

May 26, 2015

The Honorable Tom Wheeler
The Honorable Mignon Clyburn
The Honorable Jessica Rosenworcel
The Honorable Ajit Pai
The Honorable Michael O’Rielly
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Effective Competition Proposal, MB Docket No. 15-53

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly:

The undersigned parties urge you to promote consumer interests above the administrative convenience of the cable industry. Specifically, we urge the Commission not to reverse the presumption against effective competition in the 23,506 communities—or 70% of the nation—where the Commission either has made a determination that there is not effective competition or has not yet evaluated the status of competition.¹ Instead, to meet its responsibility under Section 111 of the STELA Reauthorization Act of 2014 (STELAR),² the Commission should act on the narrow proposals for streamlining effective competition procedures for small cable operators advanced in the record by multiple parties.³ This approach would promote the public interest and permit the Commission to meet the statutory deadline.

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

² The STELA Reauthorization Act of 2014 (STELAR), § 111, Pub. L. No. 113-200, 128 Stat. 2059 (2014), *codified at* 47 U.S.C. § 543(o).

³ *See, e.g.*, Letter from the Alliance for Community Media, American Community Television, Common Cause, National Association of Broadcasters and Public Knowledge in MB Docket Nos. 15-53 and 02-144 (Apr. 17, 2015).

Many questions have been raised in this proceeding that have not been—and cannot be—fully addressed in the truncated timeframe available.⁴ With seven days to act, the Commission still does not know the extent of the impact of deciding that 100% of the nation’s cable communities are now effectively competitive. Today, cable operators bear the burden of proving they are not effectively competitive, which appropriately places the burden of securing deregulation on parties with the incentive, human and capital resources, and access information to efficiently make such showings. Requiring cash-strapped, understaffed state, local and tribal governments to prove a lack of effective competition in order to retain their status as lawful regulators of cable prices and consumer protections would place undue burdens on such authorities and harm the consumers they are charged to protect.

Aside from having the opportunity to more fully consider the views of the eighteen different consumer-focused organizations and local franchise authorities and the seventeen members of Congress that have weighed in against the proposed presumption switch, such additional time will permit the Commission to consider the views of its own Intergovernmental Advisory Committee (IAC). The IAC, which was established for the very purpose of “facilitat[ing] intergovernmental communication between municipal, county, state and tribal governments” and the FCC,⁵ on matters of shared concern, apparently was not consulted by the Commission in developing a proposal to modify its effective competition process. Fortunately, the IAC, on its own initiative and under severe time constraints, was able to analyze and develop recommendations on the proposed presumption, and has strongly opposed the presumption switch as contrary to the public interest.⁶ Allowing additional time for consideration of a presumption switch would permit the Commission to consider the IAC’s views and perhaps even obtain the benefit of public comment on them.

As many of the undersigned parties have explained in prior filings, the Commission’s current proposal is inconsistent with what Congress directed it to do in STELAR, poses an unacceptable risk of harm to consumers, and unlawfully impedes the ability of state, local and tribal governments to determine the appropriate protections for their citizens. We urge the Commission

⁴ Please see the attached list of issues and factual determinations that should be made as part of an assessment of reversing the existing presumption and revoking existing local franchise authority certifications.

⁵ 47 C.F.R. §0.701(a). The IAC consists of 15 members, appointed in the following categories: (1) four elected municipal officials (city mayors and city council members); (2) two elected county officials (county commissioners or council members); (3) one elected or appointed local government attorney; (4) one elected state executive (governor or lieutenant governor); (5) three elected state legislators; (6) one elected or appointed public utilities or public service commissioner; and (7) three elected or appointed native American tribal representatives. 47 C.F.R. §0.701(b).

⁶ The IAC opposes adoption of a nationwide rebuttable presumption of effective competition, stating that such action is “contrary to the public interest.” Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-7, in MB Docket No. 15-53, at 2 (filed May 15, 2015) (IAC May 15 Recommendation).

to act in the interests of consumers by deferring consideration of a presumption switch.

Respectfully submitted,

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Senior Staff Attorney
Public Knowledge

Gordon H. Smith
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National Association of Broadcasters

Enc.

cc: Maria Kirby, Chanelle Hardy, Valery Galasso, Matthew Berry, Robin Colwell, Bill Lake, Jonathan Sallet

Outstanding Questions Regarding Proposed Effective Competition Presumption Switch

- 1) What evidence does the Commission have that makes it certain that its proposal will not result in higher cable rates, whether because of video, broadband, or equipment charges?⁷
- 2) Does the Commission have a full understanding of the impact of shifting the presumption on local franchise authorities (LFAs) and whether there have been any changes in the resources they have available to them to make effective competition showings?
- 3) Does the Commission's assessment of the lack of opposition to effective competition petitions⁸ consider the significant barriers faced by LFAs, including, but not limited to: (i) petitions served on an LFA may not be brought to the attention of the appropriate municipal or county official with authority to determine how to respond for several weeks; (ii) the LFA may not have sufficient expertise to allow it to appropriately respond to the petition; (iii) as noted by the Intergovernmental Advisory Committee (IAC),⁹ an LFA may be required to take additional steps required by law in its area, such as "a public hearing to decide whether to oppose such petitions, which may further delay responding"; (iv) LFAs may lack resources (in terms of staff and/or capital) to effectively oppose such petitions.¹⁰
- 4) Has the Commission evaluated "how many petitions that were actually opposed were withdrawn by [cable operators," which commenters have asserted would be a "more telling statistic"¹¹ than data about the percentage of petitions approved in the past two years?

⁷ See, e.g. Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No: 2015-7, in MB Docket No. 15-53, at 2 (filed May 15, 2015) (IAC May 15 Recommendation) (observing that "[c]able rates have risen at rates substantially higher than inflation and consumer satisfaction with cable services has consistently been a significant issue").

⁸ NPRM at 7 (stating that "[f]ranchising authorities filed oppositions to only 18 (or less than 8 percent) of the 228 petitions" filed since 2013).

⁹ 47 C.F.R. §0.701(a). The IAC consists of 15 members, appointed in the following categories: (1) four elected municipal officials (city mayors and city council members); (2) two elected county officials (county commissioners or council members); (3) one elected or appointed local government attorney; (4) one elected state executive (governor or lieutenant governor); (5) three elected state legislators; (6) one elected or appointed public utilities or public service commissioner; and (7) three elected or appointed native American tribal representatives. 47 C.F.R. §0.701(b).

¹⁰ IAC May 15 Recommendation at 2.

¹¹ IAC May 15 Recommendation at 2.

- 5) Has the Commission carefully evaluated the standards applied to its review of petitions for effective competition? The IAC observes that in 2008, Time Warner Cable filed petitions to determine effective competition in 725 communities in New York and Pennsylvania. Although none were opposed, the Media Bureau questioned the data because it showed that competitors allegedly served more households than there actually were in the jurisdictions. The Media Bureau denied on its own initiative the finding of effective competition in 226 of the 725 communities.¹² The Bureau then modified the data requirement based on its analysis of this problem.¹³ The IAC observes that many other communities may have been deemed effectively competitive based on similarly inaccurate data, and has urged the Commission to audit earlier decisions.¹⁴
- 6) Does the inability of an LFA to regulate rates also eliminate other “important consumer protections” such as: (i) the authority to cap the price of the basic tier and equipment; (ii) the protection of a uniform rate structure; (iii) the prohibition on subscribers being required to purchase any number of programming tiers before they may order premium and pay per view offerings; and (iv) the prohibition on “negative option billing.”¹⁵
- 7) How might the proposed merger of AT&T and DirecTV affect competition in local communities given that “competing provider” competition requires that competitors be unaffiliated?¹⁶
- 8) Even in situations where an LFA does not rate regulate, how much of a restraint does the mere existence – and possibility of regulation – of an LFA have on cable basic tier prices? Does it also constrain equipment costs, and limit questionable fees?

¹² *Time Warner Cable Inc., and Time Warner Entertainment-Advance/Newhouse Partnership 25 Petitions for Determination of Effective Competition in Various Communities in the State of New York and the Commonwealth of Pennsylvania*, Memorandum Opinion and Order, DA 08-1893 (MB rel. Aug. 13, 2008).

¹³ The Media Bureau determined that five digit zip data may be unreliable and created a requirement that cable operators submit zip+4 data. FCC Public Notice, *Commission Announces New Standards for Showings of Effective Competition for Cable Service*, DA 08-1892, 23 FCC Rcd 12067 (2008).

¹⁴ IAC May 15 Recommendation at 3-4. In many instances, the Commission has permitted cable operators to offer competing provider data that was derived from current provider subscribership, divided by the number of households in the community according to years-old census data, thereby effectively inflating the competing provider subscribership figures. *See, e.g., Subsidiaries of Cablevision Systems Corporation; Petitions for Determination of Effective Competition in 101 Communities in New Jersey*, 23 FCC Rcd 14141 (MB 2008).

¹⁵ IAC May 15 Recommendation at 3.

¹⁶ *See, e.g.,* Comments of the National Association of Telecommunications Officers and Advisors in MB Docket No. 15-53, at 5 (Apr. 9, 2015).

- 9) Has the Commission considered how the availability of high-speed broadband has altered the competitive equation? Particularly for lower and middle-income Americans that need high-speed broadband, purchasing satellite TV and high-speed broadband separately may not be a viable option. Will weakening LFAs have a negative impact on broadband build-out, especially in communities that are traditionally underserved or bypassed like tribal lands?
- 10) Lower-income consumers that rely disproportionately on the basic tier will likely balk at switching to satellite TV that does not have a similarly low-priced option. For example, Dish customers pay an average of \$83 per month. That is significantly more than the average \$23 per month paid by cable basic tier subscribers. Has the Commission done any research or analysis as to whether satellite TV is really a competitive option for these consumers?
- 11) As the Commission itself notes, only 30% of the nation has been deemed effectively competitive.¹⁷ Has the Commission considered why large cable operators have not yet filed petitions for effective competition in all communities they serve? Certainly, such operators have sufficient resources to submit petitions for every community. The process is not so burdensome that a company with a team of lawyers couldn't file petitions for all their communities within a month. Perhaps cable operators are self-selecting and applying only for those communities where they know they can meet the statutory tests.

¹⁷ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 29 FCC Rcd 14895, 14898 ¶ 8 (2014).