

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 )

REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS

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**REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF BROADCASTERS**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits the following reply comments on the Commission’s Notice of Proposed Rulemaking (“NPRM”)<sup>2</sup> implementing Section 111 of the STELA Reauthorization Act of 2014 (“STELAR”).<sup>3</sup>

**I. EXECUTIVE SUMMARY**

In its initial comments, NAB urged the Commission to adhere to Congress’s narrow mandate in STELAR requiring the Commission to streamline effective-competition petition filing processes for small cable operators only, rather than undertake sweeping modifications to its effective-competition rules on STELAR’s accelerated timetable. NAB further demonstrated that (1) the proposed new rule was inconsistent with the 1992 Cable

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<sup>1</sup> 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.

<sup>2</sup> *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).

<sup>3</sup> Pub. L. No. 113-200, 128 Stat. 2059 (2014).

Act's requirement that the Commission make individualized findings of the existence of effective competition in each franchise area before preempting the authority of local authorities to regulate cable rates; (2) the Commission cannot revoke a prior certification of a franchising authority simply based on a presumption, without any evidence specific to the franchise area; (3) the Commission lacks the claimed power of mass administrative revocation, and may only revoke a franchising authority's certification upon petition of a cable operator or other interested party and a finding that the franchising authority's actions were inconsistent with the statute; and (4) Congress in STELAR has ratified the existing rules that require the cable operator to prove the existence of effective competition in order to revoke certification.

None of the comments filed by supporters of the proposed rule demonstrates the contrary. The National Cable and Telecommunications Association ("NCTA") and the American Cable Association ("ACA") attack the continuing validity of the current presumption of no effective competition, but their proposed solutions – extinguishing the regulatory jurisdiction of franchising authorities and revoking their certifications *en masse* strictly on the basis of the converse presumption that effective competition exists everywhere – cannot be reconciled with the 1992 Cable Act. The Act mandates that the Commission make findings of fact regarding effective competition that are based on evidence specific to each franchise area before taking those administrative actions of deregulation and revocation. The Commission cannot rely on a presumption as its NPRM would have it, and indeed national data on competitive market shares cannot provide a rational basis for presuming facts about competition in each of more than 23,000 localities of highly variable characteristics. The complaint of the cable interests that factual findings specific to franchise areas are generally inconvenient and unnecessary given the current state of

competition rings hollow because the 1992 Cable Act remains in force and demands them. NCTA and ACA advocate a circumvention of the Cable Act's procedures, not an implementation of them. The Commission should retain its existing scheme of requiring the cable operator to file petitions for determination of effective competition and revocation of certifications, which is not only required by the 1992 Cable Act but by STELAR itself. The Commission should instead focus on the various proposals for streamlining the effective-competition petition process for small cable operators, as Congress directed, and leave comprehensive re-examination of the effective-competition regime to another day, if ever.

## II. REPLY COMMENTS

### A. **Even If The Commission Does Away With The Presumption Of No Effective Competition, It Still Must Make An Evidence-Based Determination That There Is Effective Competition In The Franchise Area In Order To Revoke A Franchising Authority's Certification**

The National Cable and Telecommunications Association ("NCTA") declares that the existing presumption of no effective competition is "a relic of the earliest days of Commission rate regulation under the 1992 Cable Act" and can no longer be justified given the advent of increased competition nationally.<sup>4</sup> But whether the Commission abandons that particular presumption is of little moment, except where a franchising authority seeks a new certification with regard to a new cable operator.<sup>5</sup>

Discarding an outdated presumption does not resolve the question of cable deregulation that the Commission has raised in the NPRM. The fact remains that Commission has already certified thousands of local franchising authorities to regulate the

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<sup>4</sup> NCTA Comments at 3; *accord* ACA Comments at 9-10.

<sup>5</sup> *Cf. Media Bureau Clarifies Issues Concerning Franchise Authority Certification To Regulate Rates*, 24 FCC Rcd 399 (Jan. 16, 2009) (discussing certification as to new entrants).

rates of cable operators. In granting each of those certifications, it made the implicit finding of no effective competition by accepting the franchising authority's Form 328 finding that the current presumption was correct with regard to the franchise area.<sup>6</sup> The Commission (or the Media Bureau by delegation pursuant to 47 C.F.R. § 0.283) can revoke that certification, but it must find, based on evidence specific to the franchise area, that effective competition now exists under at least one of the four tests set forth at 47 U.S.C. § 543(l)(1).<sup>7</sup> The statute is clear as to the proper process for that revocation: “[u]pon 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.”<sup>8</sup> If, after notice to the franchising authority, “the Commission *finds* that the franchising authority has acted inconsistently with the requirements of this subsection” – which would include the requirement of paragraph (2) of subsection (a) forbidding rate regulation when the Commission makes a finding of effective competition – “the Commission shall grant appropriate relief.”<sup>9</sup> Indeed, that is the two-step inquiry generally performed by the Media Bureau: it makes a finding of effective competition based on the evidence, and then orders the certification revoked.<sup>10</sup>

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<sup>6</sup> *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 ¶ 85 (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).

<sup>7</sup> See 47 U.S.C. § 543(a)(2), (5).

<sup>8</sup> 47 U.S.C. § 543(a)(5).

<sup>9</sup> *Id.* (emphasis added).

<sup>10</sup> See, e.g., *In The Matter Of Six Unopposed Petitions For Determination Of Effective Competition*, Opinion and Order, 30 FCC Rcd 323 (Jan. 28, 2015) (“find[ing] that each petition provides sufficient and reliable evidence to establish that both elements of the competing provider test for effective competition are satisfied” for all challenged Communities, and then further ordering “that any certification to regulate basic cable service rates granted to any of the [affected] Communities **IS REVOKED**”); *In the Matter of SBC Cable Co.*, 22 FCC Rcd 4065 ¶¶ 4-6 (2007) (“conclud[ing] that SusCom has submitted sufficient evidence demonstrating that its cable system serving the

The Commission's current regulation for determining effective competition is framed in terms of the rebuttable presumption: the cable operator who files the petition "bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined in § 76.905, exists in the franchise area."<sup>11</sup> But where revocation of an existing certification is sought, it would not matter if the Commission were to do away with the presumption. The proponent of revocation, *i.e.*, the cable operator, would still have to come forward with evidence specific to the franchise area that would justify the revocation (*e.g.*, evidence that the number of subscribers to competitive MVPDs "exceeds 15 percent of the households *in the franchise area*," 47 U.S.C. § 543(l)(1)(B)(ii) (emphasis added)).<sup>12</sup>

Thus, NCTA errs in arguing that it is "[b]ecause of that presumption" that the Commission has had to expend resources adjudicating effective-competition petitions<sup>13</sup>; rather, this burden arises principally because the Commission previously granted thousands of certifications, and the statute requires the Commission to make effective-competition findings specific to the franchise area in order to extinguish ratemaking jurisdiction and revoke those existing certificates. Because (1) the 1992 Cable Act places the burden upon the cable operator (or other interested third party) to petition to revoke a franchising authority's certification, (2) the cable operator is seeking to change the *status quo*, and (3)

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Community is subject to competing provider effective competition," and further ordering that "that the certification to regulate basic service rates granted to the local franchising authority overseeing SBC Cable Co. d/b/a SusCom in the affected Community **IS REVOKED**").

<sup>11</sup> 47 C.F.R. § 76.907(b).

<sup>12</sup> See 47 U.S.C. § 543(a)(5).

<sup>13</sup> See NCTA Comments at 3-4.

the cable operator is best positioned to gather and provide the relevant information,<sup>14</sup> the cable operator must retain the burden of proving effective competition in the franchise area, regardless of whether the Commission decides to abandon the current presumption.

**B. The Cable Interests Fail To Heed The 1992 Cable Act's Requirement That The Commission Make A Finding Of Effective Competition, Not Presume It**

NCTA and ACA advocate that the Commission not only adopt the converse universal presumption of effective competition, but also take robust administrative action on the basis of the presumption alone. NCTA urges that (1) “the Commission should immediately deem granted any pending petitions for a determination of effective competition that are unopposed by the LFA”; (2) “[i]n, communities where an LFA has not been certified to rate regulate, cable operators should be deemed subject to effective competition upon the effective date of any Order in this proceeding;” (3) “where LFAs have an existing certification to rate regulate, the rules should provide those LFAs 90 days to demonstrate that the presumption should not apply in that particular franchise area”; and (4) the Commission should extend the presumption to local exchange carrier competition.<sup>15</sup> ACA similarly argues that “the Commission should give cable operators the benefit of the new effective

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<sup>14</sup> NAB Comments at 5.

<sup>15</sup> NCTA Comments at 8-9. NCTA and ACA cite no empirical support to justify a presumption of local exchange carrier (“LEC”) MVPD competition in all franchise areas. For example, Verizon FiOS is only available in select cities in the Northeast and in Florida, Texas, and California. See Verizon, *FiOS Availability*, available at <http://verizonspecials.com/availability> (last visited April 17, 2015). AT&T U-Verse is only available in some parts of certain states, mostly in the South and Midwest. See AT&T, *Check Availability*, available at <http://www.attsavings.com/availability> (last visited April 17, 2015). While LEC MVPD competition may be shown even prior to the LEC’s completion of its build-out, see ACA Comments at 10; *In the Matter of Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296 ¶ 13, NCTA and ACA have not mustered any evidence of impending LEC competition that would apply to all franchise areas. Indeed, the Massachusetts regulatory authority reports that there is no LEC competition in 190 of 308 Massachusetts communities and that Verizon has ceased expansion of FiOS to new communities. Comments of the Massachusetts Department of Telecommunications and Cable at 4.



competition presumption (*i.e.*, no more rate regulation) as soon as it is adopted, with two exceptions,” and thus should conduct a mass revocation of existing certifications.<sup>16</sup>

NCTA’s and ACA’s proposals conflict with the 1992 Cable Act’s requirement that the Commission may bar regulation of the cable operator’s rates only “[i]f the Commission *finds* that a cable system is subject to effective competition,”<sup>17</sup> as set forth in the four statutory tests of effective competition that each require a showing specific to “the franchise area.”<sup>18</sup> As NAB demonstrated, the required Commission finding of the existence of specific factual circumstances that Congress deemed to constitute effective competition in a franchise area must be based on evidence of those facts.<sup>19</sup> ACA touts the Commission’s discretion over procedures for section 623 determinations,<sup>20</sup> but that discretion does not extend to failing to make the findings of fact that Congress required.

The statutory requirement of a Commission finding of effective competition is underscored by Section 623(a)(6). If the Commission were to revoke a franchising authority’s certification, but not find (based on the evidence) that the rate-regulatory jurisdiction of the franchising authority was extinguished pursuant to paragraph (2)(A) by the advent of effective competition in the franchise era, the Commission itself must regulate the cable operator’s rates:

If the Commission disapproves a franchising authority’s certification under paragraph (4), or revokes such authority’s jurisdiction under paragraph (5), *the Commission shall exercise the franchising authority’s regulatory jurisdiction under paragraph*

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<sup>16</sup> ACA Comments at iii.

<sup>17</sup> 47 U.S.C. § 543(a)(2) (emphasis added).

<sup>18</sup> *Id.* § 543(l)(1)(A)-(D).

<sup>19</sup> NAB Comments at 8-12.

<sup>20</sup> See ACA Comments at 6.

(2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3).<sup>21</sup>

Thus, in order to deregulate a cable operator in a given franchise area, the Commission must make an evidence-based determination that there is effective competition in that franchise area. The Commission cannot sidestep that requirement in the manner that NCTA and ACA propose.

NCTA and ACA would wholly dispense with the requirements of evidence-based findings of effective competition under either Section 623(a)(2) or (5). For franchise areas in which there is no certificated authority, both organizations want the Commission to declare the existence of effective competition strictly based on the presumption, without any evidence regarding competition in the franchise area.<sup>22</sup> Both likewise favor mass revocation of existing certificates of franchising authorities based strictly on the presumption (apparently even if there was a final Commission order after adjudication that there was no effective competition in the jurisdiction).<sup>23</sup> ACA would stay the revocation of rate-regulation authority as to so-called “‘active franchising authorities’ – franchising authorities that have issued a rate order during the one year period preceding the release of the NPRM,” but only if they file a new certification application within 90 days of the adoption of the presumption.<sup>24</sup>

The 1992 Cable Act does not permit these proposed procedures. The Commission must find, based on evidence, that at least one of the four types of effective competition enumerated in the statute exists in order to pre-empt local ratemaking authority or to revoke

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<sup>21</sup> 47 U.S.C. § 543(a)(6).

<sup>22</sup> NCTA Comments at 8; ACA Comments at 8-9.

<sup>23</sup> NCTA Comments at 8-9; ACA Comments at 9-10.

<sup>24</sup> ACA Comments at 13.

a certificate on this basis. This Commission cannot find the requisite competition in each franchising area simply because a franchising authority does not file for a new certification or come forward with evidence; Congress placed the duty of making findings of the relevant facts of effective competition upon the Commission, and did not make that duty contingent upon any act or omission of the franchising authority.<sup>25</sup>

The Commission is the protector of the public interest in ensuring that consumers do not pay unreasonable rates for the basic service tier and associated equipment charged by cable operators who face no competitive discipline. Accordingly, “[t]he Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.” *Scenic Hudson Preservation Conference v. Federal Power Comm’n*, 354 F.2d 608, 620 (2d Cir. 1965). “The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in \* \* \*. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts.” *Id.* at 621 (quoting *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S.D.N.Y.1951), *affirmed by an equally divided court*, *A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co.*, 342 U.S. 950 (1952)).<sup>26</sup> NCTA and ACA propose nothing short of an abdication of the Commission’s duties, and the Commission should not countenance these suggestions.

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<sup>25</sup> See 47 U.S.C. § 543(a)(2).

<sup>26</sup> *Accord Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 472 (9th Cir. 1984); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) (“The Commission and the Examiners have an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee’s performance of his duty to serve the public interest.”).

**C. The Proposed New Presumption Of Effective Competition Lacks A Rational Nexus To The Facts Of Specific Franchise Areas.**

**1. There Is No Rational Nexus Between Overall National Competitive Market Shares And The Competitive Circumstances Of Each Of 23,506 Franchise Areas That Would Justify A Universal Presumption Of Effective Competition.**

Even apart from the statutory requirement of evidence-based findings specific to the franchise area, the Commission's proposed new universal presumption of effective competition cannot stand. NCTA acknowledges that an agency may only adopt an evidentiary presumption "[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."<sup>27</sup> But NCTA misconceives the rational-nexus test in submitting that the proposed effective-competition presumption satisfies it.

The requirement that a presumption be founded upon "a sound and rational connection between the proved and inferred facts" relates to the facts to be adjudicated: if a party proves fact A about a party or circumstance in an adjudication, the agency may presume fact B if the existence of fact A makes it highly probable that fact B is also true, absent proof to the contrary. Thus, in the *Cablevision* case upon which NCTA relies, the D.C. Circuit upheld the Commission's presumption that, if it is proven that a vertically integrated cable operator withholds terrestrial regional sports network ("RSN") programming from a multichannel video programming distributor ("MVPD"), then that same cable operator had the purpose and effect of hindering or preventing the competing MVPD from providing

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<sup>27</sup> NCTA Comments at 6 (quoting *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 715 (2011) (quoting *Nat'l Mining Ass'n v. United States Dep't of Interior*, 177 F.3d 1, 6 (D.C. Cir. 1999))).

programming to its customers.<sup>28</sup> The Commission based that presumption on evidence that RSN programming was highly valued by customers and not replicable,<sup>29</sup> and the D.C. Circuit upheld the presumption because the Commission relied upon empirical data about the effects of withholdings of RSNs involving professional sports and “reasonably extrapolated from this study to a prediction about the impact RSN withholding would ordinarily have.”<sup>30</sup> Purpose and causation are classic inferred facts, and the Court found that there was a sufficient rational basis in both record and the Commission’s predictive judgments to warrant an evidentiary presumption that proof that the cable operator withheld programming from a competitor established anticompetitive effect.

Similarly, in *Chemical Manufacturers’ Ass’n v. Department of Transportation*,<sup>31</sup> the D.C. Circuit upheld a Department of Transportation rule that established a rebuttable presumption “that loose closures on railroad tank cars transporting hazardous materials result from the shipper’s failure to conduct a proper inspection.”<sup>32</sup> Because the Department had required that closures be designed not to come loose during ordinary transportation, and thus alternative causes of loosening would be extraordinary, the D.C. Circuit approved the presumption, noting that it “only arises once the Department has proven a fact strongly suggestive of a violation: the existence of a loose closure.”<sup>33</sup> The empirical fact A proven in the adjudication (loose closure) was so closely correlated with inferred fact B (failure to

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<sup>28</sup> *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716-17 (2011).

<sup>29</sup> *Id.* at 703.

<sup>30</sup> *Id.* at 717.

<sup>31</sup> 105 F.3d 702 (D.C. Cir. 1997).

<sup>32</sup> *Id.* at 703.

<sup>33</sup> *Id.* at 707.

inspect closure) that proof of the former reasonably served as a proxy for the latter, subject to rebuttal by actual evidence regarding fact B.

Here, even though Congress has demanded findings of effective competition specific to the franchise area, see 47 U.S.C. § 543(l)(1), the Commission proposes a presumption that arises *without any proof related to the franchise area*. NCTA attempts to defend the presumption on the grounds that because the national market share of the leading DBS providers is 26%, it is probable that most franchise areas will meet the 15% threshold for penetration by non-cable MVPDs.<sup>34</sup> But that has nothing to do with an evidentiary presumption, which turns on the proposition that the existence of one adjudicatory fact about a party or circumstance renders so probable the existence of another fact that the latter can be presumed (*i.e.*, that proof of evidentiary fact A about X in a specific adjudication renders the existence of fact B about X sufficiently probable, unless rebutted by actual evidence regarding fact B). This is not a case where the Commission held that a proven fact about a given franchise area would permit the inference of another fact about that franchise area; instead, the NPRM would impermissibly allow facts about highly variable localities to be presumed from national data. Because the national market share of DBS competitors is not associated or correlated with the particular market share of competitive MVPDs in each of 23,506 franchise areas, it is not a reasonable proxy for proof of such local share.<sup>35</sup> The Commission should not adopt the proposed presumption of effective competition.

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<sup>34</sup> NCTA Comments at 6.

<sup>35</sup> NAB Comments at 15-16; Initial Comments of the New Jersey Division of Rate Counsel at 11.

**2. The Recent History Of Successful Cable Operator Petitions For Effective-Competition Determinations Does Not Support The Presumption**

Both NCTA and ACA trumpet the high rate of success of cable operators in filing effective-competition petitions as supporting establishment of an effective competition presumption.<sup>36</sup> But as NAB and other commenters point out, the success rate of self-selected cable operators who believed the facts of their franchise demonstrated effective competition says nothing about the state of competition in the thousands of other jurisdictions where the cable operator chose not to file such a petition, presumably because the facts did not support a petition, despite the cable operator's strong incentive to be free of rate regulation.<sup>37</sup>

**D. The Cable Interests Have Not Supplied Any Reasons Why The Burden To Prove Effective Competition Should Be Shifted To Franchising Authorities**

In the 1993 Rate Order, Commission concluded 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.”<sup>38</sup> As set forth in NAB’s initial comments, the Commission did not set forth in the NPRM any reasoned basis for abandoning that conclusion, and indeed the consolidation of the cable industry suggests that cable operators

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<sup>36</sup> NCTA Comments at 4; ACA Comments at ii.

<sup>37</sup> NAB Comments at 16-17; Comments of the Massachusetts Department of Telecommunications and Cable at 5-7; Initial Comments of the New Jersey Division of Rate Counsel at 5-6.

<sup>38</sup> 1993 Rate Order ¶ 46.

are even more capable of bearing the relatively light burden of proving the straightforward facts necessary to prove effective competition under Section 623(l)(1).<sup>39</sup>

NCTA and ACA offer no substantive justification why the burden of production should be shifted to franchising authorities; they mostly contend that franchising authorities should bear the burden because cable operators do not want to incur the costs and hassles of filing a petition and conducting competitor discovery.<sup>40</sup> But cash-strapped municipalities are presumably less able to bear those costs than most cable operators, who have the financial incentive to earn their freedom from rate regulation.<sup>41</sup> Moreover, “[a]n important purpose underlying shifting the burden of production is to place on the person most likely to have access to the relevant evidence the obligation of bringing it forward.”<sup>42</sup> As the Commission previously concluded, franchising authorities have far less access than cable operators to information about the competitors of cable operators, and in any event the Commission has

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<sup>39</sup> NAB Comments at 19-20.

<sup>40</sup> NCTA Comments at 2, 4; ACA Comments at 10-11.

<sup>41</sup> As ACA implicitly concedes in its comments, local franchise authorities do not necessarily have jurisdiction over *all* LEC video providers. ACA Comments at 10-11 (“because *most* LEC video providers operate pursuant to state or local oversight”) (emphasis added). Some LECs offer video services that qualify as “cable systems” as defined in 47 U.S.C. 522, and are therefore subject to the jurisdiction of local franchise authorities. LECs, however, may also operate as open video systems (“OVS”), which are not subject to local cable franchise requirements. *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18330 (1996) (noting that, while franchise authorities may collect a fee based on OVS revenue and may regulate rights-of-way, “[a]ny State or local requirements . . . that seek to impose Title VI ‘franchise-like’ requirements on an open video system operator would directly conflict with Congress’ express direction that open video system operators need not obtain local franchises as envisioned by Title VI”); see also *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 29 FCC Rcd 14895, 14896 n2 (Dec. 15, 2014) (noting that AT&T U-verse is not a registered cable operator). Because franchise authorities are not uniformly in a position to have superior information about the state of LEC competition, NAB posits that the existing rules governing the petition process and providing for competitor discovery strike the correct balance.

<sup>42</sup> *Heinold Hog Market, Inc. v. McCoy*, 700 F.2d 611, 616 (10th Cir. 1983).



granted cable operators full and sufficient discovery rights.<sup>43</sup> The Commission should retain its current rules that place the burden upon the cable operator to adduce proof of effective competition in their franchise areas in order to escape rate regulation.

**E. The Proposed Rule Is Inconsistent With STELAR’s Ratification Of The Commission’s Existing Rules Requiring Cable Operators To File Petitions For A Determination Of, And Bear The Burden Of Proving, Effective Competition**

NCTA and ACA argue that the Commission’s proposed rules satisfy STELAR because reducing the burdens on all cable operators will benefit small cable operators.<sup>44</sup> But STELAR distinguished small cable operators from other cable operators, and only directed the Commission to reduce the burdens on the former. Indeed, in STELAR, Congress necessarily ratified the existing rules that require cable operators to file effective-competition petitions in its directive to the Commission 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.”<sup>45</sup> Congress then explicitly declared that it did not intend to relieve even small cable operators of the burden of proof that all cable operators bear under existing rules: “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.”<sup>46</sup> STELAR requires that cable operators file petitions to establish effective competition and bear the burden of proving those facts.

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<sup>43</sup> 47 C.F.R. § 76.907(c).

<sup>44</sup> NCTA Comments at 2, 7; ACA Comments at 4.

<sup>45</sup> Pub. L. No. 113–200, § 111, 128 Stat. 2066 (emphasis added); 47 U.S.C. § 543(o)(1).

<sup>46</sup> *Id.* § 543(o)(2) (emphasis added).

**F. The Commission Should Consider Implementation Of Proposed Streamlining Measures For Small Operators Rather Than Undertake Comprehensive Reform Of Its Effective-Competition Procedures**

NAB respectfully submits that the Commission should not undertake to resolve the multiple and substantial legal issues with the proposed rules that NAB and many others have identified on the very accelerated 180-day timetable that STELAR set for a rulemaking that Congress contemplated would be limited in scope and complexity. A number of commenters have proposed significant reform measures, including proposals that, in fulfillment of the STELAR directive, would streamline the effective-competition petitioning process for small cable operators.<sup>47</sup> In the limited time left before the deadline, the Commission should devote its resources to evaluation of those options, and leave comprehensive change for another day.

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<sup>47</sup> See NAB Comments at 23-24; Comments of Public Knowledge at 5-6; Letter from American Community Television, Public Knowledge, Common Cause and NAB to Marlene H. Dortch, FCC, MB Docket Nos. 02-144 & 15-53 (filed April 16, 2015).

### III. CONCLUSION

The Commission should not adopt a presumption of effective competition nor conduct a mass administrative revocation of local franchising authority certifications based upon such a presumption. Rather, the Commission should follow Congress's direction in STELAR, 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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A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal line extending to the right.

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Rick Kaplan  
Erin L. Dozier  
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April 20, 2015