

67300

Belknap Freeman, PE
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6 November 1999

Docket Clerk
U. S. Department of Transportation
Central Docket Office, PL 401
Nassif Building
400 Seventh Street, SW
Washington, D. C. 20590

Re: Docket FTA - 99 - 5709 - 3
Buy America Requirements
Permanent Waiver for Microcomputers

Advanced Notice of Proposed Rule Making

The Federal Transit Administration (FTA) , having published an Advanced Notice of Proposed Rule Making (ANPRM), in the docket FTA-99-5709, published in the Federal Register for October 8, 1999 (64FR54855 to 54857, inclusive):

The FTA Docket, in its last page (64FR54857) , in its section " III Issues for Comment", list five areas for which the docket invites public comment. It is the "Professional Opinion" of this respondent (with some 58 years aggressive activity in both rail and transit), that there are several significant issues which the docket does not address in an adequate manner; that are of such significance and priority; that they be added as issues for comment.

This respondent agrees with the position taken by the "Partition" of Prime Fade, Inc. (The heart or basis for the FTA Docket);; but even that "Partition" does not address, in any depth, the issues which follow.

In that regard, this response opens with a brief review of six additional issues; involving "Liability", "Obsolescence". "Software". "Integrity", "Tolerances and Tests" and "Impact on Pricing" as significant issues; but not to be considered all inclusive.

This response will follow with additional comments concerning the original five suggested items included in the FRA Docket, and with a brief correlation to like situations within the scope of the Federal Railroad Administration (FRA)..

Liability:

The FTA does not appear to recognize that microcomputers have migrated into the realm of "Public Safety"; thus "Liability" becomes a significant issue. In subsequent text, more on this issue.

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As the Docket Issue relates to a ~~germinate~~ waiver for microcomputers, in respect to "Buy America Requirements"; for any incident or alleged failure of a microcomputer, or as to how it performed; the transit operation that has adopted microcomputer products from foreign sources, is essentially defenseless in respect to the issues of liability and punitive damages; as was it not the transit agency that ordered and accepted the microcomputer facility involved?

As the "press" for lack of a more definitive response is content in "fluffing off" computer based failures as a "a glitch"; however, to avoid further problems and liabilities, one must seek the cooperation of the original vendor; but as the vendor himself can visualize he has an element of liability for any malfunctioning -- where a foreign source is involved, where is possible "leverage" to seek adjudication of the issue??(if the original source is even still in business?). On the other-hand, a domestic firm may well be motivated to cooperate either on the basis of seeking the continued business relationships and/or concern with the risk of being dragged into court (This is becoming an area of concern with the preponderance of "Proprietary software" in the market place).

Yes, there are failures -- without the need to recite all the details, one need only recall mention of two situations in FTA's "backyard", in Washington, DC, on the Metro in recent years:

a). The motor man who requested permission to go to manual operation of his brakes , from "operation central" (as he experienced inability to stop properly in the environment of the start of a snow storm; but he was "refused" - this in combination with his train coming upon an another draft of cars ahead, which had stopped going into a "yard"; but the system computer, in error counted him clear and into the yard; thus ultimately being "read ended" by the following train; whose motorman was killed. (A very interesting case; for all the pertinent details were stored in the record, to include tape of the earlier conversation about "brakes" of the motorman who was killed., et all).

b). The Washington Metro a short time back, was forced to curtail continued construction and growth of routes, as it was realized the "central" computer had inadequate capacity to operate the system in accord with the original system route plans. Replacing the original computer complex was necessary step prior to start up of continued construction and expansion of the route structure in accord with the original configuration projected.. This replacement complex obviously required a new "software effort" The performance of the Metro, to include only recently, a crisis involving a several hour delay in start up of operations at the start of a day, in combination with a history of

earlier central computer "crashes" , et all; when not employing the cleche' "a computer glitch", made reference to difficulties experienced with "software" previously subcontracted out to an organization in Germany; and the resulting difficulties in "interfacing" and "understanding" what was designed when it was previously accomplished in Germany.

The two references to the Washington Metro serve to highlight the issue of Viability" -- "you knew, or should have known"-- where a fatality can be attributed to an error in design in the first case; and the second example, a "software contractors" comments as to the difficulty of implementing and understanding the software sub-contracted out and accomplished in an overseas environment is possible basis for litigation on basis of non - performance (For the FTA, with escalators from a Washington Metro station right up into the courtyard of the Nassif Building complex, the office site of the FTA, would seem obvious that the FTA should be aware of legal litigation issues related to computer problems),

If one were in court, on the plaintiffs side, one could have fun with today's fad of "Risk Analysis", such as to develop "Mean Time Between Hazardous Failures" (developed on basis of figures based on pure straw), as contrasted with the prior generation's emphasis on "Zero Tolerance of Failures'.

Obsol escence:

In the vast world of "Microcomputers" there are elaborate small size units with individual removable "circuit cards" and on the other end of the category we have the small totally encapsulated units (designed to be "throw away" and replaced in kind), and then in today's realm, we have a complete microcomputer essentially totally incorporated into a single 'chip".

Even in the domestic market place, one would be hard pressed to find a supplier who would guarantee even an 8 to 10 year "support" period for their product line. Now translate the same problem to the foreign market place, and evaluate the "worth" of any commitment of long time support for ones support (what leverage exists, what control exists - can you take a foreign corporation to court for non performance, particularly as the odds are that it might no longer exist).

In combination with even the FTA's docket conceding that there is continued growth in the microcomputer industry; in combination with even our domestic suppliers touting to their stockholders; that constant change and improvement is their key to "growth", and further, the lack of many "standards" that cause different components that

serve the same purpose, having different "pin connections", physical dimensions, et all.

As we have a serious problem with obsolescence in our domestic market place, can we expect more favorable situations of product availability in a foreign market place?

Now one school touts the concept, that "not to worry" about obsolescence, as soon down the line we will have improved devices with enhanced features; thus there will be an advantage to replace existing facilities --- however retrofit and/or replacement programs involve need for new money. Are we committing ourselves to a perpetual program of funding our installations, a situation which obviously is accelerated by uncontrolled procurement from foreign sources. (For a "bus" vehicle, with only a 12 year service life, not so much a problem; but where ~~we~~ invests tax dollars in a rail vehicle, one would be looking at a 30 to 50 year service life -- and this does not consider the "wayside").

Now if we propose a rule change, there is a difference, in respect to foreign procurement; in one case, the foreign source who directly supplies a package; as contrasted with the domestic supplier, who elects to have part of his product line manufactured out of the country --- but in this case, the overall responsibility of the domestic supplier is responsible for his product line without regard to where he seeks to obtain some of the components that make up his product line.

Software:

As "software" is defined as being a component part of a microcomputer (as indeed it is), there are several facets of the issue which might be considered. Areas of concern include "Proprietary software", "interface concerns", "Errors of design", "safety design", and current trends to "fix responsibility" (via the route of Professional Licensing.) To shorten this response, all the comments which follow relate essentially to the domestic market place; but it is of equal importance to recognize the impact of such situations would also relate to the real issues associated with foreign procurements of microcomputers.

It was not too many years ago, that those suppliers who supported the needs of the Transit/Railroad Industry, had their own distinctive product lines; manufactured in their own facilities; with the Transit/Railroad industry ordering their needs from a "catalogue". Two major influences made a major impact of procurement. The first; in the influx of redistribution of tax dollars, procurement regulations forced the issue of competitive bidding (on a functional basis, rather than relation to a specific component). The second impact was the infiltration of computer techniques in

the industry; either as a replacement or an addition in the accomplishment of a specific task

The modern day culture of the manufacturing industry, rather than directly manufacture their product line; become agencies that essentially "package" individual component parts obtained from others on the open market place. To protect their product line (and avoid competition of copy cats), the industry elected to go down the path of "proprietary software". The agency that purchases such schemes must accept the facility on blind faith, generally compounded by the user having inadequate in house background, understanding and experience, to "protect his employer", even if he were privy to the details of the "proprietary software" in the first place.

The gist of the FTA Docket recognizes that a microcomputer can be involved in a situation where it is only a part of a larger configuration; which draws attention to all the parameters at points of interface between units. Again, today's procurement practices can result in components of a total facility being obtained from different sources.

The issue of interfaces involves code structure, timing, message format, temperature tolerances, potential levels, as well as risks from one "black box" to another that can result in unanticipated consequences, to name but a few considerations -- but of even more concern if a specific "black box" component is replaced with an alleged equivalent "black box" at a later point in time?

As the issues of errors of design (mostly in the realm of software) are not uncommon; and what is of particular significance, are those that have occurred in the domain of very elaborate enterprises. It was previously mentioned, the Washington Metro case of having lost the recognition of a draft of cars not having cleared into a yard, with the consequence of a following train striking the cars ahead resulting in a fatality. Then there was the Air Force issue of a plane's landing system inability to properly function, as the original programmer failed to appreciate, in the world, there are air fields that are below sea level; but as a more recent issue --- the recent mission where a satellite was to orbit the planet "Mars" at a lower altitude; which was ultimately destroyed; by being built in error where one contractor giving navigational data to another team that were to apply such data into the vehicles computer programs. After loss of the mission, it was found one contractor employed one data standard, while the second organization assumed the data received was in Metric terms and programmed the vehicle accordingly

Closer to home, another facet of the same problem, are instances of total failures. A contract to program an automatic scheme of individual "berth signs" at an end of a

subway route associated with an array of bus routes. A system that never worked in accordance with its original proposal, and today, many of the individual be&h automated signs having been removed and/or relocated, serving now as elaborate "time -date" displays."

A new element in the realm of computer software is an objective to "fix responsibility" and "liability"; via the route of "professional Registration". Attached as an Exhibit 1, is a copy of an item from NSPE's monthly news (Engineering Times), with title "Ontario Begins Licensuring Software Engineers". It might be of interest to realize this is an active issue within the Delaware Board of Registration for Professional Engineers; with a Mr. Robert McClure, PE as Chair of the current committee. The National Society (NSPE) has indicated, to avoid duplication of effort, that they will look to Delaware for further input. Reaching out to foreign sources for microcomputers, including software, results in total loss of any quality control, or fixed responsibility, as envisioned by the Delaware objectives of protection of the "public safety" is concerned.

Integrity:

The issue of integrity is a significant issue, and two facets of the issue come to mind. Firstly, today's mentality seems to be "happy" with "Risk Analysis" techniques; with the concepts of "Mean Time Between Failures" and "Mean Time Between Hazardous Failures" (where there is no accurate data that exists to support such "Risk Analysis") as contrasted generations experience and developments predicated upon "Zero Tolerance of Failure". A second problem of modern day adoption of a myriad of complex systems; is that a Transit Property is faced with the reality of not having a single individual (or group of individuals) who would understand the complete inner-workings of all related systems; to quickly identify "who killed cock robin"; particularly with the explosion of "parts population" related to each link of a system and their responses and/or behavior in a transit environment. (To day we seem to investigate incidents by "committee" - dumb idea when faced with an issue in the middle of the night)

Attached as Exhibit 2, is a copy of a "want add" which demonstrates "Total Intellectual Bankruptcy"; ~~now~~ after some seven years of activity, many advisory committee meetings, and expenditure of many millions of tax-payers dollars, as well as squandering like amounts from the industry. The issue, which the request for engineering assistance, is an attempt by a companion agency (The Federal Railroad Administration) as an attempt to fulfill a political "vision" of "Positive Train Control" The issue of "Intellectual Bankruptcy" relates to those, without a clue, push ahead, in spite of formal "red flags" presented in the formal "Docket Process" related to (Challenges of four

responses to an earlier request for some 43 waivers of rules to enable an experimental attempt to develop a substitute technology that would have the same "fail safe, proven capabilities of existing techniques). (As an example, can one imaging the "pain" one would incur with lack of technical detail and control of same,, in adopting a microcomputer under FTA's existing "Waiver" - - brand "X" - from a foreign source, where response can become twisted just in language translation??).

Tolerances & Tests:

In application of any microcomputer device; there are obviously a myriad of details on specifications of interface details; but not to be overlooked is the environment such a device might be exposed to in its application -- heat -- cold -- vibration -- magnetic fields - control of its "ground plane", voltage characteristics of its power supply, et all. In a foreign procurement, do we recognize what the exposure risks exist in its application?? And how do we adjudicate unanticipated problem areas??

In application of microcomputers, one must also must recognize the need for possible custom made test gear; such as to evaluate the condition of a microcomputer, rather than just do trouble shooting, or analysis of difficulties, by trial and error, by substitution of other units in place (to see if problem is corrected)). If it is a foreign source of components, such maintenance techniques would soon deplete ones supply of spares; and if a foreign source, the current availability of such components? Appropriate test equipment, or means to evaluate microcomputers is essential to avoid otherwise filling a "dump" (The fifty dollar electrical maintenance manual for my 1999 Mercury makes reference to substituting certain components; but the dealer would be delighted to do that because **I will** get to pay for the replacement, even on a trial **and** error **basis**; but one can not operate a transit system very long on such a basis before the costs will skyrocket).

Economics:

The FTA, early on, in their sponsorship of uniform specifications, say for "bus vehicles", justified their efforts on the basis, among other things, to create a uniform market with high demand, thus to drive down the unit costs, as well as to maintain a continuity of production lines over the years (as individual transit lines ordering their replacement bus vehicles on a custom made basis; serves to drive up costs; force availability of vehicles only for large quantity orders, and do nothing to **keep** the manufacturer interested in keeping his product line on a long term basis),

It appears that the FTA, in sponsoring a loosely

structured waiver; to allow anyone to buy anything, anywhere, are "changing course". (No reduction of costs, no incentive for a supplier to keep a product line alive and active, and obviously not furnishing a commitment for long time support).

The very nature of a "blanket waiver" to allocate procurement, is in itself, a disincentive to any program to develop a sense of "standards". As it is, on the basis of placing one's procurement on the basis of "price"; further on leads to creating a "weak supplier", and giving him the incentive to cut and run". (In a foreign environment, there is no sense of loyalty, or on the issue of leverage (other product lines with the same client) to serve as an added incentive to preserve and support a specific product line, even if in the face of perceived losses.

Issues for comment

Addressing those issues which FTA invited comment; that which follows, matches the format of the "Docket's" Section III, on its page 64FR54857:

A. In respect to the microcomputer waiver being out of date? It is obviously out of date; especially with the trend of microcomputers migrating into the use or applications that directly involve human and equipment safety considerations.

B. The question is asked as to what are differences in microcomputers in use today -- For one, units have become smaller, faster, with more functions on a single chip, and an array of expanded capabilities. The question is further asked as what relevance that has to the existing "free for all permanent waiver" of the FTA?

As microcomputers become more complex, have wider applications, to include personal and property risks; by allowing unlimited access to foreign sources, decreases the availability and access to "tech reps" of the manufacturer. If faced with the issue of understanding and being capable of handling a "assortment of software and hardware" one is faced with the problem of continuity of , or status of employee background.

Employee understanding and background are a significant issue (particularly injecting an issue of foreign language or other technical issues), for as the systems become more complex, is it not possible that their inner workings can extend beyond the abilities of those employees involved with a transit level wage rate?? The simplistic cleche' response is that one can "train them" to reach an appropriate skill level; however, at that point, they have accumulated a skill level such as to be able to migrate to higher paying jobs elsewhere. (This has happened)

C. The question is asked, should the FTA blanket waiver, which allows microcomputers to be to specific **catagories** of equipment?? Without question, the answer is "Yes".

The FTA docket speaks of the microcomputer having been extended to such applications as "digital recording" equipment. Such a statement by the FTA, in their docket, indicates a serious lack of awareness of various matters, which have passed through their hands and to which they have been a party to. What of the application of microcomputers involving Public Safety, such as the current fad of projects such as Communications Based Train Control (CBTC), use of microcomputers on vehicles, where involvement relates to the vehicle's control? (Even a "screw up " of a door control and **its** logic , can create a personal injury)

To obtain a waiver, from "Buy America", for a microcomputer in an application related to a risk to personal safety and/or property damage, should require the same level of justification one would have to provide for procurement of any high quality , sole source item.

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

Where application of a microcomputer involves "Public Safety" and/or risk of property damage, as FTA's own policy at present provides for; in the case of a disaster, resulting from performance of a microcomputer (obtained from outside of "Buy America), would seem to provide to an aggressive plaintiff's attorney, to reach beyond the Transit Agency involved, and attempt to "pierce" the shield of FTA's "Federal Supremacy", on the premise that it was the FTA's default to have allowed a particular microcomputer to escape the jurisdiction of our domestic court system.

E. The petition's position, out lined in FTA's current application of the **perminate** microcomputer waiver, is absolutely correct.

There is a big difference in buying a microcomputer, either directly, or as part of a lager "package" (such as a vehicle), on an unrestricted **basis**, with a permanent waiver from "Buy America Policy"; as contrasted with the situation where a microcomputer is purchased from a domestic corporation or manufacturer, (and where that manufacturer obtains components from an overseas source); for whare a domestic supplier is involved, employing components; one still has "leverage", "support" and such corporation remains within our domestic court system (for **adjuication** of a final resolution of an issue).

IV Regulatory Analysis and Notices:

The FTA in its concluding paragraph states ",,,we also do not believe that it would have a significant economic impact on a substantial number of transit systems because of changes in the computer industry.."

On two counts alone, the FTA docket and possible regulatory action, has the potential of creating a serious economic impact on the transit industry. The first issue is "obsolescence", created by both changes of technology, as well as lack of any control over the level of support and continued availability of product line maintenance items (especially related to foreign sources); thus in very short time frames, the user can expect to face the cost (and inconvenience) of "system replacement" primarily on the basis of being unable to maintain existing systems account of non availability of components.

On a second count, FTA's docket demonstrating a lack of awareness of microcomputers drifting into the realm of "Public Safety"; as Murphy's Law has not been repealed; it should not be too long before a new realm of litigation expense will unfold.



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6 November 1999
Rosemont, PA 19010

cc:

Peggy Abshagen, Exec Director
Delaware Association of Professional Engineers
56 West Main Street, Suite 208
Christiana, DE 19702

It would be appreciated, in line with our conversation of 3 November, if you would please pass this material concerning the Federal Transit Administration (FTA), Docket FTA-99-5709, relating to their Notice of Proposed Rule Making; on to Mr. Robert McClure, PE, in conjunction with his activity relative to the realm of Professional License requirements for those responsible for developing computer software involving "Public Safety"

This material is significant in two ways - firstly, even though FTA's docket seems oblivious to the issue, the use of microcomputers (as well as larger units such as "servers") are migrating into use in the transit industry, as mentioned previously, directly involving "Public Safety".

Secondly, it was of interest, in a recent National Society of Professional Engineers (NSPE) issue of their monthly publication "Engineering Times"; that from a "national Standpoint", they will monitor and determine what comes out of Robert McClure's (PE) activity, to determine what the NSPE position will be in regard the issue.

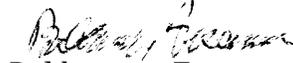
I assume you had the opportunity to see and read the article "Complex new business software calls for planning, testing" Page C 1 of the Philadelphia Inquirer's Business Section, for November 6, 1999. With "finger pointing" and "crocodile tears" it was interesting to read of the difficulties experienced by the Hersey Foods as well as the Whirlpool Corporation; but concerned as to the lack of their having anyone with an "overview" who would recognize their heading for trouble before too deeply involved.

Even though , not involving "Public Safety" - with the investment, size of the corporations, and experience of the "software organization" it seems quite easy to get into trouble - It is to be realized that it would be the same type or cast of characters that might well be the source of what should be a "safety design", each component of a system being infallible when working alone as well as working in concert with other "black boxes"


Belknap Freeman, PE
Delaware Resg. # 3221

Mr. Edward 3. Gill, Jr
Eckert Seamans Cherin & Mellot, LLC
1250 24th Street, NW Suite 200
Washington, DC 20037

Of possible interest you, as it is supportive of your "petition", the added areas intended to strengthen your position..


Belknap Freeman, PE
Wash DC, Regis # 6210

Attachments:

1. "Ontario Begins Licensing Software Engineers"
2. Solicitation for Talent (Intellectual Bankruptcy)
3. 64FR54855 to 54857, 8 Oct.'99, Docket No FTA-99-5709

Engineering Times - Vol 21, Number 10, November 1999, Page 2
of
National Society of Professional Engineers (NSPE)

Ontario Begins Licensing Software Engineers

Canada's largest provincial association for professional engineers announced in September that it will begin licensing software engineers.

The Professional Engineers of Ontario has said the move is an important first step in the professional regulation of the software industry. "If the Y2K problem has taught us anything, it is the potential for faulty software to cause mishap or serious calamity, highlighting the need for regulation and professional accountability in a field that is largely unregulated," says PEO president Patrick Quinn.

Ontario joins British Columbia as the only provinces to license software engineers.

In today's market, software practitioners come from varied backgrounds, says Quinn. Some may have degrees in engineering or computer science, while others have limited formal training. According to PEO, the new criteria for licensing will provide a basis for consistently assessing qualifications.

To become licensed in software engineering in Ontario will require graduation from an accredited program, four years of experience, and successful completion of an exam on engineering law and ethics. Practitioners will also need to have knowledge in control theory, mathematical foundations, digital

systems, computer architecture, software design, and programming fundamentals, as well as three of the following: communications, optimization, data management, real-time and control systems, performance analysis, parallel/distributed systems, and human interfaces and ergonomics.

PEO is identifying aspects of software design for which professional engineers should take responsibility and encouraging universities to develop accredited software engineering programs. Currently, McMaster University in Hamilton and the University of Ottawa have such programs.



27 October 1999

To: Prospective Bidders

The North American Joint Positive Train Control (NAJPTC) Program announces its intent to distribute a Request For Information (RFI) relating to the NAJPTC's IDOT PTC Project in the next several weeks. The subject of the RFI is the design, development, test, and demonstration of a PTC system that is compliant with industry train control standards. The intent of the RFI is to solicit comments regarding the procurement options, design strategy, technical requirements, scope, and budget of IDOT PTC Project.

A copy of the RFI, which includes the IDOT Concept of Operations Document and other program-related information, can be obtained from the PTC program web site at:

<http://aarweb.arinc.net/ptc>

Interested parties are required to register and receive a password to access the RFI document on-line. Further inquiries in regard to obtaining a copy of the RFI may be directed by e-mail to ind_ptc@arinc.com.

Input from your organization would be greatly appreciated. Section 3 of the RFI contains procedural information for responses, including a schedule for optional meetings with the NAJPTC program team. Section 9 contains questions that can help guide your response, although all questions need not be answered, nor will responses be evaluated. Responding to the RFI is not a requirement for consideration in the procurement process.

Prospective bidders and other interested parties are requested to provide written responses by **December 3, 1999**. Also, an open meeting will be held on Nov. 10, from 1:00 to 6:00 pm at the Omni Hotel in Jacksonville, FL to field questions and comments on the RFI.

The NAJPTC program looks forward to your continuing participation in this important effort.

R.E. Gallamore
General Manager – NAJPTC Program

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 C 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), 76.302(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 interpretive 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.
[FR Doc. 99-26120 Filed 10-7-99; 8:45 am]
BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 661

[Docket No. FTA-99-5709]

RIN 2132-AA68

Buy America Requirements; Permanent Waiver for Microcomputer

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 that 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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