

April 22, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Amendment to the Commission’s Rules Concerning Effective Competition and Implementation of Section 111 of the STELA Reauthorization Act, MB Docket No. 15-53 – Written Ex Parte Communication

Dear Ms. Dortch:

The American Cable Association (“ACA”) submits this written ex parte communication in support of the Commission’s proposal to implement of Section 111 of the STELA Reauthorization of 2014 (“STELAR”) by replacing the current, outdated, and irrational presumption that none of the nation’s cable systems faces effective competition with a new rebuttable presumption in favor of the presence of effective competition that is more consistent with current marketplace realities and with Congress’ express preference for competition over regulation.¹

The principal purpose of this letter is to supplement the record with specific information regarding the costs associated with the current effective competition petition process. This information clearly is needed to resolve the confusion that exists among various commenters who cannot make up their minds as to whether these costs are “relatively light,” “extremely burdensome” or simply unknown.² As described below, the costs are not insignificant and are the main reason that cable operators, particularly small cable operators, are deterred from filing petitions establishing that they are subject to effective competition.

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

² *Compare* Comments of NAB at 14 (burden of establishing effective competition is “relatively light”) *with* Reply Comments of Massachusetts Department of Telecommunications and Cable at 5 (determination of effective competition is “excessively burdensome”); *compare also* Reply Comments of NATOA at 4 (asking “where’s the burden”) *with id.* (stating that there is “little cost or burden” involved in establishing whether effective competition is present or absent) *with id.* (describing burden of filing petitions for effective competition as unreasonable).

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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The out-of-pocket costs associated with the preparation and filing of an effective competition petition showing that a system satisfies the competing provider test can be broken into four categories: the cost of obtaining zip code plus four data for a franchise area(s) served by the system; the cost of obtaining competing provider subscribership; the cost of FCC filing fees; and the cost of the legal fees required to prepare a formal request for an effective competition determination (and to prepare a reply pleading if the petition is opposed).³

Zip code plus four data. The Commission currently requires cable operators to provide the number of subscribers in the operator's franchise area that are served by competing providers, broken down on a zip code plus four basis. Most cable operators do not need this information for use in the regular course of business and, in order to prepare an effective competition petition, they must purchase it from direct marketing companies at a price that, for small cable operators, can be up to \$300 per community. On the other hand, the post office does not charge for this information when requested by governmental entities (who most likely have knowledge of all of the nine-digit zip codes within their jurisdiction anyway).

Subscribership data. Section 76.907(c) of the Commission's rules provides that a cable operators may request from a competitor information regarding that competitor's "reach and number of subscribers" if the evidence establishing effective competition "is not otherwise available." The satellite industry has elected to make subscribership data available to cable operators in the form of "tracking reports" that can be purchased from SBCA. The current cost of these tracking reports – \$0.28 per nine digit zip code – may not seem particularly burdensome at first blush. However, the number of nine digit zip codes in a community varies depending on the size of the community and even a small community may have thousands of nine digit zip codes.⁴ In one representative instance that has been brought to ACA's attention, a cable operator that served a community with only 2650 households (and, in all likelihood, less than half that number of subscribers⁵) had to purchase subscribership data for 2417 separate nine digit zip codes, at a cost of roughly \$677.

³ In cases where a cable operator seeks to establish the presence effective competition based on the "LEC test," the operator is does not have to incur out-of pocket costs to obtain subscribership data since the LEC test does not require the operator to show that the LEC has achieved a specified minimum penetration. However, the operator still must incur legal costs for preparing a formal effective competition petition as well as the less easily quantified burden of obtaining and presenting evidence 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 there are no regulatory, technical, or other impediments to the provision of service; that the LEC is marketing its services so that potential customers are aware that the LEC's services must be purchased; that the LEC has actually begun to provide services, the extent of such services, and the ease with which the LEC may expand its service area; and the expected date for completion of construction in the franchise area. Much of this information is more readily accessible to the governmental authorities that oversee the LEC's operations than to the incumbent cable operator.

⁴ Moreover, a great many of these nine digit zip codes are assigned to commercial businesses or even post office boxes, not to residential households.

⁵ Year-end data for 2013 reported in the Commission's most recent Video Competition Report indicates that basic cable penetration in 2014 was approximately 40.6 of total households, and data from SNL Kagan indicates that this number was even lower at the end of 2014. Based on this information, it is not unreasonable to assume that a cable operator serving a community with 2650 households will have between 1000 and 1100 subscribers.

Filing Fees. The Commission imposes on cable operators a filing fee of \$1465 for each separate effective competition petition that it files. While a cable system (PSID) that serves multiple communities can combine all of the communities it serves into one filing (and thus spread the filing fee cost), multiple systems cannot be combined in a single filing.

Legal Fees. The legal fees associated with the preparation of a petition for effective competition, including the time needed to obtain household data, zip code plus four data, and competing provider subscriber data for each community, parse through this information, and prepare a formal FCC pleading, can easily run into the thousands of dollars. Based on discussions with lawyers with experience filing such petitions, ACA estimates that a conservative estimate of the legal cost of a simple effective competition filing is around \$3000, although that amount could be higher depending on the number of communities covered by the filing and on whether the petition is opposed.

Illustrative examples of total costs. Using the example cited above, the total cost to seek an effective competition determination for a cable system that serves a single community of 2650 households would be around \$5400 (\$300 fee for zip code plus four data + \$677 for competing provider subscribership data + \$1465 FCC filing fee + approximately \$3000 in legal fees), assuming no reply filing is needed. That amount would have to be spread over a subscriber base that would be no more than half the 2650 households in the community— probably between 1000 and 1100 subscribers. If the community served by the system was half the size of the previous example, the costs still would exceed \$5000 (assuming \$300 to obtain zip code plus four information, \$338 for competing provider subscribership data, \$1465 FCC filing fee, and roughly \$3000 in legal fees). But now those costs would have to be spread over only 500 to 550 customers.⁶

Thus, as shown, the quantifiable costs of obtaining an effective competition determination can be significant for a small cable operator. This burden almost certainly is the reason why a review of the Commission's files for the past three years reveals no instances in which an effective competition petition was filed by any small or medium-sized cable operator that is an ACA member.⁷ It is implausible that these companies, whose median size is under 1000 subscribers and who are often located in rural areas, are not subject to effective competition to at least the same degree, and probably to an even greater degree, than the large cable operators

⁶ As the number of communities served by a cable system and/or the number of households in those communities grows, the costs of obtaining zip code plus four information and competing provider subscribership data will grow, eventually reaching the point where each of those cost items alone exceeds the FCC filing fee. For example, a system that serves five or more communities with 6000 or more total households will spend more to purchase zip code plus four data and more to purchase competing subscribership than is spent on the FCC filing fee.

⁷ ACA conducted a review of all Petitions for Determination of Effective Competition that are available on ECFS and were filed after December 30, 2011. There were 188 separate petitions filed by cable operators, as follows: Comcast (79); Time Warner Cable (78); Bright House Networks (13); Cablevision (7); Cox (6); Suddenlink (2); Midcontinent Communications (2); and Charter (1). Only Midcontinent, in which Comcast has an attributable (49%) stake, has fewer than 1,000,000 subscribers.

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who have been most active in seeking (and obtaining) effective competition determinations in recent years.⁸

In conclusion, the opponents of the Commission's proposal to reverse the existing presumption that cable operators are not subject to effective competition have suggested that whatever burden is placed on small cable operators by the effective competition petition process, the burden on franchising authorities would be even greater. But that simply is not the case. As noted above, franchising authorities do not have to pay for zip code plus four information. In addition, unlike the situation that existed in 1993 when the Commission assumed cable operators would have more ready access about their competitors than would franchise authorities, franchise authorities today almost certainly have greater information about the reach and subscribership of wireline overbuilders (such as Verizon FiOS and AT&T U-Verse) than the incumbent operator. Moreover, ACA's research reveals that while small cable operators have not filed any Petitions for a Determination of Effective Competition over the past three years, there were at least 17 separate filings made by local franchising authorities in support of largely unsuccessful attempts to hold onto regulatory authority in the face of evidence showing that effective competition exists in their franchise areas. To the extent other franchising authorities were deterred from filing oppositions because of the cost of doing so (rather than because there were no facts to support an opposition), the Commission could reduce that burden by waiving the filing fee requirement and requiring DBS providers to provide subscriber data to franchising authorities at no cost.⁹

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, a copy of this notice is being filed electronically in the above-referenced docket.

Please contact the undersigned if you have any questions regarding these issues.

Respectfully submitted,

/ Seth A. Davidson /
Seth A. Davidson
Counsel for American Cable Association

cc: Steven Broeckaert

⁸ According to publicly available data (*i.e.*, SEC 10-K filings) the Commission has granted petitions for effective competition covering over 85 percent of Time Warner Cable's systems and 80 percent of Comcast's systems.

⁹ ACA also takes this opportunity to respond to a recent written *ex parte* letter filed in this proceeding by NATOA that endorses a series of small cable operator "reform" proposals submitted by NAB et al. See Letter from Stephen Traylor, Executive Director, NATOA to Marlene Dortch, Secretary, FCC (April 17, 2015). These "reforms" constitute an offer of the proverbial "ice in the wintertime." For example, the Commission essentially relieved cable operators of the obligation to provide separate evidence of consumers' awareness of the availability of DBS service nearly a decade ago. See *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006). And SBCA now provides subscriber tracking data on a timely basis, albeit for a price. See ACA Reply Comments at 14.