Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

REPLY COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL AND THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

STEFANIE A. BRAND,
DIRECTOR
THE NEW JERSEY DIVISION OF RATE COUNSEL

Christopher J. White,
Deputy Rate Counsel
Maria T. Novas-Ruiz,
Assistant Deputy Rate Counsel

New Jersey Division of Rate Counsel
140 East Front Street, 4th Floor
P.O. Box 003
Trenton, NJ 08625
Phone (609) 984-1460
Fax (609) 292-2923
www.rpa.state.nj.us
njratepayer@rpa.state.nj.us

CHARLES A. ACQUARD,
EXECUTIVE DIRECTOR
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

Dated: April 20, 2015

TABLE OF CONTENTS

I. INTRODUCTION AND EXECUTIVE SUMMARY 1

II. ARGUMENT 3

A. The FCC's Proposed Changes Exceed the Directives of Section 111 of the STELA and are Contrary to Law 3

B. The Commission has an Obligation to Ensure that Basic Service Tier is not Eliminated and that Rates Remain Reasonable 4

C. There is Insufficient Basis to Support the Proposed Rule Change 5

III. CONCLUSION 7

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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

REPLY COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL AND
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

I. INTRODUCTION AND EXECUTIVE SUMMARY

The New Jersey Division of Rate Counsel[1] ("Rate Counsel") as an agency representing New Jersey consumers submits and the National Association of State Utility Consumer Advocates[2] ("NASUCA") (referenced herein jointly as "Consumer Advocates") file Reply Comments based on

[1]/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is in, but not of, the Department of Treasury. *N.J.S.A.* §§ 52:27EE-46 *et seq.*

[2]/ NASUCA is a voluntary association of 44 consumer advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates for utility ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law, or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

review of initial comments filed on April 9, 2015, in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission's ("FCC" or "Commission") on March 16, 2015.[3] The Notice proposes rule changes to virtually eliminate the effective competition process for small cable operators required under Section 111 of the STELA Reauthorization Act of 2014 ("STELA") by adoption of a rebuttable presumption that all cable operators are subject to effective competition. Adoption of the proposed rule change would improperly shift the burden of proof away from the cable companies to prove the existence of effective competition under the "competing provider" or "LEC" test pursuant to 47 U.S.C. §543 et seq., to the local franchising authority which would have the obligation to show effective competition is lacking.[4] Consumer Advocates join in the concerns voiced by other parties that assert that the proposed changes are fundamentally contrary to the spirit and legislative intent of §543(b)(1) to protect basic service tier subscribers by ensuring rates for basic service remain reasonable. Consumer Advocates submit that the proposed rules also ignore the public interest in affordable and accessible Public, Educational and Government ("PEG") programming for basic service tier subscribers and should not be adopted.

It is misguided and improper to adopt a rebuttable presumption that effective competition exists under STELA. The FCC interpretation is at odds with and conflicts with the expressed provisions of the STELA. Rate Counsel submits that STELA requires that even for small cable companies, the burden of proof to show effective competition remains on the companies. Consumer Advocates respectfully urge the Commission to reject the proposal for a change in presumption of effective competition and require companies to continue to have the burden of proof to show that effective competition exists.

---

[3]/ MB Docket No. 15-53, Notice of Proposed Rulemaking, FCC 15-30 (rel. Mar. 16, 2015) ("NPRM").
See also Federal Register publication, *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, 80 Fed. Reg. 14894 (Mar. 20, 2015).

[4]/ NPRM, at paragraphs 1, 2, 10,14, 15, 16, 17, 18, 20, 21, 22 and Appendix A.

II. ARGUMENT

A. The FCC's Proposed Changes Exceed the Directives of Section 111 of the STELA and are Contrary to Law

Consumer Advocates assert that the comments filed in support do not change the fact that the action proposed undermines the intent of the Act. Consumer Advocates agree with the majority comments that assert that the Commission lacks statutory authority to conduct a mass "administrative revocation" of franchising authority certifications without making the finding of effective competition statutorily required under 47 U.S.C. § 543(a)(1), and (5).[5] Moreover, as noted by several commenters, "[I]n amending Section 623 in STELAR, Congress affirmed the existing regulatory scheme placing the burden upon the rate-regulated cable operator to file a petition for a finding of effective competition. . . . To confirm that point, Congress reiterated 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. § 543(o)(2)."[6] Thus, the proposed rules are contrary and conflict with the purpose and intent of the STELA as well as the explicit provisions Section 543. The FCC's "proposal flatly violates the law, which permits such abrogation only "if the Commission finds that a cable system is subject to effective competition" in the franchise area. 47 U.S.C. §§ 543(a)(2), (l)(1) (emphasis added).[7] As stated by Consumer Advocates in initial comments, the changes proposed improperly reverse the presumption and are contrary to the statutory scheme created by Congress and also contrary to the public interest.[8]

---

[5]/ National Association of Broadcasters ("NAB") April 9, 2015 Comments filed in MB Docket 15-53 at pp. 19-21. *See also* Public Knowledge comments at pp. 2-3. Unless specifically stated otherwise, all citations are to comments in this docket.

[6]/ NAB Comments, at 22. *See also* by the Massachusetts Department of Telecommunications and Cable ("MDTC") Comments, at pp. 10-11, and at *fn* 40, citing to Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014) (codified at 47 U.S.C. § 543(o)(2)).

[7]/ NAB Comments at p. 11 and at *fn* 6.

[8]/ Consumer Advocates Comments at pp. 4-7.

B. The Commission has an Obligation to Ensure that Basic Service Tier is not Eliminated and that Rates Remain Reasonable

Consumer Advocates agree with other commenters who worry that reversal of the presumption would result in elimination of the Basic Service Tier.[9] As stated by American Community Television ("ACT") the proposed rule change opens the door to (1) threatening the elimination of Public, Educational and Government ("PEG") programming which has become part and parcel of the basic service subscriber's viewing platform; or (2) pushing the PEG platform to a higher service tier.[10] Under either scenario, economically challenged subscribers could lose PEG channels and be harmed. As noted by ACT, based on Comcast's February 2015 price sheet, elimination of a basic service tier that includes PEG, and bumping the PEG platform to the next higher level would "adversely affect the Forty-five million Americans, or approximately fifteen million households, that live in poverty."[11] Eliminating PEG effectively eliminates the basic service tier of which it is a key part.

Also worrisome are equipment charges and fees which would continue to skyrocket without oversight and rate regulation. Contrary to the FCC's proposed presumption, cable companies have market power for not only basic service tier rates but also for equipment and installation rates. According to the FCC's numbers, "equipment prices for basic and expanded basic services increased by 4.4 percent and 4.2 percent, respectively" in 2012. Crucially, as discussed in Consumer Advocates' Comments, the FCC's previous findings of "effective competition" have resulted in higher average prices in the service territories and markets deemed to be effectively competitive. In markets without effective competition, the average price for expanded basic packages increased by 4.6% while those "effective competition communities" saw average rate hikes of 5.8%.[12]

---

[9]/ National Association of Telecommunications Officers and Advisors ("NATOA") Comments at p. 4.

[10]/ American Community Television, ("ACT") Comments, at pp. 7-9. *See also* Alliance for Community Media, ("ACM") Comments, at p. 2.

[11]/ ACT Comments., at p. 7 and *fn* 1, quoting Huffington Post article: "45 Million Americans Still Stuck Below Poverty Line: Census,"; the "Poverty Line" in 2013 was $23,550 per year for a family of four.

[12]/ http://consumerist.com/2014/05/19/fcc-basic-cable-prices-increased-at-four-times-rate-of-inflation/

The adoption of the FCC's proposed presumption will undoubtedly permit additional price increases and eviscerate the overarching statutory intent to maintain a basic level of service and programming for average consumers at reasonable rates.[13] These concerns were echoed by the majority of commenters including NAB, NATOA, and MDTC.[14]

Consumer Advocates agree with Public Knowledge that "the Commission has an obligation to regulate unreasonable cable rates[15] and that a finding of effective competition should not relieve the Commission's obligation to protect consumers."[16] Consumer Advocates support Public Knowledge's recommendation that the FCC should monitor to ensure that "prices for the basic tier remain reasonable even in those markets it has found effective competition. ... [I]f basic tier rates become unreasonable it will be a sign that the FCC's standard for finding effective competition are flawed."[17]

C. There is Insufficient Basis to Support the Proposed Rule Change

Consumer Advocates submit that the existence and potential reach of multichannel video programming distributor ("MVPDs") in the marketplace is not an appropriate measure of effective competition.[18] Likewise, MDTC asserts that

> "while LECs provide valuable competition in some areas, they do not offer video programming service in every community. [A]nd that number does not figure to decrease anytime soon as Verizon has ceased expansion of its FiOS product to new communities. [I]n those communities lacking increased competition from the presence of a LEC video programming option, the underlying presumption of no effective competition continues to serve its valuable and intended purpose."[19]

New Jersey's market is similar to Massachusetts, where Verizon has also decided not to continue its rollout of its FiOS product, leaving many consumers, particularly those in more rural areas without a

---

[13]/ *See also* NAB Comments at p. 25, echoing concerns of increased cable pricing.

[14]/ NATOA Comments at p. 4, citing to NAB at *fn* 8; and MDTC Comments at pp. 13-14.

[15]/ Public Knowledge Comments at p. 7, citing 47 U.S.C § 543(c).

[16]/ Public Knowledge Comments at p. 7, citing to 47 U.S.C § 543(b)(1).

[17]/ Public Knowledge Comments at, pp. 7-8.

[18]/ Consumer Advocates Comments, at pp. 8-10.

[19]/ MDCT Comments, at p. 4.

viable alternative for cable programming. Consumer Advocates also concur with MDTC's observations that "while online video programming is becoming more prevalent, it is still not a competitive option for many consumers, especially those that are low-income and elderly."[20]

In addition, commenters correctly observed that while the NPRM notes the 1,433 communities in which the Commission had granted effective competition as of 2013, this analysis fails to capture the many thousands of regulated communities for which petitions for effective competition have not been filed. By the FCC's own account, as of May 2014, there were 23,506 communities where effective competition is not present, as opposed to only 10,129 communities where effective competition has been found.[21]

Consumer Advocates concur with the general sentiment expressed by a majority of commenters that Congress's directive to streamline the effective competition review process for small cable operators did not eliminate the FCC's continuing and overarching obligation to protect subscribers. The FCC's proposal adopting a presumption that all cable systems are subject to effective competition would risk subscribers losing the protection of basic service tier rate regulation and expose subscribers to increasing unreasonable rates, eviscerating the spirit and purpose of the underlying statute.

---

[20]/ *Id.*, at pp. 4-5.

[21]/ *Id.*,, pp. 5-7. *See also* NAB Comments at pp. 13-16, and Consumer Advocates Comments, at p. 6.

III. CONCLUSION

For the reasons addressed above, Consumer Advocates respectfully urge the FCC not to make any change to current effective competition process and continue to have cable companies bear the burden of proof to demonstrate such competition actually exists before rate regulation by the LFA can be eliminated.

Respectfully Submitted,

STEFANIE A. BRAND,
DIRECTOR,
NEW JERSEY DIVISION OF RATE COUNSEL

Christopher J. White /s/

Christopher J. White,
Deputy Rate Counsel
Maria T. Novas-Ruiz
Assistant Deputy Rate Counsel
On behalf of the Division of Rate Counsel

CHARLES A. ACQUARD,
EXECUTIVE DIRECTOR
NASUCA

8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

Dated: April 20, 2015