

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

In the Matter of)	
)	
Amendment to 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
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

April 20, 2015

Rick Chessen
Diane B. Burstein
Stephanie L. Poday
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
202-222-2445

TABLE OF CONTENTS

I.	THE PROPOSAL TO CHANGE THE PRESUMPTION IS FIRMLY GROUNDED IN TODAY’S COMPETITIVE CONDITIONS.	1
II.	THE COMMISSION HAS AMPLE AUTHORITY TO REVERSE THE PRESUMPTION.....	5
III.	THE COMMISSION SHOULD REJECT ATTEMPTS TO ERECT ADDITIONAL IMPEDIMENTS TO FINDINGS OF EFFECTIVE COMPETITION	9
IV.	REVERSING THE PRESUMPTION WILL SERVE THE PUBLIC INTEREST.....	10
	CONCLUSION.....	13

**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)	

**REPLY COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) submitted initial comments supporting the Federal Communications Commission’s (“Commission”) reasonable proposal to adopt a rebuttable presumption that reflects the intense multichannel video competition faced by cable operators nationwide. The record fully justifies the Commission taking this well-reasoned measure.¹

A handful of commenters question the appropriateness of adopting this long-overdue update to the rules based on a variety of claims that, as described below, cannot withstand scrutiny.

I. THE PROPOSAL TO CHANGE THE PRESUMPTION IS FIRMLY GROUNDED IN TODAY’S COMPETITIVE CONDITIONS.

Some commenters disagree with the factual predicate upon which the Commission proposes shifting the presumption.² Although it is undisputed that DBS providers have “close to

¹ See Comments of ITTA (agreeing that the presumption should change in light of changes to the video marketplace since the rules were adopted in 1993); Comments of the American Cable Association (“ACA”) at 8-10.

² See Comments of National Association of Broadcasters (“NAB”) at 15 (“National DBS market share is simply not a reasonable proxy for competing-provider market share in a franchise area.”).

double”³ the 15 percent penetration rate deemed necessary under the Cable Act to support a finding of effective competition, these commenters question the relevance of the national market share of DBS providers. They claim this statistic “does not give any indication as to what the DBS share is in each of 34,605 franchise areas in the United States, 23,506 of which have never been found to be competitive.”⁴ While an average figure is not conclusive evidence of the specific penetration in every community, it undeniably supports the Commission’s proposed rebuttable presumption.⁵ The average penetration number is a strong predictor that competitors have garnered far in excess of the market share Congress deemed necessary to free cable operators from the vestiges of rate regulation. Given that the current national DBS penetration rate exceeds 26 percent, it is entirely rational and logical to presume that the 15 percent competing provider threshold is satisfied in virtually all local communities.⁶ Commenters offer absolutely no evidence to the contrary.

NCTA’s analysis of SNL Kagan data confirms that even on a more granular local-market basis, the DBS penetration level exceeds the threshold needed to find effective competition. As explained in NCTA’s comments,⁷ **competing MVPD providers have in excess of 15 percent penetration in every one of the 210 Designated Market Areas (“DMAs”) in the United States.**⁸ Most markets show DBS penetration numbers above the 20 percent range.⁹

³ Notice at ¶ 6.

⁴ NAB Comments at 14; *see also* Massachusetts Department of Telecommunications and Cable (“Massachusetts”) at 5.

⁵ *See* NCTA Comments at 6 (“an evidentiary presumption is permissible ‘[i]f there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact... until the adversary disproves it”).

⁶ In addition, telephone companies now serve more than 11 percent of MVPD customers. Notice at ¶ 6.

⁷ NCTA Comments at 5.

⁸ *Id.*

Although the national DBS penetration numbers fully justify the presumption shift, the Commission went further and evaluated effective competition petitions from across the country. In communities large and small, urban and rural, the Commission has found there to be effective competition in communities in every state in the country other than Alaska.¹⁰ In total, it has found effective competition to be present in more than ten thousand communities, and has granted hundreds of petitions in just the last few years.

NAB and other proponents of continuing the presumption against effective competition try to downplay these findings, arguing that effective competition may be absent in communities where filings have not been made.¹¹ But it simply does not follow that failure to file an effective competition petition reflects the absence of actual effective competition in any significant number of those communities. As the 2014 Cable Price Survey explains, “in many ...communities [without a finding of effective competition], the incumbent cable operator could possibly meet the test yet for various reasons has not petitioned the Commission for an effective competition finding” and that “even without an effective competition finding, the LFA may elect not to regulate the price of basic service.”¹² In fact, “in communities without an effective

⁹ NCTA Analysis of SNL Kagan data.

¹⁰ *Notice* ¶ 11, n.57.

¹¹ *See, e.g.*, NAB Comments at 15 (arguing that that the Commission must presume a lack of effective competition in the “23,000 franchise areas for which cable operators have not sought such a determination, despite the strong incentive to be free of rate regulation.”); New Jersey Division of Rate Counsel (“NJ”) at 6 (that “there are 33,951 LFAs and 24,487 of those LFAs still regulate basic service tier rates and the cable companies have not sought a finding of effective competition in those jurisdictions” and that “one must assume that the failure to file and seek a finding of effective competition is because a cable company cannot meet the effective competition test”); Massachusetts Comments at 5.

¹² *In re Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 29 FCC Rcd 14895 ¶ 2 (2014) (“2014 Cable Price Survey”) at ¶ 2.

competition finding, only 13 percent of subscribers are in areas where the LFAs elect to regulate the price of basic service.”¹³

Under these circumstances, it is much more likely that the burdens on cable operators of petitioning for a determination of effective competition deter such filings, particularly where the LFA has not certified to regulate rates. To obtain a regulatory confirmation of the obvious competitive conditions it faces in its communities, a cable operator must buy granular zip-code data and must purchase community-specific third-party data from their competitors; hire attorneys to prepare (and prosecute) the petition; and pay filing fees to the FCC for each system. The New Jersey Rate Counsel offers no reason to believe that “cable operators ... are in a better position to provide the necessary data to prove that effective competition exists in a particular service area” than LFAs.¹⁴ Moreover, unlike cable operators, LFAs have information on LEC build out plans and other specific data needed to demonstrate whether LECs provide effective competition.¹⁵

Opponents of the proposed change forget that the Commission is proposing to change the presumption to minimize the burden of unnecessary filings on *all* parties (LFAs, cable operators, and the Commission) in light of market realities. Moreover, the Commission is not proposing to adopt an *irrebuttable* presumption in favor of effective competition. In the unusual circumstance where a community lacks effective competition, the LFA will be able to rebut the new presumption in much the same way cable operators have rebutted the old presumption.

¹³ *Id.*

¹⁴ NJ Comments at 2-3.

¹⁵ ACA Comments at 10-11.

II. THE COMMISSION HAS AMPLE AUTHORITY TO REVERSE THE PRESUMPTION.

Some commenters assert that, regardless of competitive conditions today, the Commission lacks authority to change the presumption to reflect those conditions.

NAB, for example, claims that Section 623 does not allow the Commission to adopt any presumption “because the 1992 Cable Act requires Commission *findings* regarding the presence or absence of effective competition in each franchise area as a predicate for rate regulation.”¹⁶ It argues that the existing presumption satisfies this supposed “evidence-based finding” obligation because the “no effective competition” presumption is backed up by “certifications by local franchising authorities that the Commission’s presumption is correct.”¹⁷

NAB misunderstands how the rate rules operate.¹⁸ There is no “evidence-based” finding in each franchise area. Operators in many cable communities are subject to the presumption¹⁹ even though a local franchising authority never sought authority from the Commission to rate regulate and thus never certified to any local facts. In fact, the Media Bureau notes that as of January 2014, only 13 percent of cable customers are in franchise areas with active local rate regulation.²⁰

Even in cases where LFAs have certified, that certification hardly constitutes a finding as to current competitive conditions. LFAs may have filed their certification to rate regulate more

¹⁶ NAB Comments at 9.

¹⁷ *Id.* at 10.

¹⁸ NAB wrongly suggests that the changed presumption would automatically overrule decisions where the Commission has already ruled on an effective competition petition. In those cases, the Commission’s adjudication would stand until a party affirmatively demonstrates that changed circumstances warrant a change in the existing ruling.

¹⁹ See generally *In re Cross Country Cable v. C-Tec Cable Systems of Michigan, Inc.; Robert Burgess v. C-Tec Cable Systems of Michigan, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 2538 (1997) (resolving uniform pricing case brought by competing provider).

²⁰ 2014 Cable Price Survey at ¶ 2.

than twenty years ago, simply attesting to their “belief”²¹ that the cable system in question was not subject to effective competition at the time the certification was filed. Indeed, the rules specifically allow LFAs to “rely on the presumption ... that the cable operator is not subject to effective competition” in filing its certification with the Commission.²² With no obligation to renew the certification to reflect conditions today,²³ the only way to bring new competitive facts to light would be for the cable operator to petition to decertify the LFA based on the presence of effective competition. That is precisely why changing the presumption would be much more administratively efficient than requiring individual filings in each franchise area not already affirmatively deemed subject to effective competition.²⁴

NAB’s argument is not only factually incorrect, but also conflicts with the statutory scheme. As NCTA’s comments explain,²⁵ the Commission previously made a “finding” that cable operators do not face effective competition in the form of its existing rebuttable presumption. NAB points to nothing in the Act or case law that would prevent the Commission from reevaluating and reversing that finding given today’s highly competitive conditions.²⁶ And

²¹ See Form 328, question 6.

²² 47 C.F.R. § 76.910(b)(4).

²³ Certified LFAs can notify the Commission of their intent to no longer regulate basic service tier rates at any time, see 47 C.F.R. § 76.917, but there is no obligation on LFAs to do so once the community reaches the effective competition threshold.

²⁴ Massachusetts is therefore also off-base in claiming that the proposed rule “may actually increase the burden on the Bureau because after franchising authorities make the thousands of initial showings rebutting the new presumption, the burden of proof would presumably shift back to cable operators to make an affirmative showing that effective competition exists.” Massachusetts Comments at 9. Given competitive conditions throughout the country and the relatively few LFAs that currently rate regulate, shifting the presumption is extraordinarily unlikely to unleash an avalanche of LFA filings.

²⁵ NCTA Comments at 7.

²⁶ The cases cited to as support by NAB (NAB Comments at 9-10) are not relevant. For example, NAB cites as support mere dicta in a deportation case, where relief under the statute did not require *any* finding of fact – indeed, the law provided broad discretion to the Attorney General. See *Kasravi v. INS*, 400 F.2d 675, 677 (9th Cir. 1968) (“Congress has made it abundantly clear by the express wording of the statute that no such finding is contemplated or required. It left to the broad discretion of the Attorney General the authority to suspend deportation in such cases and the questions of both eligibility and merit (if there be a difference) are part and

because a rebuttable presumption in favor of effective competition is fully supported by the current facts, it would be a “finding” in itself, and its use would be entirely appropriate here.

Even if NAB were correct that Section 623 requires individual community-based findings, that argument does not help its cause. Congress expressed its “preference for competition” over regulation, and allowed local franchising authorities to regulate rates only “*if the Commission finds that a cable system is not subject to effective competition...*”²⁷ If the Commission were not allowed to adopt a presumption at all, it would be forced to make individualized evaluations of competitive conditions in each franchise area prior to allowing LFA rate regulation. And absent those franchise-specific findings, by default a cable operator would be free from rate regulation. A presumption that assumes that effective competition *does* exist would be much more consistent with this statutory scheme and reflective of Congress’ preference for relieving cable operators of unnecessary regulation.

Furthermore, NAB points to nothing that suggests that the Commission lacks authority to modify an outdated rule. To the contrary, the Commission’s proposal is consistent with the goals of the 2011 Executive Order that agencies “modify, streamline, expand or repeal [rules that may be outmoded, ineffective, insufficient or excessively burdensome...].”²⁸ Moreover, the Commission itself more than a dozen years ago proposed to take this very step.²⁹

parcel of this administrative determination.”). Likewise, *Saginaw Broad. Co. v. FCC* is inapposite to the instant proceeding because the statute at issue in that case, Section 319 of the Act, “set out a criterion to govern the Commission in granting or refusing to grant a [particular] construction permit” and “required a full statement in writing of the facts and grounds for its decision.” *Saginaw Broad. Co. v. FCC*, 96 F.2d 554, 559 (D.C. Cir. 1938).

²⁷ 47 U.S.C. § 543(a)(2).

²⁸ ITTA Comments at 5-6.

²⁹ *In re Revisions to Cable Television Rate Regulations*, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 ¶ 53 (2002) (“The growth and development in DBS services has suggested to some that the effective competition determination process should be expedited, for example, *by altering the burden of proof in areas of high DBS penetration so that community-by-community decisions might not always be needed*. Thus, we seek comment on whether there are techniques consistent with the Communications Act to improve and expedite

Nor is there any conflict between the Commission’s proposal and Section 111 of STELAR.³⁰ As ACA’s Comments show, the Commission retains substantial discretion to implement the rate regulation provisions in the Act, and “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.”³¹ Extending the same relief to all operators is entirely reasonable, especially since the record contains no evidence that the level of competition varies in a community based on the size or other characteristics of the corporation operating the cable system. Indeed, given current marketplace conditions, carving out particular operators on any basis would be arbitrary.

The proposed change in the rebuttable presumption is equally consistent with the STELAR provision regarding “[t]he duty of a small cable operator to prove the existence of effective competition under this section.” As ACA explains, this language 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.”³² Local franchising authorities remain free to rebut the presumption by presenting community-specific evidence, which the cable operator would then have the burden to overcome based on its own evidence.

effective competition showings and review as competition, particularly from satellite service, becomes more prevalent.” (emphasis added).

³⁰ Massachusetts Comments at 10-12; Public Knowledge Comments at 3; NAB Comments at 22-23.

³¹ ACA Comments at 7.

³² *Id.*

III. THE COMMISSION SHOULD REJECT ATTEMPTS TO ERECT ADDITIONAL IMPEDIMENTS TO FINDINGS OF EFFECTIVE COMPETITION

The rules consider programming offered by a competitor to be “comparable” where the competing provider offers “at least 12 channels of video programming, including at least one channel of non-broadcast service programming.”³³ In an apparent effort to erect additional impediments to an effective competition finding, some commenters try to manufacture new requirements for a competitor to meet in order to be considered to be offering “comparable” programming. For example, the New Jersey Division of Rate Counsel argues that DBS service – which provides hundreds of channels of video programming nationwide, including local broadcast channels in every market in the country – should not be considered to be offering “comparable” programming unless it has “PEG channels at no additional cost on the lowest tier of service....”³⁴ The Commission previously dismissed this unsupported argument as contrary to the governing statute, as it should here. The provision of a PEG channel by any cable operator is left to negotiations with LFAs, and the Commission found “no evidence that Congress intended to impose PEG access requirements at the federal level by incorporating them into the comparable programming requirement.”³⁵

Equally unsupported is Public Knowledge’s proposal to redefine “comparable” programming to include certain terms and conditions of carriage, to require on-demand and online programming, and to require a competitor to offer broadband internet access service.³⁶

Congress required only the provision of “comparable,” not “identical” programming. Moreover,

³³ 47 C.F.R. § 76.905(g).

³⁴ NJ Comments at 14.

³⁵ *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5309 (1999).

³⁶ Public Knowledge Comments at 5-7 (proposing that “comparable” programming in cases of effective competition for “larger cable operators” would require the competitor to offer “all video programming” as the incumbent; provide broadband service; and has certain similar terms for program acquisition).

Section 623 requires the provision of “comparable *video programming*” – “video programming” is further defined in the 1992 Act as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”³⁷ A competitor’s provision of broadband internet access service has nothing to do with “comparability” for these purposes.

IV. REVERSING THE PRESUMPTION WILL SERVE THE PUBLIC INTEREST.

Some commenters claim that changing the presumption will harm the public interest. This argument is belied by experience in the ten thousand communities already deemed subject to effective competition. The record contains no evidence of any harm resulting from rate deregulation in these areas.

For example, some PEG providers point out that reversing the presumption would allow cable operators “[t]o remove PEG channels from the Basic service tier as the Basic service tier requirement only applies to rate regulated communities.”³⁸ Reversing the presumption poses no threat to PEG operations. Cable operators already have been deemed to be subject to effective competition in thousands of communities – including the communities identified in the Comments of the Alliance for Community Television (“ACT”). Even so, there is no evidence in the record that cable operators have moved PEG programming from the basic tier.³⁹

³⁷ 47 U.S.C. § 522(20) (definition of “video programming”).

³⁸ Comments of American Community Television (“ACT”) at 3; Comments of the National Association of Telecommunications Officers and Advisors (“NATOA”) at 4 (“It is essential that PEG programming be protected and remain on a cable operator’s basic service tier.”); *see also* Comments of the Alliance for Community Media at 2 (expressing concern that reversing the presumption “will have the effect of raising cable rates for millions of Americans, and will effectively decrease the availability of PEG channels for populations who rely upon PEG programming”).

³⁹ ACT points to the communities of Howard County, Maryland; Connersville, Indiana; and Longview, Washington. Yet PEG channels continue to be carried on the basic tier in all those communities, even though the Media Bureau determined there to be effective competition in 2008, 2010, and 2004, respectively. This simple fact fatally undermines ACT’s contrary hypothesis.

In addition to its purported interest in PEG channels being carried on the basic tier, NAB vaguely warns that there could be “secondary impacts on consumer access to critical local programming offered by broadcast stations ... on the basic tier.”⁴⁰ Regardless of the Commission’s action here, commercial and noncommercial stations that are carried pursuant to must carry already have certain rights under separate mandatory carriage provisions of the Cable Act – Sections 614 and 615.⁴¹ Stations carried pursuant to retransmission consent can and do negotiate for continued carriage on the basic tier, even absent any rule that requires such carriage. Moreover, the copyright payment scheme for carriage of broadcast stations pursuant to the cable compulsory license provides an independent reason for cable operators to avoid placing television stations in expanded tiers of service.⁴² NAB provides no evidence that tier placement of retransmission consent stations is a legitimate public interest concern.

In contrast to these imaginary harms, adopting a presumption that cable operators are subject to effective competition could produce real consumer benefits. Cable operators, freed from concerns about arcane rate regulations, could respond more nimbly to competitive challenges.⁴³ They could provide offerings to consumers that reflect 21st century marketplace conditions rather than twenty-two-year-old Commission rules. And it would relieve them from having to divert resources that could be put to better use to the benefit of customers.

⁴⁰ NAB Comments at 25.

⁴¹ 47 U.S.C. § 534(b)(7) (“Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system.”); *id.*, § 535(h) (“signals carried in fulfillment of the [noncommercial] carriage obligations of a cable operator under this section shall be available to every subscriber as part of the cable system’s lowest priced service tier that includes the retransmission of local commercial television broadcast signals”).

⁴² See 37 C.F.R. § 201.17 (b). Cable operators make Section 111 compulsory copyright payments based on the “gross receipts” earned from “providing secondary transmissions of primary broadcast transmitters.” If broadcast channels are offered outside the basic service, gross receipts from those additional service tiers must be included in the cable operator’s copyright calculation. Therefore, cable operators have strong incentives from a copyright standpoint to avoid placing television signals in expanded tiers so that compulsory copyright royalties can be limited to basic service revenue.

⁴³ See ITTA Comments at 2, n. 6.

In any event, the public interest arguments advanced against the Commission’s proposal must be rejected as they transparently seek to exploit the existing regulatory process in a manner contrary to Congressional intent. The deregulatory results intended by Congress should not be blocked by an outdated presumption that does not match the current competitive landscape. Yet opponents of the Commission’s proposal are essentially urging the Commission to maintain a costly administrative process of delay.

Alternative proposals advanced by NAB would not accomplish the sensible goals established under STELAR. For example, NAB suggests that the Commission take a variety of half measures that would still tie small operators up in multiple FCC proceedings, and would deny larger operators any relief.⁴⁴ Other procedural steps – which NAB admits are only “narrow administrative proposals”⁴⁵ – would also fail to address the fundamental underlying problem and are no substitute for adopting a presumption based on today’s competitive conditions.

⁴⁴ NAB Comments at 25-26.

⁴⁵ NAB *et al.* ex parte, filed Apr. 16, 2015 (proposing that the FCC adopt certain procedural measures – but not a shift in presumption – proposed in the 2002 Rate Regulation Notice).

CONCLUSION

The Commission realized more than a decade ago that its presumption against effective competition should be reevaluated in light of the then-rapidly changing video landscape. A dozen years later, there is no rationale for maintaining a factually unsupportable presumption. The time has come for the Commission to act.

For the foregoing reasons and for the reasons stated in NCTA's initial comments, the Commission should adopt a rebuttable presumption that incumbent cable operators nationwide face effective competition.

Respectfully submitted,

/s/ **Rick Chessen**

Rick Chessen
Diane B. Burstein
Stephanie L. Poday
National Cable & Telecommunications
Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
202-222-2445

April 20, 2015