Before the
Federal Communications Commission
Washington, DC 20554

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

COMMENTS OF PUBLIC KNOWLEDGE

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TABLE OF CONTENTS

Introduction and Summary

The Commission has proposed to adopt a blanket presumption that the cable industry is competitive.[1] Neither the facts, the law, sound policy, nor Congress's directive in the STELA Reauthorization Act of 2014 (STELAR)[2] support the sweeping deregulation the NPRM contemplates.

Congress has directed the FCC to "establish a streamlined process for filing of an effective competition petition ... for small cable operators, particularly those who serve primarily rural areas."[3] Public Knowledge supports the goal of reducing burdens on smaller cable operators, who do not wield the same sort of market-shaping gatekeeper power as the nation's largest cable operators. As Congress recognized, it is unwise to subject large and small operators to the exact same requirements. Since the passage of the 1992 Cable Act, the cable marketplace has become significantly more concentrated, and the disparity in power between the nation's largest and the smaller and rural cable operators has expanded dramatically. The Commission should therefore update its rules to take account of this reality, instead of treating all cable operators as if they were as powerful as Comcast, or treating large operators like Comcast as if there were rural, community-based cable operators.

Simply put, the evolving video marketplace does not support a blanket deregulation of cable. Big cable operators are more, not less, dominant today than

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[1] Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, *Notice of Proposed Rulemaking*, FCC 15-30 (rel. March 16, 2015) ["NPRM"].
[2] Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014).
[3] STELAR § 111.

ever before. Big cable operators also have a growing share of the broadband market. Because video is increasingly being offered over broadband, big cable's broadband dominance positions it to continue to grow its control of the video marketplace. The Commission should therefore seek comment on ways to strengthen its competitiveness standards with respect to big cable, while carrying out Congress's directive to ease burdens for smaller operators. As will be discussed below, one way for the Commission to ease burdens for smaller operators would be to relax its basic tier buy-through requirements, which derive from the same statute as the effective competition provisions yet which have outlived their usefulness.

I. The Proposed Rule Goes Further Than Congress Directed, Using Means Congress Prohibited

Congress directed the FCC to make it easier for smaller cable operators to petition the FCC for a finding of effective competition in their marketplace. It also made it clear that this directive "shall [not] be construed to have any effect on the duty of a small cable operator to prove the existence of effective competition under this section."[4] Yet by changing the substantive burden of proof for a finding of effective competition, the Commission proposes to do exactly that. While the Commission argues that it is entitled to overlook this statutory directive because it is grounding its proposal in other sources of authority,[5] it fails to cite any such authority and generally refers to its proposal as an implementation of Section 111 of STELAR. But it is difficult to see how the Commission can or should implement

[4] STELAR § 111.
[5] NPRM ¶ 12.

Section 111 by taking the one action it expressly forbids—removing the obligation that a petitioner *prove* effective competition.

The Commission can easily implement STELAR without changing its substantive standards or creating presumption of competition. For example, it can provide smaller operators with directions on how to make a prima facie case that their markets are competition, and grant them within a short time period unless any objections are filed. Allowing smaller operators to make a prima facie case is not the same as adopting a presumption—operators should still be required to provided evidence and sworn statements that they meet the existing legal standard. But the Commission could ease the burden of smaller operators by providing before-the-fact guidance as to what level of evidence will be sufficient.

Additionally, the fact that the Commission grants the majority of petitions currently filed provides no basis for assuming that the substantive standard is met for most markets: it is probable that the only petitions that are filed are ones that meet the standard. If the Commission adopts a blanket presumption of competition, it is possible that the lack of rate oversight could lead to higher prices for consumers, due to markets being treated as competitive when in fact they are not.

Furthermore, as discussed below, there is likely good reason for the Commission, even if it creates a rebuttable presumption of competition, to limit that presumption to smaller operators. With respect to larger operators, it is less likely that the requirement that competing MVPDs offer "comparable" video programming is met.

II. The Proposed Rule Does Not Maintain the Required Distinction Between Major Cable Operators and Small/Rural Operators

The NPRM's proposal fails to implement the distinction between smaller cable operators and big cable that Congress recognized. Since it passed the 1992 Cable Act, the cable industry has undergone significant consolidation. As the Wall Street Journal shows, the 4 largest cable operators today result from the combination of what in the 1990s were once about 30 independent companies.[6] At the same time, as the ACA has noted, "since 2008, [National Cable Television Cooperative] members closed a total of 1,078 small and rural cable systems, the vast majority of which reflect systems that have ceased providing video service in their communities."[7] Meanwhile, large cable operators like Comcast continue to post solid financial results.[8]

This is the factual backdrop behind Congress's decision in STELAR to extend special treatment to smaller cable operators with respect to determining competitiveness. Congress has long recognized that small cable operators merit special treatment under its rules.[9] In STELAR, Congress chose to extend this consideration, recognizing that smaller operators pose less of a threat to

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[6] Chart, Two Decades of Cable Consolidation (Feb. 13, 2014), http://blogs.wsj.com/corporate-intelligence/2014/02/13/chart-two-decades-of-cable-tv-consolidation. Some of these are outright mergers and acquisitions, and some were asset sales, which is why some predecessor companies are listed more than once.

[7] Comments of the American Cable Association in MB Docket No. 14-16 at 7 (March 21, 2014), http://www.americancable.org/files/140321%20--%20ACA%2016th%20Video%20Comp%20NOI%20Comments.pdf.

[8] Comcast Q4 2014 Results, http://www.cmcsa.com/releasedetail.cfm?ReleaseID=897872/

[9] 47 U.S.C. § 543(m).

competition than big cable, and affording them special treatment when filing for a petition for effective competition. The NPRM, however, ignores this, proposing to create a presumption of competition for all cable operators, regardless of size. This departs from the approach Congress took, and is unsupported by the facts or sound policy. The Commission should not take this path, and should instead follow Congressional guidance by simply streamlining procedures for small cable operators, instead of removing an important consumer protection across the board.

III. Because Large Cable Providers are Increasingly Dominant, the FCC Should Seek Comment on What "Comparable" Video Programming Means in This Context

While the statute spells out what conditions must be met before the Commission can find that a market is effectively competitive, one key term—"comparable video programming"—is left undefined.[10] Rather than weakening its substantive standards for the finding of effective competition, the Commission should adopt procedures that ensure that before it finds that larger cable operators face effective competition, that the unaffiliated multichannel video programming distributors that serve the same franchise area truly offer "comparable" service to the cable operator.

First, the Commission should take note that the statute does not require that the Commission look only to *channels* of video programming, but all video programming. This includes any on-demand or online video services a cable provider may offer. If a cable provider offers kinds of video programming that the other MVPDs in its

[10] Additionally, it may be reasonable for the FCC to limit the term "household" in this context to households that subscribe to MVPD service. A household that subscribes to no MVPD services may not be part of an MVPD's addressable market, and therefore should not affect a competition analysis.

franchise area do not, the Commission should not find that the other MVPDs offer "comparable" video programming.

Second, the Commission should determine whether MVPDs that do not offer broadband service truly offer comparable video programming to MVPDs that also provide broadband service with respect to broadband video programming. Even if a non-broadband MVPD such as a DBS provider authenticates TV Everywhere-style apps or makes its own video programming available online, it stands in a different relationship to those offerings than a cable MVPD that also offers broadband does to its own. The non-broadband MVPD will be vulnerable to data caps, interconnection disputes, and other matters in a way that a broadband MVPD is not. Thus, the Commission could logically find that a small cable operator without many of its own online video offerings faces effective competition from DBS, while a large cable operator that has significant online video offerings does not.[11]

Third, the Commission should find that when an incumbent cable provider produces its own programming, or has significant buying power that allows it to influence how unaffiliated programming is distributed by other MVPDs or online, that other MVPDs that offer service in its franchise areas do not offer "comparable" programming. In general, the Commission should not simply look to what particular

[11] To the extent that a cable operator claims it has editorial control even over unaffiliated online video offerings, *see generally* Sherwin Siy, *Public Knowledge Joins Intervenors in Case Supporting Open Internet Rules*, PUBLIC KNOWLEDGE (November 16, 2012), https://www.publicknowledge.org/news-blog/blogs/public-knowledge-joins-intervenors-case-suppo, the FCC could find that for the purposes of an effective competition finding that it does not face effective competition from non-broadband MVPDs, without considering the extent to which it provides or authenticates its own online video content.

programming is available via different MVPDs, but the terms under which that programming is made available. These terms affect the competitiveness of the marketplace and the price of programming, and the Commission should not assume that MVPDs with disparate influence in the content marketplace have "comparable" offerings.

IV. The FCC's Responsibility to Ensure That Basic Tier Rates Remain Reasonable Remains in Force Regardless of Any Competition Findings

Findings of effective competition do not limit the FCC's responsibility to protect consumers. The statute directs the FCC to "ensure that the rates for the basic service tier are reasonable,"[12] and states that it "*shall* prescribe, and periodically thereafter revise, regulations to carry out its obligations."[13] Similarly, the Commission has an obligation to regulate unreasonable cable rates.[14]

While the FCC cannot use 47 U.S.C. § 543 to regulate the rates of cable systems it has found are subject to effective competition, its obligation to create such regulations as well as "additional standards, guidelines, and procedures" remains in place.[15] Additionally, the FCC has an independent obligation to ensure that "the grant of retransmission consent by television stations"[16] does not unreasonably affect rates for the basic service tier. To carry out these mandates, the FCC should ensure that the prices for the basic tier remain reasonable even in those markets it has found are subject to effective competition. Such monitoring will aid the FCC in

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[12] 47 USC § 543(b)(1).
[13] Id. (emphasis added).
[14] 47 U.S.C. § 543(c).
[15] 47 U.S.C. § 543(b)(5).
[16] 47 U.S.C. § 325.

determining whether a grant of an effective competition was prudent—for example, if basic tier rates become unreasonable in markets where the FCC has found there to be effective competition, this may be a sign that the FCC's standards for finding effective competition are flawed.

V. Basic Tier Regulation Provides the Commission with Tools to Ensure That the Retransmission Consent Fees Paid By Cable Operators Remain Reasonable

As alluded to above, the Commission has a responsibility to "consider [when enacting retransmission consent rules] the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 543 (b)(1) of this title to ensure that the rates for the basic service tier are reasonable."[17] The first part of this requirement, the consideration of the impact retransmission consent rules has on basic tier rates, does not depend on the Commission's authority under section 543. Even if the Commission were to decide that, because a blanket finding of effective competition, that retransmission consent rules cannot conflict with its obligations under section 543, the Commission's independent responsibility to consider the impact its rules have on basic tier rates would remain in place. That said, the Commission's authority under the retransmission consent provisions to ensure reasonable basic tier rates is plainly stronger if its authority under section 543 remains intact. Because the FCC's authority to ensure reasonable rates extends to payments *by* cable systems to broadcasters, as well as rates paid by subscribers to

[17] 47 U.S.C. § 325.

cable systems, the Commission should consider the extent to which a too-hasty deregulation may end up harming the very cable systems that STELAR was designed to help.

VI. The Commission Should Clarify That Basic Tier Buy-Through Requirements Do Not Apply to Cable Systems For Which There is Effective Competition, and It Should Consider Waiving the Requirement For All Cable Systems

The Commission should update its implementation of the basic tier buy-through rules in several respects, since there is reason to think that they may now hurt consumers rather than protecting them.

The buy-through rules stem from the same statute as the effective competition and basic tier rate regulation rules. The Commission's regulation implementing regulation is straightforward: "Every subscriber of a cable system must subscribe to the basic tier in order to subscribe to any other tier of video programming or to purchase any other video programming."[18] This means that all cable subscribers are required to buy the basic tier, and that broadcast stations may not be offered à la carte by cable systems.

However, the buy-through requirements in the statute itself apply only to cable systems for which there is no effective competition: the basic tier itself is defined as the "basic tier subject to rate regulation," and the prohibition on buy-through of other tiers is found in subsection (b) of 47 U.S.C. § 543, which pursuant to 47 U.S.C. §§ 543(a)(2) and (a)(2)(A) may only be used to regulate the rates of cable systems

[18] 47 CFR § 76.920.

not subject to effective competition. Yet the Commission's implementation in 47 CFR § 76.920 has no such limitation. (A related provision, 47 CFR § 76.921, does.)

The Commission's reasoning in applying the buy-through prohibition to all video subscribers, not just subscribers of systems that do not face effective competition, was based on reading the basic tier regulation provisions in the context of must-carry rules. The Commission reasoned, agreeing with the National Association of Broadcasters, that since all cable systems must "provide" their subscribers with must-carry stations,[19] and because must-carry stations are part of the basic tier, that all cable customers must subscribe to the basic tier.[20]

However, this analysis was flawed. While it is true that cable systems in markets not subject to effective competition may not offer a version of the basic tier that consists only of must-carry stations, but are required to offer a basic tier that meets the "minimum contents" described in the statute, there is no such statutory requirement as to systems for which there is effective competition. Thus, even accepting the (debatable) interpretation that for a cable system to "provide" a must-carry station, all its customers must actually subscribe to it, there is no reason why customers in markets that are subject to effective competition should be required to pay for stations that elect retransmission consent, instead of simply using an antenna.

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[19] 47 U.S.C. § 534.

[20] 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, ¶¶ 164-66 (1993).

Additionally, even as to markets that are not subject to effective competition, the Commission should take note of how the market for retransmission of broadcast stations has changed since the early 1990s. When the 1992 Cable Act was passed, cable systems carried broadcast stations for free (paying only a statutory copyright license to the programmers, but not to the broadcaster itself). In that context, it was a reasonable consumer protection measure to make sure that cable systems offered those programs to their customers on a standalone basis, and did not require that subscribers first pay for access to premium programming to gain access to broadcast programming with their cable subscribers. But due to the provisions of the 1992 Act itself, the market has changed, and local broadcast stations now command a premium price from cable operators—a price which is ultimately paid by consumers. Given that digital broadcast television is available to many viewers for free, in HD quality, with the purchase of a low-cost antenna,[21] it makes no sense to *require* that customers pay for that programming with their cable subscriptions—though of course they should be free to do so.[22] In addition to finding that buy-through requirements do not apply to cable systems for which there is effective competition, the Commission should use the statute's waiver provision[23] to find that

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[21] In fact, the Commission's buy-through rules have stymied the development of set-top boxes that seamlessly integrate over-the-air broadcast signals with cable programming—there is no reason for cable operators to offer such boxes given that all of their customers are required to pay for broadcast programming over cable anyway.

[22] Of course, customers should not be required to pay for any programming they don't want. It is simply particularly egregious when that same programming is available to them for free, sometimes in even higher quality than the often-compressed signals available via cable.

[23] 47 U.S.C. § 543(b)(8)(C).

the buy-through requirements do not apply even to cable systems for which there is no effective competition. While there are reasonable differences of opinion as to whether public policy should *require* that cable systems offer programming à la carte, it is absurd that Commission regulations, unsupported by a sound reading of the statute, currently *prohibit* it with regard to broadcast stations.

Conclusion

The Commission has elected to go far beyond the directive of Section 111 STELAR, and proposes an across-the-board finding that the cable industry is competitive. To the extent that the Commission considers issues beyond those contemplated in STELAR, however, it should consider whether the offerings of DBS and other MVPDs are truly "comparable" to the offerings of big cable systems, the increasing divide between large and small cable operators, and whether the reasons for which the Commission first extended buy-through rules further than the statute requires still obtain today.

Respectfully Submitted,

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