

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) CS Docket No. 97-80
the Telecommunications Act of 1996)
)
Commercial Availability of)
Navigation Devices)

REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.

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SUMMARY

PRIMESTAR submits that the comments filed in this proceeding support its position that the providers of DBS and DTH satellite service and equipment are subject to robust competition and therefore that the Commission should forbear from applying any rules regarding the commercial availability of navigation devices to such services. The Commission has both sufficient statutory authority and ample record evidence before it to justify such forbearance.

In the event the Commission chooses to subject DBS/DTH to its commercial availability rules, PRIMESTAR urges that such rules be strictly performance-based. Development of any technical standards necessary in order to comply with such rules should be left to service providers and equipment manufacturers.

Finally, PRIMESTAR urges the Commission not to be swayed by those parties filing comments that seek to make universal interoperability and portability of navigation devices the primary goal of this proceeding. Neither of these measures serves the plain commercial availability mandate of Section 629.

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REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR Partners L.P. ("PRIMESTAR"), by its attorneys, hereby submits its reply comments in response to the comments received by the Commission in connection with its Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.¹

PRIMESTAR submits that the comments confirm its position that Direct Broadcast Satellite ("DBS") and Direct-To-Home Satellite ("DTH") services are sufficiently competitive to warrant forbearance from the application to those services of any new regulations implemented pursuant to this proceeding and Section 629 of the Communications Act of 1934, as amended (47 USC § 549). However, to the extent that the Commission may decide to apply its regulations to DBS/DTH, PRIMESTAR agrees with those parties who suggest that minimal performance-based regulation will satisfy the plain language of the statutory mandate.

¹ FCC 97-53, released February 20, 1997.

PRIMESTAR also urges the Commission to disregard the comments of those parties who seek to turn the instant proceeding into a vehicle for the establishment of expansive technical interoperability regulations which have little or nothing to do with the commercial availability of video navigation equipment.

I. DBS/DTH SHOULD NOT BE SUBJECT TO REGULATION UNDER SECTION 629

As the majority of parties suggest, admit or otherwise recognize, the provision of DBS/DTH service and equipment is subject to fierce competition, both among DBS/DTH providers themselves, and between such providers and their cable and other multichannel video distribution counterparts.² Despite the number of comments calling for intense regulation of the design, manufacture and distribution of navigation equipment, not a single party has offered the slightest evidence that the availability to the public of navigation equipment used in connection with DBS/DTH service is unjustly curtailed or limited by existing distribution arrangements, or that prices for navigation equipment are artificially high as the result of a lack of competition among DBS/DTH service providers. In fact, as the comments show, there is already in place a wealth of sales, lease and service arrangements available to the public from

² See, e.g., Comments of Circuit City Stores, Inc. ("Circuit City"); Comments of The Satellite Broadcasting and Communications Association of America ("SBCAA").

DBS/DTH providers and their retailers, vendors and agents.³ Given the thriving competition in all aspects of the DBS/DTH service, PRIMESTAR reiterates its position that the Commission is well justified in its reluctance to apply any regulations developed pursuant to this proceeding to DBS/DTH providers.

PRIMESTAR disagrees with those parties who maintain that the sunset provision contained in Section 629 does not also justify, in appropriate circumstances, initial forbearance from application of the regulations developed in this proceeding.⁴ The determination of whether the provision of service and equipment in a given MVPD service has reached a level of competitiveness warranting its release from such rules is left solely in the hands of the Commission under Section 629(e). If, as is the case with DBS/DTH, there is already robust competition, the Commission should recognize this and refrain from imposing unnecessary regulations in the first place. No rational reason is offered by any party that would bar the Commission from reaching this determination at the outset of the proceeding, thereby avoiding needless regulation and waste of Commission resources.

³ See, e.g., Joint Comments of DirecTV/Hughes Network Systems, Inc.

⁴ See, e.g., Comments of Circuit City; Comments of Tandy Corporation; Comments of National Cable Television Association ("NCTA").

PRIMESTAR also disagrees strongly with those parties who argue that the rules should not be sunset until all MVPD services and their related equipment offerings are fully competitive.⁵ As the comments demonstrate, the various MVPD services (cable, DBS/DTH, MMDS, OVS) face very different forms and levels of competition, based on geography, technology, extent of existing regulation and other factors, if each type of MVPD service is taken in isolation. But the different MVPD technologies are not competitively isolated from each other. As the comments demonstrate, several different and technically incompatible MVPD technologies now provide consumers with similar enough service that the different delivery technologies can be substituted for each other to a large degree. If the Commission fails to recognize the differences in market conditions affecting different types of MVPD technologies, equipment and services, and the fact that they are in competition with each other despite those differences, the Commission might create artificial distortions in the way the services operate, and could well jeopardize the current strong competition among DBS/DTH service providers.⁶ The Commission should not apply new regulations in

⁵ See, e.g., Comments of Circuit City.

⁶ Also, the language of Sections 629(e)(1) and (2) specifically links a given MVPD service with the navigation equipment used in conjunction with that service, thus suggesting the Congressional assumption that different services (e.g., cable, MMDS, DBS/DTH) should be analyzed separately.

such a way as to undermine the kind of aggressive competition which Congress sought to encourage in the first place.

In short, DBS/DTH service and the navigation equipment associated with it represent the standard of competitiveness that the Commission should use to judge other MVPD providers. Because DBS/DTH has already achieved what Congress sought in passing Section 629, the Commission should forbear from applying to it regulations which would be unnecessary, redundant and burdensome.

II. THE SOLE PURPOSE OF SECTION 629 IS TO MAKE ALL MVPD NAVIGATION EQUIPMENT COMMERCIALY AVAILABLE

As PRIMESTAR and numerous other parties note, the plain language directive of Section 629 is to ensure the commercial availability of navigation equipment.⁷ To the extent the Commission decides to apply its regulations to DBS/DTH, PRIMESTAR believes this mandate should be implemented smoothly, efficiently and with a minimum of regulatory burden on the availability of DBS/DTH service or the ability of DBS/DTH suppliers to innovate.

A. Definition of Commercial Availability

PRIMESTAR agrees with those parties who point out that the Commission need look no further than the plain language of Section 629 to find the definition of commercial availability and

⁷ See, e.g., Comments of Echelon Corporation; Comments of General Instrument Corporation; Comments of GTE Corporation.

the limit of its mandate.⁸ That statute defines commercial availability of navigation equipment as "availability....from manufacturers, retailers and other vendors not affiliated with any MVPD." PRIMESTAR further agrees with those parties who recognize that affiliation means ownership or control of the distributor by the MVPD. As noted by General Instrument Corporation, for example, it is only the pressure of ownership or control factors which would allow an MVPD to exert sufficient leverage on its distributor to unduly inflate the retail cost of equipment. PRIMESTAR, along with many other parties, also supports the employment of a 10% equity ownership limit as a bright line for determining the existence of affiliation between an MVPD and a distributor of navigation equipment used in its service.

PRIMESTAR disagrees with those parties who would seek to extend the definition of affiliation to include arm's length contractual and agency relationships between MVPDs and navigation equipment distributors.⁹ Exclusive contractual or agency arrangements can play an extremely important role in the development of new technology, the maintenance of system security and the protection of proprietary technology or information. By raising such arrangements to the level of affiliation, the

⁸ See, e.g., Comments of US West, Inc.; Comments of General Instrument Corporation; Comments of CellularVision USA.

⁹ See, e.g., Comments of Ameritech New Media, Inc.

Commission would impose a profound burden on MVPD service providers, and create a disincentive against the development of new or innovative technology. Such an outcome would hardly serve the public interest, and, in fact, would be in direct conflict with Section 629(b), which prohibits the establishment of regulations which endanger system security.

Furthermore, arm's length agreements between MVPD service providers and independent equipment distributors do not pose the same kind of danger to the market as might ownership arrangements. Without significant ownership, a service provider has little control over the distributor. This is especially true in the DBS/DTH context where, as DirectTV notes, there are at least five separate systems vying with each other for customers, and where equipment distributors have no incentive to offer equipment to the public at prices above competitive levels. Therefore, the Commission should not extend the definition of affiliation to include agency relationships or exclusive distribution contracts.

Finally, PRIMESTAR concurs with those parties who maintain that the statutory mandate is satisfied by the availability of navigation equipment to the public from a single unaffiliated retailer or vendor.¹⁰ The question posed by Section 629(a) of whether navigation equipment is available to consumers

¹⁰ See, e.g., Comments of US West, Inc.

from an independent source must be answered either yes or no.¹¹ So long as the public has a choice as to where it obtains its navigation equipment, competition for the provision of such equipment will exist and the statutory mandate will be satisfied.¹² Nothing in the statute requires any further inquiry on the part of the Commission or authorizes it to establish artificial quotas as to what would constitute a "sufficient" number of navigation equipment vendors for a given service.

B. A Performance-Based Standard Is Best

PRIMESTAR supports those parties who suggest that a simple performance standard is the most realistic and efficient method by which the Commission can implement Section 629(a).¹³ The Commission need only direct all MVPDs to whom the regulations apply to make whatever arrangements are necessary in order to ensure that navigation equipment employed in their service is available to consumers from at least one unaffiliated source.

11 PRIMESTAR disagrees with those parties who seek to include multiple manufacturing relationships within the orbit of Section 629. The statute is plainly concerned with access to navigation equipment by consumers. The inclusion of manufacturers within the language of Section 629(a) simply acknowledges that in some instances consumers are able to obtain navigation equipment directly from the manufacturing source, thereby bypassing retail outlets.

12 PRIMESTAR reaffirms its position that such independent sources include toll-free numbers and catalogues. See, also, Comments of Gateway 2000.

13 See, e.g., Comments of Echelon Corporation; Comments of Motorola, Inc.

Any technical or logistical steps necessary to implement this directive can be left to the industry to resolve itself. The availability of navigation equipment from a source not affiliated with the service provider by itself demonstrates that the technical and logistical requirements have been met, making it unnecessary to regulate directly the requirements which are only means to an end.

C. A Broader, More Regulatory Reading of Section 629 Is Misplaced

Some parties eschew a narrow, performance-based set of regulations and instead advocate a variety of portability and interoperability-based regulatory schemes to implement Section 629(a).¹⁴ Such schemes are not mandated or authorized by the simple statutory directive that navigation equipment be made commercially available. As previously stated, Section 629 is solely concerned with the competitive commercial availability of navigation equipment to customers of MVPD services. This narrowness is reflected not only in the plain language of the mandate under Section 629(a), but in the additional limitations and restrictions of the following paragraphs as well. Specifically, the statute directs the Commission not to jeopardize system security or to implement redundant regulation.¹⁵ It provides for waivers to promote technological

¹⁴ See, e.g., Comments of Viacom, Inc.; Comments of United States Satellite Broadcasting Company, Inc. ("USSB").

¹⁵ Section 629(b); 47 USC § 549(b).

development and sunseting in those situations where the regulations are no longer beneficial.¹⁶ It also states that nothing within the statute either expands or reduces the Commission's preexisting authority.¹⁷ In short, the statutory mandate is extremely focused and specific.

Even if a more regulatory-intensive approach to Section 629 had some connection with the statutory mandate, the logistical, technical and economic entanglements generated by such an approach would be far beyond any prudent deployment of regulatory resources. Despite the claim of a few parties,¹⁸ the portability and interoperability concepts inherent in the Carterfone principle involving the right to attach telephone customer premise equipment to the telephone network is not a model for the MVPD services and their related navigation equipment. As a number of other parties point out, the comparison of telephone and MVPD service is limited at best.¹⁹ The Carterfone principles were developed around a comparatively simple attachment to a telephone system based on a single national infrastructure employing a standardized technology developed over years of monopolistic control. The MVPD services,

¹⁶ Sections 629(c);(d); 47 USC §§ 549(c);(d).

¹⁷ Section 629(e); 47 USC § 549(e).

¹⁸ See, e.g., Comments of Uniden America Corporation; Comments of Viacom, Inc.

¹⁹ See, e.g., Comments of Telecommunications Industry Association; Comments of Zenith Electronics Corporation.

on the other hand, are a mix of complex, competing technologies, few of which are compatible, but many of which are functionally competitive. Thus, imposition of a mandatory interoperability standard, whether employing "smartcards," bifurcated equipment, or other means, would be a formidable task, likely taking years to accomplish even with extensive regulatory intervention and pressure. By the time an interoperability standard could be developed, it no doubt would be technically obsolete - unless the existence of the standard slowed innovation to the pace of the regulatory process.

By avoiding such an over-regulatory approach, and by establishing a performance-based standard and leaving the technical details to the industry, the Commission would most faithfully adhere to the statutory directive. At the same time, the Commission would substantially limit the regulatory burden placed on MVPD service providers and, at the same time, rely on the natural creative energies of the industry to ensure that the most efficient and least disruptive compliance mechanisms are established.

D. No Expansion of Anti-Subsidy Authority

Several parties disagree with the Commission's tentative conclusion that the anti-subsidy language of Section 629(a) should only apply to cable or other MVPD entities not subject to effective competition. These parties generally argue

that such anti-subsidy measures should apply to all MVPDs, whether competitive or not, including DBS/DTH providers.²⁰

The plain language of the statute does not support such an argument. As the Commission recognized in the Notice, Section 629(f) states that:

Nothing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before the date of enactment of the Telecommunications Act of 1996.

Currently, the only equipment rate and unbundling authority the Commission has regarding non-common carrier entities is in the context of fees for equipment and service charged by cable operators not subject to effective competition. Such authority is specifically provided for in Section 623 of the Act, 47 USC § 623(a)(2). No other statutory authority exists concerning the regulation of non-common carrier equipment rates by the Commission. The express language of Section 629 constrains the Commission's ability to adopt anti-subsidy rules where it did not have pre-existing authority. No party has offered any credible justification for the Commission to ignore this restraint on its authority and adopt and apply anti-subsidy restrictions with respect to non-common carrier MVPDs other than those cable systems not subject to effective competition.

²⁰ See, e.g., Comments of Circuit City; Comments of Tandy Corporation.

E. Security Concerns

Section 629(b) states that the Commission shall not prescribe regulations which would jeopardize security of MVPD systems, or bar MVPD providers from preventing theft of service. No commenters seriously challenge the principle that, under all circumstances, the security component of an MVPD transmission system must remain with the MVPD. Several parties, however, use the language of Section 629(b) as a means by which to propose expansive regulation of MVPD technology, including the mandatory division of navigation equipment into security and non-security components, the better to allow for expanded navigation equipment interoperability.²¹ As PRIMESTAR and others note, this expansive reading of Section 629(b) again runs counter to the statutory mandate.

Section 629(b) is a limiting section, designed to restrict the extent of Commission regulation of MVPD services under Section 629(a) and to enable continuing development of innovative and proprietary technology. Nothing therein gives the Commission powers to craft additional regulations regarding such technology in order to promote navigation equipment interoperability. The Commission, therefore, should reject the arguments of those parties who urge a broad interpretation of Section 629(b).

²¹ See, e.g., Comments of Viacom, Inc.; Comments of Tandy, Inc.

CONCLUSION

For the foregoing reasons, the Commission should not apply navigation equipment rules to DBS/DTH providers. If the Commission feels compelled to adopt some rules for DBS/DTH providers, it should structure such rules in accordance with these comments of PRIMESTAR to minimize the burden on DBS/DTH providers and their customers.

Respectfully submitted,

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I, Jette Ward, a secretary with the law firm of Reed Smith Shaw & McClay, certify that this 23th day of June, 1997, I have caused a copy of the foregoing Reply Comments of Primestar Partners L.P. to be served via first class mail, postage prepaid, on the following:

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A handwritten signature in cursive script, appearing to read "J. H. Ward", is written over a horizontal line. The signature is fluid and stylized, with a long, sweeping underline that extends to the right.