transmit or receive antenna on public or private premises,<sup>29</sup> indoor riser conduit,<sup>30</sup> and private easements in general.<sup>31</sup> In its finding relative to building entrance conduit and riser sleeves, the Commission opines that it will be accorded *Chevron* deference by a reviewing court for its determination that section 224’s legislative history defining conduit as “underground reinforced passages” does not legally limit “the plain language of the statute.”<sup>32</sup> To close the loop, the Commission seeks comment on whether its own definition of conduit in its pole attachment complaint procedure regulations as pipe “placed in the ground” should be amended to be consistent with its new, expanded definition of conduit to include indoor, above-ground private property.<sup>33</sup>

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<sup>27</sup> *Id.* at ¶ 39.

<sup>28</sup> *Id.* at ¶ 41.

<sup>29</sup> *Id.* at ¶ 42.

<sup>30</sup> *Id.* at ¶ 44.

<sup>31</sup> *Id.* at ¶ 42.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* BST does not own the entrance conduit or riser sleeves that run through multi-unit business and residential buildings. These structure runs are owned and controlled by building owners.

If Congress had intended the term “right-of-way” to include, as the Commission now holds, such non-utility plant as a privately granted right that is equivalent to an easement, Congress would have said so and described the nature of that right specifically. Congress has distinguished the legal category “easements” from the legal category “rights-of-way” in the Communications Act.<sup>34</sup> Thus, the Act specifically provides that any franchise granted to a cable system operator “shall be construed to authorize the construction of a cable system over *public rights-of-way*, and through *easements*, which are within the area to be served by the cable system and which have been dedicated for compatible uses.”<sup>35</sup>

It is instructive that franchised cable television operators historically sought to obtain judicial rulings that the term “easement” as used in § 621(a)(2) of the Act confers a mandatory right of access to private property over the objection of the property owner. Federal courts uniformly rejected the most expansive interpretations of § 621:

The most expansive construction of [47 U.S.C.] Section 541(a)(2) sought by the cable industry involves claims that a formal easement need not even exist for access to be granted. *It is argued that the mere presence of utility lines, exterior and interior to building structures, is sufficient to “create” an easement that can be “piggybacked” by a cable franchisee.* All courts to date have rejected such a statutory construction, finding it contrary to the plain language of the statute and to congressional intent.<sup>36</sup>

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<sup>34</sup> 47 U.S.C. § 621(a)(2).

<sup>35</sup> 47 U.S.C. § 621(a)(2). Here the term “right-of-way” is clearly shown to be public in nature, as distinguished from private easements.

<sup>36</sup> Deborah C. Costlow, *Access-to-Premises Litigation Under Federal, State and Local Law*, PLI Cable Television Law 1995 (Jan. 15, 1995) 1111, 1114, citing Century Southwest Cable Television v. CHF Associates, 33 F.3d 1068 (9th Cir. 1994)(“[t]he property owner cannot be assumed to have consented to the extension of Century’s wires from the utility trenches to the individual units or to the placing of amplifiers or connection boxes on its property”); Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd., 678 F.Supp. 871 (N.D. Ga. 1986) (mere presence of utility lines would not serve to create easement where property owner had not in fact granted one; access not authorized simply because utility could exercise right of eminent domain to obtain an easement, but had not done so); UACC-Midwest, Inc. v. Occidental Development Ltd., No. 1-90-CV-383 (W.D. Mich. May 22, 1990, preliminary injunction ruling and March 29, 1991 final decision).

Yet this expanded right to piggyback to, in and through private property premises is precisely what the FCC now proposes to graft onto section 224, even though that statute does not include “easements” in its limited and specific list of utility wire communications distribution plant that must be made available.

When the Commission states that it will be accorded *Chevron* deference for interpreting the “plain language of the statute,” it is patently incorrect. Rather than ascribing the plain meaning of the simple term “right-of-way,” especially as that term is used elsewhere in the Act, it engages in a legalistic shellgame, announcing that “[a] right-of-way over another party’s property has been understood in the case law as equivalent to an easement.”<sup>37</sup> Similarly, the Commission’s dismissive treatment of the legislative history’s definition of “conduit,” as well as its own definition of “conduit” in the pole attachment complaint regulations, cannot be accorded *Chevron* deference. Such flip-flopping is the epitome of arbitrariness. Existing statutory and regulatory guidance clearly show that both Congress and this Commission intended the term to apply only to outside, underground utility plant, and not to inside, above ground private property.

As the Commission is well aware, its broad reading of section 224 would extend the Commission’s jurisdiction to persons and parties over whom it has no statutory authority.<sup>38</sup> It

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<sup>37</sup> NPRM at ¶ 42.

<sup>38</sup> See 47 U.S.C. § 152(a), providing that the provisions of the Communications Act apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulation of all radio stations; with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service. *Accord* Ness Statement at 1 (building owners are a class of persons not otherwise regulated by the Commission).

also would compel them to engage in illegal acts. For example, the Commission would require a LEC or an investor owned electric utility, to grant a property "right" it may not have.

BellSouth, for instance, has negotiated for rights of use over real property with certain railroad companies and other land owners. These rights, which are extremely limited, were secured after vigorous, arms length negotiation for substantial consideration. They are granted by persons who, by the express terms of the Communications Act, are not subject to the Commission's jurisdiction. These rights of use do not allow for apportionment, or subsequent grants by BellSouth to third parties. This right to use may not involve structures such as poles, ducts or conduits, and it is certainly not a public right-of-way, but rather a private easement. Application of Section 224 to these property interests would operate as an unconstitutional taking of private property without just compensation from the perspective of both BellSouth and the landowner.<sup>39</sup> It would also abrogate private contracts. The interpretations proposed by the

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<sup>39</sup> The United States District Court for the Northern District of Florida has, of course, already held that the mandatory access provision of section 224 constitutes a taking for Fifth Amendment purposes. Gulf Power Co. v. United States, 998 F. Supp. 1386 (N.D. Fla. 1998). Only the availability of judicial review of any FCC finding on the amount of compensation to be paid the utility saved the statute. The Commission's compensation mechanism, however, does not apply to non-utility private property owners. Moreover, the Commission has never decided on a compensation mechanism for rights-of-way, as distinguished from poles and outside plant conduit.

Commission exceed the statutory authority granted the Commission by Congress and are constitutionally infirm,<sup>40</sup> in addition to being unenforceable.<sup>41</sup>

The Commission, therefore, should not expand the meaning of the term right-of-way as used in section 224 to include a privately granted right to place a transmit or receive antenna on private premises, in particular rooftops. The Commission has heretofore been pragmatic about the meaning of the term right-of-way, and has recognized that there have been few instances of attachment to a right-of-way that did not include attachment to a pole, duct or conduit.<sup>42</sup> This pragmatism reflects the fact that rights-of-way either accompany pole and conduit runs, or serve as a substitute, such as a trenched subdivision street or sidewalk where wire facilities are placed directly in the ground. In any event, it is unclear from the record that there are a sufficient number of incumbent LEC roof-top wire communications facilities to justify this unwarranted expansion of section 224. Moreover, the Commission recognizes a fundamental problem: mandatory access to in-premises facilities would trump an MVPD's exclusive contract with building owners, and would always provide an incumbent MVPD with a legally enforceable right to remain on the premises, thus rendering null the application of the Commission's recently

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<sup>40</sup> *Supra*. In the legislative history to the 1978 Amendments, the congressional Committee on Commerce, Science and Transportation reported that, with respect to the new Pole Attachments Act:

. . .any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of eminent domain, assignability of easements or other acquisitions of right-of-way *are beyond the scope of FCC CATV pole attachment jurisdiction.*

Pub. L. No. 95-234, § 6, 92 Stat. 124 (1978)(emphasis added).

<sup>41</sup> See 47 U.S.C. § 208, authorizing complaints against common carriers only.

<sup>42</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, 6832, ¶ 121 (1998).

adopted rules for the disposition of cable home run wiring.<sup>43</sup> As Commissioner Ness observes, here the Commission does nothing to distinguish its current proposal from its recent decision in the *OTARD Second Report and Order* not to impose an affirmative obligation on building owners to allow a tenant access to building common and rooftop areas for the placement of over-the-air video reception devices.<sup>44</sup>

#### **IV. THE UNBUNDLING OF NETWORK DISTRIBUTION FACILITIES ON PRIVATE PROPERTY IS A STATE ISSUE**

While it may be technically feasible to unbundle network distribution facilities located on private property in a MTE, this issue has been, and should continue to be, properly deferred to state utility commissions. BellSouth's Standard Interconnection Agreement provides that both unbundled loops and unbundled sub-loops are made available where facilities permit and where necessary to comply with an effective Commission order. In situations where it is not technically possible for a competing carrier to run their own intrabuilding wire network distribution facilities in a MTE, or where they are prevented in doing so by the building owner, purchasing such facilities, as set forth above, would seem to be a viable option.<sup>45</sup>

#### **V. PROPERTY OWNERS CAN ELIMINATE MUCH OF THE ACCESS PROBLEM THROUGH MORE EFFECTIVE SUPPORT STRUCTURE DESIGN.**

BellSouth is confident that its reservations about the Commission's use of its so called "ancillary" authority to bring building owners into its regulatory ambit will be adequately addressed by those most directly affected, and accordingly reserves its right to address this issue

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<sup>43</sup> NPRM ¶ 47.

<sup>44</sup> Ness Statement at 1.

<sup>45</sup> An interconnection point outside of the structure is a technically feasible method to provide interconnection. BellSouth would strongly oppose a Commission proposal to permit

in its reply comments. Property owners, however, can minimize any building access problem without such Commission intervention through effective support structure design, planning and installation.

At least some of the problem associated with access to MTE properties stems from a lack of adequate wiring support structures (such as building entrance conduit and riser sleeves) and spaces (such as equipment rooms or closets) in existing buildings and even in new construction. Prior to the mid-1960's, and the establishment of dedicated building industry consultants by the then Bell System building owners, more often than not, overlooked telecommunications support structure requirements. Once building owners were made aware of the need for better pre-construction planning, support structure and spatial problems were, for the most part, eliminated or at least substantially reduced. In today's environment, building owners are becoming more familiar with the issues surrounding multi-carrier access and, in BellSouth's experience, are beginning to respond appropriately to accommodate the demands of their tenants and new telecommunications providers. Now that the Commission has gained the rapt attention of the industry by floating its mandatory access proposals in this docket, the Commission has an outstanding opportunity to encourage building owners to properly plan for support structures that will accommodate the intrabuilding wire distribution facilities of multiple carriers.

Building owners are concerned that structure provisioning for unnumbered, multiple carriers will result in a logistical nightmare and dramatically increased construction costs. While such concerns certainly have some degree of validity, building owners may be pressured to overstate their case because they have been provoked into panic by "mandatory access" proposals in this and certain state legislative proceedings. For example, the cost of providing

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direct access to a remote terminal or other cross-connect enclosure. NPRM at ¶ 51.

entrance conduits and riser sleeves in new construction is minor when compared with the overall building construction cost. In BellSouth's operating territories, the cost of an additional four inch PVC entrance conduit, 300 feet in length, probably falls in the range of \$2,000 - \$3,000 (U.S). With proper construction, such structures will be usable for the life of the building. Similarly, when included in new construction, additional four-inch riser sleeves probably cost no more than \$100 each, assuming no significant structural changes are required. With fiber optic technologies, one four-inch conduit or riser sleeve can accommodate many cables. Thus, the added expenditures are well justified.

In addition, the industry itself will respond with many new solutions. As an example, today BellSouth is able to install "dual carrier" NIDs which enable residential users to quickly and easily assign different carriers' services to individual phone jacks in each room. In such situations, property owners can accommodate two telecommunications service providers, each having installed their own physical networks. It would appear, therefore, that there may be little to impede property owners from properly planning for multi-carrier access during new construction or building renovations. The question that continues to bother building owners is, *how many carriers must I plan for?*

While there may be situations in which there is simply not enough space to accommodate multiple providers without impairing the appearance of the building property or the integrity of another carrier's service, common sense should prevail. In today's competitive environment, and in the future competitive network environment envisioned by the Commission, there will continue to be some finite demand level for telecommunications services at any given multi-tenant premises. That ten carriers are authorized to offer telecommunications services in a specific market does not mean that end-user demand will increase tenfold; nor does it mean that

all ten carriers will find it economically feasible to offer competing services at any given location.

It seems evident that the increase in competition which has resulted from state legislation<sup>46</sup> and the subsequent Telecommunications Act of 1996 has caught some property owners (especially residential) by surprise. Proper education and planning will obviate many of the access problems which the NPRM seeks to address. "Mandatory access" laws are not needed because building owners will respond to market forces in the same way that they respond today relative to other aspects of the commercial and residential real estate industry. Building owners and their design teams should be referred by this Commission to telecommunications industry standards and methods, such as those published by ANSI/EIA/TIA,<sup>47</sup> and BICSI® (Building Industry Consulting Service, International). Building owners should also solicit advice from telecommunications carriers, in order to determine the appropriate structural accommodations to meet expected tenant demand.

A call to building owners for new planning parameters is not a novel concept. In the building industry this occurs frequently. Accordingly, rather than pursue "mandatory access," the Commission should support other avenues which minimize unnecessary regulatory oversight and maximize the effective use of expertise and resources which already exist in the private telecommunications and construction industries. Market forces will generate solutions to current access problems, because tenants themselves are becoming aware of how critical it is to address

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<sup>46</sup> See, e.g., Senate Bill No. 137, 143<sup>rd</sup> Georgia General Assembly, 1995-96 Regular Session, Act 405 (1995).

<sup>47</sup> American National Standards Institute, Electronics Industry Association, Telecommunications Industry Association.

access to their chosen telecommunications carrier during lease negotiations with property owners.

**VI. THE COMMISSION SHOULD NOT ADOPT A RULE WHICH MANDATES A SINGLE POINT OF DEMARCATION AT THE MINIMUM POINT OF ENTRY (MPOE) OF MULTI-TENANT PROPERTIES**

The Commission requests comments on whether its current demarcation point rule should be modified to establish a single definition of demarcation point which would be located at the Minimum Point of Entry (MPOE).<sup>48</sup> Not only is an MPOE demarcation point not necessary in order to ensure competitive access at multi-tenant properties, but a federally mandated MPOE demarcation point could frustrate building owners and effectively deny end-users the technologies and services they demand.

1. A Workable MPOE Demarcation Point Pre-Supposes Conditions Which Do Not Exist Today, Nor Are Likely To Exist In The Foreseeable Future.

In order for an MPOE demarcation to work effectively in a multi-tenant environment, property owners must install, maintain, administer, upgrade, and provide cost-effective access to premises-based telecommunications distribution systems that are state-of-the-art. This is an extremely daunting endeavor, even for carriers in the business. Today's "fiber in the loop" and other advanced technologies go far beyond the traditional copper cabling paradigm. The pages of any current telecommunications periodical reveal constant debate over architecture and technologies, which, to further complicate the issue, change at blinding speed. It is questionable whether owners of multi-tenant properties, whose primary business is leasing floor space, wish to assume responsibility for telecommunications service delivery beyond a MPOE demarcation point. While some may, at this time most, understandably, do not. As noted on the Building

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<sup>48</sup> NPRM at ¶ 65.

Owner's Management Association (BOMA) web page: "BOMA opposes mandated unilateral demarcation point relocation as it jeopardizes the quality and availability of telecom service to tenants and unfairly imposes discriminatory risks and costs on property owners."<sup>49</sup>

This is precisely why, as explained earlier, BellSouth has not adopted a MPOE demarcation policy, even when expressly permitted to do so by the 1990 revisions to the Commission's rules.<sup>50</sup> Telecommunications service is not like electrical power: there is no single, uniformly deployed service with a single transmission scheme. Until such time as property owners demonstrate the willingness and ability to extend services in a manner acceptable to carriers and their end-users, MPOE demarcation should remain as it does under the Commission's rules today: an option, not a requirement. The Commission must recognize the potentially deleterious effects on technology deployment and end-user service with forced MPOE demarcation and leave the existing rule intact.<sup>51</sup> Furthermore, the Commission must recognize that carriers like BellSouth have made significant investment in intrabuilding network distribution facilities.

2. The Existence Of ILEC Wiring To End-Users' Premises Does Not Impede Competition.

Some carriers have taken a position that embedded incumbent LEC premises wiring somehow impedes their ability to reach end-users. No rationale supporting this position is

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<sup>49</sup> *BOMA International* 1999.Online.Lycos.Internet.27 Aug. 1999. Available [www.boma.org](http://www.boma.org).

<sup>50</sup> *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by Electronic Industries Association, Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 4686, 4692 (1990).*

<sup>51</sup> Not only is service quality affected, but so is timeliness of service. When the trouble is in intrabuilding facilities owned by third parties, end-users can experience days of delays in getting their troubles resolved.

presented, *unless* an assumption is made that these carriers want total, unfettered access to incumbent LEC facilities at no cost. As explained above, access to embedded incumbent LEC wiring could be made available, if a state deems it necessary, through unbundled subloops and competitive LECs, in BellSouth's experience, have availed themselves of such offerings.<sup>52</sup> The Commission must make a clear statement that a carrier's network service delivery systems remain under the complete ownership and control of the carrier who installs and maintains these facilities. BellSouth would not object to a Commission proposal that access to ILEC sub-loop elements on private property be afforded through established interconnection procedures. The Commission must, however, put to rest the absurd concept that parties are entitled to free access to carriers' embedded, intrabuilding network delivery systems, or that the relocation of a previously established demarcation point deprives carriers of their full property rights.

### CONCLUSION

The Commission should disavow its "interconnection bottleneck" theory, or in any event deem it insufficient to support the proposals set forth in the NPRM. The Commission should not adopt any of its proposals but rather encourage building owners to plan for adequate structures to support multiple service providers. The Commission should confirm that a carrier's network

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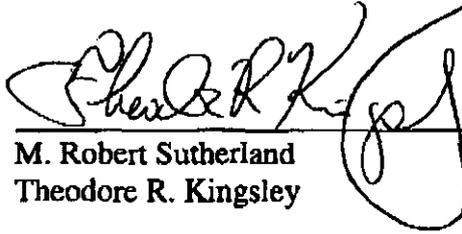
<sup>52</sup> *Supra*, section III, pp. 15-16.

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service delivery systems remain under the complete ownership and control of the carrier who installs and maintains these facilities.

Respectfully submitted,

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Date: August 27, 1999

CERTIFICATE OF SERVICE

I do hereby certify that I have this 27<sup>th</sup> day of August, 1999, served the following parties to this action with a copy of the foregoing **BELLSOUTH COMMENTS**, reference WT Docket No. 99-217 and CC Docket No. 96-98, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed below.

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