

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

In the Matter of )  
)  
Amendment to the Commission's Rules ) MB Docket No. 15-53  
Concerning Effective Competition )  
)  
Implementation of Section 111 of the STELA )  
Reauthorization Act )

COMMENTS



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## SUMMARY

In Section 111 of the STELA Reauthorization Act, Congress set a deadline for the Commission to adopt rules streamlining the effective competition petition process for small cable operators. The Commission has proposed to implement Congress' directive by reversing the existing rebuttable presumption that cable systems do not face effective competition with a new presumption that requires franchising authorities to demonstrate that effective competition does not exist as a prerequisite to regulating rates or enforcing other rules that apply on to cable systems that are not subject to effective competition.

ACA, as the principal representative of the nation's small and medium-sized cable operators, strongly supports the Commission's long overdue, common-sense proposal for streamlining the effective competition process. ACA also agrees that applying this revised rebuttable presumption across-the-board rather than limiting it to small cable operators represents an appropriate exercise of the Commission's broad authority to update its rules to reflect the reality of the current highly competitive video marketplace. And ACA urges the Commission to take an additional step to update its rules (at least with respect to small cable operators) by establishing a rebuttable presumption that effective competition is present in any franchise area in which a LEC MVPD is offering video programming service.

The Commission's authority to change its rules governing the determination of whether or not effective competition exists in a particular community is clear. Indeed, the history of the Commission's implementation of the effective competition standard reveals that the rebuttable presumption that effective competition does not exist in any franchise area was just one of several options the Commission considered in 1993. Moreover, its use was not mandated by the statute, but rather reflected the Commission's assessment of what represented the most efficient

approach to “finding” effective competition given available evidence showing a lack of competition in the marketplace at that time.

The video marketplace of 1993 has changed radically over the past 22 years. Indeed, as early as 2002, the Commission was soliciting comment on ways it might update its rules implementing rate regulation, including the rules governing effective competition petitions. Whereas in 1993, the subscribers to ninety-five percent of the nation’s cable systems had no other choice for MVPD service, today virtually every part of the country is served by two unaffiliated national DBS services that by themselves have over 30 million subscribers nationwide, representing 26 percent of all households – nearly double the 15 percent penetration threshold required to find competing provider effective competition. Moreover, wireline overbuilders, including LEC video providers, serve millions more. It is hardly surprising that the Commission has granted in their entirety over 200 petitions by cable operators requesting findings of effective competition in their communities.

While the focus of the NPRM is on the proposal to adopt a generally applicable rebuttable presumption that all cable systems face competition from one or more competing providers, the Commission also should adopt a rebuttable presumption that LEC effective competition exists in any franchise area where a LEC is offering video service. There is no minimum penetration requirement for finding LEC effective competition, but there are a series of required factual showings regarding the LEC’s build-out plans, technical capabilities, and marketing activities. For smaller cable operators, obtaining this competitively sensitive information can be a daunting task. Given that it has been at least two years since the Commission denied a LEC-test based effective competition petition, and the fact that LECs typically are subject to state and local governmental oversight, it would be irrational not to shift

the burden to the local franchising authority to establish that the operation of a LEC video provider in their community does not provide effective competition to the incumbent cable operator.

The NPRM asks for comment on how to implement a new rebuttable presumption that all cable systems are subject to effective competition and what other streamlining actions could be taken if the Commission does not adopt that rebuttable presumption or limits its application. With respect to implementation, the Commission should adopt a simple, straightforward set of rules that eschew unnecessary and confusing distinctions between petitions for effective competition, petitions for certification, petitions for reconsideration, petitions for recertification etc. Instead, the Commission should give cable operators the benefit of the new effective competition presumption (i.e., no more rate regulation) as soon as it is adopted, with two exceptions.

First, it is appropriate for the Commission to decide petitions for effective competition that are pending at the time the new presumption is adopted on the basis of the evidence supporting and opposing the petition rather than the new presumption. If the petition is granted, the cable operator will be able to seek decertification in the future, but will bear the burden of overcoming the old presumption. But if the Commission denies a pending effective competition petition, the system will be deregulated and the franchising authority will have to rebut the presumption of effective competition if it seeks to reassert rate regulation authority in the future.

Second, in deference to their reliance on the old presumption, “active franchising authorities” – those that have adopted a rate order in the twelve months preceding the NPRM’s release – should be allowed to continue to engage in rate regulation for 90 days after the new rebuttable presumption of effective competition is adopted. If after 90 days the franchising

authority has not filed a Form 328, the system will thereafter be deregulated and only subject to regulation if the franchising authority files a Form 328 containing information rebutting the presumption of effective competition. If the franchising authority files a Form 328 within the 90-day grace period, rate regulation will continue until the Commission decides whether or not the cable operator is subject to effective competition based on evidence that the franchising authority submits with its Form 328. If the Commission finds that the franchising authority has demonstrated an absence of effective competition, the cable operator may thereafter file a petition for decertification, but will not have the benefit of the presumption of effective competition.

Finally, even if the Commission declines to adopt a generally applicable presumption of competing provider effective competition and a presumption that LEC effective competition exists in franchise areas where a LEC is providing MVPD service, the Commission still should apply those presumptions to small operators in fulfillment of Section 111. The Commission also should adopt certain other measures that could be applied to all operators (but that in any event should apply to small cable operators) in order to streamline the effective competition process where the presumption in favor of effective competition has been reversed. Examples of such measures include automatically granting decertification petitions if they are not denied within 180 days, allowing the use of overlapping five digit zip code data instead of zip plus four data, and eliminating filing fees for decertification petitions.

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**COMMENTS OF AMERICAN CABLE ASSOCIATION**

The American Cable Association (“ACA”), by its attorneys, submits its comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.<sup>1</sup> In the NPRM, the Commission proposes to adopt a generally applicable rebuttable presumption that cable operators nationwide are subject to effective competition under the “competing provider” test. As detailed below, ACA strongly supports the adoption of this long overdue common-sense proposal as well as certain other modifications to the Commission’s current effective competition rules. The adoption of these revisions to the process by which the Commission determines whether cable systems are subject to effective competition will fulfill the Commission’s ongoing duty to ensure that its rules reflect current marketplace conditions and will implement Congress’ express mandate in Section 111 of the STELA Reauthorization Act (“Section 111”) that the Commission streamline the effective competition petition process for small cable operators.

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<sup>1</sup>*Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Notice of Proposed Rulemaking, MB Docket No. 15-53, FCC No. 15-30 (rel. Mar. 16, 2015) (“NPRM”).

## INTRODUCTION AND BACKGROUND

Section 623 of the 1992 Cable Act establishes a rate regulatory regime that distinguishes between cable systems based on whether or not they are subject to effective competition as defined in the Act.<sup>2</sup> In particular, Section 623(a)(2) provides that a cable operator's basic service tier, equipment and installation rates can be regulated only "if the Commission finds that a cable system is not subject to effective competition."<sup>3</sup> Other rules that apply only where an operator is not subject to effective competition include the geographic price uniformity requirement and the cable programming service tier buy-through prohibition.<sup>4</sup>

In its rulemaking implementing Section 623, the Commission initially proposed that franchising authorities seeking certification of their authority to regulate basic cable rates be required to submit to the Commission fact-based showings establishing that effective competition was not present in their franchise areas.<sup>5</sup> The Commission explained that placing the burden on franchising authorities to provide evidence of the lack of effective competition as a threshold matter of jurisdiction was reasonable because the Act "makes the absence of effective competition a prerequisite to regulators' legal authority over basic rates."<sup>6</sup>

Ultimately, however, the Commission changed direction and decided to allow franchising authorities to rely on the procedural mechanism of a rebuttable presumption to shift to cable operators the burden of producing evidence demonstrating the presence of effective

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<sup>2</sup> 47 U.S.C. § 543.

<sup>3</sup> 47 U.S.C. § 543(a)(2).

<sup>4</sup> 47 U.S.C. § 543(d)(1) (geographic uniformity); 47 U.S.C. § 543(b)(8) (buy-through). See also *Time Warner v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

<sup>5</sup> *Implementation of Sections of the Cable Television Consumer Protection Act of 1992; Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd 510, ¶¶ 17-21 (1992).

<sup>6</sup> *Id.* at ¶ 17.

competition.<sup>7</sup> In making this decision, the Commission cited, *inter alia*, the legislative history of the 1992 Act, which indicated that cable's competitors then served, in the aggregate, fewer than 5 percent of American households.<sup>8</sup> The Commission concluded that, under the circumstances, using a rebuttable presumption to shift to the cable operator the burden of producing evidence of effective competition would be administratively efficient and prevent delays in the initial implementation of the 1992 Act's rate regulation regime.<sup>9</sup>

The Commission's adoption of a rebuttable presumption against a finding of effective competition facilitated an initial wave of local regulation of cable rates. However, less than a decade later, the video marketplace was in the midst of a radical transformation. The 1996 Telecommunications Act had granted local exchange carriers ("LECs") the right to provide video service and a new "LEC" test of effective competition had been added to Section 623.<sup>10</sup> The 1996 Act also had deregulated cable programming service tier rates for all systems without the necessity of an effective competition determination.<sup>11</sup> And in 1999, Congress had authorized the DBS industry to provide local-into-local broadcast service, thereby eliminating what many had viewed as an impediment to the development of DBS as a competitive alternative to cable.<sup>12</sup>

In light of these developments, the Commission in 2002 initiated a rulemaking proceeding seeking comment on potential improvements to its rules implementing the 1992

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<sup>7</sup> *Implementation of Sections of the Cable Television Consumer Protection Act of 1992; Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, ¶ 42 (1993).

<sup>8</sup> *Id.* at ¶ 43.

<sup>9</sup> *Id.* at ¶¶ 41-42.

<sup>10</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 115 §§ 301, 302 (1996).

<sup>11</sup> *Id.* at § 301(b)(1). Deregulation of the cable programming service tier took effect on April 1, 1999. 47 U.S.C. § 543(c)(4).

<sup>12</sup> Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113-app 1, 113 Stat. 1501, § 1002 (1999).

Act's rate regulation provisions.<sup>13</sup> One of the areas with respect to which the Commission specifically sought comment was the process by which it made effective competition determinations.<sup>14</sup> Citing the *Eighth Annual Video Competition Report's* finding that DBS penetration exceeded 20 percent in 30 states and 30 percent in five states, the Commission asked for suggestions as to how it might expedite the process of determining the presence of effective competition (or the absence thereof).<sup>15</sup> In response, the cable industry urged the Commission to adopt a rebuttable presumption that cable systems are not subject to effective competition in any state where DBS penetration exceeds 15 percent, thereby shifting to the franchising authorities in such states the burden of producing evidence that effective competition is not present in their franchise areas.<sup>16</sup>

That proposal, and others like it, has languished at the Commission for over a decade. However, within the past year, there have been expressions of interest in reviving the dormant 2002 rulemaking proceeding in order to account for the continued evolution of the video marketplace.<sup>17</sup> And when Congress enacted Section 111 of the STELA Reauthorization Act requiring that the Commission streamline the effective competition petition process for small systems, the stage was set for adoption of the instant NPRM seeking comment on a new rebuttable presumption approach that would relieve cable systems of all sizes of the burden of producing community-by-community showings demonstrating the presence of effective competition.

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<sup>13</sup> *Revisions to Cable Television Rate Regulations, et al.*, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 (2002).

<sup>14</sup> *Id.* at ¶¶ 52-53.

<sup>15</sup> *Id.* at ¶ 53.

<sup>16</sup> *See e.g.*, Comments of National Cable & Telecommunications Association ("NCTA"), MB Docket No. 02-144 at 29 (filed Nov. 4, 2002).

<sup>17</sup> *See, e.g.*, *Ex Parte* Letter from Diane B. Burstein, NCTA, to Marlene H. Dortch, MB Docket No. 02-144 (filed June 16, 2014).

## DISCUSSION

As the nation's principal representative of small and medium-sized cable operators, ACA has a particular interest in the Commission's implementation of Section 111 of the STELA Reauthorization Act. The vast majority of ACA's approximately 850 member companies meet the definition of a small cable operator for purposes of Section 111.<sup>18</sup> Indeed, most of ACA's members fall far below the small cable operator threshold: the median size of an ACA company is around 1000 subscribers and the average member size is around 8,500 subscribers. In terms of service area location, these companies also tend to be disproportionately rural in nature. The combination of small size and rural location not only makes these companies particularly vulnerable targets for DBS competition but also leaves them lacking the resources to seek the regulatory relief that Congress intended them to receive.

Of course, ACA's members also include some companies are not small cable operators as defined in Section 111. Consequently, ACA strongly supports the Commission's long overdue proposal to streamline the effective competition process for all cable systems by replacing the existing rebuttable presumption against a finding of effective competition with a rebuttable presumption that effective competition exists everywhere under the "competing provider" test. Nothing in Section 111 or elsewhere in the Communications Act prevents the Commission from adopting such a global revision to the effective competition process.

Nor is there anything in Section 111 or elsewhere in the Communications Act that prevents the Commission from considering and adopting additional measures to update and streamline the effective competition process. In particular, ACA urges the Commission to adopt a rebuttable presumption that effective competition exists under the "LEC" test in any franchise

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<sup>18</sup> 47 U.S.C. § 543(m)(2) ("small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.").

area where a LEC is providing video service. Further, as described herein, ACA recommends that the Commission make certain changes in its rules to simplify and clarify the implementation of these new rebuttable presumptions. Finally, if the Commission declines to adopt these rebuttable presumptions and other rule changes for all cable systems, ACA recommends the Commission at least take these actions and others for small cable operators as defined in Section 111.

**I. The Commission Can and Should Update Its Rules By Replacing the Existing Generally Applicable Rebuttable Presumption Against a Finding of Effective Competition With a Generally Applicable Rebuttable Presumption Supporting a Finding of Effective Competition.**

**A. The Commission Has the Requisite Authority to Adopt a Rebuttable Presumption That Effective Competition is Present Nationwide.**

It is clear from the history of the Commission’s implementation of Section 623, and in particular, from its implementation of the requirement that the Commission “find[]” that a cable system is not subject to effective competition as a prerequisite to the application of certain elements of the 1992 Cable Act’s rate regulation regime, that the Commission has broad discretion in establishing the process by which such determinations are made. As described above, the Commission initially considered imposing on local franchising authorities the requirement that they support their rate regulation certification requests with facts showing that the system they sought to regulate was not subject to effective competition.

The Commission’s subsequent decision to abandon that proposal and instead rely on a rebuttable presumption approach was not mandated by Section 623. Rather, it was a choice made by the Commission based on its evaluation of the marketplace at that time and its concern that the original proposal to require franchising authorities to make a fact-based finding regarding the presence or absence of effective competition would delay subjecting cable systems

to the new rate regulation regime. Moreover, the Commission's solicitation of proposals for reforming the effective competition process in 2002 – including proposals to reform the rebuttable presumption approach adopted in 1993 – further confirms that nothing in the Communications Act compelled the Commission to adopt a rebuttable presumption against effective competition in the first place or prevents the Commission from now exercising its broad authority over the effective competition process in order to ensure that it reflects the current competitive and regulatory environment.

The most recent regulatory development – the enactment of Section 111 of the STELA Reauthorization Act – neither expands nor restricts the scope of the Commission's authority to administer the effective competition process. Section 111 merely imposes on the Commission a deadline by which it is required to exercise its existing authority to adopt rules streamlining the effective competition process with respect to small cable operators.<sup>19</sup> Implicit in Section 111 is Congress' intent that small operators be relieved of the expenditure of time and resources they currently bear under the existing, but outdated, effective competition process.

The only limitation that Congress has imposed on the Commission in implementing Section 111 is the instruction that “[n]othing in this subsection shall be construed to have any effect on the duty of a small cable operator to prove the existence of effective competition under this section.”<sup>20</sup> While this provision prevents the Commission from adopting an irrebuttable presumption that all small cable operators are subject to effective competition, it does not prevent the Commission from altering the existing rebuttable presumption, which is a procedural device that shifts the burden of production with respect to effective competition determinations, not the burden of proof.

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<sup>19</sup> *Id.* at § 543(o)(1).

<sup>20</sup> *Id.* at § 543(o)(2).

Shifting the rebuttable presumption so that the burden of production falls on the franchising authority asserting jurisdiction to review a cable operator's basic service, equipment and installation rates or to enforce any of the other rules that apply only to systems that are not subject to effective competition represents a perfect exercise of the Commission's authority in fulfilling its obligation to implement Section 111. Moreover, because Section 111 neither expands nor restricts the Commission's existing authority to establish procedures governing effective competition determinations, there is no statutory reason why the Commission cannot extend the same revised rebuttable presumption of effective competition to all cable systems.

**B. Reversing the Existing Presumption That All Cable Systems are not Subject to Effective Competition Serves the Public Interest and Carries Out the Intent of Section 111.**

The NPRM sets forth a compelling factual case for adopting a revised rebuttable presumption that all cable systems nationwide are subject to effective competition under the competing provider test. The competing provider test (also referred to as the "50/15" test) is met where an area is served by at least two unaffiliated MVPDs, each of which offers comparable video programming to at least 50 percent of the households in the area and the number of household subscribing to MVPDs other than the largest MVPD exceeds 15 percent of the franchise area.<sup>21</sup>

As the NPRM points out, the Commission has consistently held over a number of years that DirecTV and DISH provide "comparable programming" to virtually every household in the country (including Alaska and Hawaii) and that this ubiquitous presence satisfies the first prong

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<sup>21</sup> 47 U.S.C. § 543(1)(1)(B).

of the competing provider effective competition test.<sup>22</sup> With respect to the second prong of the competing provider effective competition standard, DirecTV and DISH together have achieved a penetration rate of 26 percent of all households (34.2 million customers) – nearly twice the percentage needed to satisfy the 15 percent penetration prong of the effective competition test.<sup>23</sup>

Furthermore, the presence of competing provider effective competition is not solely dependent on DBS penetration. While not as ubiquitous as DBS, wireline MVPDs offer a third and sometimes a fourth unaffiliated competitive alternative to many incumbent cable operators. According to the Commission’s most recent video competition report, LEC MVPDs provide comparable programming service to more than 11 million customers out of more than 46 million homes passed.<sup>24</sup> It is hardly surprising, therefore, that effective competition petitions based on the competing provider test are rarely opposed and almost never fail to be granted.<sup>25</sup>

In contrast to the situation that the Commission faced in 1993, when fewer than five percent of the nation’s incumbent cable operators faced any competition from another MVPD, and when the Commission was under enormous pressure to expedite the roll-out of the Cable Act’s rate regulation regime, today competing provider effective competition is the norm throughout the United States and local interest in rate regulation is in decline. Under the circumstances, it is entirely appropriate for the Commission to presume that, absent a community-specific showing to the contrary, both prongs of the competing provider test are met

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<sup>22</sup> *NPRM* at ¶ 10. Both DISH and DirecTV offer hundreds of channels of non-broadcast satellite-delivered programming. In addition, Dish offers local broadcast channels in every DMA in the country, while DirecTV offers local broadcast service in all but a handful of markets. *Id.* at ¶ 6.

<sup>23</sup> *Id.*

<sup>24</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, FCC 15-41, at ¶ 31 (rel. Apr. 2, 2015).

<sup>25</sup> *NPRM* at ¶ 7.

in every franchise area in the country. Indeed, adopting such a presumption would conserve not only the resources of cable operators, but also of franchising authorities and the Commission.

**II. In Addition to Adopting a Rebuttable Presumption that All Cable Systems (or At Least All Small Cable Operators) are Subject to Competing Provider Effective Competition, the Commission Should Adopt a Rebuttable Presumption that Cable Systems Serving Communities in which a LEC is Offering MVPD Service are Subject to Effective Competition.**

While the focus of the NPRM is the Commission's proposal to adopt a rebuttable presumption that the competing provider test is met in every community in the country, ACA submits that the goals of Section 111, as well as the public interest in general, would be served by the adoption of an additional rebuttable presumption of effective competition in any franchise area that is served by a LEC. The LEC effective competition test does not require a showing that a minimum penetration threshold has been achieved, but it does require a cable operator relying on the test to show that the LEC intends to build-out its cable system within a reasonable period of time (if it has not already completed its build-out); that no regulatory, technical, or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.<sup>26</sup>

For small cable operators in particular, the task of obtaining the competitively sensitive information that the Commission relies on in determining whether a LEC is providing effective competition can be daunting. Yet, as a practical matter, the facts typically support such a finding. Thus, according to the NPRM, the Commission has not denied a LEC-test based effective competition petition showing since at least 2013. Moreover, because most LEC video

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<sup>26</sup> 47 U.S.C. § 543(1)(1)(D); 47 C.F.R. § 76.905(b)(4). See also *Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, ¶¶ 13-14.

providers operate pursuant to state or local oversight, it makes sense to shift the burden of production with respect to the LEC effective test to the franchising authority. Thus, as described more fully below, a franchising authority that seeks certification to regulate basic rates (or otherwise attempts to enforce regulations that apply only to cable operators that are not subject to effective competition) should be required not only to rebut the presumption that the targeted cable operator is not subject to competing provider effective competition, but also to certify whether or not there is a LEC video provider operating in the franchising area and, if a LEC is operating in the franchise area, to provide evidence regarding the LEC's build-out plans, marketing, etc. sufficient to rebut the presumption that the LEC is providing effective competition to the incumbent cable operator.

**III. The Commission Should Adopt Simple, Straightforward Procedures Effectuating a Revised Rebuttable Presumption Approach for Determining Whether a Cable Operator is Subject to Effective Competition.**

The NPRM poses a number of questions regarding the changes the Commission would have to make to its rules to implement the proposal to apply a rebuttable presumption that competing provider effective competition exists throughout the United States. While these questions create the impression that implementing the proposal would be somewhat complicated, ACA submits that the implementation can and should be fairly straightforward. Clear, simple rules that do away with confusing distinctions between petitions for reconsideration, petitions for revocation, petitions for recertification, and petitions for a determination of effective competition (each with their own separate pleading cycle) not only will provide all parties with needed certainty, but also are essential if small cable operators are to obtain the benefits of the streamlining mandated by Section 111.

Specifically, ACA recommends that, subject to two exceptions described below, the rebuttable presumption that all cable systems are subject to competing provider effective competition (and thus no longer are subject to rate regulation or other regulations that apply only where there is no effective competition) should be effective immediately upon its adoption by the Commission. Thereafter, a franchising authority that wants to assert regulatory authority over a cable system's rates must first file with the Commission (and serve on the cable operator) a new Form 328 certification request containing the following information establishing that the cable operator is not subject to effective competition:

- a showing that the cable operator is not subject to competing provider effective competition;
- a sworn statement that the franchising authority is not operating an MVPD that offers video programming to at least 50 percent of the households in the franchise area; and,
- either a sworn statement that there is no LEC MVPD serving subscribers in the franchise area or a factual showing that there is a LEC MVPD but that it is not providing effective competition under the standards applied by Commission under the LEC test.

ACA recommends that cable operators be given 30 days to file an opposition to the franchising authority's Form 328 (45 days in the case of a small cable operator) after which the franchising authority would have 15 days to reply.<sup>27</sup> The cable operator would become subject to rate regulation only if and when the Commission found that the franchising authority had established the absence of effective competition in the franchise area and, on that basis, granted the Form 328. Following the grant of a Form 328, a cable operator could at any time file a petition for

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<sup>27</sup> The Commission should make clear that it will grant extensions of the deadline for filing an opposition and the deadline for filing a reply for good cause. For instance, if multiple franchising authorities submit Form 328 filings on or around the same date with respect to cable communities served by the same operator, it could be infeasible for the operator to prepare oppositions to all of them within the allotted time

decertification, but the operator would not be allowed to rely on the rebuttable presumption of effective competition and would have to affirmatively establish the presence of effective competition in the franchise area. On the other hand, if the Commission denies a Form 328, the franchising authority no earlier than one year thereafter may file a new Form 328, but in such case the burden would remain on the franchising authority to rebut the presumption that the cable operator is subject to effective competition.

As indicated, ACA suggests that there are two situations in which a franchising authority could be permitted to continue to regulate rates after the rebuttable presumption is adopted and prior to the grant of a new Form 328. The first situation involves cable systems that have filed a petition for effective competition that the franchising authority has opposed and that is pending on the date the Commission adopts the new presumption. Such petitions would be decided by the Commission on the basis of the evidence provided by the parties without reference to the new presumption. The second situation involves “active franchising authorities” – franchising authorities that have issued a rate order during the one year period preceding the release of the NPRM. In deference to these franchising authorities’ expenditure of time and resources in reliance on the old presumption that cable systems are not subject to effective competition, and in order to give them time to accumulate evidence that would rebut the new presumption that effective competition exists nationwide, active franchising authorities would be allowed to continue to regulate cable rates during a 90-day “grace period” following the adoption of the new presumption. If an active franchising authority does not submit a new Form 328 with the information described above within this 90-day grace period, the system will thereafter be deemed to be subject to effective competition and immune from rate regulation. However, if an active franchising authority timely files a new Form 328 during the 90-day grace period, the

cable system will remain subject to rate regulation until the Commission acts on the Form 328. To avoid uncertainty and delay, the failure of the Commission to act on a grace period Form 328 within 180 days after it is filed should be treated as a finding that the system is subject to effective competition.<sup>28</sup>

**IV. If the Commission Declines to Adopt a Generally Applicable Rebuttable Presumption of Effective Competition, There are Steps It Can and Should Take to Implement Section 111.**

The NPRM asks how the Commission should implement Section 111 if not through the adoption of a generally applicable rebuttable presumption that competing provider effective competition is present throughout the country.<sup>29</sup> ACA believes that there is no statutory or policy reason for the Commission not to apply the proposed rebuttable presumption of effective competition on a nationwide basis to systems of any size. However, if the Commission is unwilling to apply the new presumption to certain cable systems (or to delay its application to any franchising authority that previously was certified on the basis of the old presumption against effective competition), it should at very least apply to small cable operators (as defined in Section 111) the rebuttable presumptions of competing provider and LEC effective competition discussed herein as well as the other modifications to the Commission's current effective competition rules outlined in these comments (such as deeming a cable operator as subject to effective competition if the franchising authority's Form 328 is not granted, or if the operator's petition for decertification is not denied, within 180 days).

In addition to adopting the proposed rebuttable presumption, there are other steps that the Commission should take to streamline determinations of whether effective competition exists for

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<sup>28</sup> This 180-day "shot clock" should apply both to Form 328 filings made during the 90-day grace period and to Form 328 filings at any other time. A similar rule should apply to petitions for decertification filed by a cable operator (*i.e.*, such petitions should be deemed granted if not denied within 180 days).

<sup>29</sup> NPRM at ¶ 11.

small cable operators in those instances where the burden has shifted back to the cable operator. Specifically, the Commission should allow a *prima facie* showing of effective competition based on overlapping 5-digit zip codes rather than plus-four zip codes and should eliminate the filing fee requirement for effective competition petitions filed by small cable operators.

### CONCLUSION

For the foregoing reasons, the Commission should exercise its broad statutory authority over the effective competition process to adopt a rebuttable presumption that all cable operators are subject to competing provider effective competition and that LEC effective competition exists in any franchise area where a LEC is providing video programming. The adoption of these long overdue reforms will bring the Commission's rules into conformance with current marketplace realities and, with respect to small cable operators, carry out Congress' mandate that the Commission streamline the effective competition petition process.

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