

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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IN THE MATTER OF

IMPLEMENTATION OF SECTION 304 OF THE
TELECOMMUNICATIONS ACT OF 1996

COMMERCIAL AVAILABILITY OF
NAVIGATION DEVICES

CC DOCKET No. 97-80

**COMMENTS OF
THE BUSINESS SOFTWARE ALLIANCE**

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SUMMARY

Congress adopted Section 304 of the Telecommunications Act to enable multi-channel video programming distribution system customers to realize the benefits of a competitive market in premises-based equipment. BSA supports the Commission's proposal to implement this statutory provision by stating expressly in its rules that consumers have the right to attach competitively provided CPE to any MVPD system -- subject to restrictions necessary to prevent technical harm to the system, signal leakage, threats to public safety, or theft of programming.

Once the Commission has confirmed consumers' right to attach, BSA believes that the FCC should limit its further efforts to implement Section 304 to the sector of the MVPD market that raises the most significant competitive concerns: MVPD systems that, as a result of government-granted franchises, do not face effective competition. The Commission should not adopt regulations applicable to personal computers, software, or other competitive products. Because these products are widely distributed and commercially available, Section 304 does not authorize the FCC to import new regulations on these devices.

The Commission should prevent MVPD systems that are not subject to effective competition from bundling customer premises equipment with services. The Commission also should require such systems to disclose system information necessary to allow independent manufacturers to develop CPE that can be used in conjunction with these systems. This approach, BSA believes, is far superior to

the imposition of government standards, which would stifle innovation and impede competition. Once an MVPD system is subject to effective competition, the no-bundling and information disclosure requirements should "sunset."

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COMMENTS OF THE BUSINESS SOFTWARE ALLIANCE

The Business Software Alliance ("BSA") files these comments in response to the Commission's Notice of Proposed Rulemaking regarding implementation of Section 304 of the Telecommunications Act of 1996.¹ BSA's member companies are leading producers of personal computer and client server software.² BSA promotes the continued growth of the computer software industry through its international enforcement, education, and public policy programs.

¹ *Implementation of Section 304 of the Telecommunications Act of 1996 -- Commercial Availability of Navigation Devices, Notice of Proposed Rulemaking, CS Docket No. 97-80, FCC 97-53 (rel. Feb. 20, 1997) ("Notice").*

² BSA's Policy Council consists of: Adobe Systems; Apple Computer; Autodesk; Bentley Systems; Lotus Development; Microsoft; Novell; The Santa Cruz Operation; Symantec and other leading computer technology companies, such as Compaq; Computer Associates International; Digital Equipment; Intel; IBM; and Sybase.

I. COMMERCIAL AVAILABILITY OF MVPD EQUIPMENT WILL BENEFIT CONSUMERS.

Section 304 of the Telecommunications Act, 47 U.S.C. § 629, directs the Commission to adopt regulations necessary to ensure that customer premises equipment ("CPE") used to access services provided over cable and other multi-channel video programming distribution ("MVPD") systems is "commercially available." Congress enacted this provision to enable all MVPD system customers to realize the benefits of a competitive market for premises-based equipment. As Congress recognized, competitive markets increase consumer choice, drive innovation, and result in lower prices.

BSA believes that the Commission should implement Section 304 pragmatically: MVPD equipment should be deemed to be commercially available if consumers have the ability to choose from a variety of brands available from a variety of sources -- at least some of which are independent of the system operator. System operators should not be allowed to satisfy their statutory requirement merely by distributing system-designated equipment through specified distributors. Applying the test set forth above, personal computers, software, and telecommunication CPE are commercially available. Cable set-top boxes and cable modems, which are provided exclusively by cable system operators, plainly are not.

II. THE COMMISSION SHOULD CONFIRM THAT CONSUMERS HAVE THE RIGHT TO ATTACH ANY DEVICE TO AN MVPD SYSTEM THAT IS NOT "PUBLICLY DETRIMENTAL."

A. THE COMMISSION SHOULD CONFIRM THAT CONSUMERS HAVE THE RIGHT TO ATTACH USER-PROVIDED EQUIPMENT.

In the *Notice*, the Commission correctly observes that the "core prerequisite" for the commercial availability of premises-based equipment used in conjunction with multi-channel video distribution systems is that consumers have "the right to attach" the equipment to the system operator's transmission system.³ The Commission therefore proposes to incorporate the right to attach into its rules.⁴

BSA believes that consumers already have the right -- as property owners -- to use competitively provided equipment in any lawful manner. Indeed, ever since the D.C. Circuit's 1956 decision in *Hush-a-Phone*,⁵ it has been recognized that the Commission cannot countenance practices by a *telecommunications carrier* that interferes with a subscriber's "right reasonably to use his [equipment] in ways which are privately beneficial without being publicly detrimental."⁶ This principle is equally applicable to an *MVPD system* operator, such as a cable and DBS systems, that seeks to restrict attachment of customer-owned equipment to

³ *Notice* at ¶ 56.

⁴ *See id.*

⁵ *See Hush-a-Phone v. FCC*, 238 F.2d 266 (D.C. Cir. 1956) ("Hush-a-Phone"); *see also Use of the Carterfone Device in Message Toll Telephone Service*, 14 F.C.C.2d 571 (1968).

⁶ *Hush-a-Phone*, 238 F.2d at 269.

its system. Nonetheless, in order to remove any uncertainty that may exist, BSA believes that the Commission's rules should state expressly that consumers have the right to attach competitively provided CPE to MVPD systems for any purpose that is "privately beneficial without being publicly detrimental."

B. ANY RESTRICTION ON ATTACHMENT SHOULD BE EXPRESS, NON-DISCRIMINATORY, AND NO MORE BURDENSOME THAN NECESSARY.

In order to prevent exercise of the right to attach from being "publicly detrimental," it may be necessary, as an interim measure, to allow MVPD system operators "to establish and enforce their own standards on what can be attached to [their] system."⁷ However, the Commission should establish basic guidelines as to when a system operator can prevent the attachment of customer-provided equipment. Specifically, any system-imposed restrictions on the right to attach should be express, non-discriminatory, and no more burdensome than necessary to prevent technical harm to the operator's system, signal leakage, threats to public safety, or theft of programming.

In the long-term, BSA believes that it may be beneficial for the Commission to adopt a voluntary registration program for equipment that can attach to MVPD systems. Such a program would allow a manufacturer to register equipment with the Commission by demonstrating that attaching the device to an MVPD system would not cause technical harm. Once a piece of equipment was

⁷ Notice at ¶ 59.

registered, an MVPD system operator would be required to permit users to attach it to its system.

III. THE COMMISSION SHOULD LIMIT ADDITIONAL IMPLEMENTATION EFFORTS TO MVPD SYSTEMS THAT ARE NOT SUBJECT TO EFFECTIVE COMPETITION.

A. THE COMMISSION SHOULD NOT IMPOSE REGULATIONS WHERE COMPETITIVE FORCES ARE EFFECTIVE.

BSA believes that it is not necessary for the Commission to impose any new regulations in those sectors of the market where competitive forces are proving effective. For example, as the Commission has correctly observed, there is no need to take action to promote competition in the market for personal computers.⁸ The same is true of software. Robust competition in these markets, unfettered by unnecessary government regulation, has provided substantial consumer benefits. Today consumers can select from a wide range of innovative computer hardware and software products, available from multiple vendors, at ever-decreasing prices. The Commission should take no action that would jeopardize these benefits.

⁸ See *Notice* at ¶ 17.

B. THE COMMISSION SHOULD EXTEND ITS UNBUNDLING AND INFORMATION DISCLOSURE REQUIREMENTS TO MVPD SYSTEMS THAT ARE NOT SUBJECT TO EFFECTIVE COMPETITION.

The best means to facilitate the commercial availability of equipment used to access services provided over MVPD systems is to ensure that *all* MVPD systems are subject to *effective competition*. This will give consumers a choice of service and equipment that they do not enjoy today. However, until competition is established throughout the MVPD market, the Commission should limit its efforts to implement Section 304 to the sector of the MVPD system market that raises the greatest competitive concerns -- systems that, as a direct result of government-granted exclusive franchises issued in the past, are not subject to effective competition.

Specifically, the Commission should extend two requirements, long applied in the telephone market, to MVPD systems that are not subject to effective competition. First, the agency should bar these systems from bundling CPE with their service offerings. Second, the Commission should require that these systems disclose information necessary to allow non-affiliated manufacturers to develop compatible CPE.

No Bundling. In the telephone market, the Commission has long recognized that common carriers that are not subject to effective competition have the ability to force consumers to lease or purchase carrier supplied equipment. These carriers also can use revenues from their transmission service to cross-

subsidize their competitive CPE offerings. Such conduct, the Commission has noted, can severely distort competition in the CPE market.⁹

The Commission has sought to prevent such conduct by requiring carriers to unbundle the provision of regulated telephone transmission service from the provision of competitive CPE. Under the Commission's rules, a carrier may provide both services and CPE. However, the carrier may not *require* service customers to obtain carrier-provided CPE. Nor can the carrier provide single-price "packages" consisting of both services and CPE. Rather, the carrier must price the service and CPE components separately. The separation of competitively provided CPE from regulated transmission service has led to the growth of the most innovative CPE market in the world. Consumers, who once had to content themselves with black rotary telephones and slow-speed modems, can now choose from a vast array of premises-based equipment designed to meet their needs.

Precisely the same considerations are applicable to MVPD systems that are not subject to effective competition. Such systems have the ability to force consumers to lease or purchase system-provided equipment. This is what cable operators have done for decades. As a result, today there is no competitive market for set-top boxes. Without appropriate action, there will be no competition

⁹ See, e.g., *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 1074 (1986), *reversed on other grounds sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("[C]ost shifting can have adverse impacts on . . . competition in unregulated markets, by providing an opportunity for carriers to charge artificially low prices for their unregulated goods and services.").

in the emerging market for cable modems. To prevent this, the Commission should bar MVPD systems that are not subject to effective competition from requiring subscribers to use system-provided or system-designated CPE.

Even if they do not require consumers to use system-provided or system-designated equipment, MVPD systems that do not face effective competition also can use revenue generated from their provision of service to provide equipment to end-users at artificially low prices, thereby foreclosing competition in this important new market. To prevent this, the Commission should require these operators to offer separately -- and price separately -- services and CPE. The Commission also should expressly bar MVPD system operators that are not subject to effective competition from selling CPE to end-users at less than the operator's per-unit cost.

Information Disclosure. In order to facilitate a competitive market for MVPD CPE, the Commission should require any MVPD system that is not subject to effective competition to disclose information necessary to allow non-affiliated manufacturers to develop products that can be used in conjunction with the system. In *Computer III*, the Commission determined that -- because of the absence of competition in the local exchange -- the Bell Operating Companies ("BOCs") should be required to publicly disclose information about network changes 12 months before the introduction of new services based on those

changes.¹⁰ BSA believes that it would be appropriate to apply the same requirement to MVPD system operators that are not subject to effective competition.

The existence of competition in much of the MVPD market, coupled with the adoption of unbundling and network information requirements for those systems not subject to effective competition, should be sufficient to assure the competitive availability of equipment that can attach to MVPD systems. As a result, there is no need for the imposition of *any* government standards in this area. As BSA has pointed out in the past, government-imposed standards frequently increase costs to consumers, foreclose innovation, and impede competition. Therefore, BSA believes that the Commission should allow the market to drive the development of technical standards.

Finally, the Commission should adopt its proposal to apply the statutory "sunset" provisions flexibly.¹¹ Under the approach, the Commission would eliminate the no bundling and network information disclosure requirements in any geographic market in which an MVPD system becomes subject to effective

¹⁰ The only exception occurs when the new service can be introduced within 12 months of the so-called "make/buy" point, in which case the disclosure must be made at the make/buy point. In no case, however, can the disclosure be made less than six months before the new service is implemented. See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Phase II Order, 2 FCC Rcd 3072, 3086 (1987), vacated on other grounds sub nom. *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

¹¹ See Notice at ¶¶ 81-82.

competition. This will ensure that the goals of Section 304 are achieved with the minimum regulatory burden.

CONCLUSION

For the foregoing reasons, the Commission should confirm that consumers have the right to attach competitively provided CPE to any MVPD system if such action would not be "publicly detrimental." The Commission should limit further efforts to implement Section 304 to MVPD systems that are not subject to effective competition. Such systems should not be permitted to bundle CPE and services, and should be required to disclose system information necessary to allow independent manufacturers to develop compatible CPE. These requirements should sunset as soon as a system becomes subject to effective competition.

Respectfully Submitted,

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