Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

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COMMENTS OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

ITTA – The Voice of Mid-Size Communications Companies ("ITTA") hereby submits its comments in response to the March 16, 2015 Notice of Proposed Rulemaking ("*NPRM*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1] The *NPRM* seeks comment on improving the effective competition process by adopting a rebuttable presumption that cable operators are subject to effective competition.[2] This proposal would reverse the Commission's current presumption that cable operators are not subject to effective competition absent a demonstration to the contrary, and would require a franchising authority to make a showing that one or more cable operators in its franchise area is not subject to effective competition if it wishes to regulate basic service tier rates.[3]

Given the changes to the video distribution marketplace that have occurred since the Commission adopted its effective competition rules in 1993, ITTA agrees that the Commission should adopt a rebuttable presumption that cable operators are subject to effective competition

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[1] *In the Matter of Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53, Notice of Proposed Rulemaking, FCC 15-30 (rel. Mar. 16, 2015) ("*NPRM*").

[2] *Id*. at ¶ 1.

[3] *Id*.

and allow basic service tier rates to be dictated by the marketplace and not by regulation. Such an approach would reflect current marketplace realities where competition permits consumers to choose among multiple providers for subscription video service. It also would be consistent with the policy of the Commission and current Administration of modifying and streamlining rules that are outmoded or excessively burdensome,[4] and would appropriately implement the STELA Reauthorization Act of 2014 ("STELAR")[5] mandate that the Commission establish a streamlined effective competition process for small cable operators.[6]

I. CHANGES IN THE VIDEO DISTRIBUTION MARKETPLACE JUSTIFY A PRESUMPTION THAT CABLE SYSTEMS ARE SUBJECT TO EFFECTIVE COMPETITION

ITTA's interest in this proceeding stems from the fact that many of its members are new entrant video providers whose subscribers are located in predominantly rural markets throughout the United States. In virtually every market where ITTA members offer video service, they compete head-to-head against both DBS providers, at least one incumbent cable operator, and

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[4] *See* Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011) ("EO 13579"); *Federal Communications Commission*, *Final Plan for Retrospective Analysis of Existing Rules*, May 18, 2012, *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-314166A1.pdf (last visited: Feb. 20, 2014) ("*Final Plan*").

[5] *See* Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014). STELAR was enacted on December 4, 2014 (H.R. 5728, 113th Cong.). 47 U.S.C. § 543(o)(1) ("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.").

[6] Moreover, adopting a rebuttable presumption that cable operators are subject to effective competition could have a number of pro-consumer benefits. A finding of effective competition provides relief from basic service tier rate regulation, such as the tier buy-through prohibition and the requirement to have uniform prices throughout the geographic area served by the cable system. *See* 47 C.F.R. § 76.921(a); 47 U.S.C. § 543(d). Elimination of these requirements could give video providers greater leverage in retransmission consent negotiations with respect to tier placement of broadcast signals, which may lead to lower prices and greater programming choices for consumers. It also would permit video providers to respond more nimbly to competition in certain geographic areas within their footprint based on competitors' service offerings in those areas.

online video providers, such as Netflix, Hulu, Amazon Video, Apple TV, and others.[7] The Commission itself has concluded that nearly all homes in the U.S. have access to at least three multichannel video programming distributors ("MVPDs"), and many areas where telephone companies offer video service have access to at least four MVPDs.[8] These estimates do not even account for competition from over-the-top video distributors to which consumers increasingly subscribe.

The video distribution marketplace has undergone a significant transformation since the Commission first adopted its effective competition rules in 1993. At that time, incumbent cable operators had approximately a 95 percent share of MVPD subscribers, and in most areas of the country, the incumbent cable operator was the only option for subscription video service.[9] DBS providers had not yet begun to offer service, and local exchange carriers like ITTA member companies had yet to enter the video distribution business in any significant way.

Fast forward twenty years and DirecTV and DISH Network are now the second and third largest MVPDs in the United States, with more than 34 million subscribers between them, while telco-based video providers have an increasing competitive presence based on consumers' preference for subscription video service bundled with data, voice, and other services.[10] DBS market share has grown to nearly 34% of all MVPD subscribers, and telephone MVPDs have

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[7] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3353, ¶ 2 (2014) ("[W]hile consumers seeking to purchase video programming service typically formerly had only one option – a cable operator – today consumers may choose among several MVPDs. In addition to MVPD services, today's consumers also access video programming on the Internet.") (footnote omitted).

[8] *See NPRM* at ¶ 10.

[9] *See id*. at ¶ 5.

[10] *See id*. at ¶ 6.

attained more than 11% market share.[11] Cable's share of the market, in contrast, has decreased to about 54%.[12] Thus, although the cable industry continues to command the largest market share with respect to the provision of video service, sufficient competition exists in the video distribution marketplace to adopt a rebuttable presumption of effective competition consistent with the relevant statutory criteria.[13]

The current state of competition in the MVPD marketplace is further evidenced by the outcomes of the Commission's recent effective competition decisions. As indicated in the *NPRM*, the Commission grants nearly all requests for a finding of effective competition. From the start of 2013 to the present, the Media Bureau has granted 224 petitions requesting findings of effective competition in their entirety and four such petitions in part.[14] The Commission has not denied any such requests in their entirety.[15] In the four instances in which the Commission partially granted the petition, the Commission only denied a finding of effective competition for seven communities.[16] It also is notable that franchising authorities filed oppositions to only 18 of the 228 petitions.[17]

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[11] *Id*.

[12] *Id*.

[13] For example, a finding of competing provider effective competition requires that: (1) the franchise area be served by at least two unaffiliated MVPDs each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (2) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area. 47 U.S.C. § 543(l)(1)(B).

[14] *NPRM* at ¶ 7.

[15] *Id*.

[16] *Id*.

[17] *Id*.

As a result of these decisions, the Commission has determined that more than 1,400 communities across the United States have effective competition, including in the country's largest cities, suburban areas, and rural areas where subscription to DBS is high.[18] In other words, the Commission in recent years has concluded that thousands of communities are effectively competitive, and the number of communities where it has determined that effective competition does not exist represent less than half a percent of the communities evaluated.[19]

It is clear that market changes over the past two decades have undermined the basis for a presumption that cable operators are not subject to effective competition. The fact that more than 99.5 percent of effective competition requests are currently granted justifies reversal of this outdated assumption. As the Commission points out, the vast majority of its effective competition grants were based on competing provider effective competition from DBS.[20] Given that the threshold for competing provider effective competition is 15 percent, DBS alone, with nearly 34% market share nationwide, has close to twice as many subscribers needed to satisfy the threshold.[21] The growing presence of local exchange carriers as MVPDs provides further evidence that video markets are presumptively competitive and that the Commission should adopt a rebuttable presumption of effective competition as proposed in the *NPRM*.

II. ADOPTING A PRESUMPTION OF EFFECTIVE COMPETITION WOULD FURTHER THE COMMISSION'S GOALS OF STREAMLINING ITS RULES AND PROCESSES

Adopting a rebuttable presumption that cable systems are subject to effective competition would promote the goals of a 2011 Executive Order that encourages independent regulatory

[18] *Id*.

[19] *Id*.

[20] *Id*. at ¶ 10.

[21] *Id*.

agencies to conduct a "retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."[22] The Commission has indicated that in conducting this assessment, it will focus on regulations that, among other things, have been affected by changes in market structure, have been identified by affected stakeholders as needing revision, and that may result in greater net benefits to the public if modified or removed.[23] With respect to the outdated effective competition process, all of these criteria are met.

As indicated above, since 2013, the Commission has granted in whole or in part each of the 228 petitions requesting a finding of effective competition that it has reviewed. These petitions undoubtedly involved significant cost and time to prepare, particularly for smaller companies, and evaluating them undoubtedly required a substantial amount of time and Commission resources. Yet, the requirement that cable operators file such petitions in the first place is based on an outdated assumption that is no longer true based on changes in market structure. Given the growth in retail video competition, and the ubiquitous presence of DBS in particular, it no longer makes sense to require cable operators to adhere to this time-consuming and burdensome process.

By reversing the presumption that cable operators are not subject to effective competition, the Commission would ease the burdens cable operators, particularly smaller providers, face in filing effective competition petitions. It also would conserve Commission resources by reducing the number of effective competition determinations that the agency needs to adjudicate, allowing it to concentrate its efforts on activities that would result in greater net benefits to the public. In short, adopting a presumption of effective competition as proposed in

[22] EO 13579, § 2.

[23] *See Final Plan* at 7.

the *NPRM* would ensure the most efficient use of Commission resources and reduce unnecessary regulatory burdens on industry in furtherance of the Commission's goals of streamlining its rules and processes.

III. ADOPTING A PRESUMPTION OF EFFECTIVE COMPETITION WOULD APPROPRIATELY IMPLEMENT STELAR

STELAR requires the Commission to take prompt action to "establish a streamlined process for filing of an effective competition petition… for small cable operators."[24] Although Congress directed the Commission to focus on easing the burden of the existing effective competition process for small cable operators specifically, there is no reason the Commission should limit relief to smaller providers when the record overwhelmingly supports application of a consistent approach to all affected providers, regardless of size.

As indicated above, the growth of competition in the video marketplace more than adequately justifies reversal of the presumption that cable operators are not subject to effective competition absent a demonstration (i.e., undertaking the burdensome and time-consuming effective competition petition process) to the contrary. Moreover, shifting the burden of producing evidence from cable operators to franchising authorities in the limited instances in which effective competition may not exist is consistent with the Commission's broader goals of identifying outdated and inefficient regulations and simplifying or eliminating them. In short, reducing regulatory burdens on all cable operators, large and small, as well as their competitors, would reflect marketplace realities and allow for a more efficient allocation of Commission and industry resources.

[24] 47 U.S.C. § 543(o)(1).

IV. CONCLUSION

Given the changes to the video distribution marketplace that have occurred since the Commission adopted its effective competition rules in 1993, the Commission should adopt a rebuttable presumption that cable operators are subject to effective competition. Such an approach would reflect the competitive state of the video distribution marketplace, appropriately implement STELAR, and be consistent with the Commission's policy of reducing regulatory burdens associated with outmoded regulations.

Respectfully submitted,

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