Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Amendment to the Commission's Rules Concerning Effective Competition Implementation of Section 111 of the STELA Reauthorization Act	MB Docket No. 15-53 FCC 15-30

REPLY COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Commonwealth of Massachusetts
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I. INTRODUCTION

The Massachusetts Department of Telecommunications and Cable ("MDTC") respectfully submits these reply comments to the initial comments filed on April 9, 2015, in response to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("FCC") on March 16, 2015.[1] The comments filed in this proceeding do not provide a sufficient basis for the FCC to reverse the presumption of no effective competition.[2]

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1 *In the Matter of Amendment to the Comm'n's Rules Concerning Effective Competition*, MB Docket No. 15-53, *Notice of Proposed Rulemaking* (rel. Mar. 16, 2015) ("NPRM"). The MDTC "is the certified 'franchising authority' for regulating basic service tier rates and associated equipment costs in Massachusetts." 207 C.M.R. § 6.02; *see also* MASS. GEN. LAWS ch. 166A, §§ 2A, 15 (establishing the MDTC's authority to regulate cable rates). Also, the MDTC regulates telecommunications and cable services within the Commonwealth of Massachusetts and represents the Commonwealth before the FCC. MASS. GEN. LAWS ch. 25C, § 1; MASS. GEN. LAWS ch. 166A, § 16. When a cable operator is deemed subject to effective competition in a Massachusetts community, cable subscribers in that community lose many of the regulatory protections that the MDTC provides. *See* 47 C.F.R. § 76.905(a).

2 47 C.F.R. § 76.906.

In its initial comments, the MDTC explains—and many commenters agree—that the NPRM's proposal to automatically deem cable operators subject to effective competition in thousands of communities is overly broad and based on incomplete market analysis.[3] Specifically, in today's video programming marketplace, such a sweeping change would improperly shift a burden from the parties whose interests are served by grants of effective competition—cable operators—to state and local governments, and is inconsistent with congressional intent and the public interest.[4]

II. COMMENTERS AGREE WITH THE MDTC THAT THE FCC'S PROPOSED RULE CHANGE LACKS AN ADEQUATE BASIS

The FCC's proposal to reverse the presumption of no effective competition for all cable operators is based primarily on policy grounds.[5] However, as the MDTC and many others note in their initial comments, the data behind the NPRM's analysis provide an incomplete picture of the marketplace, and are not a sufficient basis on which to support the proposed policy.

The NPRM's proposal relies on national video programming data combined with test results from an exclusively selected group of local communities.[6] Such limited analysis cannot

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3 *See* Alliance for Community Media Comments; American Community Television Comments; MDTC Comments; National Association of Broadcasters ("NAB") Comments; National Association of Telecommunications Officers and Advisors ("NATOA") Comments; N.J. Div. of Rate Counsel Comments; Public Knowledge Comments.

4 As the MDTC notes in its initial comments, the FCC's periodic review of its rules is laudable, but in this case, the rule presuming no effective competition is not outmoded, ineffective, or excessively burdensome on cable operators and thus should not be modified. MDTC Comments at 2, 12 n.47; *see* Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587 (July 14, 2011) (encouraging agency review of rules "that may be outmoded, ineffective, insufficient, or excessively burdensome").

5 *See* NPRM, ¶¶ 3-7.

6 *See id.*, ¶¶ 5-7.

provide an adequate basis for materially modifying a presumption in a community-based test.[7] Indeed, in their comments supporting the NPRM, cable industry advocates mostly reiterate the NPRM's flawed analysis, and fail to put forth any compelling evidence or analysis in support of the proposal.[8] NCTA states that, "based on [its] analysis of SNL Kagan data," competing providers meet the 15 percent threshold in every designated market area ("DMA") in the country.[9] Notwithstanding that the NCTA fails to provide its analysis, the underlying data, or any citation to back up its claim, such high level review necessarily lacks the granularity needed to assess a community-based test.[10] There are only 210 DMAs covering the over 30,000 franchise areas nationwide, so such aggregated DMA-level data still do not provide the specificity necessary to support the NPRM's proposal.[11] The lack of correlation between aggregated national data and the individual community-based competing provider test cannot justify such sweeping change.[12]

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7 *See* MDTC Comments at 3-7; NAB Comments at 15-16; N.J. Div. of Rate Counsel Comments at 11; Public Knowledge Comments at 3.

8 *See* American Cable Association ("ACA") Comments *passim*; Independent Telephone and Telecommunications Alliance ("ITTA") Comments *passim*; National Cable and Telecommunications Association ("NCTA") Comments *passim*.

9 NCTA Comments at 5.

10 *See id.*

11 *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, FCC 15-41, ¶ 45 n.122, *Sixteenth Report* (rel. Apr. 2, 2015).

12 *See* NAB Comments at 15 ("[T]he presence nationwide of various telecommunications services does not speak to the availability of such services in a particular community." (quoting H.R. REP. NO. 98-934, at 66 (1984))).

As an alternative, the New Jersey Division of Rate Counsel urges the FCC to "undertake a detailed analysis of cable competition," rather than relying on national data.[13] The MDTC wholly supports this suggestion. While useful as a starting point, a national snapshot of competition simply does not tell the whole story.[14] Given the material change in long-standing precedent that the NPRM proposes, it is incumbent upon the FCC to conduct a meaningful, granular analysis of cable competition, and not to rely on national subscription numbers as a basis to modify a community-based test. The MDTC agrees with the NAB that "there is no rational nexus" between the NPRM's national data and the actual competitive landscape in the thousands of local communities nationwide that are not subject to effective competition.[15] The NPRM has not adequately justified its proposed rule.

III. COMMENTERS AGREE THE CURRENT PRESUMPTION IS NOT EXCESSIVELY BURDENSOME ON CABLE OPERATORS, BUT A REVERSAL WOULD BE EXCESSIVELY BURDENSOME ON FRANCHISING AUTHORITIES

In adopting the presumption of no effective competition, and again in the NPRM, the FCC explicitly recognized the limited resources with which franchising authorities have to work.[16] As the NAB correctly notes, this situation has not changed.[17] Indeed, that so few

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13 N.J. Div. of Rate Counsel Comments at 10.

14 H.R. REP. NO. 98-934, at 66 (1984).

15 NAB Comments at 13.

16 *In re Implementation of Sections of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5668, *Report & Order & Further Notice of Proposed Rulemaking* (1993) ("*Rate Order*"); NPRM, ¶ 22.

17 NAB Comments at 18-19; *see also* N.J. Div. of Rate Counsel Comments at 2-3.

franchising authorities have filed comments on this matter is telling.[18] Having conferred with issuing authorities in Massachusetts, the MDTC is convinced that the lack of commentary from franchising authorities is not because this issue is unimportant to them and their residents, and certainly not because they agree with the FCC's proposal; it is because they do not have the time or resources to weigh in, particularly in light of the accelerated timeframe the NPRM adopted for this proceeding.[19]

Moreover, as NATOA states, it is unclear what the burden on cable operators is that the FCC is seeking to reduce.[20] The NPRM references a burden anecdotally, but does not explain how rebutting a presumption of no effective competition is excessively or unfairly burdensome.[21] Similarly, the cable industry provides cursory references to purported burdens on cable operators under the current presumption, but provides no information to back up its claims.[22] The MDTC maintains that any purported burden on cable operators is not excessive such that it would warrant modification, and, indeed, is reasonable given that findings of effective competition "serve the interests of the cable operators."[23]

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[18] Even with so few franchising authorities filing comments, still over half of the commenters in this proceeding are opposed to the FCC's proposed rule.

[19] *See* NAB and Public Knowledge Motion to Narrow the Scope of the Proceeding or for an Extension of Time (filed Mar. 26, 2015). The MDTC agrees that the accelerated timeframe in this proceeding has made it difficult if not impossible for the FCC to compile a complete and accurate record.

[20] NATOA Comments at 3; *see* NPRM, ¶ 2.

[21] NPRM, ¶¶ 2, 23; *see also* N.J. Div. of Rate Counsel Comments at 3.

[22] *See* ITTA Comments at 6; NCTA Comments at 3-4 (referring abstractly to "significant costs," but failing to define "significant," or give any examples).

[23] *Rate Order*, 8 FCC Rcd 5631, 5671; *see also* MDTC Comments at 7-8; N.J. Div. of Rate Counsel Comments at 7; NPRM, ¶ 2 & n.7 (quoting Exec. Order No. 13,579, § 2, 76 Fed. Reg. 41,587 (July 14, 2011)). Additionally, the MDTC maintains that the FCC's proposal would not significantly reduce burdens on the Media Bureau, and may actually increase the burden on the Bureau. *See* MDTC Comments at 9.

IV. COMMENTERS AGREE THAT THE PROPOSED RULE IS CONTRARY TO THE PUBLIC INTEREST AND INCONSISTENT WITH CONGRESSIONAL INTENT

The NAB correctly points out that to revoke rate regulation in a community, the FCC is required by statute to "find[] that a cable system is subject to effective competition," and that the FCC cannot relieve itself of that duty simply by adopting a presumption.[24] As noted above, the NPRM does not support a *finding* that each of the approximately 23,000 currently regulated communities is subject to effective competition.[25] The MDTC agrees with the NAB that the FCC may not abandon its statutory duty by establishing a presumption in its place.[26] NCTA states that a presumption is permissible "[i]f there is a sound and rational connection between the proved and inferred facts, ***and*** when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it."[27] While NCTA quotes *Cablevision* correctly, its very language reveals that the FCC has not demonstrated in the NPRM that a presumption of effective competition is rational and thus permissible.[28] First, there is no rational connection between the FCC's national data and whether competition exists at the local level in each of the thousands of regulated

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[24] 47 U.S.C. § 543(a)(2); NAB Comments at 8-13. While the FCC must "find[]" that a cable system is not subject to effective competition to enable rate regulation, the FCC did so in each currently regulated community when franchising authorities initially filed their Forms 328. 47 U.S.C. § 543(a)(2); *see* FCC Form 328; NAB Comments at 10-11.

[25] *Supra* Section II; *see also* MDTC Comments at 5-7.

[26] *See* NAB Comments at 8.

[27] NCTA Comments at 6 (quoting *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011)) (emphasis added).

[28] *See Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 579 (D.C. Cir. 1999) (confirming that to be valid, a presumption must be rational).

communities nationwide.[29] Second, the MDTC and other commenters have shown that the NCTA's "inferred fact[]"—that effective competition exists in each community nationwide—is not only not "probable," but is in fact improbable, and therefore not a valid basis for a presumption.[30] Thus the NCTA's position and the NPRM's proposed rule fail *Cablevision*'s precedent.

Lastly, the NPRM's reasoning for its proposal notwithstanding, many commenters share the MDTC's concern about the impact the proposed rule would have on basic service tier subscribers.[31] As commenters note, and as discussed above, many franchising authorities lack the resources necessary to file certifications should the FCC adopt the proposed rule, even if their communities are not subject to effective competition.[32] Should those certifications go un-filed, subscribers would improperly lose the protections that Congress mandated the FCC provide them.[33] While Congress has directed the FCC to streamline the effective competition review process for small cable operators, that instruction did not remove Congress's prior directive to protect subscribers of *all* cable systems.[34] These two directives are not mutually exclusive, but unfortunately the NPRM fails to interpret the directives in harmony, proposing instead to

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29 *See, e.g.*, NAB Comments at 13; N.J. Div. of Rate Counsel Comments at 11.

30 *Cablevision*, 649 F.3d at 716; MDTC Comments at 6-7; NAB Comments at 15-16; N.J. Div. of Rate Counsel Comments at 6, 7.

31 *See* NAB Comments at 25-26; NATOA Comments at 4; N.J. Div. of Rate Counsel Comments at 6-7; Public Knowledge Comments at 3, 7-8.

32 *See* NAB Comments at 18; N.J. Div. of Rate Counsel Comments at 2-3; *supra* Section III.

33 *See* 47 U.S.C. § 543(b)(1).

34 *See id.*, § 543(b)(1), (o).

implement one directive at the expense of the other.[35] The MDTC reiterates that the NPRM risks "subscribers losing the protection of basic service tier rate regulation and bearing the burden of unreasonable rates as the result of an attempt to streamline the effective competition review process."[36]

V. CONCLUSION

In conclusion, the NPRM's proposal to reverse the presumption of no effective competition is not supported by the record in this proceeding, and is contrary to congressional intent and the public interest. Accordingly, the FCC should decline to adopt the proposed rule, and should maintain a rebuttable presumption of no effective competition.

Respectfully submitted,

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35 As many commenters point out, the FCC can implement the STELA Reauthorization Act of 2014 by streamlining the effective competition process for small cable operators in ways that do not involve reversing the presumption of no effective competition for all cable operators. *See* Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014) (codified at 47 U.S.C. § 543(o)); ACA Comments at 14-15; MDTC Comments at 11; NAB Comments at 23-24; NATOA Comments at 5; Public Knowledge Comments at 3.

36 MDTC Comments at 14.