

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
1998 Biennial Regulatory Review --) CS Docket No. 98-61
)
"Annual Report of Cable Television)
Systems," Form 325, filed pursuant to)
Section 76.403 of the Commission's Rules)

ORDER ON RECONSIDERATION

Adopted: May 11, 2000

Released: June 9, 2000

By the Commission:

I. INTRODUCTION

1. In *1998 Biennial Regulatory Review -- "Annual Report of Cable Television Systems," Form 325, filed pursuant to Section 76.403 of the Commission's Rules*, Report and Order ("*Form 325 Order*"), the Commission revised and streamlined the Form 325, "Annual Report of Cable Television Systems,"¹ which is provided for in Section 76.403 of the Commission's rules.² A petition for reconsideration of the *Form 325 Order* was filed by Ameritech New Media ("Ameritech"). For the reasons discussed below, Ameritech's petition is granted, in part, and denied, in part, to the extent indicated herein.

II. BACKGROUND

2. Form 325 serves as the Commission's basic annual reporting requirement for the cable television industry. In the *Form 325 Order*, the Commission assessed the continued relevance of the form for the purposes of its policymaking and enforcement activities. The Commission concluded that it would not eliminate the information collection process altogether, but instead determined to significantly streamline and revise the existing form in ways that would reduce the administrative burden placed upon both the cable industry and the Commission, and yet still continue to permit the Commission to meet its responsibilities in regulating the cable television industry. In that regard, the Commission drastically reduced the universe of cable systems required to file the Form 325. As opposed to having all cable systems in the country file the Form 325, the *Form 325 Order* requires that only systems with 20,000 or more subscribers file the form and devised a sampling methodology to gather information from cable systems with fewer than 20,000 subscribers.³ The filing requirement was thus completely eliminated for

¹FCC Form 325, Annual Report of Cable Television Systems (approved by OMB 3060-0061).

²47 C.F.R. § 76.403; *1998 Biennial Regulatory Review -- "Annual Report of Cable Television Systems," Form 325, filed pursuant to Section 76.403 of the Commission's Rules*, Report and Order, 14 FCC Rcd 4720 (1999) ("*Form 325 Order*").

³In the past, all of the approximately 11,000 cable systems in the country were required to file Form 325. The *Form 325 Order* now requires the approximately 700 systems with 20,000 or more subscribers, covering 70 percent of cable subscribers, to file the form. In addition, of the approximately 10,000 cable systems serving fewer than 20,000 subscribers, the Commission will seek to solicit information from these smaller systems by mailing the Form 325 to a sampling of 5 percent of those systems.

almost 90 percent of cable operators. The *Form 325 Order* also replaced the old four-part Form 325 with a streamlined two-part form. The *Form 325 Order* further reduced the burden on those cable systems required to file the form by modifying it so that information now will be collected on a system-wide basis rather than on a community-by-community basis which was the method utilized on the old form. This change alone substantially reduces the burden on those cable operators that serve ten or more communities on one system.

III. DISCUSSION

3. Ameritech seeks reconsideration of the *Form 325 Order* on the grounds that: (1) the revised form expands the reporting obligations of cable operators in violation of the Administrative Procedure Act ("APA") because the Commission failed to give notice in the *Notice of Proposed Rule Making ("NPRM")*⁴ of the possibility of different reporting requirements; (2) the rationales offered to support expansion of the form do not justify the Commission's action; and (3) the form requires the disclosure of confidential business information. Based on its arguments, Ameritech contends that the Commission must rescind the new reporting requirements in Form 325 pending a notice and comment rulemaking proceeding to consider the need and statutory basis for such requirements, as well as to consider whether, to the extent such need has been established, cable operators should be permitted to submit such information only on a confidential basis.⁵

4. After examining the purpose and history of the Form 325, the Commission concluded in its *NPRM* that it was prepared "to either: (1) abolish this data collection process entirely, or (2) reform the process so that the data that is deemed important may be collected in a more efficient, less resource intensive manner."⁶ In its *NPRM*, the Commission stated that "it is vital that the Commission have accurate and timely information regarding the cable television industry, both to assist in the enforcement of existing requirements and for broader rulemaking and policy purposes."⁷ More specifically, the *NPRM* sought comment "on any changes that should be made to clarify and improve the usefulness of the data collected" and noted, as examples, some areas of interest such as channel capacity and use data, must carry, leased access, and channel occupancy.⁸ After analyzing the comments received in response to the *NPRM*, the Commission decided to retain and modify Form 325.⁹ In revising the form, the Commission sought to strike a balance by reducing the burdens placed upon the industry and on Commission resources in the Form 325 information collection process while still retaining access to core information that the Commission deemed necessary in order to perform its regulatory functions.¹⁰

⁴1998 Biennial Regulatory Review -- "Annual Report of Cable Television Systems," Form 325, filed pursuant to Section 76.403 of the Commission's Rules, Notice of Proposed Rule Making, 13 FCC Rcd 12266 (1998) ("*NPRM*").

⁵Ameritech Petition at 2, 11.

⁶*NPRM* at 12268.

⁷*Id.*

⁸*Id.*

⁹In response to the *NPRM*, the Commission received 4 comments and 3 reply comments. The Institute for Public Representation, et al. and the National Association of Broadcasters supported the retention of the Form 325. Ameritech New Media, Inc., the National Cable Television Association and Adelphia Communications Corporation, et al. advocated the elimination of the Form 325.

¹⁰*Form 325 Order* at 4725.

5. Commenters responding to the *NPRM* discussed a number of issues such as cable system capacity and channel usage, digital television broadcast signal carriage, horizontal integration, must carry, and leased access.¹¹ With this information, the Commission sought to craft a new streamlined form, consistent with its *NPRM* proposal, that collected data deemed to be important in a more efficient, less resource intensive manner. The Commission eliminated information that it found to be no longer useful and substituted questions seeking more relevant and useful information that would prove helpful to better understand the cable industry in these transitional times. In that regard, the new Form 325 poses some general questions seeking information regarding digital services that will enable the Commission to better assess the technical capabilities of cable systems and the future of the cable industry. Similar to the old form, the new form also contains a section seeking frequency and signal distribution information pertaining to areas such as transmitted spectrum and channel capacity. We note that while some of the questions in this section now may ask about the digital capabilities of cable systems, the form has always sought information regarding such areas as upstream and downstream channel spectrum.

6. While not contesting the dramatic reduction in filing requirements for the cable industry as a whole, Ameritech argues that the Commission's *Form 325 Order* impermissibly expands the reporting obligations of cable operators still required to file the form.¹² Ameritech argues that the addition of these reporting requirements is inconsistent with the APA because they were not addressed in the *NPRM* that led to the *Form 325 Order*.¹³ Ameritech argues that the reporting requirements on Form 325 violate Section 553(b) of the APA, which requires the Commission to give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved."¹⁴ Ameritech contends that the Commission did not give interested parties any indication that it was considering expanding the Form 325 reporting requirements and, as a result, none of the parties to the proceeding commented on whether there is any need for the additional data, whether the data are available from another source, whether the data are confidential, or whether the Commission's potential need for the information justified the burden imposed on cable operators in having to collect and submit the information.¹⁵ Ameritech further argues that the additional reporting requirements adopted in the *Form 325 Order* do not satisfy the notice requirement in Section 553(b) of the APA as a logical outgrowth of the proposals in the *NPRM*.¹⁶ In that regard,

¹¹*Id.* at 4722-4725.

¹²Ameritech Petition at 1, 3. Specifically, Ameritech states that the Form 325 imposes 12 new reporting requirements which include: the number of subscribers who have set-top boxes and the number of set-top boxes in inventory and deployed (analog, digital and hybrid); information concerning upstream channel usage (*i.e.*, two-way capability and services); the number of telephony subscribers; the number of cable modem subscribers; the number of leased cable modems deployed; the number of optical fiber nodes in the system; the type of digital modulation method utilized; whether programming is transmitted over the system in analog, digital or HDTV formats; and the tier in which specific programming is carried. *Id.* at 3, n.6 citing *Form 325 Order* at Appendix A.

¹³*Id.* at 3, citing *NPRM*, 13 FCC Rcd 12266 (1998).

¹⁴*Id.* at 5, citing 5 U.S.C. § 553(b). Ameritech notes that the D.C. Circuit Court of Appeals has explained that this provision "requires the Commission to provide notice of the proposed rulemaking 'adequate to afford interested parties a reasonable opportunity to participate in the rulemaking.'" *Id.* at 5, citing *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995) (quoting *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)).

¹⁵*Id.* at 5.

¹⁶*Id.* at 6; 5 U.S.C. § 553(b).

Ameritech asserts that no one reasonably could have foreseen that the Commission might expand Form 325, or do so in the manner that it did.¹⁷

7. We do not agree with Ameritech that the reporting requirements adopted in the *Form 325 Order* violate the notice requirement of Section 553(b) of the APA.¹⁸ We believe that adequate notice was provided in this matter so that interested parties were afforded a reasonable opportunity to participate in the Form 325 rulemaking process. The Commission notified interested parties that it would either do away completely with the Form 325, or reform the process so that it could collect important information in a more efficient manner. We believe, therefore, that the *NPRM* gave notice of the terms or substance of the proposed rulemaking as required by Section 553(b).¹⁹ As noted above, the Commission considered the comments of interested parties regarding what they deemed to be relevant areas of regulatory concern, as well as arguments against any reporting requirements whatsoever, and then determined to reformat and revise the Form 325. We believe that the reporting requirements that Ameritech asserts to be new requirements adopted in the *Form 325 Order* constitute a logical outgrowth of the proposals in the *NPRM*. For a rule to constitute a logical outgrowth of an agency proposal, the rule must be sufficiently related to the notice given that interested parties "should have anticipated that such a requirement might be imposed."²⁰ In order to meet this standard, it has been held that the agency's notice and the public's comments must pass the "reasonable specificity" test.²¹ This standard can be stated as whether a reasonable person would be put on notice of the final rule.²²

8. In this situation, the final rule involved is not a new rule, but one that has been revised so that the form involved has been modified, as well as streamlined, from a four-part form to a two-part form, applicable to a drastically reduced universe of cable systems required to make the filing. Interested parties were advised by the *NPRM* that the Commission was considering, as one option, changing its information collection process in this matter. The Commission specifically stated in the *NPRM* that it intended to either abolish the Form 325, or "reform the process so that the data that is deemed important may be collected in a more efficient, less resource intensive manner."²³ The *NPRM* did not state that if a new streamlined form was ultimately adopted, the information collected would be the same as that collected on the old form. Those parties who submitted comments in this proceeding discussed a variety of cable issues in relation to arguments both for and against retention or elimination of the form. As the *NPRM* stated, it is

¹⁷*Id.* Ameritech argues that for a rule to constitute a logical outgrowth of an agency proposal, the rule must be sufficiently related to the proposal that a party, "ex ante, should have anticipated that such a requirement might be imposed." *Id.*, citing *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 446 (D.C. Cir. 1991 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

¹⁸5 U.S.C. § 553(b).

¹⁹*Id.*

²⁰*Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); see also *Shell Oil Co. v. EPA*, 950 F.2d 741, 759 (D.C. Cir. 1991).

²¹*Smaller Refiner Lead Phase-Down v. EPA*, 705 F.2d at 549; see also Phillip M. Kannan, Admin. L. Rev. 213 (1996).

²²*LaMadrid v. Hegstrom*, 830 F.2d 1524, 1530-31 (9th Cir. 1987); see also Phillip M. Kannan, 48 Admin. L. Rev. 213 (1996).

²³*NPRM* at 12268.

vital for the Commission to have accurate and timely information on the cable industry, both to enforce current rules and for broader rulemaking and policy purposes, and, in light of those purposes, we generally sought comment on any changes that should be made to Form 325 to improve the usefulness of the data collected.²⁴ Consequently, we believe that questions on Form 325 inquiring about cable digital age technology, including information such as cable modem and telephony services, are sufficiently related to this proceeding so that a reasonable person would be put on notice of the changes adopted in the final rule.

9. Ameritech further argues that the rationales offered to support what it alleges to be the expansion of the Form 325 do not justify the Commission's action. Ameritech contends that the Commission's claimed need for the Form 325 information is undermined because it has not been collected since 1994.²⁵ In addition, Ameritech argues that the information collected by the form is not relied upon for making policy decisions because the Commission always asks interested parties in rulemaking proceedings to submit specific, relevant information.²⁶

10. Ameritech also contends that the particular justifications offered for specific data collection requirements in the *Form 325 Order* are not valid. For instance, Ameritech disputes the Commission's assertion that the new Form 325 will provide a mechanism that will enable the Commission to oversee and audit compliance with its regulatory fee requirements. In that regard, Ameritech contends that the Commission has successfully collected regulatory fees over the past five years without Form 325 data.²⁷ Ameritech also argues that it is not necessary for the Commission to have Form 325 data in order to monitor and enforce compliance with the must carry and leased access rules.²⁸ Ameritech asserts that the Commission has access to such information through its well-defined complaint procedures or through the process of examining its own records.²⁹ Ameritech argues that there is no merit to the Commission's finding that information concerning the provision of digital services is necessary to enable the Commission to analyze cable operators' technical capabilities and the systems' technical potential to offer sophisticated services.³⁰ Ameritech questions why the Commission needs such information in light of its avowed intent not to regulate advanced services provided via cable.³¹

11. We disagree with Ameritech that we have not justified the retention of Form 325 because it has not been sent out to cable system operators in several years. As we stated in the *Form 325 Order*, due to the demands of rate regulation and the implementation of the Telecommunications Act of 1996, Commission resources were deployed to focus on those areas and it proved difficult to complete the data

²⁴ *Id.*

²⁵ Ameritech Petition at 7.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 8.

²⁹ *Id.*

³⁰ *Id.* at 9.

³¹ *Id.*, citing remarks of William E. Kennard, Chairman, Federal Communications Commission, Before the National Cable Television Association, Chicago, Illinois, June 15, 1999 ("So with competition and deregulation as our touchstones, the FCC has taken a hands-off deregulatory approach to the broadband market.")

input process utilized at that time for the Form 325.³² Although our own resource constraints have deprived us of the benefit of the information provided on the form, thus prompting us to temporarily suspend the filing requirement, the Commission has not lost sight of the value of that information, especially during this transitional time within the industry. For these reasons, the Commission reinstated the Form 325 filing requirement in a streamlined form that lessens the regulatory burden on a reduced number of cable operators and in a form that can be readily processed by Commission staff. While specific, relevant information can always be solicited from interested parties during rulemaking proceedings, the Commission has found it useful in the past, and anticipates that it will be useful in the future, to have an in-house database to supplement its rulemaking proceedings and to assist in various other aspects of carrying out its regulatory functions.³³

12. We also believe that the Form 325 collection process will prove to be a valuable resource to help monitor the implementation of the rules promulgated as a result of our rulemaking proceedings. Ameritech argues that the Commission's complaint procedures and specific requests for information from cable operators' public files are enough to enforce and monitor such rules as must carry and leased access. As we stated in the *Form 325 Order*, we believe that the Commission will benefit from the information provided in the form not only to assess industry compliance with our rules, but to monitor trends within the cable industry.³⁴ Similarly, while Ameritech disputes our desire to gather information about cable digital services in light of the Commission's stated intent not to regulate advanced services provided via cable, we believe that having such a consolidated source of information regarding the development of the future of the cable industry will assist us in monitoring and keeping abreast of the progress made in areas such as the deployment of broadband capabilities.³⁵

13. Finally, Ameritech argues that even if the Commission were to require cable operators to submit the new Form 325 data, it should permit operators to submit that data on a confidential basis.³⁶ According to Ameritech, much of the new data required by Form 325 is sensitive and highly confidential

³²*Form 325 Order* at 4722. In the past, in order to help reduce the filing burden on cable operators, preprinted forms reflecting the previous year's collected information were sent to cable operators so that they were only required to correct information that had changed since the last filing. This process proved to be labor intensive for the Commission because the returned forms, many of which were deficient in some manner, had to be reviewed on an individual basis for accuracy by the staff before being entered into the database.

³³Ameritech disputes the Commission's assertion that the Form 325 will provide a mechanism to aid in overseeing and auditing compliance with the Commission's regulatory fee requirements arguing that the Commission has been successful in collecting regulatory fees and noting that many cable operators will not even be required to file the form. While many cable operators will not be required to file the Form 325, we believe that those who do file the form will assist the Commission in verifying that the cable industry is paying appropriate regulatory fees because subscribership numbers will be reported on the form and these numbers are directly related to the fees paid by cable operators.

³⁴*Form 325 Order* at 4729.

³⁵*See In the Matter of: Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd 2398, 2449 (1999). ("We will, however, continue to monitor broadband deployment closely to see whether there are developments that could affect our goal of encouraging deployment of broadband capabilities pursuant to the requirements of section 706.")

³⁶Ameritech Petition at 10.

business information.³⁷ In that regard, Ameritech contends that by requiring an operator to disclose the number of set-top boxes (analog, digital, or hybrid) it has deployed would allow competitors to know how successfully an operator has marketed set-top box technology and attendant services.³⁸ Similarly, Ameritech asserts that requiring operators to disclose information concerning the number of their cable modem subscribers would give competitors valuable information concerning the success or failure of various cable modem deployment strategies.³⁹ In addition, Ameritech argues that forcing an operator to disclose information concerning the deployment of two-way services and other advanced technologies would give competitors significant information concerning the operators' upgrade of its cable plant and rollout of advanced services which then would allow competitors to copy successful business strategies with little risk of failure.⁴⁰

14. While Ameritech makes general assertions about the confidentiality of such information, it provides no specific or detailed support for its claims.⁴¹ Nonetheless, we are aware that there may be instances where parties submitting information to the Commission believe that the information contains commercial, financial or technical data that should be guarded from competitors. Therefore, those cable operators required to file the Form 325 may designate as proprietary such information on the Form 325 that the operator believes, in good faith, to be information that falls within an exception to disclosure contained in the Freedom of Information Act ("FOIA").⁴² Those operators making requests that information contained in their Form 325 submissions be withheld from public inspection shall follow the procedures outlined in Section 0.459 of the Commission's rules.⁴³

IV. ORDERING CLAUSE

15. **IT IS ORDERED** that the Petition for Reconsideration filed by Ameritech New Media is **GRANTED, IN PART, AND DENIED, IN PART, TO THE EXTENT INDICATED.**

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ We note also that the record in this proceeding is lacking as no other filings have been made except for the instant petition filed by Ameritech.

⁴² 5 U.S.C. § 552(b).

⁴³ 47 C.F.R. § 0.459.