

DOCKET FILE COPY ORIGINAL RECEIVED

JUN 23 1997

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Implementation of Section 304 of the) CS Docket No. 97-80
Telecommunications Act of 1996)
)
Commercial Availability of)
Navigation Devices)

To: The Commission

REPLY COMMENTS

BellSouth Corporation ("BellSouth"), on behalf of itself and its subsidiaries that are and will be engaged in the delivery of video programming services, hereby respectfully submits the following limited reply comments in the captioned proceeding.¹ BellSouth is a participant in the Americast venture² and fully supports Americast's comments filed on May 16, 1997.

The Notice seeks to resolve a myriad of issues raised by implementation of Section 304 of the Telecommunications Act of 1996, 47 U.S.C. §629 (1996). From BellSouth's perspective as a current and prospective provider of wired and wireless cable systems, the issues that warrant additional comment are: (1) permitting multichannel video programming distributors ("MVPDs") to differentiate their products through

¹ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Notice of Proposed Rule Making*, CS Docket No. 97-80, FCC 97-53, released February 20, 1997, summarized 62 Fed. Reg. 10,011 (1997).

² Americast was created to be a source for programming and programming services that could be distributed by its owners over wired and wireless multichannel video distribution systems. Americast is owned by subsidiaries of Ameritech Corporation, BellSouth, GTE Corporation, SBC Communications, Inc., Southern New England Telecommunications Corporation and The Walt Disney Company.

No copies rec'd
List A B C D E 0+9

unique hardware and software; (2) exempting providers facing effective competition from Section 629(a) restrictions on bundling and ant subsidization; (3) excluding analog devices from complying with rules designed for digital navigation devices; (4) excluding MMDS antennas and downconverters from those devices that must be commercially available; (5) permitting industry and standards setting bodies to develop any needed equipment parameters; (6) tailoring the commercial availability requirement; and (7) defining affiliate under Section 629(a).

1. The Commission should permit new entrants to differentiate their offerings by not requiring their proprietary software and hardware to be commercially available.

The purpose of Section 629 of the Communications Act is to instill competition not to stifle innovation. Competition will be achieved if new entrants believe they can be successful and become so. Such success will be realized if the Commission allows new MVPDs to offer new and innovative services that are differentiated from those of incumbent video providers.

The Commission should avoid dictating a degree of fungibility in CPE hardware and software that thwarts the development and marketing of unique offerings. New entrants need to be able to offer new services that encourage consumers to opt for a different “look and feel” in video services. The consumer will benefit from the choice and the marketplace will become characterized as competitively viable. Thus, the Commission should encourage new entrants’ efforts to differentiate their offerings by not requiring that the proprietary software and hardware that supports their unique services be commercially available.

2. *The Commission should not apply to MVPDs facing effective competition its prohibition on cross-subsidization of CPE with service revenues.*

Section 629(a) does not permit MVPDs to offer a package of equipment and services if the charge for the equipment is subsidized by the charge for the video or other services. This prohibition should not apply to the MVPD that is facing effective competition. The Commission's acknowledged experience with packaging or bundling of cellular CPE and service,³ among other things, argues in favor of the Commission eliminating this type of regulation for those MVPDs that are facing effective competition.⁴ Moreover, the Commission has been given statutory authority to relieve MVPDs facing effective competition from rate regulation.⁵

3. *The Commission should exclude analog devices from the rule requiring navigational devices to be commercially available.*

The embedded base of analog navigation devices is recognized as being quite substantial.⁶ Setting a new standard that would require reconfiguration or retrofitting of those devices is not cost justified⁷, nor is it warranted given that digital devices will replace analog equipment in the near future.⁸ The Commission's and the industry's efforts should focus on the digital equipment of today and tomorrow. Accordingly, BellSouth supports the exclusion of analog devices from the application of rules pertaining to navigation devices; they are commercially available today.

³ Notice, at 43.

⁴ See, Ameritech at 1; Pacific Bell Video Services ("PacBell") at 5-6.

⁵ See, Section 623(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. §543(a)(2) (1996).

⁶ See, Viacom at 3; and Telecommunications Industry Association ("TIA") at 9.

⁷ See, PacBell, at 2.

⁸ See, TIA at 9, Ameritech at 10, and PacBell at 2.

4. The Commission should require that MMDS antennas and downconverters be commercially available only through installers licensed or qualified by the MVPD.

Wireless cable antennas and downconverters should be installed by qualified personnel. The nuances of installation and calibration of this equipment suggest that a subscriber-installed reception device likely will not be optimized. If the equipment is not properly installed, the subscriber will not receive the desired signal and the provider will lose the desired customer. Thus, BellSouth supports PacBell's request that "'commercial availability' in the context of MMDS/wireless cable antennas and downconverters be construed to mean that antennas should be available from vendors licensed by the MMDS provider."⁹ PacBell describes quite correctly that the MMDS provider cannot assure performance of its delivery system without control over this essential component of its wireless network.¹⁰

5. The Commission should delegate to the industry and standards-setting bodies the development of standards.

To the extent that standards need to be established as a result of the Commission's findings in this proceeding, a consensus exists that it is best to leave the development of particular rules or standards to private industry and standards-setting bodies.¹¹ The Notice acknowledged that this is the proper course for the Commission, especially in light of the clear directive from Congress to do so.¹² Some parties have advanced the use

⁹ See, PacBell Comments at 4.

¹⁰ See, PacBell Comments at 4-5.

¹¹ See, e.g., National Cable Television Association ("NCTA") at 31; Information Technology Industry Council and the Computing Technology Industry Association ("ITIC/CTIA"), at 14-15; TIA, at 5; and Bell Atlantic and NYNEX, at 4.

¹² Notice at ¶66.

of one standards body or another.¹³ BellSouth does not endorse any particular group, but simply prefers that standards be established privately rather than by the Commission.

6. The Commission should allow an MVPD to meet the commercial availability dictate so long as it has at least one unaffiliated vendor or distributor.

The precept of “commercial availability” can be accommodated if an MVPD has at least one unaffiliated vendor or distributor for its CPE. GTE agrees with this characterization of the Act’s dictate;¹⁴ U S West is of a similar mind.¹⁵ Other commenters argue that a multiplicity of providers and even manufacturers is called for by Section 629 of the Act.¹⁶ However, circumstances may argue to the contrary. In particular, a new entrant may have a significant need to influence, if not control, the manufacture, directly or through licensing, of its proprietary hardware and software. Accordingly, so long as an unaffiliated vendor or distributor exists for an MVPD’s CPE , the marketplace should be allowed to determine the number of sources for an MVPD’s CPE, thereby relieving the Commission of the unneeded task of supplanting an MVPD’s business judgment with a regulatory regime.

7. The definition of “affiliate” adopted as part of the 1996 Telecom Act should apply for purposes of Section 629.

Section 3(1) of the Communications Act of 1934, as amended, 47 U.S.C. §153(1) (1996), addresses affiliation in terms of ownership and control in much the same manner as in Section 602(2) of the Act, 47 U.S.C. §522(2) (1996). However, the threshold at

¹³ See, e.g., PacBell at 6.

¹⁴ GTE, at 8 (“commercial availability’ will be achieved as long as CPE is available to consumers at retail outlets not affiliated with the MVPD and at a price that is unbundled from the MVPDs services”).

¹⁵ U S West, at 13 (“[t]he Commission should define commercial availability as the presence of at least two unaffiliated CPE providers, one of which can be the MVPD”). See also, NCTA, at 21.

¹⁶ ITIC/CTIA, at 16-17.

which ownership confers affiliation is lower under Section 3(1) than Section 602(2). Section 3(1) requires ownership to be looked at in situations where a person owns more than 10 percent. Section 602(2) of the Act confers affiliation through ownership only in the event of 100 percent ownership. For purposes of “commercial availability,” ownership should be looked at in the broader terms of Section 3(1) of the Act. However, contrary to the arguments of some,¹⁷ affiliation should not arise as a result of contractual relationship not involving ownership or control. Even exclusive distribution or vendor relationships should not confer affiliate status on otherwise unaffiliated entities.¹⁸ Such relationships do not foreclose commercial availability through one or more retail outlets.

CONCLUSION

As stated above, BellSouth fully supports Americast’s comments. Furthermore, in addressing the issues raised in the Notice, the Commission should: (1) permit multichannel video programming distributors (“MVPDs”) to differentiate their products through unique hardware and software and not require that they be made commercially available; (2) not apply Section 629(a)’s antisubsidization restrictions on bundling to systems facing effective competition; (3) exclude analog devices from the requirement of commercial availability; (4) define “commercial availability” of MMDS antennas and downconverters to mean that wireless cable providers will make this equipment available through one or more vendors licensed or selected by the provider; (5) rely on the industry and standards setting bodies for the development of any needed equipment parameters; (6) allow an MVPD to meet the commercial availability dictate so long as it has at least

¹⁷ See, e.g., ITIC/CTIA, at 16-18.

¹⁸ See GTE, at 9; NCTA, at 19-20; and U S West, at 14-15.

one unaffiliated vendor or distributor; and (7) determine affiliation based exclusively on the ownership and control threshold in Section 3(1) of the Act.

Respectfully submitted,

BELLSOUTH CORPORATION

By: William Barfield / of
William B. Barfield
Thompson T. Rawls II
1155 Peachtree Street, N.E., Suite 1800
Atlanta, GA 30309
(404) 249-2641

By: David G. Frolio
David G. Frolio
David G. Richards
1133 21st Street, N.W., Suite 900
Washington, DC 20036
(202) 463-4155

Its Attorneys

June 23, 1997

CERTIFICATE OF SERVICE

I, Brett Kilbourne, hereby certify that on this 23rd day of June 1997 copies of the foregoing Reply Comments of BellSouth were sent via first class mail to the following parties:

Aaron I. Fleishman
Arthur H. Harding
Howard S. Shapiro
Craig A. Gilley
Fleishman and Walsh, L.L.P.
1400 Sixteenth Street, N.W., Suite 600
Washington, D.C. 20036

John I. Taylor
Vice president, Public Affairs
Zenith Electronics Corporation
1000 N. Milwaukee Avenue
Glenview, IL 60025

David Alan Nall
Squire, Sanders & Dempsey
P.O. Box 407
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Allan P. Bierman
Belden Wire & Cable Company
P.O. Box 1980
Richmond, IN 47375-1980

Daniel L. Brenner
Neal M. Goldberg
Loretta P. Polk
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20554

Becca Gould
Vice President, Public Policy
J.D. Marple
Manager, Legislative Policy
Business Software Alliance
1150 18th Street, N.W.
Suite 700
Washington, D.C. 20036

Craig A. Newman
Senior Vice President and General Counsel
Bruce D. Gellman
Associate General Counsel
Corporate Media Partners
10880 Wilshire Boulevard, Suite 1750
Los Angeles, CA 90024

Barrett L. Brick
Cable Services Bureau
2033 M Street, N.W.
Room 703B
Washington, D.C. 20037

John M. Boehm, #15550
811 South 13th Street
Lincoln, NE 68508

Marlin D. Ard
Sarah R. Thomas
Pacific Bell Video Services
140 New Montgomery Street
1522 A
San Francisco, CA 94105

James F. Rogers
James H. Barker
Nandan M. Joshi
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
1300
Washington, D.C. 20004-2505

Fiona J. Branton
Director, government Relations
and Regulatory Counsel
Information Technology Industry Council
1250 Eye St., N.W., Suite 200
Washington, D.C. 20005

Colleen Boothby
Kevin DiLallo
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036-1703

Quincy Rodgers
Christine G. Crafton
Faye Morrison
General Instrument Corporation
1133 21st Street, N.W.
Suite 405
Washington, D.C. 20036-3384

Bruce N. Hahn
Director of Public Policy
Computing Technology Industry Association
6776 Little Falls Road
Arlington, VA 22213

Andrew R. Paul
Senior Vice President
Satellite Broadcasting and Communications
Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22201

Richard G. Warren
Room 3831
1095 Avenue of the Americas
New York, NY 10036

Michael R. Gardner, P.C.
1150 Connecticut Avenue, N.W.
Suite 710
Washington, D.C. 20036

Stuart E. Overby
Assistant Director
Spectrum Planning
Motorola, Inc.
1350 I Street, N.W., Suite 400
Washington, D.C. 20005

Phillip L. Verveer
Francis M. Buono
Willkie, Farr & Gallagher
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Benjamin L. Griffin
Robert L. Galbreath
Reed Smith Shaw & McClay
1301 K Street, N.W.
Suite 1100-East Tower
Washington, D.C. 20005

Marvin Rosenberg
David Vaughan
Hollan & Knight LLP
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037-3202

John F. Raposa, HQE03J27
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092

Andre J. Lachance
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

Robert Sachs
Margaret A. Sofio
John S. Fouhy
The Pilot House
Lewis Wharf
Boston, MA 02110

Brenda L. Fox
Gregory L. Cannon
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036

Deborah H. Morris
George D. Callard
300 S. Riverside Plaza
Suite 1800 North
Chicago, IL 60606

John W. Pettit
Richard J. Arsenault
Drinker Biddle & Reath LLP
901 Fifteenth Street, N.W.
Washington, D.C. 20005

Edward Schor
Anne Lucey
Viacom Inc.
1515 Broadway
New York, NY 10036

Bill Loughrey
Directory of Government Affairs
Corporate Communications Department
Scientific-Atlanta, Inc.
One Technology Parkway, South
Norcross, GA 30092-2967

Gregg P. Skall
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, D.C. 20006

Glenn B. Manishin
Blumenfeld & Cohen
1615 M Street, N.W., Suite 700
Washington, D.C. 20036

John D. Heubusch
Vice President, Government Affairs
Gateway 2000, Inc.
707 D Street, N.W.
Washington, D.C. 20004

Margaret E. Garber
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Jonathan D. Blake
Kurt A. Wimmer
Erin M. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-7566

Leslie A. Vial
1320 North Courthouse Road
Eighth Floor
Arlington, VA 22201

Robert S. Schwartz
Joni Lupovitz
McDermott, Will & Emery
Suite 450
1850 K Street, N.W.
Washington, D.C. 20006

Grant E. Seiffert
Director of Government Relations
Telecommunications Industry Association
1201 Pennsylvania Avenue, N.W.
Suite 315
Washington, D.C. 20004-2401


