

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

|                                    |   |                     |
|------------------------------------|---|---------------------|
| In the Matter of                   | ) |                     |
|                                    | ) |                     |
| BELLSOUTH TELECOMMUNICATIONS, INC. | ) | File No. W-P-C-7093 |
|                                    | ) |                     |
| Application for Authority to       | ) |                     |
| Construct and Operate              | ) |                     |
| Through an Affiliate               | ) |                     |
| Cable Television Facilities        | ) |                     |
| in its Telephone Service Area      | ) |                     |

ORDER AND AUTHORIZATION

Adopted: December 7, 1995

Released: December 8, 1995

By the Deputy Chief, Network Services Division, Common Carrier Bureau:

**I. Introduction**

1. On July 19, 1995, BellSouth Telecommunications, Inc. ("BellSouth" or "Applicant") filed an Application ("Application") pursuant to Section 214 of the Communications Act of 1934 ("Communications Act" or "Act") and Sections 63.09 and 63.58 of the Commission's rules for authority to construct, own, and operate, directly and through an affiliate, a cable television system on Daniel Island, South Carolina. The proposed cable television system would be located within BellSouth's telephone service area. Comcast Cablevision of Carolina, Inc. ("Comcast") filed a Petition to Deny BellSouth's Application.<sup>1</sup> The present Order authorizes BellSouth to construct and operate the proposed cable system.

**II. Background**

2. Section 613(b)(1) of the Cable Communications Policy Act of 1984 (the "Cable Act") and Section 63.54 of the Commission's rules prohibit a telephone company from providing cable television service within its telephone service area.<sup>2</sup> Since 1981,

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<sup>1</sup> Comcast filed its Petition to Deny on August 25, 1995. On September 8, 1995, BellSouth filed an Opposition to the Petition to Deny, and on September 20, 1995, Comcast filed a Reply.

<sup>2</sup> 47 U.S.C. § 533(b)(1); 47 C.F.R. § 63.54(a). Recent court opinions have held Section 613(b)(1) unconstitutional. *See, e.g., Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 115 S. Ct. 2608 (1995); *US West, Inc. v. United States*, 855 F. Supp. 1184 (W.D. Wash. 1994), *aff'd*, 48 F.3d 1092 (9th Cir. 1994), *petition for cert. filed*, 64 U.S.L.W. 3160

however, the Commission has provided an exception to this general prohibition allowing telephone companies to construct cable television systems in rural areas.<sup>3</sup> The Commission adopted this exception to stimulate the development of cable television systems in areas that might not otherwise support them. Congress preserved this exception in the Cable Act of 1984 for much the same reason.<sup>4</sup>

3. Section 214 of the Communications Act requires common carriers to receive authorization from the Commission if they wish to construct, lease, acquire or operate a line of communication.<sup>5</sup> The Commission has interpreted Section 214 to apply to common carriers that wish to construct, lease, acquire or operate a cable television system.<sup>6</sup> Generally, there are three relevant rule provisions under which carriers may apply for authority to construct and operate cable television facilities in their telephone service areas: (1) carriers proposing to operate cable systems in rural areas<sup>7</sup> may apply pursuant to Section 63.09 of the Commission's rules; (2) carriers proposing to build stand-alone<sup>8</sup> cable systems

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(U.S. Aug. 23, 1995) (No. 95-315); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994). These courts have concluded that, under the First Amendment, Section 613(b) burdens substantially more speech than necessary to protect a significant governmental interest.

<sup>3</sup> *Elimination of the Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.56, for Rural Areas*, 88 F.C.C.2d 564 (1981); See also 47 C.F.R. § 63.09. The Commission has defined a rural area as one which may not contain:

- (1) Any incorporated place of 2,500 inhabitants or more, or any part thereof;
- (2) Any unincorporated place of 2,500 inhabitants or more, or any part thereof; or
- (3) Any other territory, incorporated or unincorporated, included in an urbanized area.

47 C.F.R. § 63.58(a). "All population statistics and definitions used in qualifying for this exemption shall be the most recent available from the U.S. Department of Commerce, Bureau of the Census." 47 C.F.R. § 63.58(b).

<sup>4</sup> See 47 U.S.C. § 533(b)(3).

<sup>5</sup> 47 U.S.C. § 214.

<sup>6</sup> See Public Notice, "Commission Announces Enforcement Policy Regarding Telephone Company Ownership of Cable Television Systems," DA 95-520, 1995 WL 507421 (Released March 17, 1995), corrected, Public Notice, "Commission Announces Enforcement Policy Regarding Telephone Company Ownership of Cable Television Systems," 10 FCC Rcd 7346 (1995); See generally *General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971).

<sup>7</sup> See *supra* note 3.

<sup>8</sup> A "stand-alone" cable system is defined in Section 63.16(b) of the Commission's rules, 47 C.F.R. § 63.16(b), as "one that does not share central office assets (USOA Accounts 2210 through 2232, 47 C.F.R. §§ 32.2210-32.2232) or cable and wire facilities (USOA Accounts 2410 through 2441, 47 C.F.R. §§ 32.2410-32.2441) with the carrier's regulated telephone business."

in their telephone service areas may apply under Section 63.16;<sup>9</sup> and (3) carriers proposing to build cable systems that are not located in rural areas or that are not stand-alone systems generally must apply under the more detailed information requirements of Section 63.01.<sup>10</sup> BellSouth's cable system is acknowledged not to be a stand-alone system. Therefore, only the application procedures in Section 63.01 or Section 63.09 potentially apply to BellSouth's proposed system. BellSouth has applied under Section 63.09.

### III. Application and Comments

4. In its application, BellSouth certifies that its proposed service area, Daniel Island, is rural as defined in Section 63.58 of the Commission's rules. BellSouth also certifies that its affiliate, Daniel Island Cable, Inc., has received a cable television franchise to serve Daniel Island by the City of Charleston, South Carolina. Charleston recently annexed Daniel Island into its borders.<sup>11</sup> Attached to BellSouth's application is a letter from the Bureau of the Census stating that the annexation of Daniel Island by Charleston, South Carolina, since the 1990 Census, would not cause the Census Bureau to reclassify Daniel Island as an urban area. According to the Census Bureau, inter-decennial reclassifications on the basis of such annexations would "create unnecessary confusion for vast numbers of data users."<sup>12</sup> The letter further states that Daniel Island is "currently recognized as rural."<sup>13</sup> The application conforms in these and all other particulars to the information requirements of Section 63.09.

5. In its Petition to Deny, Comcast states that the less burdensome information requirements of Section 63.09 were designed to turn a blind eye to possibilities of cross-subsidization of cable television service by telephone companies in areas that could not independently support cable television service.<sup>14</sup> Comcast argues that Section 63.09 was intended to apply only to carriers needing exemption from the telco-cable cross-ownership restriction. Comcast asserts that only Section 63.01 is designed to discover and help prevent cross-subsidies. Comcast further states that exemption is no longer necessary since the provision of the Communications Act banning cross-ownership has been overturned.

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<sup>9</sup> *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-58, Fourth Report and Order*, CC Docket No. 87-266, FCC 95-357, 1995 WL 490846 (Released August 14, 1995), *recon. pending*.

<sup>10</sup> 47 C.F.R. § 63.01.

<sup>11</sup> Application at 2; *see also* attached February 7, 1994 Letter from Robert W. Marx, Chief, Geography Division, Bureau of the Census ("Census Bureau Letter").

<sup>12</sup> Census Bureau Letter at 1.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> Petition to Deny, at 4.

Comcast argues that the Commission's adoption of streamlined application procedures for stand-alone systems "ought to eliminate the need for separate (and different) streamlined requirements for rural systems."<sup>15</sup> Comcast states that there are few remaining rural areas in which ensuring provision of cable television service is more important than avoiding cross-subsidization. Comcast bases this claim on the further assertion that cable companies unaffiliated with telephone companies are now able to provide services in most rural areas. Comcast states that it is more important to ensure that these unaffiliated providers are not subjected to unfair competitive practices of telephone companies able to subsidize their own cable affiliates. Comcast seems to argue that language in the *Fourth Report and Order* precludes any "blanket or streamlined" application for construction of integrated cable systems, *i.e.*, cable systems that do not "stand alone."<sup>16</sup>

6. Comcast also argues that the rural exemption does not apply in this case because Daniel Island does not qualify as a rural area as defined by the Commission's rules.<sup>17</sup> According to Comcast, the Bureau of the Census letter included in BellSouth's application, shows only that Daniel Island does not contain any part of an urbanized area. Comcast states that the letter does not deny that Daniel Island is now part of an incorporated place of 2,500 inhabitants or more. Citing the 1990 Census,<sup>18</sup> Comcast asserts that Charleston is an incorporated place of over 80,000 inhabitants. Comcast cites *Warren Telephone Co.*<sup>19</sup> and *Kearsarge Telephone Co.*<sup>20</sup> for the proposition that the Census Bureau's 1990 Census only defines the terms "place" and "urbanized area" and states the population of such areas. Whether or not an area is "incorporated" is, according to Comcast, a matter of fact to be determined by circumstances independent of the latest Census Report. Comcast states that BellSouth must reapply for Section 214 authorization under Section 63.01, supplying the information required therein.<sup>21</sup>

7. In its Opposition, BellSouth argues that Comcast (then known as Storer Systems) rejected an opportunity to provide cable service to Daniel Island "until 1000 to 2000 homes" have been built or until Daniel Island Development Corporation establishes an

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<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at 8, citing *Fourth Report and Order*, para. 16.

<sup>17</sup> See *supra* note 3.

<sup>18</sup> Petition to Deny, at note 14, citing *1990 Census of Population, Social and Economic Characteristics, South Carolina*, 1993, p.2, Table 1. ("1990 Census").

<sup>19</sup> *Warren Telephone Co.*, 6 FCC Rcd 5286 (Com. Car. Bur. 1991).

<sup>20</sup> *Kearsarge Telephone Co.*, 6 FCC Rcd 5036 (Com. Car. Bur. 1991).

<sup>21</sup> Petition to Deny, at 8.

escrow account to provide Comcast's startup funding.<sup>22</sup> BellSouth states that this is exactly the kind of situation that motivated Congress to establish the rural exemption and motivated the Commission to provide the abbreviated application requirements under Section 63.09.<sup>23</sup> BellSouth states that any change in the Commission's rules must be accomplished through a rulemaking.<sup>24</sup>

8. BellSouth further argues that Daniel Island was annexed by Charleston after the most recent census and that, under Section 63.58(b), the annexation may not to be taken into account in determining Daniel Island's urban/rural status. BellSouth maintains that such inter-decennial changes are ignored, as a matter of policy, by the Bureau of the Census. As grounds for its assertion that the annexation of Daniel Island cannot be taken into account in determining whether it is an incorporated place, BellSouth cites a 1990 Census statement that an incorporated place must have been "legally in existence on January 1, 1990 under the laws of their respective states . . . ."<sup>25</sup>

9. In its Reply, Comcast states that BellSouth's Section 63.09 application contains no cost and revenue estimates that would be required if the application were submitted pursuant to Section 63.01. Comcast asserts that the absence of such information forecloses review of the incentives for cross subsidization and will, therefore, prevent the Commission from fulfilling its Section 214 obligation to determine whether the proposed system will serve the public convenience and necessity. Comcast states that requiring BellSouth to apply under Section 63.01 would not create a significant barrier to BellSouth's proposed cable television service. Comcast asserts that BellSouth's willingness to establish cable television service in Daniel Island before the first resident moves in will require that telephone ratepayers subsidize cable television service while foreclosing later competitive entry by Comcast or other cable television providers.<sup>26</sup>

10. Comcast further states that, under Section 63.58(b), the Census Bureau's definitions determine whether the City of Charleston is an "incorporated place" and the Bureau's statistics determine whether the population of the city exceeds 2,500. But whether Daniel Island is part of the City of Charleston is not a matter of Census Bureau definition or statistics, but an independent and indisputable fact not determinable by the Census Bureau.<sup>27</sup>

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<sup>22</sup> Opposition, Affidavit of Matt Sloan, para. 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> 1990 Census, Appendix A, Area Classification, at A-10.

<sup>26</sup> Reply, at 4.

<sup>27</sup> *Id.* at 6.

#### IV. Discussion

11. The Commission adopted Section 63.09 to ensure that its rules would not deprive rural Americans of cable television service.<sup>28</sup> Consistent with this original Commission goal, Congress, too, by enacting Section 613(b)(3) of the Cable Act, wished to remove "any legal or administrative barriers preventing a common carrier from providing rural cable television service except the need to certify . . . that it is servicing a rural area and the obligation . . . to obtain a franchise."<sup>29</sup> Congress, as well as the Commission, wished to facilitate the rapid spread of cable television services to rural areas. That purpose is served by the abbreviated application procedure of Section 63.09 and is unaffected by the presence or absence of the telco-cable cross-ownership ban.

12. Contrary to Comcast's suggestion, the continuing validity of Sections 63.58 and 63.09 is not called into doubt as a result of the Commission's adoption of Section 63.16 in the *Fourth Report and Order*. While both Sections 63.09 and 63.16 result in streamlined review for particular carriers, their purpose and design cover entirely different factual situations. We, therefore, reject Comcast's claim that the streamlined procedures established in the *Fourth Report and Order* preclude continued reliance upon these sections. Moreover, we agree with BellSouth that amendment of Sections 63.58 and 63.09 could be achieved only through a further rulemaking. Even then, changes by means of an agency rulemaking could not significantly alter congressional intent in providing for the rural exemption.

13. For rural areas, the decision as to whether construction of a cable television system by a telephone company in its telephone service area serves the public convenience and necessity has already been made in large part by Congress. Without BellSouth's proposed system, cable service to Daniel Island would have to wait until either the developer was willing to cover Comcast's start-up costs or the number of inhabitants had reached a level that satisfied Comcast's demands.<sup>30</sup> This would contravene the determination of Congress and the Commission to serve the public interest by facilitating the rapid spread of cable television services to rural areas. The public convenience and necessity is better served by providing cable television service to inhabitants of Daniel Island as soon as possible.

14. We also reject Comcast's argument that BellSouth is prohibited from applying under Section 63.09 because its proposed service area does not qualify as rural under Section 63.58. Comcast's claim that Daniel Island is part of an incorporated place under the criteria established in Section 63.58 is mistaken. BellSouth is correct in its assertion that the

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<sup>28</sup> *Elimination of the Telco-Cable Television Cross Ownership Rules for Rural Areas*, 88 F.C.C.2d at 571.

<sup>29</sup> Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 613, 98 Stat. 2779, 2785 (1984).

<sup>30</sup> Opposition, Affidavit of Matt Sloan.

term "Incorporated Place" is specifically defined as "those reported to the Census Bureau as legally in existence on January 1, 1990 under the laws of their respective States ...."<sup>31</sup> As stated in the Census Bureau letter cited by BellSouth, annexation since 1990 of Daniel Island by Charleston, an urbanized area and an incorporated place, has not caused the Census Bureau to include Daniel Island as part of Charleston.<sup>32</sup> Section 63.58(b) of the Commission's rules is intended to provide a bright line rule for determining the status of an area as rural. It was the Commission's intent that such areas be "easily identifiable and verifiable."<sup>33</sup> Until the Commission changes its rules, we will not depart from the bright line test. Consequently, we find that Daniel Island qualifies as a rural area under Section 63.58 of our rules.

15. Finally, we are always concerned about the possibility that telephone ratepayers will bear the cost of other, non-common carrier services provided by telephone companies or their affiliates. The Commission, however, has rules in place to prevent such cross-subsidies.<sup>34</sup> We hereby condition our grant of BellSouth's application on its compliance with those rules.

#### IV. Conclusion

16. For the reasons stated above, we find that BellSouth's Section 214 Application meets the requirements of Section 214 of the Communications Act of 1934, as amended, and thus serves the public convenience and necessity. We further find that BellSouth has provided all necessary information and has complied with all procedures required under the application provisions of Section 63.09 of our rules and that the area proposed to be served by BellSouth's cable system is a rural area as defined in Section 63.58. BellSouth is, therefore, authorized to construct and operate cable television facilities through its affiliate on Daniel Island, South Carolina. We condition this authorization on BellSouth's adherence to strict accounting safeguards, so that any risk regarding the cable venture will not be borne by its telephone ratepayers.

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<sup>31</sup> 1990 Census, Appendix A, Area Classification, at A-10; see also *Warren Telephone Co.*, 6 FCC Rcd at 5287. Neither *Warren Telephone Co.* nor *Kearsarge Telephone Co.*, 6 FCC Rcd 5036, contradict the clear definition of "Incorporated Place" in the 1990 Census.

<sup>32</sup> Census Bureau Letter, at 1.

<sup>33</sup> *Elimination of the Telco-Cable Television Cross-Ownership Rules for Rural Areas*, 88 FCC 2d at 565; see also *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781, 5857 (1992).

<sup>34</sup> See 47 C.F.R. §§ 32.27 and 64.901-904.

## V. Ordering Clauses

17. Accordingly, **IT IS ORDERED** that the application of BellSouth Telecommunications Company under Section 214 of the Communications Act of 1934, as amended, to construct and operate cable television facilities through its affiliate on Daniel Island, South Carolina **IS GRANTED** subject to the condition stated herein.

18. **IT IS FURTHER ORDERED** that BellSouth comply with the accounting safeguards in Sections 32.27 and 64.901-904 of our rules, 47 C.F.R. §§ 32.27 and 64.901-904.

19. **IT IS FURTHER ORDERED** that, pursuant to 47 C.F.R. § 1.103(a), this order is effective upon adoption.

20. **IT IS FURTHER ORDERED** that the BellSouth Telecommunications Company is granted thirty-one days from the release date of this order to decline this authorization. Failure to respond within that period will constitute formal acceptance of this authorization.

FEDERAL COMMUNICATIONS COMMISSION



John S. Morabito  
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