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Small Entity Compliance Guide

Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act

FCC 15-62
MB Docket No. 15-53

This Guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced FCC rulemaking docket(s). This Guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide may, perhaps, not apply in a particular situation based upon the circumstances, and the FCC retains the discretion to adopt approaches on a case-by-case basis that may differ from this Guide, where appropriate. Any decisions regarding a particular small entity will be based on the statute and regulations.

In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation; the FCC will consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or to clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:

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I. BACKGROUND INFORMATION

In the Cable Television Consumer Protection and Competition Act of 1992, Congress adopted a “preference for competition,” giving a franchising authority the ability to regulate basic cable tier rates and equipment only if the Commission finds that the cable system is not subject to Effective Competition.¹

When the Commission implemented the statute’s Effective Competition provisions in 1993, the vast majority of franchise areas had only a single cable operator that provided service² and those operators had “substantial market power at the local distribution level.”³ Under these circumstances, the Commission adopted a presumption that cable systems are not subject to Effective Competition,⁴ and if a franchising authority wanted to regulate a cable operator’s basic service tier rates, then the franchising authority was obligated to file FCC Form 328 with the Commission.⁵ A cable operator that wanted to challenge the franchising authority’s right to regulate its basic service tier rate needed to rebut the presumption and demonstrate that it was subject to Effective Competition.⁶

The MVPD marketplace has changed significantly since 1993,⁷ and the Commission has found Effective Competition in more than 99.5 percent of the communities evaluated since the beginning of 2013.⁸ Given the ubiquitous nationwide presence and penetration levels of Direct Broadcast Satellite (“DBS”) service, the Commission has amended its rules to adopt a presumption of Competing Provider Effective Competition. Competing Provider Effective Competition exists if (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.”⁹ The new rules and procedures for Effective Competition implement section 111 of the STELA Reauthorization Act of 2014 (“STELAR”), which directed the Commission to adopt a streamlined Effective Competition process for small cable operators.¹⁰ The rebuttable

¹ 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).

² *Implementation of Section 19 of the Cable Television Consumer Protection & Competition Act of 1992*, First Report, 9 FCC Rcd 7442, 7449, ¶ 15 (1994).

³ *Id.* at 7449, ¶ 13.

⁴ *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).

⁵ *See* 47 C.F.R. § 76.910. Form 328 is available at <http://www.fcc.gov/Forms/Form328/328.pdf>.

⁶ *See* 47 C.F.R. §§ 76.907, 76.911.

⁷ *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).

⁸ *Id.* at 2567, ¶ 7.

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

¹⁰ *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

presumption of Competing Provider Effective Competition will reduce the regulatory burdens on all cable operators, particularly small cable operators.

II. PROCEDURES TO IMPLEMENT THE NEW PRESUMPTION

Certifications – Form 328. Under the new presumption of Competing Provider Effective Competition, a franchising authority that seeks certification to regulate a cable operator’s basic service tier and associated equipment will file a revised Form 328, accompanied by a demonstration that rebuts the presumption of Competing Provider Effective Competition. Question 6 of revised Form 328 will include a new Question 6a, which will ask a franchising authority to provide an attachment containing precise evidence sufficient to satisfy its burden of rebutting the presumption. A franchising authority needs only to submit evidence regarding a lack of Competing Provider Effective Competition; unless it has actual knowledge to the contrary, a franchising authority may continue to rely on the current presumption that Low Penetration, Municipal Provider, and LEC Effective Competition are not present.¹¹

Question 6b of the revised form will retain the question that asks the franchising authority to indicate whether it has reason to believe that cable systems are not subject to any kind of Effective Competition excluding Competing Provider Effective Competition.

As specified in section 76.910, a franchising authority certification will become effective 30 days after the franchising authority files Form 328 unless the Commission informs the franchising authority otherwise.¹²

- After a franchising authority files revised Form 328, the Commission may deny a certification if it fails to meet the applicable burden. Accordingly, if a franchising authority files a revised Form 328 that does not meet the required standards to regulate rates, the Commission will promptly deny the filing and it thus will not become effective 30 days after it is filed.

effective competition petition pursuant to this section for small cable operators, particularly those who serve primarily rural areas.”).

¹¹ Section 623(1)(l) of the Act defines those three types of Effective Competition as follows: (1) Low Penetration Effective Competition exists if fewer than 30 percent of households in the franchise area subscribe to the cable service of a cable system; (2) Municipal Provider Effective Competition exists if the franchising authority operates an MVPD that offers video programming to at least 50 percent of the households in that franchise area; and (3) LEC Effective Competition exists 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 via any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator that is providing cable service in that franchise area, but only if the video programming services offered in that area are comparable to the unaffiliated cable operator’s video programming services in that area. *See* 47 U.S.C. § 543(l)(1)(A), (C), (D); 47 C.F.R. § 76.905(b)(1), (3), (4). 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.

¹² *See* 47 C.F.R. § 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).

Currently, if the evidence needed to establish Effective Competition is not otherwise available, the Commission's rules allow cable operators to request information from a competitor about the competitor's reach and number of subscribers.¹³ The Commission retained that provision and added a similar provision to benefit franchising authorities given that they now bear the burden of demonstrating the lack of Competing Provider Effective Competition. Specifically, if a franchising authority filing Form 328 wishes to demonstrate a lack of Competing Provider Effective Competition and the required evidence is not available, the franchising authority may directly request from an MVPD information concerning the MVPD's reach and number of subscribers in a certain franchise area. An MVPD is required to respond to such a request within 15 days. The Commission permits responses to be limited to numerical totals related to subscribership and reach.

Petitions for Reconsideration. To oppose a Form 328, a cable operator may file a petition for reconsideration of the form. 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). The procedures set forth in section 1.106 of the Commission's rules for the filing of petitions for reconsideration will continue to guide petitions for reconsideration of Form 328 and responsive pleadings.¹⁴ Additionally, 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 result of the reconsideration proceeding.¹⁵

Effective Competition Petitions. Even with this new presumption of Competing Provider Effective Competition, the Commission understands that cable operators still may from time to time wish to file petitions for a determination of Effective Competition pursuant to section 76.907 of the rules.¹⁶ If a franchising authority is certified under the new rules and procedures, then 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 is present, and it may do so pursuant to section 76.907.

Effective Date. All of the new rules and procedures for Effective Competition will take effect once the Commission announces that the Office of Management and Budget ("OMB") has approved revised Form 328 and the new rules that require approval.

¹³ 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).

¹⁴ 47 C.F.R. §§ 1.106(f), 76.911(a). Accordingly, the 30-day period for a cable operator to file its petition for reconsideration begins to run from the 30th day after the Form 328 is filed with the Commission. *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, 5693, ¶ 88 (1993). See also 47 C.F.R. § 1.106(f).

¹⁵ *Id.* § 76.911(b).

¹⁶ *Id.* § 76.907.

III. CURRENT CERTIFICATIONS AND PENDING EFFECTIVE COMPETITION PROCEEDINGS

Within 90 days of the effective date of the new rules, 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. 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.

- If a franchising authority with an existing certification does not file a new certification (Form 328) during the 90-day window, its existing certification will expire at the end of the window so long as 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 is not pending for the franchise area.¹⁷
- The Media Bureau will issue a public notice at the end of the 90-day period identifying all franchising authorities that filed a revised Form 328 as well as those that are party to one of the abovementioned pending proceedings, and stating its finding of Competing Provider Effective Competition applicable to all other currently certified franchising authorities.
- 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 both the record from that filing and the new certification in making its evaluation regarding whether the franchising authority has overcome the presumption of Competing Provider Effective Competition.
 - If no applicable pending proceeding exists, the Media Bureau may consider the revised Form 328 itself along with any other relevant data available to the Bureau in making its determination.
- Where the pending proceeding involves a franchising authority that does not file revised Form 328 during the 90-day period but either (a) the proceeding is an opposed cable operator Effective Competition petition or (b) the proceeding is a petition for reconsideration of certification, a petition for reconsideration of Effective Competition decision, or an application for review of an Effective Competition decision, then the Commission or the Media Bureau will adjudicate the pending proceeding based on the record before it.

¹⁷ The Commission recognizes 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. Unless the franchising authority and cable operator reach an agreement to the contrary, the cable operator should continue to make any such required filing.

- Regarding pending unopposed cable operator Effective Competition petitions where the franchising authority does not file revised Form 328, the Media Bureau will grant such petitions. At the conclusion of the 90-day period for filing revised Form 328, the Media Bureau will issue a public notice 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.

INTERNET LINKS

Report and Order

- <https://www.fcc.gov/document/commission-adopts-effective-competition-order>

Chairman and Commissioner Statements

- Chairman Wheeler: <https://www.fcc.gov/article/fcc-15-62a2>
- Commissioner Clyburn: <https://www.fcc.gov/article/fcc-15-62a3>
- Commissioner Rosenworcel: <https://www.fcc.gov/article/fcc-15-62a4>
- Commissioner Pai: <https://www.fcc.gov/article/fcc-15-62a5>
- Commissioner O’Rielly: <https://www.fcc.gov/article/fcc-15-62a6>