

EchoStar argues that the changes imposed new obligations on part 76 complainants. The Commission finds that the rule changes clarify the procedural requirements of the existing rules, but do not impose any new obligations.

**FOR FURTHER INFORMATION CONTACT:** Thomas Horan, Cable Services Bureau, (202) 418-7200.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Order on Reconsideration in CS Docket No. 98-54, FCC 99-258, adopted September 23, 1999, released September 29, 1999. The complete text may be purchased from the Commission's copy contractor, International Transcription Services, 1231 20th Street, NW, Washington, DC 20036, telephone (202) 857-3800, facsimile (202) 857-3805. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by contacting Martha Contee at (202) 418-0260, TTY (202) 418-2555, or mcontee@fcc.gov. The full text of the Order on Reconsideration is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th St., SW, Room CY-A257, Washington, DC 20054. The full text of the Order on Reconsideration can also be downloaded at: <http://www.fcc.gov/Bureaus/Cable/Orders/1999/fcc99258.txt> or <http://www.fcc.gov/Bureaus/Cable/Orders/1999/fcc99258.wp>

### Summary of the Order on Reconsideration

1. EchoStar Communications Corporation (EchoStar) filed a petition requesting that the Commission reconsider recent amendments to 47 CFR 76.1003(f), 76.1302(e), and 76.1513(g). These amendments and several other rule changes were adopted in the Commission's Report and Order in this proceeding, 64 FR 6565 (February 10, 1999). The amendments at issue clarified the time period for filing complaints pursuant to the existing program access, program carriage and open video system rules. EchoStar argues that the amendment of these rules is inconsistent with the Administrative Procedure Act (APA) because substantive changes, imposing new obligations on part 76 complainants, were made to the Commission's rules without providing notice and opportunity for comment.

2. In denying the petition, the Commission finds that the amendments conform with the APA requirements. Section 553 of the APA (5 USC 553)

excepts interpretative and procedural rules from the notice and comment requirements. The amendments are not substantive rule changes that impose new obligations, but at most clarify how to file complaints under the existing rules, and thus, are interpretive and/or procedural rules that are excepted from the notice and comment requirements.

### List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

**Magalie Roman Salas,**

*Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

#### 49 CFR Part 661

[Docket No. FTA-99-5709]

RIN 2132-AA68

#### Buy America Requirements; Permanent Waiver for Microcomputers

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** In 1986, the Federal Transit Administration (FTA) adopted a waiver of its Buy America requirements for the purchase of microcomputers. FTA has been asked to review whether this waiver should be retained, revoked, or modified in light of changes in the computer industry since then. This Advance Notice of Proposed Rulemaking (ANPRM) solicits public comment on this question.

**DATES:** Comments on this ANPRM must be submitted by December 7, 1999.

**ADDRESSES:** Written comments must refer to the docket number appearing above and must be submitted to the Docket Clerk, United States Department of Transportation, Central Dockets Office, PL-401, Nassif Building, 400 Seventh Street SW, Washington, DC 20590. All comments received will be available for examination at the above address. Docket hours at the Nassif Building are from 10:00 a.m. to 5:00 p.m., Monday through Friday, except Federal holidays. Those desiring agency notification of receipt of their comments should include a self-addressed stamped envelope or postcard with their comments.

**FOR FURTHER INFORMATION CONTACT:** For legal issues: Meghan G. Ludtke, Office

of Chief Counsel, Federal Transit Administration, Room 9316, (202) 366-4011 (telephone) or (202) 366-3809 (fax) program/technical issues: Spiro M. Colivas, Office of Program Management, Acting Director, Office of Engineering, Federal Transit Administration, same address, Room 9311, (202) 493-0107 (telephone) or (202) 366-7951 (fax). Electronic access to this and other rules may be obtained through the FTA World Wide Web home page at <http://www.fta.dot.gov>, or by using the Universal Resources Locator (URL); both services are available seven days a week.

### SUPPLEMENTARY INFORMATION:

#### I. Background

In section 401 of the Surface Transportation Assistance Act of 1978 (Pub. L. 95-594, 92 Stat. 2689), Congress first enacted the Buy America legislation applicable to the expenditure of Federal funds by recipients under FTA grant programs. FTA's implementing regulation was issued at 49 Part CFR 661. In January 1983, Congress repealed section 401 and substituted section 165 of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424, 96 Stat. 2097). On July 5, 1994, section 165 was codified at 49 U.S.C. 5323(j).

The FTA Buy America Regulations, 49 CFR Part 661, apply to all federally assisted procurements using funds authorized by the Federal transit laws, 49 U.S.C. Chapter 53. The general Buy America requirement is that all manufactured products procured in projects funded under the Federal transit laws be produced in the United States. In 1986 under 49 U.S.C. 5323(j)(2)(A) and (B) and the implementing regulations at 49 CFR 661.7(b) and (c). FTA granted a general waiver of the Buy America requirements for microcomputer equipment and software of foreign origin. 49 CFR 661.7, Appendix A(d).

On February 26, 1999, FTA received a request from Prima Facie, Inc. (petitioner) to re-examine the permanent waiver for microcomputers to determine if the basis for the subject waiver still exists, and, if not, whether it is appropriate for FTA to revoke the general waiver. Additionally, petitioner requests that FTA seek comments on whether modification of the waiver to include only selected types of microcomputer equipment is necessary and whether the inclusion of a microcomputer (chip) in a manufactured product should result in the entire product's being considered a microcomputer.

## II. Petition for Removal or Modification of Permanent Waiver for Microcomputers

### A. History of the Permanent Waiver

Under 49 U.S.C. 5323(j), FTA may not obligate Federal funds for mass transportation projects unless all iron, steel, and manufactured products used in the project are produced in the United States. This requirement can be waived if, *inter alia*, its application would be inconsistent with the public interest (section 5323(j)(2)(A)) or if the goods are not reasonably available from domestic sources (section 5323(j)(2)(3)).

On January 5, 1985, in response to a request from the American Association of State Highway and Transportation Officials (AASHTO), FTA solicited comments from interested parties regarding the question of whether its grantees were experiencing difficulty in purchasing domestically produced microcomputer equipment appropriate to their needs (50 FR 1156). AASHTO requested that FTA amend its Buy America rule, arguing that small transit systems were unable to procure domestically produced equipment because chips and some other major components were not made in the United States. Because the rule required transit systems to obtain individual non-availability waivers, which was burdensome, AASHTO requested a general waiver. After reviewing the comments received, FTA provided a one-year waiver from the Buy America requirement for microcomputers because of the rapid technological changes in an expanding market for domestically produced computers (50 FR 18760). That waiver was extended for a second comment period a year later and subsequently made permanent (51 FR 19653, 51 FR 36126). FTA noted that while new technology had increased the availability of hardware and software components, many product components were still made and assembled abroad, and it would be difficult to determine when, if ever, microcomputer component manufacturing would be relocated to the United States.

### B. The Petition

The petition from Prima Facie, Inc. is as follows:

ECKERT SEAMANS CHERIN & MELLOTT, LLC

February 26, 1999

Patrick Reilly,

Chief Counsel, Federal Transit Administration, 400 7th Street, SW, Washington, DC 20590.

Dear Mr. Reilly: Under the provisions of 49 U.S.C. 5323(j)(3)(2)(A) and (B) and

implementing regulations set forth at 49 CFR 661.7(b) and (c), the Federal Transit Administration (FTA) has granted a general waiver of the Buy America requirements for microcomputer equipment of foreign origin. This waiver is set forth in Appendix A of 49 CFR 661.7.

It is clear that, without the waiver, microcomputer equipment would have to meet the requirements of 49 U.S.C. 5323(j)(1) and the implementing regulations at 49 CFR 661.5 which require that no FTA funds may be obligated for the procurement of manufactured products unless such manufactured products are produced in the United States.

On behalf of Prima Facie, Inc., this letter will serve as a petition to the FTA to re-examine the subject waiver to determine if the basis for the waiver that existed at the time it was originally granted still exists; and, if not, whether it is appropriate for the FTA to revoke the general waiver.

The original petition for the general waiver was made by the American Association of State Highway and Transportation Officials (AASHTO) to FTA's predecessor agency (the Urban Mass Transportation Administration [UMTA]) in 1985. The petition was based on the fact that many smaller transit systems were using microcomputers for their daily transit planning and daily programming needs and were unable to procure domestically produced equipment since chips and some major components were not made in the United States. AASHTO indicated that the public interest would be best served by the granting of a general public interest waiver. AASHTO stated that since transit systems were required to seek individual "non-availability" waivers, the purchasing process for transit systems who would need or expect to need microcomputer equipment would be streamlined by the granting of the general waiver.

It should be noted that UMTA originally granted the public interest waiver for a one-year period because of the "rapid technological changes in an expanding market for domestically produced computers."

The waiver was made permanent in 1986, and has not been re-examined since that time. At the time that the permanent waiver was granted, UMTA stated that the waiver was being made permanent because "although new technology had increased the availability of hardware and software components, many product component(s) (microchips) are still made and assembled abroad." UMTA further stated that it would be difficult to estimate when, if ever, microcomputer component manufacturing would be relocated to the United States.

"Microcomputer" was defined in the original waiver as "[a] computer system whose processing unit is a microprocessor. A basic microcomputer includes a microprocessor, storage, and input/output facility, which may or may not be on one chip." In addition, "computer system" was defined as

"[a] functional unit consisting of one or more computers and associated software that uses common storage for all or part of a program and also for all or part of the data

necessary for the execution of the program; executes user-written or user-designated programs; performs user-designated data manipulation, including arithmetic operations and logic operations; and that can execute programs that modify themselves during their executions. A computer system may be a stand-alone unit or may consist of several interconnected units. Synonymous with ADP system, computing system."

Prima Facie believes that it is appropriate to re-examine the permanent waiver at this time for several reasons. First, the state of the microcomputer and microprocessor industry in the United States today is significantly different than when the waiver was originally issued in 1985/86. Second, the original intent of the waiver was to address the procurement of a significantly different type of equipment (the traditional "desk-top" computer) than recent application of the waiver by FTA (i.e., digital recording equipment). Third, the definition cited above may not be appropriate for the myriad of products to which the general waiver now applies under FTA's current application.

A logical extension of FTA's current application of the waiver would be that any manufactured product that contains a data storage or processing unit should be granted a waiver from the Buy America requirements. This, in effect, would mean the almost total waiving of the Buy America requirements since the vast majority of products used today by transit systems contain some type of microprocessor which is significantly different than the microcomputer that was granted a waiver in 1985 (e.g., the following types of equipment all contain microprocessors—fare collection equipment; bus destination signs; rail car train control systems; radios; and bus diesel engines). As indicated above, in granting the original waiver, UMTA was examining the traditional "desk-top" computer—it was not examining the types of equipment cited in the previous sentence because the usage of microprocessors in that equipment just simply did not exist in general, broad application in 1985.

In petitioning for the re-examination of the general waiver, Prima Facie specifically requests that FTA seek public comment on the following issues:

- Is the waiver out of date?
- Should the waiver, apply, if at all, only to selected types of microcomputer equipment?
- Is there any necessity for a waiver since the domestic market has changed so dramatically since 1985?
- Should the inclusion of a microcomputer (chip) in a manufactured product result in the entire product being considered as a microcomputer?

Prima Facie certainly appreciates your immediate attention to this request. If I can provide any more information at this time, please do not hesitate to contact me.

Sincerely,

Edward J. Gill, Jr.  
On Behalf of Prima Facie, Inc.  
cc: Shawn Marcell

### III. Issues for Comment

FTA invites public comment on the following issues:

A. Is the microcomputer waiver out of date? The Petitioner believes that the state of the microcomputer as well as the microcomputer industry in the United States is significantly different today than when the waiver was issued in 1986.

B. What are these differences, and are they relevant to the existing waiver?

C. Should the permanent microcomputer waiver apply only to selected types of microcomputer equipment? The Petitioner asserts that the original intent of the waiver was to address the procurement of a significantly different type of equipment, specifically, the "desk-top" computer. The recent application of the microcomputer waiver has been extended to such items as digital recording equipment.

D. How is the use to which a microcomputer is put relevant to FTA's Buy America requirements?

E. Petitioner asserts that the logical extension of FTA's current application of the permanent microcomputer waiver would be that any manufactured product that contains a data storage or processing unit qualifies for the permanent microcomputer waiver from the Buy America requirements. Further, petitioner asserts that such an application by FTA is essentially a total waiving of Buy America requirements, since the vast majority of manufactured products used by transit systems contain some type or form of microprocessor, and that is radically different than the microcomputer waiver that was granted by FTA in 1985.

### IV. Regulatory Analyses and Notices

It does not appear, at this point, that any regulatory action with respect to the

existing microcomputer waiver would be significant under Executive order 12866 or under the Department's Regulatory Policies and Procedures. We further believe that such action would require the preparation of a Federalism Assessment. We also do not believe that it would have a significant economic impact on a substantial number of transit systems because of the changes in the computer industry. This notice does not propose or contemplate new information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3520, nor would any subsequent action pursuant to this notice likely do so.

Issued on: October 4, 1999.

**Gordon J. Linton,**  
*Administrator.*

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