

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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)

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)¹ submits the following comments on the Commission’s Notice of Proposed Rulemaking (“NPRM”)² implementing Section 111 of the STELA Reauthorization Act of 2014 (“STELAR”), Pub. L. No. 1113-200, 128 Stat. 2059 (2014). As explained below, the narrow congressional directive that is driving this proceeding – to streamline effective competition petition filing *processes for small cable operators only* – can and should be achieved expeditiously and with widespread support by focusing solely on those administrative elements of the filing process that can be simplified, especially through electronic means. Instead, the Commission has proposed sweeping, nationwide changes that would have broad implications well beyond small cable operators, including consumers, local TV broadcasters and local governments and the communities they serve. These extensive changes are unnecessary and unwise, especially within the truncated timeline mandated by Congress.

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *In the Matter of Amendment to the Commission’s Rules Concerning Effective Competition*, Notice of Proposed Rulemaking, FCC 15-30, MB Docket No. 15-53 (Mar. 16, 2015).

I. EXECUTIVE SUMMARY

In the NPRM, the Commission has sought comment on whether it should adopt a nationwide presumption that all cable operators are subject to effective competition and revoke existing certifications of franchising authorities *en masse*, subject to the right of a local franchising authority to commence a new certification proceeding in which it may offer evidence to rebut the presumption. NPRM ¶¶ 1-2. The answer is no. Congress has required that the Commission make individualized findings of the existence of effective competition in each franchise area to preempt the authority of local authorities to regulate cable rates. NAB posits that the Commission cannot revoke that authority simply based on a presumption, without any evidence specific to the franchise area of the facts that Congress declared necessary to a finding of effective competition. Furthermore, NAB submits that the Commission lacks the claimed power of mass administrative revocation; once certification has been granted, Congress has only permitted the Commission, upon petition of a cable operator or other interested party, to revoke a franchising authority's certification upon a *finding* that the authority is acting inconsistently with the statute (such as regulating rates when the cable operator is subject to effective competition). A presumption cannot substitute for a finding. Moreover, in STELAR, Congress has ratified the existing rules that require the cable operator to prove the existence of effective competition in order to revoke certification, which is inconsistent with the proposed presumption of effective competition.

Especially given the expedited statutory timeline, NAB urges the Commission to limit this proceeding to the task assigned by Congress of streamlining the petitioning process for small cable operators, rather than upending its existing general framework for determining effective competition. Moreover, the NPRM fails to explore some of the critical implications for consumers that its proposals could have. It should not plow forward with such drastic

changes in a compressed timeframe without offering the public a chance to comment meaningfully on its wide-ranging proposals.

II. STATUTORY AND REGULATORY BACKGROUND

A. The 1992 Cable Act And Implementing Regulations

The Cable Television Consumer Protection and Competition Act of 1992 (the “1992 Cable Act”), Pub. L. No. 102-385, 106 Stat. 1460 (1992), subjects any cable operator that does not face “effective competition” to rate regulation. *Time Warner Entm’t Co. v. FCC*, 56 F.3d 151, 162 (D.C. Cir. 1995). The 1992 Cable Act defines effective competition to require the existence of at least one of four factual circumstances in specific franchise areas. The first is that “fewer than 30 percent of the households *in the franchise area* subscribe to the cable service of a cable system,” 47 U.S.C. § 543(l)(1)(A) (emphasis added); the Commission has termed this circumstance “low penetration effective competition.” NPRM ¶ 3 n.11. The second requires both that “the *franchise area*” is “served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households *in the franchise area*,” and that more than “15 percent of the households *in the franchise area*” subscribe to programming services offered by multichannel video programming distributors (MVPDs) “other than the largest multichannel video programming distributor,” 47 U.S.C. § 543(l)(1)(B) (emphasis added); the Commission has termed this circumstance “competing provider effective competition.” NPRM ¶ 3 n.12. The third is that “a multichannel video programming distributor operated *by the franchising authority for that franchise area* offers video programming to at least 50 percent of the households in that franchise area,” 47 U.S.C. § 543(l)(1)(C) (emphasis added); the Commission calls this circumstance “municipal provider effective competition.” NPRM ¶ 3 n.13. The fourth factual circumstance is the offering by a

local exchange carrier or its affiliate (or other persons using their facilities) of comparable video programming services “*in the franchise area* of an unaffiliated cable operator which is providing cable service *in that franchise area*,” 47 U.S.C. § 543(l)(1)(D) (emphasis added); the Commission designates this circumstance “local exchange carrier ... effective competition.” NPRM ¶ 3 n.14.

“The Act divides the cable services of a system that is subject to rate regulation into three categories: (1) the basic service tier; (2) cable programming service; and (3) video programming offered on a per channel or per program basis, which alone is not subject to rate regulation.” *Time Warner*, 56 F.3d at 162 (citing 47 U.S.C. §§ 543(a)(1), (l)(2)). The authority to regulate rates depends on a finding of the existence or non-existence of effective competition by the Commission: “If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition,” then either a local franchising authority or the Commission shall regulate rates as the Act provides. 47 U.S.C. §§ 543(a)(2).³

In 1994, the Commission adopted rules to implement the 1992 Cable Act and established a presumption that the cable operator does not face effective competition, and placed the burden upon the cable operator to overcome the presumption. *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631

³ Congress terminated the Commission’s authority to regulate the rates for cable programming service as of March 31, 1999, see 47 U.S.C. § 543(c)(4); in some enumerated circumstances, the Commission may exercise the authority to regulate the rates for the basic service tier, *id.* § 543(a)(6).

¶ 42 (1993) (“1993 Rate Order”), on reconsideration, Third Order on Reconsideration, 9 FCC Rcd 4316 (1994), *rev’d in part, Time Warner Entm’t Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995). In adopting that approach, the Commission acknowledged the “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.” *Id.* ¶ 41. Accordingly, the Commission would “presume that the cable operator is not subject to effective competition”; the franchising authority would rely on that presumption in filing its certification unless it knew the contrary to be true; and “[t]he cable operator will then have the burden of rebutting this presumption with evidence of effective competition.” *Id.* ¶ 42. Placing that burden upon cable operators was reasonable, the Commission determined, because they are best positioned to gather the necessary data:

Cable operators are in a better position than franchising authorities or the FCC to ascertain their competitors’ availability and subscribership, particularly in light of our requirement that competitors provide operators with such information. Moreover, as competitors, operators will be motivated to bring all competitive facts to light. Not only would the Commission be insurmountably burdened by having to gather such data in the first instance for franchise areas across the nation, but it is not locally positioned, as is the operator, to obtain the most precise data on competition in a given area. A finding of effective competition would serve the interests of the cable operators. We find it reasonable to place the burden on them, therefore, to rebut the presumption of no effective competition.

Id. ¶ 46.

Notwithstanding this presumption, the Commission also recognized that a finding of no effective competition is “a jurisdictional prerequisite to rate regulation” under the 1992 Cable Act. *Id.* ¶ 89. However, in the 1993 Rate Order, the Commission determined that it could not permit a full pleading cycle for cable operators to contest the question of effective competition, given the statutory requirement that certifications of franchising authorities

become effective within 30 days of filing. *Id.* ¶ 85. Accordingly, the Commission declared that, in making the requisite jurisdictional finding, it “must rely initially on the franchising authority’s statement that it does in fact meet certification standards.” *Id.*

Under the procedures that have been in place for more than two decades, the local franchising authority files a standard form that includes a certification that the authority believes that the presumption of no effective competition is correct in the relevant communities. *Id.* ¶ 74; see *id.* App. D (Question 6: “The Commission presumes that the cable system(s) listed in 2b is (are) not subject to effective competition. Based on the definition below, do you have reason to believe that this presumption is correct? If not, state why not.”); see also FCC Form 328, available at <http://www.fcc.gov/Forms/Form328/328.pdf> (same). The cable operator can file a petition for reconsideration of the certification decision to challenge the effective competition finding within 30 days, which stays any rate regulation. 1993 Rate Order ¶¶ 87-89; see 47 C.F.R. § 76.911. If certification is granted, the cable operator can petition the local franchising authority for a change of status, or file a petition for revocation of certification with the Commission to rebut the presumption of competition. 1993 Rate Order ¶ 101; see 47 U.S.C. § 543(a)(5); 47 C.F.R. § 76.914.⁴

B. The STELA Reauthorization Act

In 2014, in Section 111 of STELAR, Congress directed the Commission to “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

⁴ Filing a change-of-status petition with the local franchising authority is not a condition precedent to filing a petition for revocation with the Commission. See *In the Matter of Century Cable of Northern California Inc.*, 13 FCC Rcd 24153 n.57 (1998).

rural areas,” within 180 days of enactment. P.L. No. 113–200, § 111, 128 Stat. 2006 (2014); 47 U.S.C. § 543(o)(1). Congress declared, however, 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.” *Id.* § 543(o)(2).

C. Notice Of Proposed Rulemaking

Although STELAR gave the Commission only 180 days to conduct a rulemaking on the narrow issue of streamlining procedures for small cable operators, the Commission decided in the NPRM to propose sweeping changes to its effective-competition rules on STELAR’s accelerated timetable. Based on national data showing increased competition, the Commission has proposed to “reverse [its] presumption and instead presume that cable operators are subject to effective competition” from competing providers, and to shift the burden to franchising authorities “to demonstrate to the Commission that one or more cable operators in its franchise area is not subject to effective competition if it wishes to regulate cable service rates.” NPRM ¶ 1. If it adopts such a presumption, the Commission proposes to order an “administrative revocation” of all existing certifications of franchising authorities within 90 days, thus shifting the burden to the franchising authority to submit a new application for certification demonstrating the absence of effective competition. *Id.* ¶¶ 14-16.

III. COMMENTS

A. The Statute Requires The Commission To Make A Finding With Regard To Effective Competition, Not Merely Presume It

The Commission has sought comment on “whether we should adopt a presumption that cable systems are subject to competing provider effective competition, absent a franchising authority’s demonstration to the contrary.” NPRM ¶ 8. NAB submits that the

answer is no and observes that “[t]he law is clear that ‘an agency is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found.’” *Shi Liang Lin v. U.S. Dep’t of Justice*, 494 F.3d 296, 308 (2d Cir. 2007) (en banc) (quoting *United Scenic Artists v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985)).

1. The Commission Cannot Employ Presumptions To Avoid The Statutory Requirement Of An Evidence-Based Finding Of Effective Competition In Franchise Areas

The 1992 Cable Act expressly requires the Commission to make findings on the absence or presence of effective competition for each franchise area, because the rate regulation authority of franchising authorities and certain other statutory duties turn on those area-specific facts: “If the Commission *finds* that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission *finds* that a cable system is not subject to effective competition,” then either a local franchising authority or the Commission may exercise ratemaking authority. 47 U.S.C. § 543(a)(2) (emphasis added); see also *id.* § 543(d)(1) (requirement of a geographically uniform rate structure “does not apply to ... a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator *in that area are subject to effective competition*”) (emphasis added). The statute identifies four specific factual circumstances, any one of which, if present in a specific “franchise area,” constitutes effective competition *in that area*: *i.e.*, (1) low penetration by the cable operator, or lack of (2) municipal, (3) effective provider, or (4) local exchange carrier competition. *Id.* § 543(l)(1).

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, and specifies the facts that constitute effective competition, the Commission must base any effective-competition finding on actual evidence concerning the presence of competition in individual franchise areas. *Kasravi v. INS*, 400 F.2d 675, 677 (9th Cir. 1968) (“If such a finding of fact were required by the statute, the decision of the Attorney General would be subject to review in order to determine whether such finding were supported by reasonable, substantial and probative evidence.”). As the D.C. Circuit has held, in discussing in a related context the statutory requirement that the Commission make findings of public convenience, interest, or necessity under Section 319 of the Communications Act:

The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts.

Saginaw Broad. Co. v. FCC, 96 F.2d 554, 559 (D.C. Cir. 1938); *id.* at 561 (Commission must make “findings of the basic facts which represent the determination of the administrative

body as to the meaning of the evidence, and from which the ultimate facts flow”). Here, the Commission has previously acknowledged that “the finding of effective competition is essential to both franchising authority and FCC jurisdiction to regulate rates.” 1993 Rate Order ¶ 86. Therefore, the Commission must make findings on the evidence particular to a franchise area, such as whether more than “15 percent of the households *in the franchise area*” subscribe to programming services offered by multichannel video programming distributors “other than the largest multichannel video programming distributor,” 47 U.S.C. § 543(l)(1)(B)(ii) (emphasis added).

Under current regulations, the Commission approaches its statutory obligation to make evidence-based findings of effective competition by creating a presumption of no-effective-competition and then relying on certifications by local franchising authorities that the Commission’s presumption is correct. The Commission implicitly makes a no-effective-competition determination by allowing the certification to go into effect within 30 days (subject to subsequent challenge by the cable operator). See 1993 Rate Order ¶¶ 85-88 & App. D, Question 6. No aggrieved parties (*i.e.*, cable operators) apparently challenged the legality of these procedures in the petition for review of the 1993 Rate Order.⁵ Regardless of whether any such challenge would have succeeded, under the current rules, the Commission has at least *some evidence* specific to an individual franchise area upon which

⁵ In the 1993 Rate Order, the Commission justified the current presumption of no effective competition because of the exigency of granting certifications within 30 days of filing, as the statute required. 1993 Rate Order ¶ 85. That did not warrant dispensing with the findings of fact that the Act required. The Commission could have required the cable operator within a reasonable period of time after adoption of the final rules to either file a stipulation that there was no effective competition according to any statutory criteria (as most operators would have had to do in 1993), or give notice that it would seek an effective-competition determination, before permitting the franchising authority to file a certification application. Alternatively, the Commission could have granted the certification but stayed ratemaking authority (subject to potential refund) until it made the requisite finding. See *id.* ¶ 89 (adopting that procedure for petitions to determine effective competition by cable operators).

to base its implicit finding of no-effective-competition: namely, the certification of the franchising authority that it has “reason to believe that the presumption is correct” as to its franchise areas. See Form 328, at 2 (Question 6); see 1993 Rate Order Appendix D, Question 6 (last visited April 5, 2015).

By contrast, as proposed in the NPRM, the Commission would automatically abrogate the ratemaking authority of franchising authorities within 90 days of the final rule strictly based on the new nationwide presumption – without *any evidence* concerning the existence of effective competition in the franchise area. NPRM ¶ 15. This proposal flatly violates the statute, 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). The Commission is thus proposing simply to presume the very facts that Congress has required it to find.

NAB contends that it is no answer that, under the Commission’s proposal, a franchising authority may commence a new certification proceeding prior to the effective date of the revocation, in which it can attempt to demonstrate effective competition. See NPRM ¶ 15. Under the proposed rule, the Commission would still be taking an initial affirmative regulatory action – abrogation of local ratemaking authority across the country – without the statutorily required finding of effective competition specific to the franchise area in question (and merely staying revocation of the certification in those jurisdictions where the franchising authority timely files a new certification application). *Id.*

Agencies cannot adopt presumptions to avoid the individualized factual determinations required by statute. In *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987), the Board of Immigration Appeals was required to consider on a case-by-case basis the hardship to a citizen or permanent-resident child if a parent were deported, but the BIA

justified its failure to make an individualized determination because it presumed that parents would not leave young children in the United States. *Id.* at 1426. The Ninth Circuit held that “[t]he BIA cannot adopt a general presumption that separation of parents and children will not occur and thereby relieve itself of its duty to consider applications on an individual basis. It must consider the specific facts and circumstances of each case. In failing to consider the factor of separation, the BIA ‘overlooked or evaded an inquiry necessary to a reasoned decision.’” *Id.* (quoting *Trailways, Inc. v. ICC*, 673 F.2d 514, 525 (D.C. Cir. 1982)). Similarly, in *United Scenic Artists v. NLRB*, 762 F.2d 1027 (D.C. Cir. 1985), the NLRA required that a union could be found to have engaged in an unlawful secondary boycott only upon “a showing of a purpose to coerce a neutral employer.” *Id.* at 1033. The NLRB invoked a rebuttable “presumption” to establish that object: namely, “that if a union is not denied access to information and if it is not affirmatively misled concerning the issue of control, it must be presumed to have had knowledge of the neutral status of the controlling employer and thus to have had an unlawful secondary object.” *Id.* The D.C. Circuit rejected that presumption as inconsistent with the statute because the agency had dispensed with the statutorily imposed requirement to find unlawful purpose. *Id.* at 1034-35. So too here the Commission cannot abrogate ratemaking authority by relying upon a nationwide presumption of effective competition, when the statute directs the Commission to determine effective competition in each franchise area based on the presence of specified facts *before* abrogating that authority.

Indeed, the Commission is proposing to go farther than that. It would invoke a mere nationwide presumption not only to undo final agency action granting thousands of franchising authority certifications, but also many final agency orders that found *on the*

evidence (including very recently) that there was no effective competition in the franchise area.⁶ NAB submits that the rule proposed in the NPRM is unlikely to survive judicial review.

2. A Presumption Based On National Market Share Data Lacks A Rational Nexus To The Question Of Effective Competition In Each Of The Thousands Of Franchise Areas In The Country

Provided that they are consistent with the statute, agencies may generally establish rebuttable presumptions, *Southern Co. Servs. Inc. v. FCC*, 313 F.3d 574, 581 (D.C. Cir. 2002), but “their validity depends as a general rule upon a rational nexus between the proven facts and the presumed facts.” *United Scenic Artists*, 762 F.2d at 1034; *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979) (holding that “a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts”).

Here, the Commission untenably proposes to invoke a presumption of effective competition without proof of *any* predicate facts about the franchise area in question, and to take the regulatory action of preempting rate regulation by franchising authorities before permitting the newly minted presumption to be rebutted (which requires commencement of a separate certification proceeding by the franchising authority). Even outside of these defects, there is no rational nexus that would permit *national* data of effective competition

⁶ See, e.g., *Three Communities in Massachusetts*, 2015 FCC LEXIS 565, DA 15-164 (MB 2015) (denying petition with respect to Adams, Massachusetts (MA0001)); *Communities in Texas*, 28 FCC Rcd 16776 (MB 2013) (denying petition with respect to the City of Beverly Hills (TX0256), the City of Lorena (TX1068) and the City of McGregor (TX0231)); *Communities in Indiana and Kentucky*, 28 FCC Rcd 3313 (MB 2013) (denying petition with respect to Taylorsville, KY (KY0730)); *Twenty-Four Communities in the State of New York and the Commonwealth of Pennsylvania*, 23 FCC Rcd 18355 (MB 2008) (denying petition with respect to Montour Falls (NY0584), Odessa (NY0585), Watkins Glen (NY0518) and Lawrenceville (PA2719)); *Twenty-Three Local Franchise Areas in Oregon*, 20 FCC Rcd 10679 (MB 2005) (denying petition with respect to Clackamas and Lincoln Counties); *Kansas City, Missouri*, 19 FCC Rcd 1445 (MB 2004); *Clinton County, Kentucky*, 10 FCC Rcd 8899 (CSB 1995); *City of Pembroke Pines, Florida*, 10 FCC Rcd 2140 (CSB 1995).

to serve as proof of effective competition in each of the 23,506 communities (*i.e.*, franchise areas) without such a finding.⁷

In proposing the new presumption, the Commission noted that the cable operators' share of subscribers in the multichannel video programming distributor (MVPD) market over the last year had declined in the course of 2013 from 55.8% to 53.9%, while Direct Broadcast Satellite (DBS) and telephone MVPDs had increased their shares to 33.9% and 11.2% respectively. NPRM ¶ 6. But telephone MVPDs are not ubiquitous, so the Commission largely relied on a single national fact in justifying an effective presumption: namely, that “nearly 26 percent of American households in 2013 subscribed to DBS service,” which “on a national scale ... [is] close to double” the 15% competitive household presentation that must be shown to prevail under Section 623(l)(1)(B)(ii). *Id.*

This is a non-sequitur. The *national* share of DBS providers does not give any indication as to what the DBS share is in each of the 34,605 franchise areas in the United States, 23,506 of which have never been found to be competitive. 2014 Cable Prices Report at 14898 & 14913. For example, if a particular government program required a showing of the average annual precipitation in a locality, data on the average annual precipitation in the United States would be irrelevant. The average annual precipitation in the continental U.S. is 30.2 inches, but that figure varies from 9.5 inches in Nevada to 60.1 inches in Louisiana; some places in the U.S. receive only 2-3 inches annually. See *Average Annual Precipitation by State*, available at

⁷ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 29 FCC Rcd 14895, 14898 & 14913 (Dec. 15, 2014) (“2014 Cable Prices Report”). The Commission treats the areas identified as identified by separate Community Unit Identification Numbers assigned to cable operators (“CUIDs”) as approximating separate franchise areas. NPRM ¶ 7 n.37.

<http://www.currentresults.com/Weather/US/average-annual-state-precipitation.php> (last visited April 5, 2015); *Places in the United States with Lowest Precipitation*, available at <http://www.currentresults.com/Weather-Extremes/US/places-with-lowest-precipitation.php> (last visited April 5, 2015). Indeed, as early as the 1984 Cable Act, Congress directed the Commission to determine “on a community-by-community basis whether a cable system is subject to effective competition” because “the presence nationwide of various telecommunications services does not speak to the availability of such services in a particular community.” H.R. Rep. No. 98-934, at 66 (1984). The competitive situation in different franchise areas may be highly variable, and the Commission has mustered no evidence to the contrary. National DBS market share is simply not a reasonable proxy for competing-provider market share in a given franchise area, and thus the Commission has failed to show “a rational nexus between the proven facts and the presumed facts.” *United Scenic Artists*, 762 F.2d at 1034.

The Commission attempted to buttress its proposed presumption by observing that in 2013 the Commission found effective competition in over 99% of the communities in which such a determination was sought, and 80% of the time on the grounds of competing-provider competition). NPRM ¶ 7. This, too, is a non-sequitur. Those cable operators who petitioned for an effective-competition determination did so because they believed they could prove that the facts germane to their franchise area supported the finding under the statutory test of Section 623(l)(1); their success rate says nothing about the likely factual situation in the more than 23,000 franchise areas for which cable operators *have not* sought such a determination, despite the strong incentive to be free of rate regulation. The Commission’s logic is akin to saying that if 99% of Iraq War veterans who applied for certain disability benefits received them, then the Department of Veterans Affairs can presume that

all such veterans have disabilities (even those that never applied). The Commission cannot draw a meaningful connection between the success rates of self-selected cable operators who proved effective competition based on the particular facts of their franchise areas and the competitive situation in completely unrelated franchise areas where the cable operator did not even seek such a determination.⁸

3. The Commission Has Not Established The Need For A Presumption Of Effective Competition As A Substitute For Actual Evidence

“The usefulness of a presumption is also a factor to be considered in assessing its validity,” and an agency presumption will not be upheld if there is no need for it. *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983) (“Presumptions should not replace proof needlessly.”). In *Holland Livestock Ranch*, the Bureau of Land Affairs established a presumption that cattle with unrestricted access to public lands would be presumed to have trespassed on public lands; the Ninth Circuit held that “the presumption cannot stand where it is not needed: as the sole evidence to establish a claim of trespass. The government must prove some actual trespass before relying upon the presumption.” *Id.* The Ninth Circuit noted that “[p]roving that at least one animal has actually trespassed is not difficult,” and that it would “not add greatly to [the agency’s] labors to locate animals actually trespassing, if such trespasses are at all substantial.” *Id.*

⁸ Moreover, even among that self-selected group, cable operators did not claim competing-provider effective competition as to 20% of the franchise areas, relying instead on other grounds. See NPRM ¶ 7 n.38. While the Commission correctly states that that does not necessarily mean that competing provider competition does not exist in such jurisdictions, *id.*, one would expect a cable operator who has filed a petition to plead and prove that ground in the alternative if the facts supported it. The fact that cable petitioners did not as to 20% of the franchise areas further renders suspect the proposed application of a nationwide presumption of effective competition as to all jurisdictions.

There is likewise no need here for a presumption in order to adjudicate effective competition in any particular franchise area. The evidence needed to prove effective competing-provider competition is straightforward and readily available. A cable operator can easily prove the first prong of the test – namely, that “the franchise area is ... served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area,” 47 U.S.C. § 543(l)(1)(B)(i) – with evidence that the DBS provider operates in the area and advertises its services in local, national, or regional media accessible to the community. 1993 Rate Order ¶ 32. The second prong merely requires a showing that the cumulative subscribership of competing MVPDs “exceeds 15 percent of the households in the franchise area.” 47 U.S.C. § 543(l)(1)(B)(ii); 47 C.F.R. § 76.905(c)-(g). The cable operator has a right to request and receive all necessary information from competitors, *id.* § 76.907(c), and (once that information is gathered) it is a relatively simple matter to calculate whether the number of subscribers of competitive MVPDs exceeds 15% of households in the franchise area.

The utility of the presumption to the Commission is not to facilitate adjudication of these factual issues, but to relieve the Commission of the need to make potentially 23,506 evidence-based determinations of effective competition within franchise areas. See NPRM ¶ 23. The Commission understandably may want to shed that growing burden given the emergence of competition nationally, but such particularized findings are what the 1992 Cable Act requires. The Commission’s remedy lies in Congress, not in rulemaking.

4. The Commission Has Not Given A Reasoned Explanation For Shifting The Burden Of Production From Cable Operators To Franchising Authorities

As explained above, NAB contends that the Commission has not proposed a true rebuttable presumption; the Commission is revoking the existing certification without any opportunity to rebut the presumption *prior* to that administrative action. The Commission is simply permitting the local franchising authority (before the effective date of the revocation) to seek a new certificate if it can prove the lack of effective competition in that proceeding. See NPRM ¶ 15.

But even if *arguendo* the proposed rule were deemed to create a rebuttable presumption, and only shift the burden of production (and not the burden of persuasion) to the franchising authority, see *Director, Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-76 (1994) (discussing differences in the two burdens), the Commission has failed to give a reasoned justification for its change of position. Allocation of the burden of production should not depend on which party is typically more likely to prevail in the proceeding; it should depend on which party has more ready access to the information and the capability to discover and present it properly to the finder of fact. In the 1993 Rate Order, the Commission accepted that the franchising authorities, which do not regulate all MVPDs, lacked the resources and access to information to bear the burden of production, 1993 Rate Order ¶ 41; indeed, it stated that “[c]able operators are in a better position than franchising authorities or the FCC to ascertain their competitors’ availability and subscribership, particularly in light of our requirement that competitors provide operators with such information. Moreover, as competitors, operators will be motivated to bring all competitive facts to light.” *Id.* ¶ 46 (emphasis added).

Nothing in the NPRM indicates that facts have changed in the regard; indeed, given consolidation in the cable industry, cable operators are typically part of large conglomerates that certainly have the financial resources and wherewithal to bear the burden of production.⁹ In all events, the Commission has failed to give a reasoned explanation for shifting the burden to franchising authorities. “An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.” *Motor Veh. Mfrs. Ass’n v. State Farm Ins.*, 463 U.S. 29, 57 (1983) (internal quotation marks omitted). Having granted thousands of franchising authorities rate-regulation authority based on an implicit finding of effective competition, the Commission should retain its current regulations requiring the cable operator to petition to rescind that finding based on changed circumstances. See 47 C.F.R. § 76.907.

B. The Commission Lacks Statutory Authority To Conduct A Mass “Administrative Revocation” Of Franchising Authority Certifications Without Making A Finding Of Effective Competition

The Commission seeks comment on whether all existing certifications should be “administratively revoked on the effective date of the new presumption pursuant to Sections 623(a)(1) and (2) because their reliance on the presumption of no effective competition would no longer be supportable.” NPRM ¶ 14. The Commission suggests that “here [it]

⁹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, MB Docket No. 14-16, FCC 15-14, ¶ 25 (April 2, 2015) (noting that, at the end of 2013, the five largest cable companies “accounted for approximately 81.8 percent of all cable MVPD subscribers”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496, 10506 (2013) (noting that, at the end of 2010, the five largest cable MVPDs “accounted for approximately 80.1 percent of all cable MVPD subscribers”).

would be administratively revoking the franchising authority's jurisdiction under Sections 623(a)(1) and (2), rather than based on a determination described in Section 623(a)(5)." *Id.*

NAB submits that the Commission has been afforded no such implied power of revocation in Sections 623(a)(1) and (2). Congress has granted the Commission an express power to revoke the certification of franchising authorities in Section 623(a)(5), which is entitled "Revocation of Jurisdiction." 47 U.S.C. § 543(a)(5). But that statute has procedural requirements, including a petition by the cable operator or other interested party, notice to the franchising authority, and a finding by the Commission:

Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief.

Id. (emphasis added). The scope of this revocation power – to remedy actions by franchising authorities "inconsistent[] with the requirements of this subsection" – encompasses inconsistency with all of Subsection 623(a), including the provisions that forbid franchising authorities to regulate rates when there is effective competition. See 47 U.S.C. § 543(a)(1), (2). Thus there can be no implied separate power of "administrative revocation" arising from those provisions. *Christensen v. Harris Cnty.*, 529 U.S. 576, 583 (2000) ("We accept the proposition that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'" (quoting *Raleigh & G.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1872))); *Continental Cas. Co. v. United States*, 314 U.S. 527, 533 (1942) ("The conditions for action make action without meeting the conditions, we think, contrary to Congressional purpose, as expressed in the statute.").

The Commission and the Media Bureau have long recognized that a petition for revocation by a cable operator is the proper vehicle for requesting revocation of a franchising authority's certification because effective competition has emerged. See 1993 Rate Order ¶ 101 (“Operators denied a change in [effective-competition] status by a franchising authority would be entitled to seek review of that finding by the Commission, by means of a petition for revocation ...”); *In the Matter of CMA North Carolina Cable Associates*, 10 FCC Rcd 555 n.11 (1994) (“Should CMA wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's Rules.”); *In the Matter of Century Cable Of Northern California Inc.*, 13 FCC Rcd 24153 ¶¶ 3, 22 n.57 (1998) (noting that “[c]able operators are permitted to seek deregulation directly from the Commission” under 47 C.F.R. § 76.914, and that “[c]able operators filing petitions for revocation on the grounds of effective competition must prove that they face competition under one of the four tests set forth in Section 76.905(b) of the Commission's rules”). Congress gave the Commission the power to revoke certifications at the behest of the cable operator under Section 623(a)(5) if the Commission found that the franchising authority was continuing to regulate rates despite the advent of effective competition (or other inconsistency with the statute). The Commission has implemented that revocation power in Section 76.914 of its Rules. The Commission lacks the power to invent new non-statutory “administrative” powers to revoke certificates granted to franchising authorities without adherence to Section 623(a)(5)'s requirements, most notably that revocation be based on a Commission finding (not merely a presumption).

C. STELAR Has Ratified The Commission's Existing Regulation Imposing The Burden Of Proving Effective Competition Upon Cable Operators

Finally, STELAR confirms that Congress has ratified the Commission's placement of the burden of proving effective competition upon the cable operator. "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States v. Bd. of Comm'rs*, 435 U.S. 110, 134–35, (1978); *Don E. Williams Co. v. Comm'r*, 429 U.S. 569, 576–77 (1977); *Isaacs v. Bowen*, 865 F.2d 468, 475 (2d Cir.1989) ("The basic requirement for the application of the [ratification] doctrine remains congressional awareness coupled with meaningful action aimed at the agency's interpretation.").

In 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. Congress's directive to the Commission to reduce the procedural difficulties faced by small cable operators in connection with such petitions – by adopting rules "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," P.L. No. 113–200, § 111, 128 Stat. 2066 (emphasis added); 47 U.S.C. § 543(o)(1) – presupposes and ratifies the existing regulatory scheme that places the burden of filing a petition and proving effective competition upon a cable operator. 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." *Id.* § 543(o)(2). Congress intended effective competition to

be proven, not presumed, and placed that burden upon cable operators. Accordingly, NAB submits that the NPRM cannot be reconciled with STELAR.

D. The Commission Should Fulfill Its Section 111 Directive By Streamlining And Modernizing Effective Competition Petition Filing Requirements For Small Cable Operators Only

Congress's narrow directive that the Commission "establish a streamlined process for filing of an effective competition petition" for small cable operators can and should be fulfilled through improved and modernized filing requirements, not the wholesale and industry-wide shift proposed in the NPRM. 47 U.S.C. § 543(o)(1). The Commission should consider any process improvements that may ease burdens for small cable operators and ensure timely resolution of their petitions. By giving the Commission merely 180 days to complete this objective, Congress made clear its intention that these process improvements should be more ministerial than substantive and generally uncontroversial.

While it is not clear from STELAR nor the NPRM what burdens small cable operators face in filing effective-competition petitions, especially given the straightforward proof involved in finding effective competition under 47 U.S.C. § 543(l)(1), small cable operators may be concerned with the costs of requesting and enforcing third-party discovery and conducting litigation before the Commission. One option for easing these burdens might be to establish a streamlined procedure whereby the operator would: (i) provide proof that it qualifies as a non-exempt "small cable operator," *id.* § 543(m)(1) & (2), 47 C.F.R. § 76.990(b)(1); (ii) provide the number of its subscribers in each of its franchise areas; (iii) request a determination of effective competition by the Commission in each area; and (iv) give notice to the relevant franchising authorities. The Media Bureau could then order the required third-party discovery and make the factual determinations required by statute, subject to the right of the franchising authority to contest the issue.

The Commission also could use the types of streamlining tools it has applied in other contexts to the filing of effective competition petitions for small cable operators. For example, the Commission could establish an electronic filing process – perhaps one that involves an electronic form that clearly delineates the facts required for effective competition petitions, especially for those entities asserting effective competition because of “competing providers.” Such a process or form would likely ease burdens on both petitioners and Commission staff. The Commission may also consider instituting a “shot-clock” to provide small cable operators some guidance regarding the timing of FCC review and adjudication of their petitions.¹⁰ The Commission should also consider warehousing, and making available to small cable operators and franchising authorities, any data it obtains through other proceedings that may be useful to effective-competition determinations.¹¹

If small cable operators, like local franchise authorities, lack the financial wherewithal to properly file and litigate effective competition petitions before the Commission – as Congress’s charge in Section 111 appears to suggest – then modification and updates to the filing process, like those listed above, should reduce their burdens and ensure the Commission complies with Congress’s intent.

¹⁰ See, e.g., FCC, *Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers*, <http://www.fcc.gov/encyclopedia/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or-autho> (viewed Apr. 8, 2015).

¹¹ See *Report on Process Reform*, 29 FCC Rcd 1341, 1369 (2014) (Recommendation 2.23 suggests that the Commission “Make Data More Accessible and Transparent to the Public”).

E. Mass “Administrative Revocation” Of Franchise Authority Certifications, Coupled With A Wholesale Burden Shift, Will Have Much Broader Implications Than Congress Intended In STELAR And Will Likely Lead To Higher Cable Bills For Consumers

As we have explained above, Congress, through STELAR, gave the Commission a narrow and specific directive to modify its rules and processes to ease administrative burdens on small cable operators filing effective competition petitions for a particular franchise area. 47 U.S.C. § 543(o)(1). The Commission has instead, in this NPRM, proposed sweeping changes that will greatly benefit the entire cable industry, including the massively consolidated and powerful cable giants.

By wiping out franchise authority certifications nationwide, and making it exceedingly difficult for franchise authorities to regain certification because of an unwise and unfounded wholesale burden shift, the proposals in the NPRM would virtually guarantee increases in the cost of entry-level cable service, including increases in the cost of equipment. The time limitations associated with meeting its statutory deadline will not permit the Commission to fully assess the impact of these proposed changes, or the potential for secondary impacts on consumer access to critical local programming offered by broadcast stations and public, educational and governmental access (PEG) channels on the basic tier. Failing to evaluate these issues clearly does not serve the public interest.

Given the truncated timeline in which the Commission is tasked with completing this rulemaking, affected stakeholders and consumers will not have enough time to consider and comment on the broad implications of these proposed changes. Therefore, NAB urges the Commission to limit this proceeding only to those dictates prescribed in Section 111 of

STELAR – namely to provide some regulatory relief to small cable operators that file effective competition petitions, similar to the proposals NAB has suggested in Section III.D. above.

IV. CONCLUSION

In STELAR, Congress sought to make the administrative process of filing effective competition petitions more streamlined for small cable operators. The Commission’s proposals go far beyond that and, without serious consideration of the actual impacts of its sweeping proposed changes, it should not bring this NPRM to fruition. Rather, the Commission should follow Congress’s direction, enact targeted procedural reforms that can benefit small cable operators, and do so in a manner that is consistent with the Communications Act and the Administrative Procedure Act.

Respectfully submitted,

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