

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment to the Commission’s Rules) MB Docket No. 15-53
Concerning Effective Competition)
)
Implementation of Section 111 of the STELA)
Reauthorization Act)

REPORT AND ORDER

Adopted: June 2, 2015

Released: June 3, 2015

By the Commission: Chairman Wheeler and Commissioners Pai and O’Rielly issuing separate
statements; Commissioners Clyburn and Rosenworcel approving in part, dissenting in part and issuing
separate statements.

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I. INTRODUCTION

1. In this Report and Order (“Order”), we improve and expedite the effective competition
process by adopting a rebuttable presumption that cable operators are subject to “Effective Competition.”¹
Specifically, we presume that cable operators are subject to what is commonly referred to as “Competing
Provider Effective Competition.”² As a result, each franchising authority³ will be prohibited from

¹ Effective Competition is a term of art that the statute defines by application of specific tests.

² See 47 U.S.C. §§ 543(a)(2), (l)(1)(B); *infra* ¶ 2.

³ A “franchising authority” is “any governmental entity empowered by Federal, State, or local law to grant a
franchise.” See 47 U.S.C. § 522(10).

regulating basic cable rates⁴ unless it successfully demonstrates that the cable system is not subject to Competing Provider Effective Competition. This change is justified by the fact that Direct Broadcast Satellite (“DBS”) service is ubiquitous today and that DBS providers have captured almost 34 percent of multichannel video programming distributor (“MVPD”) subscribers.⁵ This Order also implements section 111 of the STELA Reauthorization Act of 2014 (“STELAR”), which directs the Commission to adopt a streamlined Effective Competition process for small cable operators.⁶ By adopting a rebuttable presumption of Competing Provider Effective Competition, we update our Effective Competition rules, for the first time in over 20 years, to reflect the current MVPD marketplace,⁷ reduce the regulatory burdens on all cable operators, especially small operators,⁸ and more efficiently allocate the Commission’s resources.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Congress adopted a “preference for competition,” pursuant to which a franchising authority may regulate basic cable service tier rates and equipment only if the Commission finds that the cable system is not subject to Effective Competition.⁹ Section 623(l)(1) of the Act defines the four types of Effective Competition, as follows:

- *Low Penetration Effective Competition*, which is present if fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;¹⁰
- *Competing Provider Effective Competition*, which is present if the franchise area is (i) served by at least two unaffiliated MVPDs each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;¹¹

⁴ See *id.* § 543(b)(7)(A).

⁵ See *infra* Section II.

⁶ See Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014); 47 U.S.C. § 543(o)(1) (“Not later than 180 days after December 4, 2014, the Commission shall complete a rulemaking to establish a streamlined process for filing of an effective competition petition pursuant to this section for small cable operators, particularly those who serve primarily rural areas.”). Accordingly, this rulemaking must be completed by June 2, 2015.

⁷ See Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587 (July 14, 2011) (“To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned”); *Final Plan for Retrospective Analysis of Existing Rules*, 2012 WL 1851335 (May 18, 2012).

⁸ Congress applied the definition of “small cable operator” as set forth in section 623(m)(2) of the Communications Act of 1934, as amended (the “Act”), which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.” See 47 U.S.C. § 543(m)(2), (o)(3).

⁹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); 47 U.S.C. § 543(a)(2)(A). This Order contains references to the Commission’s role in the franchising authority certification process. Although our rules refer to the Commission as having these responsibilities, the Media Bureau has delegated authority to act on certification matters pursuant to the rules established by the Commission, and in practice the Media Bureau evaluates certifications and related pleadings on behalf of the Commission. See 47 C.F.R. § 0.61.

¹⁰ 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

¹¹ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

- *Municipal Provider Effective Competition*, which is present if an MVPD operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area;¹² and
- *Local Exchange Carrier (LEC) Effective Competition*, which is present if a local exchange carrier or its affiliate (or any MVPD using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.¹³

Section 623 of the Act does not permit franchising authorities to regulate any cable service rates other than the basic service tier rate and equipment used to receive the signal.¹⁴

3. In 1993, when the Commission implemented the statute's Effective Competition provisions, the existence of Effective Competition was the exception rather than the rule. Incumbent cable operators had captured approximately 95 percent of MVPD subscribers.¹⁵ In the vast majority of franchise areas only a single cable operator provided service¹⁶ and those operators had "substantial market power at the local distribution level."¹⁷ DBS service had not yet entered the market,¹⁸ and local exchange carriers ("LECs"), such as Verizon and AT&T, had not yet entered the MVPD business in any significant way.¹⁹ Against this backdrop, the Commission adopted a presumption that cable systems are not subject to Effective Competition,²⁰ and it provided that a franchising authority that wanted to regulate a cable operator's basic service tier rates must be certified by filing FCC Form 328 with the Commission.²¹ A cable operator that wishes to challenge the franchising authority's right to regulate its basic service tier rate bears the burden of rebutting the presumption and demonstrating that it is in fact subject to Effective Competition.²²

¹² 47 U.S.C. § 543(l)(1)(C); 47 C.F.R. § 76.905(b)(3).

¹³ 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4). In 1996 Congress added LEC Effective Competition to the statute. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 115, § 301(b)(3) (1996).

¹⁴ See 47 U.S.C. § 543. See also *id.* § 543(c)(4) (sunsetting upper tier rate regulation for cable programming services provided after March 31, 1999).

¹⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, 4495 (App. F) (1997).

¹⁶ *Implementation of Section 19 of the Cable Television Consumer Protection & Competition Act of 1992*, First Report, 9 FCC Rcd 7442, 7449, ¶ 15 (1994).

¹⁷ *Id.* at 7449, ¶ 13.

¹⁸ DIRECTV, the first DBS entrant, began offering service in 1994. *Id.* at 7474, ¶ 63.

¹⁹ *Id.* at 7495, ¶¶ 103-04.

²⁰ See *Implementation of Sections 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, 5669-70, ¶ 42 (1993) ("*1993 Rate Order*"); 47 C.F.R. § 76.906 ("In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.").

²¹ See 47 C.F.R. § 76.910. Form 328 is available at <http://www.fcc.gov/Forms/Form328/328.pdf>.

²² See 47 C.F.R. §§ 76.907, 76.911.

4. As described in the NPRM in this proceeding, the MVPD marketplace has changed in ways that substantially impact the test for Competing Provider Effective Competition.²³ After the NPRM was released, the Commission adopted its most recent video competition report containing many of the same statistics cited in the NPRM. Specifically, the video competition report reached the following conclusions, among others:

- *Slight increase in DBS subscribership.* The number of DBS subscribers increased from year-end 2012 (34.1 million, or 33.8 percent of MVPD subscribers) to year-end 2013 (34.2 million, or 33.9 percent of MVPD subscribers).²⁴
- *Significant increase in telephone MVPD subscribership.* The number of telephone MVPD subscribers increased from year-end 2012 (9.9 million, or 9.8 percent of MVPD subscribers) to year-end 2013 (11.3 million, or 11.2 percent of MVPD subscribers).²⁵
- *Widespread availability of DBS video service.* DIRECTV provides local broadcast channels to 197 markets representing over 99 percent of U.S. homes, and DISH Network provides local broadcast channels to all 210 markets.²⁶
- *Consumer access to multiple MVPDs.* Approximately 99.7 percent of homes in the U.S. have access to at least three MVPDs, and nearly 35 percent have access to at least four MVPDs.²⁷

As described in the NPRM, the Commission has found Effective Competition in more than 99.5 percent of the communities evaluated since the start of 2013.²⁸ As stated in the NPRM, the Commission has issued affirmative findings of Effective Competition in the country's largest cities, in its suburban areas, and in its rural areas where subscription to DBS is particularly high.²⁹

5. The Commission released the NPRM in this proceeding seeking comment on adopting a presumption of Competing Provider Effective Competition. The Commission sought to establish a streamlined Effective Competition process for small cable operators and to adopt policies that would reduce unnecessary regulatory burdens on the industry as a whole while ensuring the most efficient use of Commission resources.³⁰

III. DISCUSSION

A. Rebuttable Presumption that Cable Systems are Subject to Effective Competition

6. We adopt a rebuttable presumption that cable operators are subject to Competing Provider Effective Competition, finding that such an approach is warranted by market changes since the

²³ *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Notice of Proposed Rulemaking, 30 FCC Rcd 2561, 2565-67, ¶¶ 6-7 (2015) ("NPRM").

²⁴ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3256, ¶ 2 (2015) ("*16th Annual Video Competition Report*").

²⁵ *Id.*

²⁶ *Id.* at 3300-01, ¶¶ 112-113.

²⁷ *Id.* at 3267, ¶ 31.

²⁸ NPRM, 30 FCC Rcd at 2567, ¶ 7.

²⁹ *Id.* at 2566-67, ¶ 7.

³⁰ *Id.* at 2567, ¶ 7.

Commission adopted the presumption of no Effective Competition over 20 years ago.³¹ When the Commission adopted the presumption of no Effective Competition, incumbent cable operators had approximately a 95 percent market share of MVPD subscribers and only a single cable operator served the local franchise area in the vast majority of franchise areas, which is very different from today's marketplace.³² As explained above, the two-pronged test for a finding of Competing Provider Effective Competition requires that (1) the franchise area is "served by at least two unaffiliated [MVPDs] each of which offers comparable video programming to at least 50 percent of the households in the franchise area;" and (2) "the number of households subscribing to programming services offered by [MVPDs] other than the largest [MVPD] exceeds 15 percent of the households in the franchise area."³³ Below we explain

³¹ See, e.g., Comments of the American Cable Association at 3-5, 8-9 ("ACA Comments"); Comments of ITTA – The Voice of Mid-Size Communications Companies at 1-5 ("ITTA Comments"); Comments of the National Cable & Telecommunications Association at 1, 4-6 ("NCTA Comments"); Reply Comments of the American Cable Association at 1-2 ("ACA Reply"); Reply Comments of Cablevision Systems Corporation at 1, 5-6 ("Cablevision Reply"); Reply Comments of the Free State Foundation at 1-4 and Appendix ("FSF Reply"); Reply Comments of the National Cable & Telecommunications Association at 1-4 ("NCTA Reply"); Letter from Seth A. Davidson, Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 1 (Apr. 22, 2015) ("ACA Apr. 22 *Ex Parte* Letter"); Letter from Samuel L. Feder, Counsel for Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (Apr. 23, 2015); Letter from Samuel L. Feder, Counsel for Cablevision Systems Corporation, to Marlene H. Dortch, Secretary, FCC, at 2 (Apr. 23, 2015); Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, at 1 (May 14, 2015) ("NCTA May 14 *Ex Parte* Letter").

³² See *supra* Section II.

³³ 47 U.S.C. § 543(l)(1)(B). The statute establishes the applicable test for each type of Effective Competition, and we thus cannot modify the tests, as some commenters request, nor can we base an Effective Competition decision on vague allegations of large cable operators' dominance. See Comments of the New Jersey Division of Rate Counsel at 7-10 ("NJ Rate Counsel Comments"); Comments of Public Knowledge at 1-2 and 5, n. 10 ("Public Knowledge Comments"); Reply Comments of the Massachusetts Department of Telecommunications and Cable at 4 ("MDTC Reply"); Letter from Cheryl A. Leanza, Policy Advisory, United Church of Christ, Office of Communication Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (May 8, 2015) ("UCC OC May 8 *Ex Parte* Letter") (claiming that the Commission should consider the cost of broadband as part of its analysis); Intergovernmental Advisory Committee to the FCC, Advisory Recommendation No. 2015-7, at 4-5 (filed May 15, 2015) ("IAC Recommendation"); Letter from Public Knowledge *et al.* to The Honorable Tom Wheeler *et al.*, at 6 (May 26, 2015) ("Public Knowledge *et al.* May 26 *Ex Parte* Letter") (questioning "how the availability of high-speed broadband has altered the competitive equation"). In addition, while some commenters state that the basic service tier rate increases more rapidly in communities with a finding of Effective Competition than in those without such a finding, we emphasize that the average rate for basic service is actually lower in communities with a finding of Effective Competition than in those without a finding, demonstrating that basic service tier rates remain reasonable where there is a Commission finding of Effective Competition. See *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, 14902, ¶ 15 (2014) ("2014 Cable Price Report"); Comments of the Massachusetts Department of Telecommunications and Cable at 2, 13-14 ("MDTC Comments"); NJ Rate Counsel Comments at 3, 6; Reply Comments of the National Association of Telecommunications Officers and Advisors at 6 ("NATOA Reply"); Reply Comments of the Staff of the Office of Cable Television for the New Jersey Board of Public Utilities at 7-8 ("NJ OCTV Reply"). See also 47 U.S.C. § 543(b)(1) ("The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable."); Public Knowledge Comments at 3 (expressing concern about the impact of a presumption of Effective Competition on cable rates); Letter from Gus K. West, President, The Hispanic Institute, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Apr. 30, 2015) (same); Letter from Michael J. Scurato, Policy Director, National Hispanic Media Coalition, to Marlene H. Dortch, Secretary, FCC, at 1 (May 12, 2015) (same) ("NHMC May 12 *Ex Parte* Letter"); Letter from Rev. Sheldon Williams, President, National Black Religious Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 1-2 (May 21, 2015) (same); Public Knowledge *et al.* May 26 *Ex Parte* Letter at 4, 6 (same); Letter from Jennifer Johnson, Counsel for NBC Television Affiliates and CBS Television Network Affiliates Association, to Marlene H. Dortch, Secretary, FCC, at 1 (May 27, 2015) (same) ("Affiliates May 27 *Ex Parte* Letter"); Letter from Gerald J. Waldron, Counsel to Univision Communications Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (May 29, 2015) (same)

(continued....)

how the current state of competition in the MVPD marketplace, particularly with regard to DBS, supports a rebuttable presumption that the two-part test is met.

7. At the outset, we note that out of the 1,440 Community Unit Identification Numbers (“CUIDs”)³⁴ for which the Commission has made an Effective Competition determination since the start of 2013, it found that 1,433 CUIDs (or more than 99.5 percent of the CUIDs evaluated) have satisfied one of the statutory Effective Competition tests.³⁵ For the vast majority of the CUIDs evaluated (1,150, or approximately 80 percent), this decision was based on Competing Provider Effective Competition.³⁶ Franchising authorities filed oppositions to only 18 (or less than 8 percent) of the total of 228 Effective

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(“Univision May 29 *Ex Parte* Letter”); Letter from Delara Derakhshani, Policy Counsel, Consumers Union, to The Honorable Tom Wheeler *et al.* at 1-2 (June 1, 2015) (same). In addition, contrary to NAB’s assertion, there is no evidence in the record that a finding of Effective Competition causes cable operators to increase their other fees or equipment rental charges. *See* Letter from Rick Kaplan, Executive Vice President and General Counsel, Legal and Regulatory Affairs, NAB, to Marlene H. Dortch, Secretary, FCC, at 1 (May 22, 2015) (“NAB May 22 *Ex Parte* Letter”). We also clarify that while commenters characterize their statistics as a comparison between communities with Effective Competition and communities without Effective Competition, the statistics in fact involve communities where the Commission has made a finding of Effective Competition and communities where the Commission has yet to make such a finding even though Effective Competition may be present. *See 2014 Cable Price Report*, 29 FCC Rcd at 14897, ¶ 2 (“For purposes of this survey, we have defined all cable operators that do not have an FCC finding of effective competition as ‘noncompetitive’. In many such communities, the incumbent cable operator could possibly meet the test yet for various reasons has not petitioned the Commission for an effective competition finding . . .”).

³⁴ A CUID is a unique identification code that the Commission assigns a single cable operator within a community to represent an area that the cable operator services. A CUID often includes a single franchise area, but it sometimes includes a larger or smaller area. CUID data is the available data that most closely approximates franchise areas.

³⁵ NPRM, 30 FCC Rcd at 2566, ¶ 7. The IAC’s suggestion that the Commission has made incorrect Effective Competition findings is unsubstantiated. IAC Recommendation at 2-3. We clarify that any Commission grant of an Effective Competition petition, including an unopposed petition, is based on satisfaction of the statutory Effective Competition tests. *Id.* at 3.

³⁶ NPRM, 30 FCC Rcd at 2566, ¶ 7. Of the total number of CUIDs in which the Commission granted a request for a finding of Effective Competition during this timeframe, 229 (nearly 16 percent) were granted due to Low Penetration Effective Competition, and 54 (nearly 4 percent) were granted due to LEC Effective Competition. None of the requests granted during this timeframe was based on Municipal Provider Effective Competition. Where a finding of Effective Competition was based on one of the other types of Effective Competition besides Competing Provider Effective Competition, it does not necessarily mean that Competing Provider Effective Competition was not present. Rather, it means that the pleadings raised one of the other types of Effective Competition, and the Commission thus evaluated Effective Competition in that context. *But see* Comments of the National Association of Broadcasters at 16, n. 8 (“NAB Comments”) (stating NAB’s expectation that a cable operator who files an Effective Competition petition based on one of the other tests also would allege the presence of Competing Provider Effective Competition if supported by the facts). In fact, cable operators often file Effective Competition petitions arguing that they are subject to more than one type of Effective Competition within a single franchise area. In such cases, if the Bureau finds that a cable operator has met its burden under one of the statutory tests, it forgoes making a finding under the alternate tests for Effective Competition. *See, e.g., Time Warner Cable Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16299, 16304, n. 45 (MB, 2013) (“Because we find that Time Warner is subject to competing provider effective competition in El Cenizo and Rio Bravo, we need not address its claim that it is also subject to ‘low penetration’ effective competition there.”); *Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 4901, 4905, n. 34 (MB, 2011) (“Comcast also claims to be subject to low penetration effective competition in 3 Attachment A Communities, Bolton Town, Edwards Town, and Hinds County. We need not rule on these claims because we have found that Comcast is subject to competing provider effective competition in them.”) (citation omitted); *Cox Communications Hampton Roads, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 3910, 3915, n. 43 (MB, 2011) (“Cox claims that it is subject to LEC effective competition in the Communities of Chesapeake, Hampton, Langley Air Force Base, and Portsmouth. We need not adjudicate these claims because Cox has satisfied the competing provider test in those Communities.”) (citation omitted).

Competition petitions considered during this timeframe.³⁷ Some commenters object to an analysis of data based on filed Effective Competition petitions, asserting that cable operators do not file petitions where they know the filings would be denied based on a lack of Effective Competition.³⁸ However, given data that indicates a ubiquitous DBS presence nationwide,³⁹ we have no reason to believe that the number of Effective Competition petitions granted in recent years is not representative of the marketplace on the whole. Marketplace realities cause us to believe that in nearly all communities where cable operators have declined to file Effective Competition petitions, Effective Competition is present but the cable operator has not found it worthwhile to undertake the expense of filing an Effective Competition petition, perhaps because the vast majority of franchising authorities have chosen not to regulate rates despite the existing presumption of no Effective Competition.⁴⁰

8. With regard to the first prong of the Competing Provider Effective Competition test as related to the new presumption, we find that the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH Network, presumptively satisfies the requirement that the franchise area be served by two unaffiliated MVPDs each of which offers comparable programming to at least 50 percent of the households in the franchise area. Neither DIRECTV nor DISH Network is affiliated with each other.⁴¹ To offer comparable programming, the Commission's rules provide that a competing MVPD must offer at least 12 channels of video programming, including at least one channel of non-broadcast service programming.⁴² The programming lineups of DIRECTV and DISH Network satisfy this requirement.⁴³

³⁷ NPRM, 30 FCC Rcd at 2566, ¶ 7. The IAC argues that a franchising authority may not oppose an Effective Competition petition for various reasons, including administrative delays. *See* IAC Recommendation at 2; Public Knowledge *et al.* May 26 *Ex Parte* Letter at 4. We emphasize, however, that the exceedingly small number of opposed petitions is just one of many factors that support a rebuttable presumption of Competing Provider Effective Competition, as detailed above.

³⁸ *See* MDTC Comments at 3, 5, 7; NAB Comments at 15-16; NJ Rate Counsel Comments at 6-7; Reply Comments of the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates at 6 (“Consumer Advocates Reply”); Reply Comments of the National Association of Broadcasters at 13 (“NAB Reply”); NATOA Reply at 3; NJ OCTV Reply at 5.

³⁹ *See supra* ¶ 4 (explaining that the MVPD marketplace has changed in ways that substantially impact the test for Competing Provider Effective Competition).

⁴⁰ *See supra* Section II; 2014 *Cable Price Report*, 29 FCC Rcd at 14897, ¶ 2 (“[I]n the communities without an effective competition finding, only 13 percent of subscribers are in areas where the [franchising authorities] elect to regulate the price of basic service.”); ACA Reply at i-ii (“The evidence also shows that even among the communities where there has not yet been a formal finding of effective competition, franchising authorities are choosing not to regulate, implicitly recognizing that rates are being controlled by competitive market forces.”). *But see* Letter from Erin L. Dozier, Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 2, n. 6 (May 15, 2015) (“NAB May 15 *Ex Parte* Letter”) (claiming that because the cable price survey is based on a random sampling of cable operators, it may not be conclusive). For a further discussion of the burdens currently faced by cable operators, *see infra* Section III.C.

⁴¹ We recognize that DIRECTV and AT&T Inc. have filed applications for consent to assign or transfer control of licenses and authorizations. *See* MB Docket No. 14-90. That proceeding remains pending. Even if the DIRECTV and AT&T applications are granted, DIRECTV and DISH Network still will not be affiliated with each other and both of them may be considered as competing providers for purposes of the Competing Provider Effective Competition test. *See* Public Knowledge *et al.* May 26 *Ex Parte* Letter at 5 (questioning how a merger of AT&T and DIRECTV would affect application of the Competing Provider Effective Competition test).

⁴² 47 C.F.R. § 76.905(g). The NPRM did not seek comment on revisiting the meaning of “comparable” programming in this context, and thus we reject commenters’ requests that we do so here. *See* NJ Rate Counsel Comments at 11-14; Public Knowledge Comments at 3, 5-7; Letter from Steve Traylor, Executive Director, NATOA, to Marlene H. Dortch, Secretary, FCC, at 1 (May 18, 2015). *See also* NCTA Reply at 9 (characterizing these “unsupported” arguments as an attempt “to manufacture new requirements”).

In addition, the widespread presence of DIRECTV and DISH Network justifies a rebuttable presumption that they each offer MVPD service to at least 50 percent of households in all franchise areas. As stated above, DIRECTV provides local broadcast channels to 197 markets representing over 99 percent of U.S. homes, and DISH Network provides local broadcast channels to all 210 markets.⁴⁴ In the most recent video competition report, the Commission assumed that DBS MVPDs are available to all homes in the U.S., while recognizing that this slightly overstates the actual availability of DBS.⁴⁵ Further, the Commission has held in hundreds of Competing Provider Effective Competition decisions that the presence of DIRECTV and DISH Network satisfies the first prong of the test.⁴⁶ Notably, the Commission has never determined that the presence of DIRECTV and DISH Network failed to satisfy the first prong of the competing provider test.

9. With regard to the second prong of the test, we will presume that more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD. Based on the data presented above, on a nationwide basis competitors to incumbent cable operators have captured approximately 34 percent of U.S. households, or more than double the percentage needed to satisfy the second prong of the competing provider test.⁴⁷ Nationally, DBS service alone has close to twice the necessary subscribership.⁴⁸ Further, NCTA has found that competing MVPDs have a penetration rate of more than 15 percent in each of the 210 Designated Market Areas (“DMAs”) in the United States, and most DMAs have a DBS penetration rate above 20 percent.⁴⁹ NAB argues that a presumption based on national market share data lacks a rational nexus to the question of whether more than 15 percent of the households in a specific franchise area actually subscribe to programming services offered by MVPDs other than the largest MVPD.⁵⁰ We disagree, finding instead that, as NCTA states, “an average figure is not conclusive evidence of the specific penetration in every community” but “it undeniably supports the Commission’s proposed rebuttable presumption” and “is a strong predictor that competitors have garnered far in excess of the market share Congress deemed necessary to free cable

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⁴³ See www.directv.com/guide; www.dish.com/info/channels-list/.

⁴⁴ *Supra* ¶ 4 (citing *16th Annual Video Competition Report*, 30 FCC Rcd at 3300-01, ¶¶ 112-113). Even in the 13 markets where DIRECTV does not provide local broadcast channels, its channel lineup still satisfies the comparable programming requirement because its channel lineup contains substantially more than 12 channels including at least one channel of non-broadcast service programming.

⁴⁵ *16th Annual Video Competition Report*, 30 FCC Rcd at 3264, n. 57 (explaining that physical features, such as tall buildings or trees, can prevent some homes from receiving DBS signals).

⁴⁶ See, e.g., *supra* ¶ 7; *Six Unopposed Petitions for Determination of Effective Competition*, Memorandum Opinion and Order, 29 FCC Rcd 5321 (MB, 2014); *Fifty-Five Unopposed Petitions for Determination of Effective Competition*, Memorandum Opinion and Order, 29 FCC Rcd 3140 (MB, 2014); *Time Warner Entertainment-Advance/Newhouse Partnership*, Memorandum Opinion and Order, 28 FCC Rcd 16776 (MB, 2013).

⁴⁷ See *supra* ¶ 4. At year-end 2013 there were 34.2 million DBS subscribers and 11.3 million telephone MVPD subscribers, which yields a total of 45.5 million subscribers to competitors to incumbent cable operators. SNL Kagan estimates that there were 133.8 million households in this country in 2013. See <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx?startYear=2012&endYear=2013> (visited Mar. 31, 2014). If we divide 45.5 million by 133.8 million, the data shows that competitors to incumbent cable operators have captured approximately 34 percent of U.S. households.

⁴⁸ See *supra* ¶ 4. If we divide 34.2 million by 133.8 million, the data shows that DBS operators have captured approximately 25.6 percent of U.S. households. We note that DIRECTV is the second largest MVPD in the U.S. and DISH Network is the third largest MVPD. See *16th Annual Video Competition Report*, 30 FCC Rcd at 3262-63, ¶ 26.

⁴⁹ See NCTA Comments at 5; NCTA Reply at 2 (citing to NCTA’s analysis of SNL Kagan data).

⁵⁰ See NAB Comments at 13-16. See also MDTC Reply at 2-3, 6-7.

operators from the vestiges of rate regulation.”⁵¹ The level of competing MVPD penetration in all of the DMAs, along with their ubiquitous service availability, justifies placing the burden on franchising authorities to show a lack of Effective Competition. Under the rebuttable presumption adopted in this Order, local franchising authorities will be able to attempt to demonstrate that the Competing Provider Effective Competition test is not met in a given area.⁵² Thus, we will not be basing our finding on the nationwide statistics alone.

10. For all of the above reasons, we conclude that adopting a rebuttable presumption of Competing Provider Effective Competition is consistent with the current state of the video marketplace. We do not, however, find that market changes since the adoption of the original presumption would support a presumption that any of the other Effective Competition tests (low penetration, municipal provider, or LEC) is met. Although some commenters have asked that we also establish a rebuttable presumption of LEC Effective Competition in any franchise area where an LEC MVPD offers video service,⁵³ we decline to do so at this time. The record lacks evidence to support a presumption that the service area of an LEC MVPD substantially overlaps that of the incumbent cable operator in a sufficient number of franchise areas where an LEC MVPD offers video service to make such a presumption supportable.⁵⁴ Accordingly, our presumption of Effective Competition is limited to Competing Provider Effective Competition. Absent a demonstration to the contrary, we will continue to presume that cable systems are not subject to Low Penetration, Municipal Provider, or LEC Effective Competition.⁵⁵

11. Adoption of the presumption of Competing Provider Effective Competition is consistent with section 623 of the Act, which prohibits a franchising authority from regulating basic cable rates “[i]f the Commission finds that a cable system is subject to effective competition.”⁵⁶ Contrary to the suggestion of some commenters,⁵⁷ we see no statutory bar to applying a nationwide rebuttable presumption of Competing Provider Effective Competition in making this finding.⁵⁸ In fact, the NPRM in the proceeding implementing section 623 of the Act initially proposed to require franchising authorities to demonstrate that Effective Competition was not present in the franchise area, explaining that such an approach would be reasonable because the Act “makes the absence of effective competition a prerequisite to regulators’ legal authority over basic rates.”⁵⁹ Specifically, the statute provides that “[i]f the Commission finds that a cable system is not subject to effective competition, the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission”⁶⁰ Although the Commission ultimately took a different course, that decision was based on what was most efficient given the state of the marketplace at the time the presumption was adopted and it was not mandated by statute.⁶¹ Given the state of the video marketplace today,⁶² we find that it is appropriate to

⁵¹ See NCTA Reply at 2.

⁵² See *infra* Section III.C.

⁵³ See ACA Comments at 10-11; NCTA Comments at 9; ACA Reply at i; Cablevision Reply at 3-5.

⁵⁴ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5303, ¶ 10 (1999).

⁵⁵ *But see* NCTA Comments at 9 (asserting without support that franchising authorities also should bear the burden of rebutting a presumption of Low Penetration and Municipal Provider Effective Competition).

⁵⁶ 47 U.S.C. § 543(a)(2).

⁵⁷ See NAB Comments at 7-13; NAB Reply at 2, 10-12; NATOA Reply at 2.

⁵⁸ See ACA Comments at 6-8; Cablevision Reply at 5.

⁵⁹ See *Implementation of Sections of the Cable Television Consumer Protection Act of 1992; Rate Regulation*, Notice of Proposed Rulemaking, 8 FCC Rcd 510, 515, ¶ 17 (1992). See also ACA Comments at 2.

⁶⁰ 47 U.S.C. § 543(a)(2).

⁶¹ See ACA Comments at 6-7; NCTA Comments at 7; Cablevision Reply at 5.

presume the presence of Competing Provider Effective Competition on a nationwide basis, provided that franchising authorities have an opportunity to rebut that presumption and demonstrate that the Competing Provider Effective Competition test is not met in a specific area. The franchising authority's ability to file a revised Form 328 pursuant to the procedures discussed below⁶³ will ensure that the Commission will continue to receive evidence regarding a specific franchise area where the franchising authority deems it relevant.⁶⁴ The fact that Effective Competition decisions apply to specific franchise areas does not preclude the Commission from adopting a rebuttable presumption of Competing Provider Effective Competition today based on the pervasive competition to cable from other MVPDs, just as it did not prevent the Commission from adopting a rebuttable presumption of no Effective Competition based on cable's national 95 percent share of the MVPD marketplace in 1993.⁶⁵ In the NPRM, we sought comment on whether there were certain geographic areas in which we should not adopt a presumption of Competing Provider Effective Competition.⁶⁶ No commenter addressed this issue, and thus we will not adopt different rules for any specific geographic areas.

12. We are not persuaded by commenters who argue that we should not adopt a rebuttable presumption of Competing Provider Effective Competition because of the potential impact of findings of Effective Competition on the basic service tier requirement found in section 623 of the Act. Several commenters argue that our action would enable cable operators to move broadcast stations that elect retransmission consent and public, educational, and governmental access ("PEG") channels to a higher tier, leading to higher consumer prices.⁶⁷ If a finding of Effective Competition results in elimination of the basic service tier requirement -- a statutory interpretation issue that we do not address here -- that conclusion would apply not only in communities where the new presumption of Effective Competition is not successfully rebutted but also in the thousands of communities in which we have already issued findings of Effective Competition. Despite these widespread findings of Effective Competition, commenters have not pointed to a single instance in which cable operators have even attempted to move broadcast stations or PEG channels off the basic service tier.⁶⁸ NAB argues that cable operators may not

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⁶² See *supra* Section II.

⁶³ See *infra* Section III.C.

⁶⁴ See NAB Comments at 10-11; NJ Rate Counsel Comments at 6.

⁶⁵ See ACA Reply at 5.

⁶⁶ NPRM, 30 FCC Rcd at 2569, ¶ 11.

⁶⁷ See Comments of the Alliance for Community Media at 1-3; Comments of American Community Television at 3-9; NAB Comments at 25; Comments of the National Association of Telecommunications Officers and Advisors at 4; Reply Comments of American Community Television at 1-4; Consumer Advocates Reply at 4-5; MDTC Reply at 7; Letter from James L. Winston, President, National Association of Black Owned Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 1-2 (May 6, 2015) ("NABOB May 6 *Ex Parte* Letter"); Letter from Tracy Rosenberg, Executive Director, Media Alliance, and Paul Goodman, Legal Counsel, Greenlining Institute, to Marlene H. Dortch, Secretary, FCC, at 1-2 (May 7, 2015) ("Media Alliance/Greenlining Institute May 7 *Ex Parte* Letter"); NHMC May 12 *Ex Parte* Letter at 2; Letter from George Tourville, Mayor of Inver Grove Heights, MN, Chair of NDC4 Cable Commission, to Marlene H. Dortch, Secretary, FCC, at 2 (May 14, 2015) ("NDC4 May 14 *Ex Parte* Letter"); Affiliates May 27 *Ex Parte* Letter at 1; Univision May 29 *Ex Parte* Letter at 1.

⁶⁸ See also ACA Reply at 9-12, NCTA Reply at 10-11; Letter from Craig A. Gilley, Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 2 (Apr. 16, 2015) ("ACA Apr. 16 *Ex Parte* Letter"); NCTA May 14 *Ex Parte* Letter at 2. Similarly, while the IAC contends that consumers will be harmed because the uniform pricing provision and the tier buy-through provision do not apply following a finding of Effective Competition, they have not pointed to any instances of cable operators in the thousands of communities with Effective Competition findings using this flexibility to the detriment of subscribers in these communities. See IAC Recommendation at 3; 47 C.F.R. §§ 76.984, 76.921. The IAC also claims that "use of public rights of ways by [Satellite Master Antenna Television ("SMATV")] operators serving individual properties may be allowed if there is a finding of effective competition." IAC Recommendation at 3; 47 C.F.R. § 76.501. IAC has failed to explain the significance of this or

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have moved broadcast stations or PEG channels to a higher tier in communities with a finding of Effective Competition at least in part because they do not wish to do so on a fragmented “patchwork” basis⁶⁹ but they have provided no support for this assertion. Moreover, a patchwork of communities with and without Effective Competition will continue to exist after the adoption of this Order if any franchising authorities are able to rebut the new presumption and remain certified. We thus find that the concerns expressed by commenters in this regard are unpersuasive. Moreover, they do not speak to the key issue in this proceeding: whether maintaining a presumption of no Effective Competition is consistent with the current state of the MVPD marketplace. Accordingly, we do not believe that they provide a sound basis to retain rules that are no longer justified by marketplace realities and that place unwarranted burdens on cable operators and the Commission.

B. Implementation of Section 111 of STELAR

13. For the reasons stated above, section 623 of the Act provides the Commission with ample authority to adopt a rebuttable presumption of Competing Provider Effective Competition for both large and small cable operators. However, additional support for our decision today is found in STELAR. Specifically, we conclude that adopting a rebuttable presumption of Competing Provider Effective Competition fully effectuates the Commission’s responsibilities under section 111 of STELAR.⁷⁰ Section 111 directs 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.”⁷¹ The new presumption of Competing Provider Effective Competition will establish a streamlined process for all cable operators, including small operators, by reallocating the burden of providing evidence of Effective Competition in a manner that better comports with the current state of the marketplace.⁷² The existing presumption of no Effective Competition requires cable operators to produce information about competing providers’ service areas and numbers of subscribers, and to petition the Commission for an affirmative finding of the requisite competition in particular franchise areas.⁷³ Changing the presumption – which is merely a procedural device – will streamline the process by shifting the burden of producing evidence with respect to Effective Competition. Under our modified rule, franchising authorities remain free to rebut the presumption by presenting community-specific evidence, which the cable operator would then have the burden to overcome based on its own evidence.⁷⁴ The new

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why such a possibility would be a reason to refrain from updating our processes to reflect market realities. Further, a SMATV issue has not manifested itself in the thousands of communities that the Commission has already determined are subject to Effective Competition. We also emphasize that both the prohibition against negative option billing and cable customer service standards, as a general matter, survive a finding of Effective Competition, per *Time Warner Entertainment Co., L.P., v. FCC*, 56 F.3d 151, 192-196 (D.C. Cir. 1995). See IAC Recommendation at 3; NAB May 22 *Ex Parte* Letter at 2; 47 C.F.R. §§ 76.981, 76.309.

⁶⁹ NAB May 15 *Ex Parte* Letter at 2.

⁷⁰ Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014).

⁷¹ 47 U.S.C. §543(o)(1).

⁷² See ACA Comments at 10 (“adopting [a presumption of Competing Provider Effective Competition] would conserve not only the resources of cable operators, but also of franchising authorities and the Commission”); ITTA Comments at 2 (a rebuttable presumption that cable operators are subject to Effective Competition “would be consistent with the policy of the Commission and current Administration of modifying and streamlining rules that are outmoded or excessively burdensome, and would appropriately implement the [STELAR] mandate that the Commission establish a streamlined effective competition process for small cable operators”) (footnotes omitted). See also ACA Reply at 1.

⁷³ See 47 C.F.R. § 76.907 (a cable operator may file a petition for a determination of Effective Competition with evidence that Effective Competition exists in the franchise area; if such evidence is not otherwise available, cable operators may request from a competitor information regarding the competitor’s reach and number of subscribers).

⁷⁴ See NCTA Reply at 8; ACA Comments at 7. See also 47 C.F.R. § 76.906.

process is streamlined for cable operators because they will be required to file only in response to a showing by a franchising authority that an operator does not face Competing Provider Effective Competition in the franchise area.⁷⁵ The burden would then shift to the cable operator to prove Effective Competition. As ACA states:

Despite widespread and obvious competition, many cable operators, particularly small operators, have not availed themselves of effective competition relief because of the burdens of overcoming the current presumption against effective competition. These burdens include the costs of purchasing the required zip code and competing provider penetration information, preparing a formal legal filing for submission to the Commission, paying a filing fee, and then waiting an uncertain amount of time for a decision. Congress recognized these burdens when it enacted Section 111 of STELAR and adoption of the Commission's proposal is the most effective and rational way to reduce these burdens and ensure that cable operators of all sizes that face effective competition obtain the relief to which they are entitled.⁷⁶

14. We agree with commenters that there is no statutory restriction on extending the same revised rebuttable presumption of Competing Provider Effective Competition to all cable systems.⁷⁷ Section 111 of STELAR directs the Commission to establish streamlined measures for small cable operators within a certain deadline,⁷⁸ but it “neither expands nor restricts the scope of the Commission’s authority to administer the effective competition process.”⁷⁹ As commenters observe, “reducing regulatory burdens on all cable operators, large and small,” will ensure that Commission procedures “reflect marketplace realities and allow for a more efficient allocation of Commission and industry resources.”⁸⁰

15. We recognize that STELAR provides 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.”⁸¹ NAB argues that this provision ratifies the Commission’s placement of the burden of proving Effective Competition on the cable operators, and prevents the Commission from shifting the burden.⁸² We do not read this language as limiting the Commission’s authority to eliminate or modify the presumption for cable operators, large or small. The Commission adopted the presumption of no Effective Competition as a procedural mechanism,⁸³ based in large part on the premise that “the vast

⁷⁵ See NCTA Comments at 7.

⁷⁶ See ACA Reply at ii. See also NCTA Comments at 2, 7 (“Shifting the burden of production to local franchising authorities to show the lack of effective competition in those extremely rare cases where such competition is not present, rather than requiring cable operators to bear the burden of production in the thousands of communities where they face such competition, will reduce unnecessary costs on small cable operators”); Cablevision Reply at 6; ITTA Comments at 7; FSF Reply at 4; Letter from Seth A. Davidson, Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 1 (May 26, 2015) (“In particular, we stressed that ACA’s members and other small operators were being deterred from seeking regulatory relief (and regulatory parity with their competition) by the costs associated with the current effective competition process and that the Commission’s proposal was consistent with Congress’ intent in Section 111 of STELAR to streamline that process.”).

⁷⁷ See ACA Comments at 8.

⁷⁸ 47 U.S.C. §543(o)(1). See NCTA Reply at 8.

⁷⁹ See NCTA Reply at 8. See also ACA Comments at 8.

⁸⁰ See ITTA Comments at 7. See also NCTA Reply at 8 (“Extending the same relief to all operators is entirely reasonable, especially since the record contains no evidence that the level of competition varies in a community based on size or other characteristics of the corporation operating the cable system.”).

⁸¹ 47 U.S.C. § 543(o)(2).

⁸² NAB Comments at 22-23; NAB May 15 *Ex Parte* Letter at 1.

⁸³ 47 C.F.R. § 76.906.

majority of cable systems” in 1993 were “not subject to effective competition.”⁸⁴ The presumption was never mandated by Congress, and there is nothing in STELAR’s provisions that suggests that Congress intended to withdraw the Commission’s general rulemaking power to revisit its rules and modify or repeal them if it finds such action is warranted.⁸⁵ In the clause that NAB relies on, Congress merely disavows any intent to alter or interfere with the Commission rule requiring proof of the existence of Effective Competition, as applied to small cable operators. It does not require the Commission to maintain the presumption of no Effective Competition. Rather, Congress only requires the Commission to streamline the process for “small cable operators.” Thus, Congress did not “ratify” or lock in place the current presumption. Indeed, if this provision were read to restrict the Commission from changing the presumption for small operators, as NAB urges, it would have the perverse effect of permitting the Commission to reduce burdens on larger operators but not on smaller ones, contrary to the clear intent and narrow focus of section 111. Thus, we find unpersuasive NAB’s argument that section 111 of STELAR prohibits the rule modifications adopted in this Order.⁸⁶

16. In the NPRM, the Commission sought comment on alternate streamlined procedures that it could adopt for small cable operators pursuant to section 111.⁸⁷ Some commenters proposed that we could implement section 111 through small cable operator Effective Competition reforms other than reversing the presumption, for example, by eliminating filing fees, automatically granting certain petitions, adopting a time limit for Commission review, or otherwise streamlining existing Effective Competition procedures.⁸⁸ We have evaluated all of the alternate proposals set forth in the record and we conclude that, while some are already implemented,⁸⁹ others would not have a sufficient impact on the

⁸⁴ See *1993 Rate Order*, 8 FCC Rcd at 5670, ¶ 43. See also *id.* at 5640, ¶ 10 (“We anticipate that the regulations we adopt today will change over time. In accordance with the statute, we will review and monitor the effect of our initial rate regulations on the cable industry and consumers, and refine and improve our rules as necessary.”).

⁸⁵ 47 U.S.C. §§ 154(i), 303(r).

⁸⁶ See NAB Comments at 22; NAB Reply at 15. See also Public Knowledge Comments at 2-3.

⁸⁷ NPRM, 30 FCC Rcd at 2570, ¶ 13.

⁸⁸ See, e.g., ACA Comments at 14-15; MDTC Comments at 11-12, n. 46; NAB Comments at 23-24; Public Knowledge Comments at 2-3; ACA Reply at vi; Letter from the National Association of Broadcasters *et al.* to Marlene H. Dortch, Secretary, FCC, at 2-3 (Apr. 16, 2015) (“NAB *et al.* Apr. 16 *Ex Parte* Letter”); Letter from Stephen Traylor, Executive Director/Legal Counsel, National Association of Telecommunications Officers and Advisors, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Apr. 17, 2015) (“NATOA Apr. 17 *Ex Parte* Letter”); NABOB May 6 *Ex Parte* Letter at 1; UCC OC May 8 *Ex Parte* Letter at 1; Public Knowledge *et al.* May 26 *Ex Parte* Letter at 1.

⁸⁹ For example, NAB and others ask that we establish an electronic filing process, perhaps through the use of an electronic form. NAB Comments at 24; NAB *et al.* Apr. 16 *Ex Parte* Letter at 3. We already require all Effective Competition petitions to be filed electronically. See *Media Bureau Announces Commencement of Mandatory Electronic Filing for Cable Special Relief Petitions and Cable Show Cause Petitions via the Electronic Comment Filing System*, Public Notice, 26 FCC Rcd 17150 (MB, Dec. 30, 2011) (“Effective January 3, 2012, the Commission will no longer accept and consider new Cable Special Relief (CSR) and Cable Show Cause (CSC) petitions filed on paper.”). NAB and others also ask that we relieve cable operators of the obligation to present evidence regarding elements that are no longer in dispute, including in particular evidence regarding consumers’ awareness of the availability of DBS service. NAB *et al.* Apr. 16 *Ex Parte* Letter at 2; NATOA Apr. 17 *Ex Parte* Letter at 1. The Media Bureau has already addressed this issue by stating that a party may prove consumers’ awareness of the availability of DBS service by providing evidence of penetration rates in the franchise area coupled with the ubiquity of DBS service. See, e.g., ACA Reply at 14; *Time Warner Entertainment-Advance/Newhouse Partnership*, 28 FCC Rcd at 16778, ¶ 6 (“The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service. The ‘comparable programming’ element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming and is supported in this petition with citations to the channel lineups for both DBS providers. Also undisputed is Time Warner’s assertion that both DBS providers

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costs that burden cable operators, particularly small cable operators, under the existing Effective Competition regime, including the costs of purchasing data indicating what zip codes make up the local franchising area, using the resulting list of zip codes to purchase penetration data, and preparing a formal legal filing.⁹⁰ Accordingly, we have concluded that adopting a rebuttable presumption of Competing Provider Effective Competition is the best approach to streamline the process for small cable operators.

C. Procedures to Implement the New Presumption

17. In this section, we adopt new procedures to implement the rebuttable presumption of Competing Provider Effective Competition. With certain exceptions discussed below, we adopt procedures largely comparable to those discussed in the NPRM. In short, a franchising authority will obtain certification to regulate a cable operator's basic service tier and associated equipment by filing a revised Form 328, which will include a demonstration rebutting the presumption of Competing Provider Effective Competition. A cable operator may continue to oppose a Form 328 by filing a petition for reconsideration of the form.

18. Specifically, as under our existing procedures, a franchising authority that seeks certification to regulate a cable operator's basic service tier and associated equipment will file Form 328. We will revise Question 6 of that form to include a new Question 6a, which will state the new presumption of Competing Provider Effective Competition. Question 6a will ask a franchising authority to provide an attachment containing evidence adequate to satisfy its burden of rebutting the presumption with specific evidence. A franchising authority may continue to rely on the current presumption that Low Penetration, Municipal Provider, and LEC Effective Competition are not present unless it has actual knowledge to the contrary.⁹¹ Hence, a franchising authority need not submit evidence regarding a lack of Effective Competition under those three tests; it need only submit evidence regarding the lack of Competing Provider Effective Competition. Question 6b of the revised form will state the presumption that cable systems are not subject to any other type of Effective Competition excluding Competing Provider Effective Competition, and it will retain the question in the current form asking the franchising authority to indicate whether it has reason to believe that this presumption is correct. We will revise the instructions for completing Form 328 to reflect the changes to Question 6. In addition, we note that instruction number 2 to the form was not previously updated to reference LEC Effective Competition, even though the form itself contains such an update. For accuracy and completeness, we will revise instruction number 2 to reference LEC Effective Competition.

19. Except as otherwise discussed, we will retain the existing provisions in section 76.910 of our rules governing franchising authority certifications. As stated in current section 76.910, the certification will become effective 30 days after the franchising authority files Form 328 unless the

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offer service to at least '50 percent' of the households in the communities because of their national satellite footprint. Based on all the foregoing considerations, we find that the first part of the competing provider test is satisfied for all the communities in which Time Warner is invoking it.") (footnotes omitted); *Comcast Communications, LLC*, Memorandum Opinion and Order, 28 FCC Rcd 16754, 16755, ¶ 4 (MB, 2013) (making similar statements); *Comcast Cable Communications, LLC*, Memorandum Opinion and Order, 28 FCC Rcd 16292, 16293, ¶ 5 (MB, 2013) (making similar statements).

⁹⁰ See, e.g., NCTA Comments at 4; ACA Reply at 4, 14-15; NCTA Reply at 4; ACA Apr. 16 *Ex Parte* Letter at 1 ("[T]he alternatives put forth by opponents of the proposed presumption are unlikely to overcome these burdens and persuade a small cable operator to seek an effective competition finding, even for those who undoubtedly would meet the 'competing provider' test.").

⁹¹ See 47 C.F.R. § 76.910(b)(4) ("Unless a franchising authority has actual knowledge to the contrary, the franchising authority may rely on the presumption in § 76.906 that the cable operator is not subject to effective competition."). The three other types of Effective Competition could become relevant if a franchising authority rebuts a presumption of Competing Provider Effective Competition, and the cable operator seeks to demonstrate that a different type of Effective Competition exists and the franchising authority thus cannot regulate basic cable rates.

Commission notifies the franchising authority otherwise.⁹² We find that this approach is consistent with a presumption of Competing Provider Effective Competition, because the franchising authority is required to submit a rebuttal of that presumption with Form 328. This approach also is consistent with the statutory requirement that in general, a franchising authority's certification must become effective 30 days after the date filed.⁹³ Once a franchising authority files revised Form 328, the Commission may deny a certification based on failure to meet the applicable burden, consistent with the Commission's authority to dismiss a pleading that fails on its face to satisfy applicable requirements.⁹⁴ Accordingly, if a franchising authority files a revised Form 328 that fails to meet the required standards to regulate rates, we will promptly deny the filing and it thus will not become effective 30 days after filing. We see no need to require a franchising authority to wait one year before filing a new Form 328 after one is denied, as ACA requests;⁹⁵ we believe that franchising authorities should remain able to file a new Form 328 at any time if circumstances change such that they can submit new data rebutting the presumption of Competing Provider Effective Competition.

20. We also find that deeming a certification effective 30 days after it is filed is consistent with STELAR's requirement that we streamline the Effective Competition process for small cable operators. We expect that few franchising authorities will file the revised Form 328 because they will be unable to produce the necessary evidence to rebut the presumption of Competing Provider Effective Competition in most franchise areas, due to the ubiquity of DBS service. Cable operators thus will likely need to address only a small number of filed Form 328s. In fact, if the Commission finds that the attachment accompanying a franchising authority's Form 328 fails to show the evidence required to rebut the presumption, and the Commission thus dismisses the form based on failure to meet the applicable burden, then the cable operator will not need to take any affirmative action. The new approach adopted herein thus will streamline the Effective Competition process for all cable operators, including small ones. The NPRM sought comment on whether a cable operator should have an opportunity before the 30-day period expires to respond to a franchising authority's showing.⁹⁶ Commenters did not address this issue and we find it unnecessary to do so, given that a cable operator may file a petition for reconsideration that would automatically stay the imposition of rate regulation, as discussed below.

⁹² See *id.* § 76.910(e). The franchising authority may not, however, regulate a cable system's rates unless it meets certain procedural requirements. See *id.* ("Unless the Commission notifies the franchising authority otherwise, the certification will become effective 30 days after the date filed, *provided, however,* That the franchising authority may not regulate the rates of a cable system unless it: (1) Adopts regulations: (i) Consistent with the Commission's regulations governing the basic tier; and (ii) Providing a reasonable opportunity for consideration of the views of interested parties, within 120 days of the effective date of certification; and (2) Notifies the cable operator that the authority has been certified and has adopted the regulations required by paragraph (e)(1) of this section."). See also 47 U.S.C. § 543(a)(4).

⁹³ See *id.* Given this statutory provision, we cannot grant ACA's request that we provide cable operators with 30 days to oppose a revised Form 328 and franchising authorities with 15 days to respond, or that we automatically deny a Form 328 not acted on within 180 days. See ACA Comments at 12 and 14, n. 28.

⁹⁴ See, e.g., *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd 7842 (1995) (denying the Public Utilities Commission of Ohio's petition to retain state regulatory authority over the rates of intrastate CMRS because it failed to satisfy the statutory standard established for extending state regulatory authority over CMRS rates). See also *Telecommunications Carriers Eligible for Universal Service Support*, Order, 26 FCC Rcd 13788, 13797, ¶ 21 (2011) ("Petitioners seeking forbearance bear the burden of proof and must show that each of the statutory elements of forbearance is met, and we need only find that petitioner has failed to meet one of the forbearance criteria to deny its petition.") (footnote omitted).

⁹⁵ ACA Comments at 13.

⁹⁶ NPRM, 30 FCC Rcd at 2572, ¶ 16.

21. As discussed in the NPRM,⁹⁷ under our current rules a cable operator may oppose a certification by filing a petition for reconsideration pursuant to section 76.911 of our rules, demonstrating that it satisfies any of the four tests for Effective Competition.⁹⁸ Similarly, under the new rules, the cable operator may file a petition for reconsideration in which it either (a) disagrees with a franchising authority's rebuttal of the presumption of Competing Provider Effective Competition, or (b) attempts to demonstrate the presence of one of the other types of Effective Competition (low penetration, municipal provider, or LEC). We see no need to make any revisions to existing section 76.911. The procedures set forth in section 1.106 of our rules for the filing of petitions for reconsideration will continue to govern petitions for reconsideration of Form 328 and responsive pleadings.⁹⁹ In addition, a cable operator's filing of a petition for reconsideration alleging that Effective Competition exists will continue to automatically stay the imposition of rate regulation pending the outcome of the reconsideration proceeding.¹⁰⁰ Although the NPRM sought comment on whether we should deem a petition for reconsideration granted if the Commission does not act on it within six months,¹⁰¹ we find that such an approach is unnecessary given the automatic rate regulation stay.

22. Our rules currently permit cable operators to request information from a competitor about the competitor's reach and number of subscribers, if the evidence necessary to establish Effective Competition is not otherwise available.¹⁰² We will retain that provision, while adding a similar provision to benefit franchising authorities now that they will bear the burden of demonstrating the lack of Competing Provider Effective Competition.¹⁰³ Specifically, we will amend our rules to provide that, if a franchising authority filing Form 328 wishes to demonstrate a lack of Competing Provider Effective Competition and necessary evidence is not otherwise available, the franchising authority may request directly from an MVPD information regarding the MVPD's reach and number of subscribers in a particular franchise area. As currently required for such requests by cable operators, we will require the MVPD to respond to such a request within 15 days, and we will permit such responses to be limited to numerical totals related to subscribership and reach. Third-party MVPDs must timely respond to these requests, and the Commission may use its enforcement power to ensure compliance.¹⁰⁴ We understand that currently, third-party MVPDs or their agents sometimes charge cable operators for access to this data. We will revisit the issue of the cost of the data if we receive complaints that the cost of such data makes the filing of Form 328 cost-prohibitive to franchising authorities.¹⁰⁵

⁹⁷ *Id.* at 2572, ¶ 17.

⁹⁸ 47 C.F.R. § 76.911. We see no benefit to eliminating the distinctions between petitions for reconsideration, petitions for revocation, petitions for recertification, and petitions for a determination of Effective Competition, as ACA advocates. *See* ACA Comments at 11.

⁹⁹ 47 C.F.R. § 76.911(a). Accordingly, a cable operator must file its petition for reconsideration within 30 days of the date that Form 328 is filed. *Id.* § 1.106(f).

¹⁰⁰ *Id.* § 76.911(b).

¹⁰¹ NPRM, 30 FCC Rcd at 2572, ¶ 17.

¹⁰² 47 C.F.R. § 76.907(c) (“If the evidence establishing effective competition is not otherwise available, cable operators may request from a competitor information regarding the competitor’s reach and number of subscribers.”); 47 C.F.R. § 76.911(a)(1) (applying that provision to the context of petitions for reconsideration of franchising authority certifications).

¹⁰³ *See* Cablevision Reply at 8.

¹⁰⁴ *See* NAB *et al.* Apr. 16 *Ex Parte* Letter at 2; NATOA Apr. 17 *Ex Parte* Letter at 1; 47 C.F.R. § 0.61(j) (directing the Media Bureau to “[e]xercise authority to issue non-hearing related subpoenas for the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, schedules of charges, contracts, agreements, and any other records deemed relevant to the investigation of matters within the jurisdiction of the Media Bureau.”).

¹⁰⁵ *See* ACA Reply at 16.

23. Even under the new approach to Effective Competition adopted herein, we expect that cable operators still on occasion may wish to file petitions for a determination of Effective Competition pursuant to section 76.907 of our rules.¹⁰⁶ In particular, if a franchising authority is certified under the new rules and procedures, a cable operator may at a later date wish to file a petition demonstrating that circumstances have changed and one of the four types of Effective Competition exists. Accordingly, we will retain existing section 76.907, but we will revise section 76.907(b) to reflect the new presumption. Once a franchising authority is certified under the new rules adopted herein, after having demonstrated a lack of Competing Provider Effective Competition, we agree with ACA that it would not make sense for a cable operator filing a decertification petition to benefit from the presumption of Effective Competition,¹⁰⁷ rather, in this instance the cable operator must demonstrate that circumstances have changed and Effective Competition is now present in the franchise area.¹⁰⁸ We will clarify in revised section 76.907(b) that the new presumption of Competing Provider Effective Competition does not apply in this instance.

24. All of the new rules and procedures for Effective Competition will go into effect once the Commission announces approval by the Office of Management and Budget (“OMB”) of the rules that require such approval and of revised Form 328. Although some of the rules, such as the new rebuttable presumption of Competing Provider Effective Competition itself, do not require OMB approval, we conclude that none of the rules should go into effect until the OMB approval is obtained. Although some commenters have argued that cable operators generally should benefit from the new presumption as soon as it is adopted,¹⁰⁹ we find that tying the effective date to the OMB approval is appropriate where, as here, all of the rules are so closely tied to the submission of a revised form that requires OMB approval.

25. Overall, we find that the new rules and procedures discussed above will create an Effective Competition process that is more efficient for cable operators, especially small cable operators, than the current approach.¹¹⁰ Cable operators will not be required to file petitions for a determination of Effective Competition in the first instance; instead, franchising authorities will have to rebut the presumption of Competing Provider Effective Competition in those limited locations in which the statutory test is not met.¹¹¹ The record demonstrates that filing Effective Competition petitions has forced cable operators to incur significant costs, such as the cost of purchasing zip code and competing provider penetration data and preparing formal legal filings,¹¹² merely to confirm what the marketplace data already suggests about the likely application of the statutory Effective Competition tests in almost all

¹⁰⁶ 47 C.F.R. § 76.907.

¹⁰⁷ ACA Comments at 12-13.

¹⁰⁸ Thus, it would be inappropriate to automatically grant cable operator petitions for decertification that are not acted on within a certain timeframe, as ACA suggests, given that the franchising authority would have previously put forth evidence of a lack of Competing Provider Effective Competition in order to become certified in the first place. *See id.* at 14, n. 28.

¹⁰⁹ *See id.* at 12; NCTA Comments at 8-9; Cablevision Reply at 6.

¹¹⁰ *See* ITTA Comments at 6. ACA also argues that the benefits will flow through to consumers. *See* Letter from Seth A. Davidson, Counsel for American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 1-2 (May 28, 2015).

¹¹¹ *See supra* Section II.

¹¹² *See* NCTA Comments at 4; ACA Reply at 4; NCTA Reply at 4, 11. ACA estimates that, for a cable system serving a single community of 2,650 households, the total cost of seeking an Effective Competition determination would be approximately \$5,400 (\$300 for zip code data, \$677 for competing provider subscribership data, \$1,465 for the FCC filing fee, and \$3,000 in legal fees) assuming the cable operator does not file a reply. *See* ACA Apr. 22 *Ex Parte* Letter at 2-3. Some other commenters, however, claim, without convincing supporting evidence, that rebutting the current presumption is not overly burdensome for cable operators. *See* MDTC Comments at 8; NAB Comments at 17; NJ Rate Counsel Comments at 3. We disagree and find that the costs of the current process are significant, especially for smaller cable operators.

communities.¹¹³ According to ACA, only one cable operator with fewer than 1,000,000 total subscribers has filed an Effective Competition petition since December 30, 2011, even though such operators are likely subject to Effective Competition to the same degree as other, larger operators.¹¹⁴ Given the ubiquitous nationwide presence and penetration levels of DBS, we find that it no longer makes sense to burden cable operators with the costs of filing an Effective Competition petition in the first instance. It is far more efficient to require franchising authorities to rebut the presumption in those relatively rare instances where there may not be Effective Competition. Contrary to NAB's suggestion,¹¹⁵ the burdens imposed on cable operators under the current presumption, which is no longer supportable by marketplace data, justify adoption of the new presumption as the most efficient approach. The fact that cable operators benefit from a finding of Effective Competition¹¹⁶ does not alter this analysis. We expect that the volume of new Form 328s filed by franchising authorities will be far less than the volume of cable operator Effective Competition petitions currently filed, which will conserve resources of cable operators as well as the Commission.¹¹⁷ Contrary to the suggestion of some commenters,¹¹⁸ we do not expect franchising authorities in thousands of communities to file new Form 328s. Rather, we anticipate that few franchising authorities will be able to present data to rebut the presumption of Competing Provider Effective Competition, given the ubiquity and penetration of DBS. In this regard, we agree with NCTA that, "[g]iven competitive conditions throughout the country and the relatively few [franchising authorities] that currently rate regulate, shifting the presumption is extraordinarily unlikely to unleash an avalanche of [franchising authority] filings."¹¹⁹

26. We recognize that franchising authorities, including small franchising authorities, will face additional burdens in preparing revised Form 328 with an attachment rebutting the presumption of Competing Provider Effective Competition, and we also recognize that some franchising authorities have limited resources.¹²⁰ We conclude that any such burdens are justified by the efficiency gained by conforming the presumption to marketplace realities.¹²¹ In 1993, the Commission stated that it was "mindful of franchising authorities' concern that they do not have access to the information or the resources necessary to show the absence of effective competition as a threshold matter of jurisdiction."¹²² Today, in contrast, Effective Competition exists in the vast majority of franchise areas and we anticipate few franchising authorities will have a basis for filing a revised Form 328 demonstrating a lack of Competing Provider Effective Competition.¹²³ In addition, we have ensured that franchising authorities will have access to the information needed to demonstrate a lack of Competing Provider Effective

¹¹³ See *supra* Section II; Cablevision Reply at 2.

¹¹⁴ See ACA Apr. 22 *Ex Parte* Letter at 3, n. 7.

¹¹⁵ NAB Comments at 16-17.

¹¹⁶ See MDTC Comments at 10; MDTC Reply at 5; NJ OCTV Reply at 4.

¹¹⁷ See ITTA Comments at 6; Cablevision Reply at 2-3.

¹¹⁸ See MDTC Comments at 9; NATOA Reply at 5.

¹¹⁹ NCTA Reply at 6, n. 24.

¹²⁰ See MDTC Comments at 9, n. 32 and 10; NJ Rate Counsel Comments at 2-3; MDTC Reply at 4-5; NAB Reply at 14; NJ OCTV Reply at 2-4; Media Alliance/Greenlining Institute May 7 *Ex Parte* Letter at 2; Letter from Linda Sherry, Director, National Priorities, Consumer Action, to Marlene H. Dortch, Secretary, FCC, at 1 (May 8, 2015); IAC Recommendation at 5.

¹²¹ See *supra* Section III.A.

¹²² *1993 Rate Order*, 8 FCC Rcd at 5668, ¶ 41. See also MDTC Comments at 10; NAB Comments at 18; NJ Rate Counsel Comments at 2-3; NAB Reply at 13-14; NJ OCTV Reply at 3.

¹²³ See *supra* ¶ 7 (stating that franchising authorities filed oppositions to fewer than 8 percent of the Effective Competition petitions considered since the start of 2013).

Competition by implementing procedures pursuant to which a franchising authority may request directly from an MVPD information regarding the MVPD's reach and number of subscribers in a particular franchise area.¹²⁴ With regard to the burden on the franchising authorities, ACA explains that unlike cable operators, governmental entities can receive zip code data from the post office free of charge, and governmental entities likely know all of the zip codes within their jurisdiction in any event.¹²⁵ Overall, the costs to franchising authorities will be outweighed by the significant cost-saving benefits of a presumption that is consistent with market data showing that the vast majority of communities would satisfy the Competing Provider Effective Competition standard. We will monitor the marketplace to determine whether the burdens of filing a revised Form 328 are dissuading franchising authorities from filing, and if so, we will reconsider whether changes should be made to reduce their costs.¹²⁶

D. Current Certifications and Pending Effective Competition Proceedings

27. Many franchising authorities were certified over 20 years ago to regulate the basic service tier rates and equipment based on the existing presumption of no Effective Competition. Based on the changes in the marketplace that have occurred in the last 20 years, discussed above, we believe that the factual foundation for those findings is no longer valid in most cases. Therefore, all franchising authorities with existing certifications that wish to remain certified must file revised Form 328, including the attachment rebutting the presumption of Competing Provider Effective Competition, within 90 days of the effective date of the new rules.¹²⁷ If a franchising authority with an existing certification does not file a new certification (Form 328) during the 90-day timeframe, its existing certification will expire at the end of that timeframe as long as there is not pending for the franchise area an opposed Effective Competition petition or an opposed or unopposed petition for reconsideration of certification, petition for reconsideration of an Effective Competition decision, or application for review of an Effective Competition decision.¹²⁸ The Media Bureau will issue a public notice at the conclusion of the 90-day timeframe identifying all franchising authorities that filed a revised Form 328 as well as those franchising authorities that are party to one of the above-listed pending proceedings, and stating its finding of Competing Provider Effective Competition applicable to all other currently certified franchising authorities. This public notice will address commenters' concerns that the Act requires the Commission to make a franchise area-specific finding of Effective Competition before revoking existing

¹²⁴ See *supra* ¶ 22.

¹²⁵ ACA Apr. 22 *Ex Parte* Letter at 2.

¹²⁶ See *id.* at 4 (stating in the context of the current system that, to the extent franchising authorities are deterred from filing oppositions to Effective Competition petitions due to the cost involved, the Commission could waive the filing fee or require DBS providers to provide subscribership data to franchising authorities at no cost). We clarify there is not a filing fee associated with Form 328. See also *supra* ¶ 22 (discussing charges from third-party MVPDs or their agents for access to subscribership data).

¹²⁷ ACA and NCTA support a comparable procedure. See ACA Comments at 13-14; NCTA Comments at 9. See also Cablevision Reply at 6. ACA claims that with regard to small cable operators the procedure should only apply to "active" franchising authorities, meaning those that have adopted a rate order in the previous 12 months. See ACA Reply at 9. We find that such a limitation would be difficult for the Commission to administer and would not provide an offsetting benefit to small cable operators. We find further that the approach adopted here is preferable to the approach advocated by some commenters, in which all previously adjudicated Effective Competition decisions would remain valid until either the franchising authority or the cable operator affirmatively demonstrates a change. See NCTA Comments at 8; NCTA Reply at 5, n. 18. The approach adopted here will enable us to ensure more promptly that franchising authority certifications correspond to the current marketplace.

¹²⁸ We recognize that, while the franchising authority remains certified, it is possible that the Commission's rate regulation rules may require a rate filing in the normal course of business. See Cablevision Reply at 6-7. Unless the franchising authority and cable operator reach an agreement to the contrary, the cable operator should continue to make any such required filing.

certifications.¹²⁹ The Media Bureau's finding of Competing Provider Effective Competition will be based on the new presumption coupled with the franchising authority's failure to attempt to retain its certification by resubmitting Form 328 accompanied by the requisite showing of no Competing Provider Effective Competition. We thus find that the approach adopted herein, which the NPRM sought comment on in the alternative,¹³⁰ is preferable to administratively revoking *all* existing certifications since it will afford franchising authorities an opportunity to rebut the new presumption while their existing certification is still in effect and requires a Commission finding of Effective Competition for each franchise area.

28. Where currently certified franchising authorities file revised Form 328, their certifications will remain valid unless and until the Media Bureau issues a decision denying the new certification request.¹³¹ We will not automatically deny a Form 328 that we do not act on within a certain timeframe,¹³² finding that doing so would be inconsistent with the statutory requirement that franchising authority certifications become effective 30 days after the date filed and with the procedures adopted above.¹³³ If a currently certified franchising authority files revised Form 328 and there is a pending cable operator Effective Competition petition, petition for reconsideration of certification, petition for reconsideration of an Effective Competition decision, or application for review of an Effective Competition decision applicable to the franchise area, the Media Bureau will consider the record from that filing along with the new certification in making its determination regarding whether the franchising authority has overcome the presumption of Competing Provider Effective Competition.¹³⁴ If a currently certified franchising authority files revised Form 328 but there is no applicable pending proceeding, the Media Bureau may consider the form itself as well as other relevant data available to the Bureau in making its determination.

29. Where existing franchising authority certifications expire pursuant to the procedures discussed above, the Commission itself will not regulate rates. Section 76.913(a) of the Commission's rules, which generally directs the Commission to regulate rates upon revocation of a franchising authority's certification, will not apply upon the expiration of existing certifications discussed above.¹³⁵ The Act precludes a franchising authority or the Commission from regulating rates where Effective

¹²⁹ See 47 U.S.C. § 543(a)(2); NAB Comments at 2, 7-21; Consumer Advocates Reply at 3; NAB Reply at 3-9.

¹³⁰ NPRM, 30 FCC Rcd at 2571, ¶ 15.

¹³¹ See ACA Comments at 13-14; NCTA Comments at 9. Accordingly, a currently certified franchising authority that wishes to remain certified and to make use of its basic service tier rate regulation authority may do so pursuant to these procedures. See NDC4 May 14 *Ex Parte* Letter at 1. The franchising authority's ability to regulate rates, however, would be automatically stayed if the filing of revised Form 328 impels the cable operator to file a petition for reconsideration of certification alleging the presence of Effective Competition. See 47 C.F.R. § 76.911(b)(1) ("The filing of a petition for reconsideration . . . will automatically stay the imposition of rate regulation pending the outcome of the reconsideration proceeding."). See also Cablevision Reply at 7. The Media Bureau will promptly dismiss cable operator petitions for reconsideration that do not rebut a franchising authority's demonstration that Competing Provider Effective Competition is not present in the franchise area.

¹³² See ACA Comments at 14.

¹³³ 47 U.S.C. § 543(a)(4); *supra* Section III.C.

¹³⁴ Prior to the effective date of the rules adopted herein, we note that the Media Bureau has authority to continue processing pending petitions for a determination of Effective Competition, petitions for reconsideration of certification, and petitions for reconsideration of an Effective Competition decision in the normal course of business pursuant to existing rules.

¹³⁵ See 47 C.F.R. § 76.913(a).

Competition is present,¹³⁶ and the expirations will be based on just such a finding. Section 623(a)(6) of the Act does not apply to this situation because it requires the Commission to “exercise the franchising authority’s regulatory jurisdiction” over cable basic service tier rates if the Commission either (1) “disapproves a franchising authority” due to specified legal or procedural infirmities, or (2) revokes the franchising authority’s jurisdiction to regulate rates following petition by a cable operator or other interested party based upon a finding “that the State and local laws and regulations are not in conformance with” the Commission’s basic service tier rate regulations.¹³⁷ The expiration of existing franchising authority certifications based on a rebuttable presumption of Competing Provider Effective Competition combined with the franchising authority’s subsequent failure to attempt to retain its certification is distinguishable from a Commission finding of legal or procedural infirmities following an initial certification submission. Contrary to NAB’s suggestions, the expiration of existing franchising authority certifications is justified for the reasons discussed above, and it does not matter that the expirations will be unrelated to a petition by a cable operator or other interested party.¹³⁸

30. There are currently 58 pending cable operator petitions seeking a finding of Effective Competition, and a total of 17 pending petitions for reconsideration of certification, petitions for reconsideration of an Effective Competition decision, and applications for review of an Effective Competition decision. As explained above, if one of these pending proceedings involves a currently certified franchising authority that files revised Form 328, the record from the pending proceeding will be considered along with the revised Form 328 submission when the Media Bureau makes its certification determination. If, however, the pending proceeding involves a franchising authority that does not file revised Form 328 during the 90-day timeframe but either (i) the proceeding is an opposed cable operator Effective Competition petition, or (ii) the proceeding is a petition for reconsideration of certification, petition for reconsideration of an Effective Competition decision, or application for review of an Effective Competition decision, then the Media Bureau or the Commission will adjudicate the pending proceeding based on the record before it.¹³⁹ With regard to pending *unopposed* cable operator Effective Competition petitions where the franchising authority does not file revised Form 328, the Media Bureau will grant such petitions based on a finding that the new presumption of Competing Provider Effective Competition applies and the franchising authority has not attempted to rebut it.¹⁴⁰ The Media Bureau will issue a public notice at the conclusion of the 90-day timeframe for filing revised Form 328, granting all pending unopposed cable operator Effective Competition petitions where the franchising authority has not filed revised Form 328, with the grant based on a finding of Competing Provider Effective Competition. That finding will be premised on the new presumption of Competing Provider Effective Competition, as well as the franchising authority’s failure to oppose the cable operator Effective Competition petition in the first instance.

¹³⁶ 47 U.S.C. § 543(a)(2) (“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.”).

¹³⁷ *Id.* §§ 543(a)(6), 543(a)(4) (providing that those legal or procedural infirmities include a Commission finding that “(A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the [Commission’s implementation of basic service tier rate regulation]; (B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or (C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties”), 543(a)(5). *See also* ACA Reply at 8.

¹³⁸ *See* NAB Comments at 20-21.

¹³⁹ *See* ACA Comments at 13; NCTA Comments at 8.

¹⁴⁰ *See* NCTA Comments at 8; Cablevision Reply at 8.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

31. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹⁴¹ the Commission has prepared a Final Regulatory Flexibility Analysis (“FRFA”) relating to this Order. The FRFA is set forth in Appendix B.

B. Final Paperwork Reduction Act of 1995 Analysis

32. We analyzed this Order with respect to the Paperwork Reduction Act of 1995 (“PRA”),¹⁴² and it contains modified information collection requirements.¹⁴³ It will be submitted to the Office of Management and Budget (“OMB”) for review under section 3507(d) of the PRA.¹⁴⁴ The Commission, as part of its continuing effort to reduce paperwork burdens, invites OMB, the general public, and other interested parties to comment on the information collection requirements contained in this document. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002,¹⁴⁵ we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”¹⁴⁶

C. Congressional Review Act

33. The Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

D. Additional Information

34. For additional information on this proceeding, contact Diana Sokolow, Diana.Sokolow@fcc.gov, of the Policy Division, Media Bureau, (202) 418-2120.

V. ORDERING CLAUSES

35. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 543, and section 111 of the STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 111, this Order **IS ADOPTED**, effective upon announcement in the *Federal Register* of OMB approval and the effective date of the rules.

36. **IT IS ORDERED** that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 543, and section 111 of the STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 111, the Commission’s rules **ARE HEREBY AMENDED** as set forth in Appendix A.

¹⁴¹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (“CWAAA”).

¹⁴² The Paperwork Reduction Act of 1995 (“PRA”), Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

¹⁴³ Relevant information collections include those pertaining to Form 328 and the franchising authority certification (OMB Control No. 3060-0550), and to petitions for reconsideration of certifications (OMB Control No. 3060-0560).

¹⁴⁴ 44 U.S.C. § 3507(d).

¹⁴⁵ The Small Business Paperwork Relief Act of 2002 (“SBPRA”), Pub. L. No. 107-198, 116 Stat. 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. § 3506(c)(4).

¹⁴⁶ NPRM, 30 FCC Rcd at 2574, ¶ 25.

37. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

38. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

The Federal Communications Commission amends 47 CFR part 76 to read as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Revise § 76.906 to read as follows:

§ 76.906 Presumption of effective competition.

In the absence of a demonstration to the contrary cable systems are presumed (a) to be subject to effective competition pursuant to § 76.905(b)(2); and (b) not to be subject to effective competition pursuant to § 76.905(b)(1), (3) or (4).

3. Amend § 76.907 by revising paragraph (b) to read as follows:

§ 76.907 Petition for a determination of effective competition.

* * * * *

(b) If the cable operator seeks to demonstrate that effective competition as defined in § 76.905(b)(1), (3) or (4) exists in the franchise area, it bears the burden of demonstrating the presence of such effective competition. Effective competition as defined in § 76.905(b)(2) is governed by the presumption in § 76.906, except that where a franchising authority has rebutted the presumption of competing provider effective competition as defined in § 76.905(b)(2) and is certified, the cable operator must demonstrate that circumstances have changed and effective competition is present in the franchise area.

Note to paragraph (b): The criteria for determining effective competition pursuant to § 76.905(b)(4) are described in Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order in CS Docket No. 96-85, FCC 99-57 (released March 29, 1999).

* * * * *

4. Amend § 76.910 by revising paragraph (b)(4) to read as follows:

§ 76.910 Franchising authority certification.

* * * * *

(b) * * *

(4) The cable system in question is not subject to effective competition. The franchising authority must submit specific evidence demonstrating its rebuttal of the presumption in § 76.906 that the cable operator is subject to effective competition pursuant to § 76.905(b)(2). Unless a franchising authority has actual knowledge to the contrary, the franchising authority may rely on the presumption in § 76.906 that the

cable operator is not subject to effective competition pursuant to § 76.905(b)(1), (3) or (4).

Note to paragraph (b)(4): The franchising authority bears the burden of submitting evidence rebutting the presumption that competing provider effective competition, as defined in § 76.905(b)(2), exists in the franchise area. If the evidence establishing the lack of effective competition is not otherwise available, franchising authorities may request from a multichannel video programming distributor information regarding the multichannel video programming distributor's reach and number of subscribers. A multichannel video programming distributor must respond to such request within 15 days. Such responses may be limited to numerical totals.

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),¹ an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the Notice of Proposed Rulemaking in this proceeding.² The Federal Communications Commission (“Commission”) sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received no comments on the IRFA, although some commenters discussed the effect of the proposals on smaller entities, as discussed below. This present Final Regulatory Flexibility Analysis (“FRFA”) conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. In the Report and Order (“Order”), the Commission improves and expedites the effective competition process by adopting a rebuttable presumption that cable operators are subject to “Effective Competition.”⁴ Specifically, we presume that cable operators are subject to what is commonly referred to as “Competing Provider Effective Competition.”⁵ As a result, each franchising authority⁶ will be prohibited from regulating basic cable rates⁷ unless it successfully demonstrates that the cable system is not subject to Competing Provider Effective Competition. This change is justified by the fact that Direct Broadcast Satellite (“DBS”) service is ubiquitous today and that DBS providers have captured almost 34 percent of multichannel video programming distributor (“MVPD”) subscribers.⁸ The Order also implements section 111 of the STELA Reauthorization Act of 2014 (“STELAR”), which directs the Commission to adopt a streamlined Effective Competition process for small cable operators.⁹ By adopting a rebuttable presumption of Competing Provider Effective Competition, we update our Effective Competition rules, for the first time in over 20 years, to reflect the current MVPD marketplace,¹⁰ reduce

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (“CWAAA”).

² *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Notice of Proposed Rulemaking, 30 FCC Rcd 2561 (“NPRM”).

³ See 5 U.S.C. § 604.

⁴ Effective Competition is a term of art that the statute defines by application of specific tests.

⁵ See 47 U.S.C. §§ 543(a)(2), (l)(1)(B); NPRM ¶ 2.

⁶ A “franchising authority” is “any governmental entity empowered by Federal, State, or local law to grant a franchise.” See 47 U.S.C. § 522(10).

⁷ See *id.* § 543(b)(7)(A).

⁸ See NPRM Section II.

⁹ See Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014); 47 U.S.C. § 543(o)(1) (“Not later than 180 days after December 4, 2014, the Commission shall complete a rulemaking to establish a streamlined process for filing of an effective competition petition pursuant to this section for small cable operators, particularly those who serve primarily rural areas.”). Accordingly, this rulemaking must be completed by June 2, 2015.

¹⁰ See Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587 (July 14, 2011) (“To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned”); *Final Plan for Retrospective Analysis of Existing Rules*, 2012 WL 1851335 (May 18, 2012).

the regulatory burdens on all cable operators, especially small operators,¹¹ and more efficiently allocate the Commission's resources.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. No comments were filed in response to the IRFA. In response to the NPRM, some commenters discussed the effect of the proposals on smaller entities. Specifically, while some commenters advocated the benefits that a presumption of Competing Provider Effective Competition would have on cable operators, including small cable operators, other commenters expressed concern about the burdens that would be imposed on franchising authorities, including small franchising authorities.¹² In addition, as explained above, section 111 of STELAR directs the Commission to adopt a streamlined Effective Competition process for small cable operators.¹³ While some commenters expressed their view that adopting a presumption of Competing Provider Effective Competition would best fulfill section 111, others advocated alternate ways to reform the Effective Competition process for small cable operators.¹⁴

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

4. The RFA directs the Commission to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted in the Order.¹⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁶ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁷ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹⁸ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Small Governmental Jurisdictions.* The term "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."¹⁹ Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.²⁰ We estimate that, of this

¹¹ Congress applied the definition of "small cable operator" as set forth in section 623(m)(2) of the Communications Act of 1934, as amended (the "Act"), which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." See 47 U.S.C. § 543(m)(2), (o)(3).

¹² See NPRM Section III.C (discussing the impact of a presumption of Competing Provider Effective Competition on cable operators and on franchising authorities).

¹³ 47 U.S.C. § 543(o)(1).

¹⁴ See NPRM Section III.B.

¹⁵ 5 U.S.C. § 603(b)(3).

¹⁶ *Id.* § 601(6).

¹⁷ *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

¹⁸ 15 U.S.C. § 632.

¹⁹ 5 U.S.C. § 601(5).

²⁰ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 427 (2007).

total, a substantial majority may qualify as “small governmental jurisdictions.”²¹ Thus, we estimate that most governmental jurisdictions are small.

6. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System (“NAICS”) defines “Wired Telecommunications Carriers” as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”²² The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”²³ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated for the entire year.²⁴ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.²⁵ Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

7. *Cable Companies and Systems.* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rate regulation rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.²⁶ According to SNL

²¹ The 2007 U.S. Census data for small governmental organizations indicate that there were 89,476 local governments in 2007. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Table 428. The criterion by which the size of such local governments is determined to be small is a population of fewer than 50,000. 5 U.S.C. § 601(5). However, since the Census Bureau, in compiling the cited data, does not state that it applies that criterion, it cannot be determined with precision how many such local governmental organizations are small. Nonetheless, the inference seems reasonable that a substantial number of these governmental organizations have a population of fewer than 50,000. To look at Table 428 in conjunction with a related set of data in Table 429 in the Census’s Statistical Abstract of the U.S., that inference is further supported by the fact that in both Tables, many sub-entities that may well be small are included in the 89,476 local governmental organizations, e.g. county, municipal, township and town, school district and special district entities. Measured by a criterion of a population of fewer than 50,000, many of the cited sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746 small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority are small.

²² U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

²³ 13 C.F.R. § 121.201 (NAICS code 517110).

²⁴ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodTpe=table.

²⁵ *Id.*

²⁶ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

Kagan, there are 1,258 cable operators.²⁷ Of this total, all but 10 incumbent cable companies are small under this size standard.²⁸ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁹ Current Commission records show 4,584 cable systems nationwide.³⁰ Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

8. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"³¹ which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³² Census data for 2007 shows that there were 3,188 firms that operated for the entire year.³³ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.³⁴ Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The 2002 definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts.³⁵ Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.³⁶ Each currently

²⁷ Data provided by SNL Kagan to Commission Staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, ¶ 24 (2013) ("15th Annual Video Competition Report").

²⁸ SNL Kagan, U.S. Multichannel Top Cable MSOs, <http://www.snl.com/interactivex/TopCableMSOs.aspx>. We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. 15th Annual Video Competition Report, 28 FCC Rcd at 10507-08, ¶¶ 27-28 (subscriber data for DBS and Telephone MVPDs). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

²⁹ 47 C.F.R. § 76.901(c).

³⁰ The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

³¹ See 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 6, above.

³² 13 C.F.R. § 121.201, NAICS code 517110 (2007).

³³ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

³⁴ *Id.*

³⁵ 13 C.F.R. § 121.201; NAICS code 517510 (2002).

³⁶ See 15th Annual Video Competition Report, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id.* at 10507, 10546, ¶¶ 27, 110-11.

offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

9. *Open Video Systems.* The open video system (“OVS”) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.³⁷ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,³⁸ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”³⁹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁴⁰ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.⁴¹ Therefore, under this size standard, the majority of such businesses can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.⁴² Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.⁴³ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

10. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁴⁴ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.⁴⁵ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

³⁷ 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2000) (“13th Annual Video Competition Report”).

³⁸ See 47 U.S.C. § 573.

³⁹ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁴⁰ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

⁴¹ *Id.*

⁴² A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsr.html>.

⁴³ See *13th Annual Video Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁴⁴ 15 U.S.C. § 632.

⁴⁵ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

11. *Incumbent Local Exchange Carriers (“ILECs”)*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁶ Census data for 2007 shows that there were 3,188 firms that operated for the entire year.⁴⁷ Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.⁴⁸ Therefore, under this size standard, the majority of such businesses can be considered small entities.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

12. Certain rule changes adopted in the Order will affect reporting, recordkeeping, or other compliance requirements. Pursuant to the rules and policies adopted in the Order, the Commission will presume that cable operators are subject to Competing Provider Effective Competition, with the burden of rebutting this presumption falling on the franchising authority. A franchising authority seeking certification to regulate a cable operator’s basic service tier and associated equipment will file revised FCC Form 328, including an attachment containing evidence adequate to satisfy its burden of rebutting the presumption with specific evidence. Franchising authorities are already required to file Form 328 to obtain certification to regulate a cable system’s basic service tier, but the attachment rebutting the presumption of Competing Provider Effective Competition will be a new requirement. Cable operators, including small cable operators, will retain the burden of demonstrating the presence of any other type of Effective Competition, which a cable operator may seek to demonstrate if a franchising authority rebuts the presumption of Competing Provider Effective Competition. A cable operator opposing a certification will be permitted to file a petition for reconsideration pursuant to section 76.911 of our rules, as is currently the case, demonstrating that it satisfies any of the four tests for Effective Competition. The procedures set forth in section 1.106 of our rules for the filing of petitions for reconsideration will continue to govern petitions for reconsideration of Form 328 and responsive pleadings. While a certification will become effective 30 days after the date filed unless the Commission notifies the franchising authority otherwise, the filing of a petition for reconsideration based on the presence of Effective Competition will automatically stay the imposition of rate regulation pending the outcome of the reconsideration proceeding. All of the new rules and procedures will go into effect once the Commission announces approval by the Office of Management and Budget (“OMB”) of the rules that require such approval and of revised Form 328.

13. All franchising authorities with existing certifications that wish to remain certified must file revised Form 328, including the attachment rebutting the presumption of Competing Provider Effective Competition, within 90 days of the effective date of the new rules. At the conclusion of the 90-day timeframe, the Media Bureau will issue a public notice identifying all franchising authorities that filed a revised Form 328 as well as those franchising authorities that are party to a pending opposed Effective Competition petition or a pending opposed or unopposed petition for reconsideration of certification, petition for reconsideration of an Effective Competition decision, or application for review of an Effective Competition decision. The public notice will state the Media Bureau’s finding of Competing Provider Effective Competition applicable to all other currently certified franchising authorities. Where currently certified franchising authorities file revised Form 328, their certifications will remain valid unless and until the Media Bureau issues a decision denying the new certification

⁴⁶ 13 C.F.R. § 121.201 (2007 NAICS code 517110).

⁴⁷ U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census,” NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodT ype=table.

⁴⁸ *Id.*

request. If a currently certified franchising authority files revised Form 328 and there is a pending cable operator Effective Competition petition, petition for reconsideration of certification, petition for reconsideration of an Effective Competition decision, or application for review of an Effective Competition decision applicable to the franchise area, the Media Bureau will consider the record from that filing along with the new certification in making its determination regarding whether the franchising authority has overcome the presumption of Competing Provider Effective Competition.⁴⁹ If a pending proceeding involves a franchising authority that does not file revised Form 328 during the 90-day timeframe but either (i) the proceeding is an opposed cable operator Effective Competition petition, or (ii) the proceeding is a petition for reconsideration of certification, petition for reconsideration of an Effective Competition decision, or application for review of an Effective Competition decision, then the Media Bureau or the Commission will adjudicate the pending proceeding based on the record before it. With regard to pending *unopposed* cable operator Effective Competition petitions where the franchising authority does not file revised Form 328, the Media Bureau will issue a public notice granting the petitions based on a finding of Competing Provider Effective Competition.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”⁵⁰ The NPRM invited comment on the benefits and burdens of the approach we adopt herein on all entities, including small entities.⁵¹

15. Overall, we expect that the approach the Commission adopts today will lessen the number of Effective Competition determinations addressed by the Commission and thus will reduce regulatory burdens on cable operators, and will more efficiently allocate the Commission’s resources. In paragraph 25 of the Order, the Commission finds that the new rules and procedures will create an Effective Competition process that is more efficient for cable operators, especially small cable operators, since they will not be required to file petitions for a determination of Effective Competition in the first instance. The Commission explains the significant costs imposed on cable operators by the current Effective Competition process, and it explains how the new presumption will alleviate those costs.

16. In paragraph 26 of the Order, the Commission discusses the impact of the new rules and procedures on franchising authorities, including small franchising authorities. The Commission concludes that the burdens of filing revised Form 328 are justified by the efficiency gained by conforming the presumption to marketplace realities. The Commission also anticipates that few franchising authorities will have a basis for filing a revised Form 328 demonstrating a lack of Competing Provider Effective Competition as a result of the presence of Effective Competition in the vast majority of franchise areas. In addition, the Commission states that it has ensured that franchising authorities will have access to the information needed to demonstrate a lack of Competing Provider Effective

⁴⁹ Prior to the effective date of the rules adopted in the Order, we note that the Media Bureau has authority to continue processing pending petitions for a determination of Effective Competition, petitions for reconsideration of certification, and petitions for reconsideration of an Effective Competition decision in the normal course of business pursuant to existing rules.

⁵⁰ 5 U.S.C. § 603(c)(1)-(c)(4).

⁵¹ NPRM, 30 FCC Rcd at 2573-74, ¶¶ 21-23.

Competition.⁵² Overall, the costs to franchising authorities will be outweighed by the significant cost-saving benefits of a presumption that is consistent with market data showing that the vast majority of communities would satisfy the Competing Provider Effective Competition standard. The Commission states that it will monitor the marketplace to determine whether the burdens of filing a revised Form 328 are dissuading franchising authorities from filing, and if so, it will reconsider whether changes should be made to reduce their costs.

17. Finally, we note that the Commission considered alternate means to implement section 111 of STELAR. After evaluating all of the alternate proposals set forth in the record, in paragraph 16 the Commission concludes that while some proposals are already implemented, others would not have a sufficient impact on the costs that burden cable operators, particularly small cable operators, under the existing Effective Competition regime. Accordingly, the Commission has concluded that adopting a rebuttable presumption of Competing Provider Effective Competition is the best approach to streamline the process for small cable operators.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

18. None.

G. Report to Congress

19. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁵³ In addition, the Commission will send a copy of the Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The Order and FRFA (or summaries thereof) will also be published in the Federal Register.⁵⁴

⁵² In addition, in paragraph 22 of the Order, the Commission explains that third-party MVPDs or their agents sometimes charge cable operators for access to subscribership and reach data. The Commission states that it will revisit the issue of the cost of the data if it receives complaints that the cost of such data makes the filing of Form 328 cost-prohibitive to franchising authorities.

⁵³ See 5 U.S.C. § 801(a)(1)(A).

⁵⁴ See *id.* § 604(b).

**STATEMENT OF
CHAIRMAN TOM WHEELER**

Re: *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53.

Where There is “Competition, Competition, Competition,” the Need for Cable Rate Regulation is Diminished

In the Cable Television Consumer Protection and Competition Act of 1992, Congress instructed that where “Effective Competition” existed among pay-TV providers, such competition was preferable to using local rate regulation to protect consumers. Congress determined that Effective Competition existed in communities where there are more than one pay-tv provider in the market serving more than 15 percent of the community.

Under the Act, pay-tv providers may petition the FCC to determine if Effective Competition exists, relieving them from basic service tier rate regulation. This is a costly process for small and large operators, and resource-intensive for the Commission. Since 1992, the Commission has found that “Effective Competition” exists in more than 10,000 communities under Congress’s standard. Recently, the FCC has confirmed the presence of Effective Competition in more than 99.5 percent of the communities evaluated. These include the majority of communities served by cable systems with over 5,000 subscribers.

In the more than twenty years since Congress’s 1992 instructions, competition in the video marketplace has increased dramatically. Direct broadcast satellite (DBS) providers, like DIRECTV and DISH Network, now have a ubiquitous nationwide presence providing competition in virtually all markets. This is in addition to the competition increasingly being provided by other pay –TV providers. It should, therefore, come as no surprise that the Commission found, in almost all cases, that Effective Competition did exist and that most cable operators who petitioned the FCC met the statutory test. Where there is “Competition, Competition, Competition,” the need for basic service tier rate regulation is diminished.

Last year, the STELA Reauthorization Act further instructed the Commission to make it easier for small cable operators to petition the FCC to determine Effective Competition in their markets. The size of the cable system, however, bears little relationship to whether it has Effective Competition. Thus, it is only appropriate for the Commission to adopt a process that reflects the reality that Effective Competition exists throughout the nation, and provides relief to operators both large and small.

For the last several years, we have been able to watch real world examples of what happens when cable rate regulation is removed. In the thousands of cable systems subject to Effective Competition, we have a sizable cohort of real life examples, not hypotheses. Significantly, our most recent report on cable industry prices concludes that the average rate for basic service is lower in communities with a finding of Effective Competition than in those without such a finding. This is not surprising since competitive choice is the most efficient market regulator.

Similarly, there has been no evidence in this proceeding to suggest that our previous findings of Effective Competition in thousands of communities led to any changes in the tier placement of local broadcast stations.

This is our presumption: competition results in lower prices for consumers. However, any local franchising authority is free to come to the FCC and rebut this new presumption for its service area, and, where successful, regulate basic tier cable rates. In addition, nothing in this Order affects other

franchising authority responsibilities including the collection of franchise fees, provisions relating to PEG channels and I-Nets, and the creation and enforcement of customer service standards.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN
APPROVING IN PART, DISSENTING IN PART**

Re: *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53.

In the STELA Reauthorization Act of 2014, Congress issued a clear mandate to provide administrative relief for small cable operators. Today, while I approve steps to reduce burdens on smaller providers, I cannot support the broader relief proposed because it is not in line with Congress's intent, it may harm consumers with increased prices and it unnecessarily burdens local franchising authorities.

Currently, cable providers must overcome a presumption that local franchise areas lack effective competition. However, rather than tailoring the relief to reduce the burden on smaller providers as Congress directed us to do, the Report and Order completely flips the presumption for all cable providers and the justification for this shift is STELA. Based on the plain reading of the statute, however, such broad relief goes beyond what is necessary to effectuate Congress' intent. Moreover, the record raises significant questions as to the possibility of unintended consequences based on the solution proposed here (i.e. that a universal presumption of effective competition could lead to an increase in cable rates). I cannot support relief to larger providers particularly when doing so could harm consumers and unnecessarily increases the burdens on our local franchising authorities.

As a result, I vote to approve the Report and Order insofar as it provides relief to small cable operators, but dissent as to its proposal to go beyond that group of providers.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART**

Re: *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53.

The title of the Satellite Television Extension and Localism Act Reauthorization Act of 2014 may be complicated, but the direction Congress provided in this legislation is clear. In Section 111 Congress charged the Commission with establishing “a streamlined process for filing . . . effective competition petition[s] for small cable operators[.]” To the extent that we do so here, this Order has my support.

However, the Commission inexplicably races past this straightforward statutory directive and instead provides all cable operators—from the biggest to the smallest—with an expedited process to avoid oversight. This is contrary to what Congress asked us to do, at odds with the recommendation of the Commission's own Intergovernmental Advisory Committee, and provides no clear benefit to consumers. Consequently, to the extent that the Commission acts beyond the direction of Congress in Section 111, I dissent.

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53.

A bedrock principle of good government is that regulations should reflect the marketplace to which they apply. Accordingly, throughout my tenure at the Commission, I've emphasized the importance of updating our rules to reflect the modern video marketplace.¹ This Report and Order does precisely that.

More than twenty years ago, the FCC adopted a presumption that cable operators were not subject to effective competition. This meant that local franchising authorities could regulate the rates charged by an incumbent cable operator for basic-tier service unless the operator overcame the presumption by demonstrating that it was in fact subject to effective competition.

This approach made sense in 1993. At the time, consumers had no meaningful choice when it came to multichannel video programming distributors (MVPDs). Incumbent cable operators held a 95% share of video subscribers, and in the vast majority of the country, Americans had only one MVPD option. Thus, the FCC's presumption that there was no effective competition accurately reflected then-prevailing market conditions.

Over the past two decades, however, the industry has changed dramatically. New entrants have made major competitive splashes into the MVPD market—satellite providers and telephone companies are the most notable examples. At the end of 2013, satellite providers held 33.9% of the market, while telephone companies held 11.2%. A granular market analysis reveals that competing MVPDs currently have more than 15% penetration in each and every one of the 210 Designated Market Areas in the United States. Moreover, approximately 99.7% of homes in the United States have access to at least three competing video providers, and nearly 35% have access to at least four providers. These market developments have literally and figuratively changed the picture for millions of American consumers.

Given this profound transformation, we can't keep living in the past.² I therefore support our decision to adopt a presumption that there is effective competition among competing providers. This presumption far more accurately reflects the current state of the video marketplace than did its predecessor.

I hope in the months to come we will continue to modernize our media rules. Whether we are regulating MVPDs, broadcasters, or other media entities like newspapers, our rules should reflect the competitive and technological conditions of today, not those of twenty or forty years ago.

¹ See, e.g., Remarks of Commissioner Ajit Pai at the Media Institute Luncheon, "The Video Marketplace and the Internet Transformation," at 2 (Feb. 7, 2013), available at <http://go.usa.gov/3XVZF>; 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket Nos. 14-50, 09-182, 07-294, 04-256, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4587 (2014) (Dissenting Statement of Commissioner Ajit Pai), available at <http://go.usa.gov/3XyVh>.

² See Eric the Clown, *Seinfeld*, Season 5, Episode 20 (May 6, 1994) ("You're living in the past, man! You're hung up on some clown from the '60s, man!"), available at <https://www.youtube.com/watch?v=esJl7MZoVww>.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, MB Docket No. 15-53.*

I am pleased to approve this Report and Order streamlining the effective competition process to reflect current realities in the video marketplace. With a track record of 99.5% of the communities the Commission has evaluated having been found to have effective competition since the start of 2013, adopting a rebuttable presumption of Competing Provider Effective Competition is an idea whose time has come.

The simple reality in the marketplace is that cable providers meet the standard for relief outlined in the statute, which the Commission is obligated to follow. In fact, subscriber rates for direct broadcast satellite providers, Dish and DirecTV, far exceed the threshold in the law for multichannel video competitive providers under the definition of effective competition. Accordingly, shifting the Commission's presumption, which is not contained in the law and remains within our purview to alter, is both appropriate and needed. Today's item prevents unnecessary staff efforts under the previous presumption standard on applications that would have been approved in any event.

The fact that the scope of this item is broader than just the smaller cable system relief identified in the STELA Reauthorization Act of 2014 does not preclude the Commission from moving forward at this time to address the presumption standard for all cable systems at once. Just the opposite: we have an affirmative obligation to streamline our procedures when appropriate, and certainly when it meets the statutory requirement. In fact, we should have done this long ago.

At the same time, I do not believe that this item and the reasoning articulated within will impact the continued existence of the basic service tier. It is certainly not my intent to do so in this item and those reading the statute in such an extended way seem misguided. That is not to say it is not a logical consideration for Congress to explore and assess given the changing video marketplace.

I commend the Chairman for working with me to provide this relief to cable operators and hope to identify even more areas where we can reduce or eliminate legacy regulatory burdens in response to the rapid evolution of the communications landscape.