



May 15, 2015

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

Re: Notice of Ex Parte Communication, MB Docket No. 15-53

Dear Ms. Dortch:

On Thursday, May 14, 2015, Rick Kaplan and the undersigned of the National Association of Broadcasters (NAB) met with Chanelle Hardy of the Office of Commissioner Clyburn to discuss the Commission's implementation of Section 111 of the STELA Reauthorization Act of 2014 (STELAR).¹

In the meeting, we discussed the potential ramifications of reversing the current presumption that cable systems do not face "effective competition" in all markets. We stated that the Commission's proposal to adopt a new rebuttable presumption of effective competition for all cable operators, including the largest operators, is unlawful and goes well beyond STELAR's limited directive to modify the petition filing process for small cable companies.

We observed that Congress just recently addressed the Commission's implementation of the effective competition requirements, and elected not to alter the FCC's longstanding approach to making its necessary effective competition findings. It is odd, indeed, for the FCC to go far beyond what Congress just instructed it to do; namely, make mere administrative changes for small cable operators.² Moreover, the current proposal is inconsistent with Congress's express statement that procedural reforms for small cable operators should have no impact on the substance of the effective competition process, which requires cable operators to prove effective competition.³ Under the FCC's proposal,

¹ *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 (Mar. 16, 2015).

² See, e.g., Letter from Senator Patrick Leahy to FCC Chairman Tom Wheeler (May 8, 2015); Letter from Senators Al Franken, Amy Klobuchar, Jeff Merkley, Edward J. Markey, Ron Wyden, Bernard Sanders, Jack Reed, Tom Udall, Sheldon Whitehouse, Sherrod Brown, Tammy Baldwin, Martin Heinrich, and Elizabeth Warren to FCC Chairman Tom Wheeler (May 11, 2015).

³ *Id.* See also The STELA Reauthorization Act of 2014 (STELAR), § 111, Pub. L. No. 113-200, 128 Stat. 2059 (2014), *codified at* 47 U.S.C. § 543(o)(2) ("Nothing in this subsection shall be construed

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cable operators may never have to prove the existence of effective competition, as the Commission's presumption would, in most instances, do that work for them.

We also explained that the communities where a finding of effective competition has been made do not serve as a "test bed" for how cable operators may alter consumer pricing or tiering following the adoption of a blanket, nationwide presumption of effective competition. This change would eliminate the existing "patchwork" of communities that includes those found to be effectively competitive and a mix of communities where local franchise authorities may or may not regulate rates. Certain communities that do not regulate rates still have the authority to step in when and if they determine it is necessary to do so. The potential for regulation in such communities can serve as a check on a cable operator's behavior. If effective competition applies everywhere, on the other hand, operators can much more easily market and sell their services on a multi-system, multi-market basis without any constraints affecting portions of systems or markets that are rate-regulated or under regulatory oversight.

NAB also sought to address what appeared to be some misinformation being suggested by proponents of the Commission's proposal to reduce the amount of consumer protections in place against ever-rising cable rates. It has been suggested that, in most if not all areas, cable rates are not currently regulated, and thus a nationwide change to effective competition would be much ado about nothing.⁴ Indeed, within the last year, one operator noted that "approximately 17 percent of [its] total subscriber base is subject to rate regulation by local government," and they added that "some additional communities retain authority to regulate but choose not to do so."⁵ The Commission should ensure it has a complete and accurate picture of the extent to which regulatory authorities, communities, and subscribers could be affected by the proposed shift.⁶

We reiterated that the Commission should instead adopt procedural reforms to the effective competition filing process consistent with those that have been proposed in this and other

to have any effect on the duty of a small cable operator to prove the existence of effective competition under this section.").

⁴ See, e.g., *Letter from Rick Chessen of NCTA to Marlene H. Dortch, Secretary, FCC in MB Docket No. 15-53 (May 14, 2014) at 2.*

⁵ Responses of Comcast Corporation to U.S. Senate Judiciary Committee Questions for the Record, available at <http://www.judiciary.senate.gov/imo/media/doc/April%209,%202014%20-%20Cohen%20Responses.pdf> (Apr. 9, 2014), pp. 26-27.

⁶ We understand that the Commission also has noted evidence of low levels of rate regulation in its cable price survey report. *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"). However, the cable price survey focuses on a random sampling of only 2 percent of cable operators serving communities where an effective competition determination has not been made, which may hinder the Commission's assessment. *Id.*, at ¶ 8 (the FCC surveyed operators serving 485 of the 23,506 communities that have not been found subject to effective competition).

proceedings.⁷ Additionally, we shared the attached slide deck summarizing our positions and identifying potential consumer harms that could result from the Commission's proposal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'ERIN L. DOZIER', written in a cursive style.

Erin L. Dozier
Senior Vice President and Deputy General Counsel
Legal and Regulatory Affairs

Enclosure

cc: Chanelle Hardy

⁷ NAB Comments in MB Docket No. 15-53 (Apr. 9, 2015); Joint Ex Parte Letter of NAB, Alliance for Community Media, American Community Television, Common Cause, and Public Knowledge in MB Docket Nos. 15-53 and 02-144 (Apr. 17, 2015).



Preserving Effective Competition: The Importance of Protecting Pay TV Customers

Overview

- Three primary reasons why the FCC should not deem the entire nation “effectively competitive” for pay TV
 - Congress just directed the FCC in STELAR not to make additional changes beyond administrative relief for small cable operators
 - Wholesale deregulation threatens a rise in already soaring cable rates, harming those least able to afford it
 - Cable companies have far greater resources than LFAs to pursue effective competition determinations; a flip gives far too much power to already dominant cable operators

Congress's Direction Is Clear



SEC. 111. ADMINISTRATIVE REFORMS TO EFFECTIVE COMPETITION PETITIONS.

Section 623 of the Communications Act of 1934 (47 U.S.C. 543) is amended by adding at the end the following:

“(o) STREAMLINED PETITION PROCESS FOR SMALL CABLE OPERATORS.—

“(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this subsection, the Commission shall complete a rulemaking to establish a streamlined process for filing of an effective competition petition pursuant to this section for small cable operators, particularly those who serve primarily rural areas.

“(2) CONSTRUCTION.—Nothing 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.

“(3) DEFINITION OF SMALL CABLE OPERATOR.—In this subsection, the term ‘small cable operator’ has the meaning given the term in subsection (m)(2).”.



Gateway to Higher Cable Rates

- When FCC makes an effective comp finding, local franchise authorities can no longer keep cable rates in check
- The cable industry also argues that, where there is effective comp, they no longer must include the most-watched stations or public, educational and governmental channels on a consumer's basic tier
 - This would allow them to significantly raise consumer rates for the most-sought-after broadcast TV programming
- FCC data indicates that average basic tier is \$22.78; expanded basic is three times that at \$66.61



Rising Rates for Those Who Can Least Afford It?

Who relies most on competitive rates and the basic tier?

- Economically disadvantaged Americans
 - More than half of pay TV basic tier subscribers (54%) have an annual income under \$35,000
- Communities of color
 - 23% of Hispanic pay TV households and 22% of African American pay TV households subscribe to the basic tier
 - Over 1/3 of all basic tier subs are Hispanic, African-American, Asian-American or Native American
- Older Americans
 - 53% of basic tier homes skew older (i.e., householders 55+)



LFA's Remain At A Disadvantage

- In the FCC's own words:
 - “Cable operators are in a better position than franchising authorities or the FCC to ascertain their competitors’ availability and subscribership.”*
 - “We are mindful of franchising authorities’ concern that they do not have access to the information or the resources necessary to show the absence of effective competition as a threshold matter of jurisdiction.”*
- Has that balance of power changed? No.

**In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation (1993)*



Compare the Parties

→ Swinomish Tribal Community,
WA

→ The Cobb County Cable TV
Franchise Authority

→ Mt. Hood Cable Regulatory
Commission

→ Town of Clarksburg, MA

VS.

Market Cap

\$38
Billion

Market Cap

\$20
Billion





There Are Better, Lawful Solutions

- Alliance for Community Media, Alliance for Community Television, Common Cause, National Association of Broadcasters and Public Knowledge recommended the following common sense administrative reforms in line with STELAR:
 - Eliminate elements of an effective comp showing that are no longer in dispute
 - Reiterate that competitors must timely respond to requests for information and use enforcement authority to ensure compliance with this requirement
 - Automatically grant unopposed petitions for effective competition once the time for filing oppositions has elapsed
 - Adopt a time limit for FCC's review of petitions for effective competition, even where the petitions are opposed