BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15-1295

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS
OFFICERS AND ADVISORS, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The petitioners are the National Association of Telecommunications Officers and Advisors, the National Association of Broadcasters, and the Northern Dakota County Cable Communications Commission. The respondents are the Federal Communications Commission and the United States of America. The intervenors are the American Cable Association and the National Cable & Telecommunications Association. All parties that appeared before the agency are listed in the brief of petitioners.

2. Ruling under review.

Amendment to the Commission's Rules Concerning Effective Competition, 30 FCC Rcd 6574 (2015) (JA___) ("*Order*").

3. Related cases.

This case has not previously been before this Court or any other court. We are aware of no pending cases related to this one.

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GLOSSARY

DBS	Direct Broadcast Satellite; a multichannel video programming service provided via satellite
DMA	Designated Market Area; a geographic area defined by Nielsen on the basis of local television viewing patterns
House Report	H.R. Rep. No. 102-628 (1992)
MVPD	multichannel video programming distributor
NCTA	National Cable & Telecommunications Association; a national trade association of cable operators; one of the intervenors supporting the FCC in this case
1984 Cable Act	Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779
1992 Cable Act	Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460
Senate Report	S. Rep. No. 102-92 (1992)
STELAR	STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059

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BRIEF FOR RESPONDENTS

INTRODUCTION

Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act"), a cable system's rates are subject to regulation by franchising authorities only if the Federal Communications Commission finds that the cable system is not subject to "effective competition" (as defined by the statute). *See* 47 U.S.C. § 543(a)(2), (*l*)(1). When the FCC promulgated rules in 1993 to implement this statute, it adopted a presumption that unless a cable operator showed

otherwise, no cable system was subject to effective competition.[1] At that time, "only a single cable operator provided [multichannel video programming] service" in "the vast majority" of local franchise areas. *Amendment to the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd 6574, 6576 ¶ 3 (2015) (JA___, ___) ("*Order*").

Much has changed in the last two decades. Consumers today have alternatives to cable; they can choose from among multiple competing multichannel video programming distributors ("MVPDs"). DISH Network and DIRECTV offer direct broadcast satellite ("DBS") service in virtually every franchise area in the country. And some providers of local phone service (*e.g.*, Verizon) also offer multichannel video service. With the rise of competing MVPDs, cable's market share has sharply declined. In 1993, competition in the MVPD market "was the exception rather than the rule." *Order* ¶ 3 (JA___). By 2013, "competitors to incumbent cable operators" had "captured approximately 34 percent of U.S. households." *Id.* ¶ 9 (JA___).

In response to this transformation in the MVPD marketplace, the FCC amended its rules in 2015, adopting a rebuttable presumption that cable

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[1] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5669-70 ¶ 42 (1993) ("*1993 Order*"), *pets. for review denied*, *Time Warner Entm't Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

systems are subject to effective competition. *Order* ¶¶ 6-12 (JA___-___). The Commission concluded that it was reasonable to presume that almost all franchise areas now satisfy the two prerequisites for "effective competition" under 47 U.S.C. § 543(*l*)(1)(B): (1) a 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," *id.* § 543(*l*)(1)(B)(i); 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," *id.* § 543(*l*)(1)(B)(ii). Under the FCC's new rules, a franchising authority may not regulate cable rates unless it produces evidence that the cable operator it seeks to regulate is *not* subject to effective competition. *Order* ¶¶ 17-18 (JA___).

Petitioners—a coalition of franchising authorities and broadcasters—contend that the new rules exceed the FCC's statutory authority. Br. 30-56. They also maintain that the agency's presumption of effective competition is unjustified. Br. 56-65. Neither claim has merit. The Commission's decision to revise its outdated 22-year-old presumption regarding cable competition was a sensible and lawful response to changing market realities.

JURISDICTION

The *Order* was published in the Federal Register on July 2, 2015. 80 Fed. Reg. 38001. Petitioners filed a timely petition for review within 60 days of that publication. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1). This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

(1) Whether the FCC acted within its statutory authority when, in light of substantial evidence that cable operators generally are subject to effective competition, the Commission concluded that franchising authorities cannot continue to regulate cable rates under 47 U.S.C. § 543 unless they produce evidence that effective competition is absent in their franchise areas.

(2) Whether the Commission reasonably adopted a rebuttable presumption that cable operators are subject to effective competition.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. Statutory And Regulatory Background

1. The 1984 Cable Act

In the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Cable Act"), Congress established a national framework

for the regulation of cable television by adding Title VI to the Communications Act of 1934. One of Title VI's provisions—section 623, 47 U.S.C. § 543—governs cable rate regulation. Originally, section 623 directed the FCC, within 180 days of the statute's enactment, to "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." 1984 Cable Act, § 2; 47 U.S.C. § 543(b)(1) (1984). The statute further provided that such regulations "shall define the circumstances in which a cable system is not subject to effective competition." 47 U.S.C. § 543(b)(2)(A) (1984).

When the FCC adopted rules implementing the 1984 Cable Act, it concluded that, for purposes of section 623, "a cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals."[2] Under this standard, "cable systems in approximately 96 percent of all communities were not rate regulated." H.R. Rep. No. 102-628, at 31 (1992) ("House Report"). As a result, cable rates soared. Between 1986 and 1992, the "average monthly

[2] *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 58 Rad. Reg. 2d (P&F) 1, 27 ¶ 100 (1985).

cable rate … increased almost 3 times as much as the Consumer Price Index." 1992 Cable Act, § 2(a)(1).

2. The 1992 Cable Act

By 1992, Congress became "greatly concerned that subscribers, in a deregulated marketplace," were "at the mercy of cable operators' market power." S. Rep. No. 102-92, at 8 (1992) ("Senate Report"). Congress found evidence that some cable operators had "abused their deregulated status and their market power" by "unreasonably rais[ing] the rates they charge subscribers." House Report at 33.

Although Congress "strongly prefer[red] competition and the development of a competitive marketplace to [rate] regulation," House Report at 30, it was unclear in 1992 whether "competition to cable operators with market power [would] appear any time soon." Senate Report at 18. Congress concluded that "until true competition develop[ed], some tough yet fair and flexible regulatory measures [were] needed" to protect consumers from unreasonable cable rates. House Report at 30. At the same time, Congress continued to believe that "competition ultimately will provide the best safeguard for consumers in the video marketplace." *Id.* Therefore, in Congress's view, any "governmental oversight" of cable rates "should end as soon as cable is subject to effective competition." Senate Report at 18.

In short, while Congress had a preference for competition, it also recognized that in the absence of competition, rate regulation was necessary. The 1992 Cable Act amended section 623 of the Communications Act to reflect this duality. As amended, section 623 includes a new paragraph entitled "PREFERENCE FOR COMPETITION," which states: "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." 47 U.S.C. § 543(a)(2). Under this provision, cable rate regulation is authorized *only* if "the Commission finds that a cable system is *not* subject to effective competition." *Id.* (emphasis added).

Congress also added a definition of "effective competition" to section 623. *See* 47 U.S.C. § 543(*l*)(1). Under this definition, "effective competition" exists in a franchise area in any of the following situations:

> *Low Penetration Effective Competition*: "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system," *id.* § 543(*l*)(1)(A);
>
> *Competing Provider Effective Competition*: "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," *id.* § 543(*l*)(1)(B);

> *Municipal Provider Effective Competition*: "[an MVPD] operated by the franchising authority of that franchise area offers video programming to at least 50 percent of the households in that franchise area," *id.* § 543(*l*)(1)(C);
>
> *Local Exchange Carrier Effective Competition*: "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," *id.* § 543(*l*)(1)(D).[3]

See Order ¶ 2 (JA___-___).[4]

In franchise areas without effective competition, section 623 authorizes the local franchising authority to regulate the cable system's rates for "the basic service tier," which "includes local broadcast channels; those non-commercial public, educational, and government-access channels that the cable system is required by its franchise to carry; and such additional

[3] Subparagraph (D) was added to 47 U.S.C. § 543(*l*)(1) by the Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(3), 110 Stat. 56, 115.

[4] The FCC's analysis of "effective competition" under section 623 of the Communications Act is distinct from the market definition standards and analyses of entry and competitive effects that the Department of Justice applies in enforcing the antitrust laws, which may lead to different results.

channels as the cable operator may in its discretion include in this tier." *Time Warner*, 56 F.3d at 162 (citing 47 U.S.C. § 543(b)(7)).[5]

Before franchising authorities may exercise jurisdiction over basic cable rates under section 623, they must certify to the FCC that: (1) they will adopt and administer regulations that are consistent with the basic tier rate regulations prescribed by the FCC under section 623(b); (2) they have the legal authority to adopt, and the personnel to administer, such regulations; and (3) their procedural rules and regulations provide a reasonable opportunity for consideration of the views of interested parties. 47 U.S.C. § 543(a)(3). Unless the FCC finds that a franchising authority's certification is inaccurate in any respect, the certification "shall be effective 30 days after the date on which it is filed" with the Commission. *Id.* § 543(a)(4).

If the FCC disapproves a certification under section 623(a)(4) or revokes a franchising authority's jurisdiction under section 623(a)(5), "the Commission shall exercise the franchising authority's regulatory jurisdiction" over basic cable rates "until the franchising authority has qualified to exercise

[5] Section 623 also authorizes franchising authorities to regulate rates for "installation and lease of the equipment used by subscribers to receive the basic service tier." 47 U.S.C. § 543(b)(3).

that jurisdiction by filing a new certification that meets the requirements" of section 623(a)(3). 47 U.S.C. § 543(a)(6).

3. The *1993 Order*

To ensure that the rate regulation provisions of the 1992 Cable Act were implemented "expeditiously," as Congress intended, the FCC adopted "a simple, streamlined process for certification of local authorities." *1993 Order*, 8 FCC Rcd at 5669 ¶ 41. "[G]iven the sheer number of franchise areas," the Commission found that, as a practical matter, it could not "make an affirmative finding … as to the presence or absence of effective competition" in each individual franchise area without substantially delaying the certification process. *Id.* Accordingly, the agency adopted a rebuttable presumption that the cable operator in each franchise area was not subject to effective competition. *Id.* at 5669-70 ¶ 42. "Franchising authorities [could] rely on this presumption when filing certifications with the Commission, unless they [had] actual knowledge to the contrary." *Id.* at 5669 ¶ 42. If a cable operator wished to challenge the presumption that effective competition was absent in a particular franchise area, it bore "the burden of rebutting this presumption with evidence of effective competition." *Id.* at 5669-70 ¶ 42.

The Commission found that "using a presumption of no effective competition" was "consistent with the 1992 Cable Act." *1993 Order*, 8 FCC

Rcd at 5670 ¶ 43. It observed that "the vast majority of cable systems" were "not subject to effective competition" in 1993. *Id.*; *see also* 1992 Cable Act, § 2(a)(2) (Congress found in 1992 that "most cable television subscribers have no opportunity to select between competing cable systems").

Various cable companies and municipalities raised a host of legal challenges to the FCC's rules implementing the 1992 Cable Act. *See Time Warner*, 56 F.3d at 161-205 (rejecting most of those challenges). But no one challenged the Commission's authority to use a rebuttable presumption to find that there is no effective competition in particular franchise areas.

B. The Order On Review

Over the past two decades, the MVPD market has undergone a fundamental transformation, "with cable operators facing dramatically increased competition." *Amendment to the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd 2561, 2565 ¶ 6 (2015) (JA___, ___) ("*NPRM*"). In 1993, when the FCC adopted a presumption of no effective competition, "DBS service had not yet entered the market, and local exchange carriers … had not yet entered the MVPD business in any significant way." *Order* ¶ 3 (JA___). Today, DBS service is available from two different companies in almost every local market nationwide: "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." *Id.* ¶ 8 (JA___). In addition, local telephone companies have expanded their presence in the MVPD market. By the end of 2013, Verizon had more than 5 million MVPD subscribers. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd 3253, 3263 ¶ 27 (2015) ("*2015 Video Competition Report*").

This influx of competing MVPDs has significantly eroded cable's market share. In 1993, cable operators served "approximately 95 percent of MVPD subscribers." *Order* ¶ 3 (JA___). By the end of 2013, cable operators' market share had fallen to about 53.9 percent of MVPD subscribers, compared with a market share of approximately 33.9 percent for DBS providers and roughly 11.2 percent for telephone MVPDs. *2015 Video Competition Report*, 30 FCC Rcd at 3262-64 ¶¶ 25-27.

Due to this surge in competition, more cable operators in recent years have successfully petitioned the FCC to find that there is effective competition in their franchise areas under section 623. Between January 2013 and March 2015, the FCC's Media Bureau ruled on 228 effective competition petitions, granting 224 of them in their entirety and granting the other four in part. In granting these petitions, the Bureau determined that

1,433 communities have effective competition. "[F]or the vast majority of these communities (1,150, or over 80 percent)," the Bureau found "competing provider effective competition" under 47 U.S.C. § 543(*l*)(1)(B)—*i.e.*, in each of those communities, multiple MVPDs offered comparable programming to at least 50 percent of the households, and more than 15 percent of the households subscribed to competing MVPDs. *NPRM* ¶ 7 (JA___). During the same two-year period, the Bureau declined to find effective competition in just seven communities—"less than half a percent of the total number of communities evaluated." *Id.*

In response to these developments, the FCC in March 2015 initiated a rulemaking to consider whether it should "reverse" its longstanding presumption of no effective competition "and instead presume that cable operators are subject to effective competition." *NPRM* ¶ 1 (JA____). The Commission explained that it "intend[ed] to implement policies that are mindful of the evolving video marketplace." *Id.* It also said that it would use the rulemaking to implement section 111 of the STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 111, 128 Stat. 2059, 2066 ("STELAR"). That provision required the FCC, within 180 days after STELAR's enactment on December 4, 2014, to "complete a rulemaking to establish a streamlined process for filing of an effective competition petition pursuant to [section

623] for small cable operators, particularly those who serve primarily rural areas." 47 U.S.C. § 543(o)(1).

In June 2015, the Commission amended its rules by adopting a rebuttable presumption that cable operators are subject to effective competition under 47 U.S.C. § 543(*l*)(1)(B). *Order* ¶ 1 (JA___-___). In the agency's judgment, the new presumption was "warranted by market changes" that had occurred since the cable rate rules were first adopted "over 20 years ago." *Id.* ¶ 6 (JA___-___).

The FCC concluded that "the current state of competition in the MVPD marketplace … supports a rebuttable presumption" that the two-part test for "Competing Provider Effective Competition" is met in franchise areas throughout the nation. *Order* ¶ 6 (JA___). The Commission determined that "the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH Network, presumptively satisfies" the first part of the test—*i.e.*, "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." *Id.* ¶ 8 (JA___); *see* 47 U.S.C. § 543(*l*)(1)(B)(i).

The agency also found substantial evidence to support the presumption that the second part of the test is met—*i.e.*, "that more than 15 percent of the households in a franchise area subscribe to programming services offered by

MVPDs other than the largest MVPD." *Order* ¶ 9 (JA___); *see* 47 U.S.C. § 543(*l*)(1)(B)(ii). According to the latest national data, "competitors to incumbent cable operators have captured approximately 34 percent of U.S. households, … more than double the percentage needed to satisfy" section 623(*l*)(1)(B)(ii). *Order* ¶ 9 (JA___). DBS operators alone serve "approximately 25.6 percent of U.S. households." *Id.* n.48 (JA___). In addition, the National Cable & Telecommunications Association ("NCTA") submitted evidence that "competing MVPDs have a penetration rate of more than 15 percent in each of the 210 Designated Market Areas" in the United States. *Id.* ¶ 9 (JA___); *see* NCTA Comments at 5 (JA___); NCTA Reply at 2 (JA___).[6]

The FCC determined that its new presumption was "consistent with" section 623, "which prohibits a franchising authority from regulating basic cable rates '[i]f the Commission finds that a cable system is subject to effective competition.'" *Order* ¶ 11 (JA___) (quoting 47 U.S.C. § 543(a)(2)). "Contrary to the suggestion of some commenters," the Commission found

[6] Designated Market Areas (or "DMAs") are geographic areas defined by Nielsen Media Research on the basis of local television viewing patterns. Nielsen uses "audience survey information from cable and noncable households to determine the assignment of counties to local television markets based on local stations' respective viewer shares." *See Costa de Oro Television, Inc. v. FCC*, 294 F.3d 123, 125 (D.C. Cir. 2002).

"no statutory bar to applying a nationwide rebuttable presumption of Competing Provider Effective Competition." *Id.* In the agency's view, the fact that "Effective Competition decisions apply to specific franchise areas" did "not preclude the Commission from adopting a rebuttable presumption of Competing Provider Effective Competition" in 2015 "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" in 1993 based on then-prevailing market conditions. *Id.* (JA___).[7]

The agency found "additional support" for its new presumption in section 111 of STELAR, which "directs the Commission 'to establish a streamlined process'" for small cable operators to file effective competition petitions. *Order* ¶ 13 (JA___) (quoting 47 U.S.C. § 543(o)(1)). The Commission explained that its new rebuttable presumption creates a streamlined process for cable operators "by reallocating the burden of

[7] While the Commission concluded that "adopting a rebuttable presumption of Competing Provider Effective Competition" was "consistent with the current state of the video marketplace," it found insufficient evidence to support a presumption that any of the other three statutory tests for effective competition was met. *Order* ¶ 10 (JA___). Consequently, the agency continues to apply a rebuttable presumption that "cable systems are not subject to Low Penetration, Municipal Provider, or [Local Exchange Carrier] Effective Competition." *Id.*; *see* 47 U.S.C. § 543(*l*)(1)(A), (C), (D).

providing evidence of Effective Competition in a manner that better comports with the current state of the marketplace." *Id.*

"Given the state of the video marketplace today," the Commission found it "appropriate to 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." *Order* ¶ 11 (JA___). Under the new rules, cable operators "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." *Id.* ¶ 13 (JA___). The Commission concluded that its revised rules and procedures "will create an Effective Competition process that is more efficient for cable operators … than the current approach," which "has forced cable operators to incur significant costs … merely to confirm what the marketplace data already suggests" about the emergence of effective competition in the vast majority of franchise areas. *Id.* ¶ 25 (JA___).

For purposes of implementing the new presumption, the Commission stated that "all franchising authorities with existing certifications that wish to remain certified must file revised" certifications, including an "attachment

rebutting the presumption of Competing Provider Effective Competition, within 90 days of the effective date of the new rules." *Order* ¶ 27 (JA___). This procedure was designed to "ensure that the Commission will continue to receive evidence regarding a specific franchise area where the franchising authority deems it relevant." *Id.* ¶ 11 (JA___).

A currently certified franchising authority that files a revised certification during the 90-day timeframe will remain certified "unless and until the Media Bureau issues a decision denying the new certification request." *Order* ¶ 28 (JA___). If a currently certified franchising authority fails to file a new certification during the 90-day timeframe, "its existing certification will expire at the end of that timeframe" unless it is a party to certain pending proceedings involving effective competition. *Id.* ¶ 27 (JA___).[8] With respect to the expiring certifications, the Media Bureau will "make a franchise area-specific finding of Effective Competition" that is "based on the new presumption" of Competing Provider Effective

[8] A franchising authority's certification will not expire as long as there is a pending "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." *Id.*

Competition "coupled with the franchising authority's failure to attempt" to rebut the presumption. *Id.* (JA___-___).

The Commission rejected the argument that it lacks authority to terminate certifications unless a party petitions for revocation under section 623(a)(5). *Order* ¶ 29 & n.138 (JA___). In light of the data documenting a dramatic increase in MVPD competition since 1993, the Commission found that franchising authorities' failure to rebut the new presumption of Competing Provider Effective Competition justified the expiration of existing certifications: "[I]t does not matter that the expirations will be unrelated to a petition by a cable operator or other interested party." *Id.* ¶ 29 (JA___).

C. Subsequent Developments

The revised effective competition rules took effect on September 9, 2015. *See Notice of Effective Date of Revised Effective Competition Rules*, 30 FCC Rcd 10124 (Med. Bur. 2015) ("*Filing Deadline Notice*"). Under the terms of the *Order*, franchising authorities that wished to retain their existing certifications were required to file a revised certification—including an attachment rebutting the presumption of Competing Provider Effective Competition—by December 8, 2015 (90 days from the effective date of the new rules). *Id.* at 10125.

In a public notice issued on December 17, 2015, the FCC's Media Bureau announced that three franchising authorities had filed revised certifications by December 8, 2015.[9] The Bureau also noted that a number of franchising authorities were parties to pending proceedings concerning effective competition. *December 2015 Public Notice*, Apps. B-E. With respect to all franchise areas that were not the subject of revised certifications filed by December 8, 2015, or the pending proceedings listed in Appendices B-E of the *December 2015 Public Notice*, the Bureau found that "Competing Provider Effective Competition is present" in those communities. *Id.* at *1. It based this finding "on the current presumption of Competing Provider Effective Competition, as supported by the analysis" in the *Order*, "as well as the franchising authorities' failure to attempt" to rebut the presumption. *Id.*

[9] *See Findings of Competing Provider Effective Competition Following December 8, 2015 Filing Deadline for Existing Franchise Authority Recertification*, DA 15-1441, 2015 WL 9260866, App. A (Med. Bur. Dec. 17, 2015) ("*December 2015 Public Notice*"). The Bureau denied the revised certification filed by the Campbell County Cable Board for failure to rebut the new presumption. *Jennifer Teipel*, DA 15-1399, 2015 WL 8477555 (Med. Bur. Dec. 9, 2015). The revised certifications filed by the Hawaii Department of Commerce and Consumer Affairs and the Massachusetts Department of Telecommunications and Cable took effect on January 7, 2016 (30 days after their submission) pursuant to 47 U.S.C. § 543(a)(4).

In accordance with the *Order*, the Bureau concluded that the certifications for these franchising authorities "expired as of December 8, 2015." *Id.*[10]

SUMMARY OF ARGUMENT

Regulatory agencies have an obligation "to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Ass'ns, Inc. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967). Consistent with this obligation, the FCC revised its 22-year-old effective competition rules to respond to the dramatic increase in MVPD competition over the past two decades. The agency's action gave effect to Congress's clear preference for competition over cable rate regulation at any level—local, state, or federal. *See* 47 U.S.C. § 543(a)(2); House Report at 30; Senate Report at 12, 18.

The FCC had good reason to modify its rules for implementing section 623. For more than two decades, those rules had employed a rebuttable presumption of no effective competition. By 2015, with the development of

[10] On January 19, 2016, petitioners in this case filed a petition for reconsideration of the *December 2015 Public Notice*. They stated that they filed the petition "so that the Bureau may vacate its findings of Competing Provider Effective Competition and certificate expirations in the event that the D.C. Circuit sets aside" the *Order*. Petition for Reconsideration at 2.

substantial competition in the MVPD marketplace, that presumption no longer reflected market realities. In response to "market data showing that the vast majority of communities would satisfy the Competing Provider Effective Competition standard," *Order* ¶ 26 (JA___), the Commission reasonably adopted a new rebuttable presumption of effective competition under section 623(*l*)(1)(B). The new presumption "better comports with the current state of the marketplace … by shifting the burden of producing evidence" from cable operators to franchising authorities. *Id.* ¶ 13 (JA___).

I. The new effective competition rules fall comfortably within the FCC's statutory authority. Petitioners' claims to the contrary are baseless.

I.A. Petitioners assert that section 623 requires the agency to base its findings regarding effective competition on "evidence particular to [each] franchise area." Br. 34. But the statute does not mandate that such findings be based on any particular type of evidence. It merely requires the Commission to find whether or not cable systems are subject to effective competition. It does not prohibit the agency from relying on national market data to inform itself of the probable state of local markets.

Nor does section 623 ban the use of rebuttable presumptions. The FCC has always employed such presumptions when making findings regarding effective competition. The agency's new rebuttable presumption of

Competing Provider Effective Competition—like its earlier presumption of no effective competition—is permissible under section 623.

National market share data show that the vast majority of franchise areas are now subject to effective competition under section 623(*l*)(1)(B). In light of that evidence, the FCC reasonably decided to adopt a rebuttable presumption of Competing Provider Effective Competition. If franchising authorities fail to rebut the presumption in their communities, the Commission will find that those franchise areas are subject to effective competition, and—on the basis of such findings—will terminate franchising authorities' existing certifications. This action is entirely consistent with section 623(a)(2), which prohibits cable rate regulation in franchise areas where "the Commission finds that a cable system is subject to effective competition." 47 U.S.C. § 543(a)(2).

I.B. Petitioners mistakenly assert that the Commission may not terminate any certification unless a party petitions for revocation under 47 U.S.C. § 543(a)(5). Br. 47-52. The agency properly rejected that cramped construction of the statute, which supposes that Congress intended to create unnecessary procedural obstacles to the elimination of cable rate regulation in competitive markets—a core goal of the statute.

I.C. There is no basis for petitioners' claim (Br. 52-55) that the new rules violate section 111 of STELAR by "abolishing" the process for filing effective competition petitions. On the contrary, by adopting the new rules, the FCC fulfilled its mandate under STELAR to streamline the filing process for small cable operators. Under those rules, cable operators will have fewer occasions to file effective competition petitions.

II. Petitioners also argue that the new rebuttable presumption is arbitrary and capricious. Not so.

Competitive conditions in the MVPD marketplace justified the new presumption. Now that DBS is available nationwide, every franchise area is presumptively "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." 47 U.S.C. § 543(*l*)(1)(B)(i). And now that competing MVPDs serve 34 percent of all U.S. households, the Commission had reason to believe that for the vast majority of franchise areas, "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." *Id.* § 543(*l*)(1)(B)(ii). Thus, the Commission had a solid evidentiary foundation for presuming that franchise areas generally satisfy the test for Competing Provider Effective Competition.

The Commission reasonably concluded that by shifting the burden of producing evidence from cable operators to franchising authorities, the new presumption offered "the most efficient approach" to making effective competition determinations under section 623. *Order* ¶ 25 (JA___). That approach ensures that the transition from rate regulation to competition will proceed without undue delay, consistent with Congress's preference for competition under section 623.

STANDARD OF REVIEW

Petitioners' challenge to the FCC's statutory authority is reviewed under *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question" for the Court is whether the agency has adopted "a permissible construction of the statute." *Id.* at 843; *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013). If the implementing agency's reading of an ambiguous statute is reasonable, the Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

The FCC's *Order* must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review," the Court "presumes the validity of agency action." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). The Court "is not to ask whether [the challenged] regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 2016 WL 280888, *20 (U.S. Jan. 25, 2016). To prevail, "[t]he Commission need only articulate a 'rational connection between the facts found and the choice made.'" *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

I. THE FCC HAD AUTHORITY TO ADOPT THE NEW EFFECTIVE COMPETITION RULES

Section 623 of the Communications Act authorizes the regulation of cable television rates *only* if the FCC "finds that a cable system is *not* subject to effective competition." 47 U.S.C. § 543(a)(2) (emphasis added). In that circumstance, an FCC-certified franchising authority may regulate basic cable rates in its franchise area. *Id.* § 543(a)(2)(A). "If the Commission finds that

a cable system is subject to effective competition," however, the cable system is exempt from rate regulation. *Id.* § 543(a)(2).

To implement section 623, the FCC must determine whether cable systems face "effective competition." The statute defines "effective competition" in terms of market conditions in a franchise area. *See* 47 U.S.C. § 543(*l*)(1). But it does not prescribe any particular procedures that the agency must follow when assessing whether "effective competition" exists. Absent "a clear indication" that Congress intended "to impose a specific procedure on the [FCC] in its implementation" of section 623, the Commission's rules "are expected to be adaptable to changing circumstances so that Congress' general intent will be effectively promoted." *See Nat'l Tour Brokers Ass'n v. ICC*, 671 F.2d 528, 531 (D.C. Cir. 1982).

The FCC has always employed a rebuttable presumption to make the findings required by section 623. When the Commission first promulgated cable rate regulations in 1993, it adopted a rebuttable presumption that cable systems nationwide were not subject to effective competition. At that time, no party argued that the FCC's use of a nationwide presumption was unlawful. Cable operators could rebut that presumption by producing evidence of effective competition in specific franchise areas. For all franchise areas where the presumption was not rebutted, the Commission

found that cable systems were not subject to effective competition. Such an approach made perfect sense in the early 1990s, when cable operators dominated the MVPD market.

More than 20 years later, the market has fundamentally changed. Cable operators now face substantial competition from DBS providers and telephone MVPDs. These "competitors to incumbent cable operators have captured approximately 34 percent of U.S. households." *Order* ¶ 9 (JA___).

In response to this altered competitive landscape, the FCC reasonably decided to replace its presumption of *no* effective competition with a rebuttable presumption of effective competition under section 623(*l*)(1)(B). The new presumption "better comports with the current state of the marketplace … by shifting the burden of producing evidence" from cable operators to franchising authorities. *Order* ¶ 13 (JA___). Under the FCC's new rules, a "franchising authority will be prohibited from regulating basic cable rates unless it successfully demonstrates that the cable system" serving its franchise area "is not subject to Competing Provider Effective Competition." *Id.* ¶ 1 (JA___). This approach not only mirrors current marketplace realities; it also gives effect to Congress's preference for competition. *See* 47 U.S.C. § 543(a)(2).

In addition, the Commission's decision to modify its rules fulfilled its obligation "to engage in informed rulemaking" by reviewing "the wisdom of its policy on a continuing basis." *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 24 (D.C. Cir. 2015) (quoting *Chevron*, 467 U.S. at 863-64). "Regulatory agencies do not establish rules … to last forever; they are supposed … to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday."[11] For that reason, courts have long recognized that agencies "must be given ample latitude to adapt [their] rules and policies to the demands of changing circumstances."[12] The FCC acted well within its broad latitude to respond to changing conditions when it revised its effective competition rules to account for the growth of competition in the MVPD market.

Petitioners nonetheless argue that the new rules exceed the FCC's statutory authority in three respects. First, they assert that section 623

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[11] *Office of Commc'n of United Church of Christ v. FCC*, 707 F.2d 1413, 1425 n.25 (D.C. Cir. 1983) (quoting *American Trucking*, 387 U.S. at 416); *see also American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1565 n.27 (D.C. Cir. 1987).

[12] *Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013) (quoting *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991)); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

prohibits the Commission from relying on a rebuttable presumption to determine whether effective competition exists. Br. 30-46. Second, they maintain that the new rules violate section 623 by terminating franchising authorities' certifications without a revocation petition. Br. 47-52. Third, they contend that the rules contravene section 111 of STELAR. Br. 52-56. None of these claims has merit.

A. Nothing In Section 623 Bars The Commission From Using A Rebuttable Presumption To Make Findings Concerning Effective Competition.

Invoking *Chevron* step one, petitioners assert that section 623 unambiguously prohibits the Commission from adopting a rebuttable presumption of effective competition. Br. 30-46. That contention is baseless.

Contrary to petitioners' position, Congress did not speak directly to the permissibility of presumptions. Section 623 does not ban the use of rebuttable presumptions; indeed, it does not even mention them. It simply "requires the Commission to make findings on the absence or presence of effective competition for each franchise area." Br. 30. The Commission correctly found "no statutory bar to applying a nationwide rebuttable presumption" in making the findings required by section 623. *Order* ¶ 11 (JA___). "The fact that Effective Competition decisions apply to specific franchise areas" did "not preclude the Commission from adopting a rebuttable

presumption of Competing Provider Effective Competition" in 2015 "based on the pervasive competition to cable from other MPVDs, just as it did not prevent the Commission from adopting a rebuttable presumption of no Effective Competition" in 1993—a presumption that benefited petitioners—based on cable's then-dominant market position. *Id.* (JA___).

Petitioners argue that section 623 requires the FCC to make effective competition findings based on "evidence concerning the presence of competition in individual franchise areas." Br. 31. But the statute does not constrain the Commission to base its findings on any particular type of evidence. It simply directs the Commission to "find" whether cable systems are subject to effective competition. It does *not* mandate that such findings be based on "evidence particular to [each] franchise area." Br. 34.

As petitioners recognize (Br. 31-32), a "finding" is "[a] conclusion by way of reasonable inference from the evidence." *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988) (quoting BLACK'S LAW DICTIONARY 569 (5th ed. 1979)). The Commission reasonably chose to make the findings required to implement section 623 by employing a rebuttable presumption, a common procedural device designed to draw reasonable inferences from established facts. Such a presumption is "permissible if 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." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (internal quotation marks omitted).

The evidence is undisputed that MVPD competition has greatly increased nationwide since 1993, and that DBS providers reach virtually every market in the country. *See 2015 Video Competition Report*, 30 FCC Rcd at 3256 ¶ 2, 3300-01 ¶¶ 112-113. On the basis of this evidence, the Commission reasonably found that the test for Competing Provider Effective Competition is now satisfied in the vast majority of franchise areas. *See Order* ¶¶ 8-10 (JA___-___). The agency therefore "plac[ed] the burden on franchising authorities to show a lack of Effective Competition" in their franchise areas. *Id.* ¶ 9 (JA___). This shift in the burden of production "better comports with the current state of the marketplace." *Id.* ¶ 13 (JA___). The Commission's use of a rebuttable presumption to account for current market realities is plainly permissible under *Chevron*.

Under the new rules, if a franchising authority fails to rebut the presumption with respect to its franchise area, the Commission will "make a franchise area-specific finding of Effective Competition … based on the new presumption coupled with the franchising authority's failure" to rebut the

presumption. *Order* ¶ 27 (JA___-___).[13] Such a finding—which rests on substantial evidence of extensive MVPD competition nationwide—fully satisfies the agency's obligation under section 623.[14]

Seeking support for their challenge to the FCC's use of presumptions, petitioners turn to *United Scenic Artists v. NLRB*, 762 F.2d 1027 (D.C. Cir. 1985), and *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987). Br. 35-36. Neither case helps petitioners.

In *United Scenic Artists*, this Court invalidated a presumption by the NLRB that a union had an improper "secondary object." 762 F.2d at 1033-35. That presumption was nothing like the rebuttable presumption at issue here. For one thing, the NLRB's presumption could not generally be rebutted by a showing of contrary facts: A "secondary objective" was "presumed as a matter of law, whether or not this square[d] with the actual facts," and "that presumption [could] be overcome only in extraordinary circumstances." *Id.* at 1035. More importantly, the Court held that the NLRB's presumption was

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[13] *See also December 2015 Public Notice* at *1 (finding that "Competing Provider Effective Competition is present" in all franchise areas where the franchising authority produced no evidence to rebut the presumption).

[14] In addition to challenging the FCC's statutory authority, petitioners argue that it was unreasonable for the Commission to adopt the new presumption. Br. 56-65. We address that argument in Section II below.

based on "no credible evidence," either "direct or circumstantial," that the union "had a secondary object." *Id.* at 1035 n.26. Unlike that presumption, the FCC's presumption is rooted in powerful market evidence—data documenting a significant increase in MVPD competition nationwide. *See Order* ¶¶ 8-9 (JA___-___). This evidence justified a rebuttable presumption that Competing Provider Effective Competition now exists in franchise areas throughout the nation.

The Ninth Circuit's decision in *Cerrillo-Perez* is also easily distinguishable. The court there rejected the INS's argument that the Board of Immigration Appeals could "adopt a general presumption that separation of parents and children will not occur" if the parents are deported. 809 F.2d at 1426. Critically, the presumption advocated by the INS was not rebuttable; it amounted to "an improper *per se* rule." *Id.* By contrast, the FCC's presumption is rebuttable. *Order* ¶ 11 (JA___).

1. The FCC's New Presumption, Like Its Old One, Is Permissible Under Section 623.

Petitioners acknowledge—as they must—that the FCC has always used rebuttable presumptions to make the findings required by section 623(a)(2). Br. 37. When it first promulgated rules implementing the statute, the agency adopted a rebuttable presumption of no effective competition. *See 1993 Order*, 8 FCC Rcd at 5669-70 ¶ 42. The Commission relied on that

presumption when it accepted the certifications of franchising authorities to regulate cable rates in thousands of communities. If (as petitioners now claim) the statute requires that effective competition findings be based on evidence specific to each franchise area, then every certification that was based on the nationwide presumption of no effective competition would presumably be invalid. The Court should reject this implausible premise. Both the old presumption and the new one are permissible under the statute.

Petitioners argue that the FCC's initial presumption of no effective competition was adopted "for reasons of exigency" that cannot justify the new presumption. Br. 37. To be sure, the exigency that led the agency to adopt the original presumption—the need to "expeditiously implement" the 1992 Cable Act—no longer exists. *See 1993 Order*, 8 FCC Rcd at 5669 ¶ 41. But a new concern emerged. Given the development of MVPD competition over the last two decades, the Commission had reason to believe that rate regulation remained in effect in many franchise areas where cable systems had become subject to effective competition. Rate regulation in a competitive market is inconsistent with both the plain terms of section 623[15] and

[15] *See* 47 U.S.C. § 543(a)(2) (regulation of a cable system's rates is prohibited if the FCC finds that the cable system "is subject to effective competition").

Congress's strong preference for competition over rate regulation.[16] Congress intended that "governmental oversight" of rates under the 1992 Cable Act "should end as soon as cable is subject to effective competition." Senate Report at 18. Consistent with Congress's wishes, the FCC adopted its new presumption of Competing Provider Effective Competition to facilitate the prompt termination of cable rate regulation in competitive markets.

Petitioners also try to distinguish between the old and new presumptions by asserting that findings under the previous rules "were not made 'simply by operation of the presumption.'" Br. 38 (quoting *1993 Order*, 8 FCC Rcd at 5670 ¶ 42). But the same is true of the new rules. The FCC's new presumption—like its old one—is rebuttable. The Commission will not make any findings regarding effective competition under the new rules until it gives franchising authorities an opportunity "to demonstrate that the Competing Provider Effective Competition test is not met in a given

[16] *See* House Report at 30 ("The Committee believes that competition ultimately will provide the best safeguard for consumers in the video marketplace and strongly prefers competition and the development of a competitive marketplace to [rate] regulation."); Senate Report at 12 ("the Committee prefers competition to regulation … because regulation imposes costs, which may be significant"). The headings in section 623 underscore this preference for competition. *See* 47 U.S.C. § 543(a) (entitled "COMPETITION PREFERENCE; LOCAL AND FEDERAL REGULATION"); *id.* § 543(a)(2) (entitled "PREFERENCE FOR COMPETITION").

area." *Order* ¶ 9 (JA___). If a franchising authority makes no attempt to rebut the new presumption in its franchise area, the Commission will make a finding of effective competition in that area "based on the new presumption coupled with the franchising authority's failure" to rebut the presumption. *Id.* ¶ 27 (JA___). Section 623 requires nothing more.[17]

2. The FCC May Permissibly Base A Finding Of Effective Competition On An Unrebutted Presumption.

Petitioners maintain that a finding of effective competition based on an unrebutted presumption is not really a "finding" because it is "based on the *absence* of any relevant franchise-area evidence." Br. 35. But petitioners are wrong to suggest that such a finding has no evidentiary foundation. The new presumption rests on "market data showing that the vast majority of

[17] Petitioners assert that unlike the new rules, the old rules ensured that the FCC received "at least *some evidence* specific to an individual franchise area" because franchising authorities were required to certify that they had reason to believe that the presumption of no effective competition was correct as to their franchise areas. Br. 38 (citing *1993 Order*, 8 FCC Rcd at 6069 (Appendix D, Question 6)). But in light of the evidence of strong competition nationwide and the FCC's experience with recent effective competition petitions, the Commission certainly has some evidence that there is effective competition in local markets generally. In any event, as we explained at page 31 above, section 623 does not require the FCC to base its findings of effective competition on any particular type of evidence. As long as those findings are supported by substantial evidence, the Commission has fulfilled its statutory obligation.

communities would satisfy the Competing Provider Effective Competition standard." *Order* ¶ 26 (JA___). On the basis of this uncontested evidence, the Commission reasonably concluded that (absent any contrary evidence concerning specific franchise areas) it should find that Competing Provider Effective Competition is present nationwide. Thus, there is no basis for petitioners' assertion that the Commission is improperly relying on "presumptions *in lieu of* the required evidence-based finding of effective competition." Br. 35 (emphasis added). Rather, the FCC is properly using rebuttable presumptions to make evidence-based findings regarding effective competition.

Contrary to petitioners' contention (Br. 39-46), nothing in the statute bars the Commission from making a finding of effective competition if a franchising authority makes no effort to rebut the new presumption. The Commission reasonably "anticipate[d] that few franchising authorities [would] be able to present data to rebut the presumption of Competing Provider Effective Competition, given the ubiquity and penetration of DBS." *Order* ¶ 25 (JA___). Consistent with the agency's expectations, only three franchising authorities tried to rebut the new presumption by filing revised certifications. *See December 2015 Public Notice*, App. A. And one of them failed to rebut the presumption. *See Jennifer Teipel*, 2015 WL 8477555.

Petitioners argue that the Commission abdicated its "affirmative duty to assist the development of a meaningful record" by adopting a rebuttable presumption. Br. 41 (quoting *Democratic Central Comm. v. Washington Metro. Area Transit Comm'n*, 485 F.2d 886, 905 (D.C. Cir. 1973)). That assertion is unfounded.

The Commission took reasonable steps to assist the development of a meaningful record regarding effective competition. First, it found substantial evidence of significant MVPD competition nationwide—"market data showing that the vast majority of communities would satisfy the Competing Provider Effective Competition standard." *Order* ¶ 26 (JA___). Then it provided an opportunity for franchising authorities—which are better positioned than the Commission to assess market conditions in their local communities—to submit evidence demonstrating the absence of effective competition in their franchise areas. Franchising authorities have a powerful

incentive to come forward with such evidence: the desire to preserve their jurisdiction over cable rates.[18]

If a franchising authority fails to produce evidence that its community is not subject to Competing Provider Effective Competition, the Commission will find that such competition exists in that franchise area. Such a finding is justified by the substantial nationwide evidence of MVPD competition and the franchising authority's failure to provide any contrary evidence vis-à-vis its franchise area.[19]

Petitioners speculate that some franchising authorities may not attempt to rebut the presumption because the process would be too costly. Br. 42. But the Commission has taken steps to reduce the burdens associated with rebutting the presumption. In particular, it has "ensured that franchising

[18] Local officials have not hesitated to object when they believed that the FCC was improperly curtailing their authority. *See City of New York v. FCC*, 486 U.S. 57 (1988); *Montgomery County v. FCC*, 2015 WL 9261375 (4th Cir. Dec. 18, 2015); *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); *Time Warner*, 56 F.3d at 196-200. The FCC thus had good reason to expect that in the few franchise areas without effective competition, franchising authorities would move quickly to rebut the new presumption.

[19] This case bears no resemblance to *Democratic Central Committee* on the facts. The agency there "refused to make any findings on [the] efficiency" of a transit system's management, 485 F.2d at 903, and the Court faulted the agency for failing to gather any evidence concerning the issue, *id.* at 903-05.

authorities will have access to the information" they need to rebut the presumption "by implementing procedures" that enable a franchising authority to "request directly from an MVPD information regarding the MVPD's reach and number of subscribers in a particular franchise area." *Order* ¶ 26 (JA___); *see also id.* ¶ 22 (JA___). The Commission also said that if it found evidence that "the burdens of filing a revised [certification] are dissuading franchising authorities from filing," it would "reconsider whether changes should be made to reduce their costs." *Id.* ¶ 26 (JA___). Specifically, it vowed to "revisit the issue of the cost of [MVPD] data" if it received "complaints that the cost of such data makes the filing of [new certifications] cost-prohibitive to franchising authorities." *Id.* ¶ 22 (JA___).

Petitioners further speculate that other factors might have prevented franchising authorities from filing revised certifications before their certifications expired on December 8, 2015. Without any evidence to substantiate their theories, petitioners hypothesize that "the relevant officials may not [have been] aware of requirements in a timely fashion," or that "certain municipal actions may [have required] hearings." Br. 43. But the FCC gave clear and express notice of the time limit for filing revised certifications, and the filing deadline was widely publicized. *See Order* ¶¶ 27-30 (JA___-___); *Filing Deadline Notice*, 30 FCC Rcd at 10125.

Moreover, even if franchising authorities allowed their certifications to lapse through inadvertence or inertia or for whatever reason, they remain free to "file a new [certification] at any time if circumstances change such that they can submit new data rebutting the presumption of Competing Provider Effective Competition." *Order* ¶ 19 (JA___).

Petitioners make much of the fact that before the new presumption was adopted, the Media Bureau denied some cable operators' petitions for a finding that they were subject to Competing Provider Effective Competition in certain franchise areas. Br. 45. These Bureau decisions, however, do not undermine the validity of the new presumption. The FCC understood that although "the vast majority of communities" now meet the test for Competing Provider Effective Competition, *Order* ¶ 26 (JA___), some franchise areas do not. That is why the Commission made its presumption rebuttable, giving franchising authorities an opportunity to "demonstrate that the Competing

Provider Effective Competition test is not met in a specific area." *Id.* ¶ 11 (JA___).[20]

Ultimately, petitioners can point to nothing in section 623 that precludes the FCC from using a rebuttable presumption to make findings regarding effective competition. In the absence of an express ban on rebuttable presumptions, the agency reasonably interpreted the statute—both in 1993 and in 2015—to permit the use of this common-sense procedural device.

B. Nothing In Section 623 Bars The Commission From Terminating The Certifications Of Franchising Authorities That Do Not Rebut The Presumption Of Competing Provider Effective Competition.

Franchising authorities that were certified to regulate cable rates under the old rules could retain their certifications under the new rules if, within 90 days of the new rules' effective date, they filed a revised certification that rebutted the new presumption. The FCC made clear that if a currently

[20] Insofar as petitioners suggest that the new presumption should not apply to franchise areas where the Bureau recently denied effective competition petitions, that claim has been waived. *See* 47 U.S.C. § 405; *Environmentel, LLC v. FCC*, 661 F.3d 80, 83-84 (D.C. Cir. 2011). Although the FCC "sought comment" on whether "certain geographic areas" should be excluded from the new presumption, it did "not adopt different rules for any specific geographic areas" because "[n]o commenter addressed this issue." *Order* ¶ 11 (JA___).

certified franchising authority did not file a new certification "during the 90-day timeframe, its existing certification" would "expire at the end of that timeframe" unless its franchise area was the subject of certain pending proceedings. *Order* ¶ 27 (JA___). Pursuant to this procedure, the Media Bureau determined in December 2015 that "Competing Provider Effective Competition is present" in all franchise areas that are not the subject of timely filed new certifications or other pending proceedings relating to effective competition. *December 2015 Public Notice* at *1. As a result, franchising authorities' certifications for those communities "expired as of December 8, 2015," when the 90-day filing window closed. *Id.*

Once again invoking *Chevron* step one, petitioners argue that the FCC's "mass termination" of certifications violated section 623. Br. 52. They contend that under the statute's revocation provision, the agency may terminate a certification only "[u]pon petition by a cable operator or other interested party." Br. 47-48 (quoting 47 U.S.C. § 543(a)(5)). The agency rightly rejected that cramped and unreasonable construction of the statute.

Section 623(a)(5) provides: "Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection." 47 U.S.C. § 543(a)(5). Such a petition could lead the FCC to "revoke the jurisdiction"

of a franchising authority if the Commission determines that the franchising authority's "laws and regulations are not in conformance with the regulations prescribed by the Commission under [section 623(b)]." *Id.* But the statute does not state that the petition process is the *only* means by which the FCC can terminate a franchising authority's certification. The Commission reasonably construed section 623 to authorize the termination of certifications on the agency's own initiative if the FCC finds that previously certified franchise areas have become subject to effective competition. Thus, "it does not matter" that under the new rules, the "expirations" of existing certifications "will be unrelated to a petition by a cable operator or other interested party." *Order* ¶ 29 (JA___).

The Commission has adopted a similar approach in interpreting section 10 of the Communications Act, 47 U.S.C. § 160. Section 10(c) provides that telecommunications carriers may petition the FCC to forbear from applying any regulation or provision of the Act. *Id.* § 160(c). The FCC concluded that the statute's creation of a petition process did not preclude the agency from forbearing on its own motion under section 10. Consequently, shortly after section 10 was enacted, the Commission commenced a rulemaking "to implement mandatory detariffing" for certain long-distance carriers under section 10, even though no party had filed a forbearance petition seeking

detariffing. *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 762-63 (D.C. Cir. 2000). Just as the establishment of a forbearance petition process did not prevent the FCC from forbearing on its own motion under section 10, the availability of a petition process for challenging certifications under section 623 does not foreclose the Commission from acting *sua sponte* to rescind certifications in franchise areas that become subject to effective competition.

The FCC's interpretation of its authority under section 623 is both reasonable and consistent with the statute's plain terms and the intent of Congress. Section 623 expressly prohibits cable rate regulation in franchise areas where "the Commission finds that a cable system is subject to effective competition." 47 U.S.C. § 543(a)(2). In light of market data showing extensive MVPD competition nationwide, the Commission has now found that "the vast majority of communities … satisfy the Competing Provider Effective Competition standard." *Order* ¶ 26 (JA___). Now that the Commission has made a finding of effective competition in a wide swath of franchise areas throughout the country, section 623 bars cable rate regulation in those areas. Therefore, it was entirely appropriate for the FCC to act swiftly to terminate the certifications for those communities. This is precisely what Congress intended—that "governmental oversight" of cable

rates "should end as soon as cable is subject to effective competition." Senate Report at 18.

Petitioners' contrary construction of the statute would frustrate this objective by ossifying outdated and unwarranted rate regulation. Petitioners read section 623 to handcuff the Commission from taking any action to terminate a certification until a party files a petition under section 623(a)(5). Under their interpretation, even if the FCC became aware of incontrovertible evidence of effective competition in thousands of franchise areas, it could not rescind the certifications for *any* of those areas until it received a petition under section 623(a)(5). And it would be unable to repeal the certifications for *all* of those thousands of communities until it received and ruled on petitions for *each* community—a process that could take many years. Congress did not contemplate such an unwieldy procedure for ending cable rate regulation in areas where competition has developed. On the contrary, the Commission's determination that the transition from rate regulation to competition should proceed without undue delay best advances Congress's belief that "competition ultimately will provide the best safeguard for consumers in the video marketplace." House Report at 30.

As Congress anticipated, substantial competition has taken root in the MVPD market. But under petitioners' reading of section 623, the FCC would

be powerless to react to new evidence of widespread MVPD competition unless and until someone challenged a particular certification under section 623(a)(5). Nothing in the text of section 623 compels the adoption of petitioners' odd reading of the statute. And there is no good reason to read the statute, "against its clear terms, to halt" the prompt termination of certifications in franchise areas where effective competition exists—"a practice that so evidently enables the Commission to fulfill its statutory duties." *See Elec. Power Supply*, 2016 WL 280888, *19. In assessing whether a certification should remain in effect in a particular community, the Commission need not blind itself to substantial evidence of the emergence of effective competition until a party petitions to revoke the certification.

C. The New Rules Are Consistent With Section 111 Of STELAR.

In adopting the new effective competition rules, the FCC also fulfilled its mandate under section 111 of STELAR "to establish a streamlined process for filing of an effective competition petition pursuant to [47 U.S.C. § 543] for small cable operators." 47 U.S.C. § 543(o)(1). The Commission explained that its new presumption creates "a streamlined process for all cable operators, including small 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." *Order* ¶ 13 (JA___-___).

Petitioners argue that Congress "did not intend any relief for large cable operators" when it enacted section 111 of STELAR. Br. 53. But section 111 "neither expands nor restricts the scope of the Commission's authority to administer the effective competition process." *Order* ¶ 14 (JA___) (quoting NCTA Reply at 8 (JA___)). Even if Congress had never passed STELAR, the Commission had the authority under section 623 to streamline the effective competition process for all cable operators. And although section 111 of STELAR focuses on small cable operators, it does not disable the FCC from streamlining the process for other cable operators.

Petitioners claim that the agency failed to comply with STELAR because it did "not 'establish a streamlined process'" for filing effective competition petitions, but instead "abolish[ed] that 'process' and 'petition[s]' altogether." Br. 53 (quoting 47 U.S.C. § 543(o)(1)). That is not true. Cable operators will still have occasion to file effective competition petitions under the new rules, but only when a franchising authority has demonstrated that a cable operator "does not face Competing Provider Effective Competition in the franchise area." *Order* ¶ 13 (JA___). "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." *Id.* ¶ 23 (JA___).

Under the new rules, cable operators will continue to bear the burden of proof regarding effective competition. If a franchising authority rebuts the new presumption of Competing Provider Effective Competition "by presenting community-specific evidence," the burden will "then shift to the cable operator to prove Effective Competition." *Order* ¶ 13 (JA___-___). Thus, consistent with section 111 of STELAR, the new rules do not "have any effect on the duty of a small cable operator to prove the existence of effective competition" under section 623. 47 U.S.C. § 543(o)(2). They merely shift the initial burden of producing evidence from cable operators to franchising authorities in order to "reflect marketplace realities and allow for a more efficient allocation of Commission and industry resources." *Order* ¶ 14 (JA___) (quoting ITTA Comments at 7 (JA___)).

II. THE COMMISSION REASONABLY ADOPTED A REBUTTABLE PRESUMPTION OF COMPETING PROVIDER EFFECTIVE COMPETITION

Petitioners also argue that the FCC's rebuttable presumption of Competing Provider Effective Competition was arbitrary and capricious. That claim cannot withstand scrutiny.

In implementing a statute, an agency may employ rebuttable presumptions that "bear a rational relationship" to the relevant statutory criteria. *Atchison, T. & S.F. Ry. Co. v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978). Such presumptions "are valid" if "a rational connection exists between the facts giving rise to a presumption and the fact presumed." *Id.*; *see also Chemical Mfrs. Ass'n v. Dep't of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997). Under this deferential standard, the Court has upheld the FCC's use of rebuttable presumptions in a variety of contexts.[21] It should do likewise here.

The record in this proceeding supported the Commission's adoption of a rebuttable presumption that franchise areas satisfy the two-part test for Competing Provider Effective Competition under section 623(*l*)(1)(B). The Commission reasonably found that "the ubiquitous nationwide presence" of two DBS providers "presumptively satisfies" the first part of the test because every franchise area is presumably served by multiple MVPDs "each of

[21] *See, e.g.*, *Cablevision*, 649 F.3d at 716-18 (presumption concerning MVPDs' access to regional sports programming under 47 U.S.C. § 548); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 581-82, 584-85 (D.C. Cir. 2002) (presumptions regarding the proper allocation of pole attachment costs under 47 U.S.C. § 224); *Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 912 (D.C. Cir. 2002) (presumption concerning incumbent local exchange carriers' duty under 47 U.S.C. § 251(c)(6) to accommodate collocation of competing carriers' equipment).

which offers comparable programming to at least 50 percent of the households in the franchise area." *Order* ¶ 8 (JA___); *see* 47 U.S.C. § 543(*l*)(1)(B)(i). Petitioners do not really dispute this finding. *See* Br. 64 (cable operators "can easily prove the first prong of the test" by citing the availability of DBS in their franchise areas).

Substantial evidence also supported a rebuttable presumption that the second part of the test was met—*i.e.*, that "more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD." *Order* ¶ 9 (JA___); *see* 47 U.S.C. § 543(*l*)(1)(B)(ii). The record showed that "competitors to incumbent cable operators have captured approximately 34 percent of U.S. households"—"more than double the percentage needed to satisfy the second prong of the [Competing Provider Effective Competition] test." *Order* ¶ 9 (JA___). DBS operators alone serve "approximately 25.6 percent of U.S. households." *Id.* n.48 (JA___).

Petitioners contend that "there is no rational nexus" between "*national* data of effective competition" and the Commission's rebuttable presumption regarding the state of competition in *local* franchise areas. Br. 58-60. On the contrary, while national data do not provide "conclusive evidence of the specific [level of] penetration" by cable's competitors in each community, the

current national market share of competing MVPDs "undeniably supports" the rebuttable presumption that the agency adopted. *Order* ¶ 9 (JA___) (quoting NCTA Reply at 2 (JA___)). Given the evidence that competing MVPDs serve 34 percent of all U.S. households, the FCC could reasonably infer that those MVPDs serve at least 15 percent of the households in "the vast majority of communities." *Id.* ¶ 26 (JA___). The national data are "a strong predictor" that in the vast majority of franchise areas, competitors have attained "the market share Congress deemed necessary to free cable operators from … rate regulation." *Id.* ¶ 9 (JA___-___) (quoting NCTA Reply at 2 (JA___)).

In any event, the FCC did not base its presumption solely on national market data. It also cited record evidence that "competing MVPDs have a penetration rate of more than 15 percent in each of the 210 Designated Market Areas" in the United States, with DBS alone achieving a "penetration rate above 20 percent" in most of those areas. *Order* ¶ 9 (JA___).[22] This

[22] *See* NCTA Comments at 5 (JA___); NCTA Reply at 2 (JA___). Designated Market Areas (or "DMAs") are local television markets defined by Nielsen for purposes of measuring television ratings. *See* note 6 above. Because each DMA encompasses multiple franchise areas, the evidence concerning DMAs does not definitively prove that the 15 percent penetration threshold has been surpassed in every single franchise area. Nonetheless, the evidence shows that competing MVPDs have achieved a penetration rate above 15 percent in local markets throughout the nation.

evidence of local competition buttressed the FCC's conclusion that most franchise areas now meet the prerequisites for Competing Provider Effective Competition.

The Commission further noted that since the start of 2013, it had granted cable operators' petitions for effective competition findings in more than 99.5 percent of the communities it evaluated. *Order* ¶ 7 (JA___). Petitioners contend that there is no "meaningful connection" between these findings of effective competition in specific franchise areas "and the competitive situation in completely unrelated franchise areas." Br. 61-62. The FCC's findings, however, were consistent with national data showing a marked increase in MVPD competition. And the Commission had "no reason to believe that the number of Effective Competition petitions granted in recent years" was "not representative of the marketplace on the whole." *Order* ¶ 7 (JA___). Indeed, the FCC found effective competition in a wide range of demographically diverse communities, including large cities like Philadelphia (estimated 2014 population of 1,560,297) and small towns like

Delanson, New York (estimated 2014 population of 380) and Cinco Bayou, Florida (estimated 2014 population of 414).[23]

In light of the substantial evidence of widespread MVPD competition, the FCC's use of a rebuttable presumption to make effective competition findings under section 623 was "neither inherently unlawful nor facially unreasonable" because the Commission made clear that the presumption was "subject to rebuttal in any case." *See Southern Co.*, 313 F.3d at 581.

Petitioners nonetheless maintain that the rebuttable presumption is invalid because "there is no need for it." Br. 63 (citing *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983)). As this Court has held, however, "[a] presumption is normally appropriate 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.'" *Chemical Mfrs. Ass'n*, 105 F.3d at 705 (quoting *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-89 (1990)); *see also Cablevision*, 649 F.3d at 716. Under that standard, the FCC's presumption clearly passes muster.

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[23] *See Six Unopposed Petitions for Determination of Effective Competition*, 30 FCC Rcd 383, 385-86 (Med. Bur. 2015). The population estimates cited above are available at www.census.gov.

Because "market data show[ ] that the vast majority of communities would satisfy the Competing Provider Effective Competition standard," *Order* ¶ 26 (JA___), it was both sensible and time-saving for the FCC to presume the existence of effective competition in a franchise area until the franchising authority proved otherwise. Given the current state of the marketplace, it is likely that only a "few franchising authorities will be able to present data to rebut the [new] presumption." *Id.* ¶ 25 (JA___).[24] As a result, "the volume of new [certifications] filed by franchising authorities" under the new rules "will be far less than the volume of cable operator Effective Competition petitions" filed under the old rules. *Id.* For that reason, the FCC was justified in concluding that the new presumption offers "the most efficient approach" to making effective competition determinations under section 623. *Id.*

There is no reason to believe that Congress would have disfavored efficiency in this context. When it enacted the 1992 Cable Act, Congress emphasized its preference for competition over rate regulation. *See* 47 U.S.C. § 543(a)(2) (entitled "PREFERENCE FOR COMPETITION"); House Report at 30;

[24] Only three previously certified franchising authorities even attempted to rebut the presumption by filing revised certifications. *See December 2015 Public Notice*, App. A.

Senate Report at 12. At that time, Congress recognized the need for cable rate regulation; but it believed that such regulation "should end as soon as cable is subject to effective competition." Senate Report at 18.

Like Congress, the Commission believes that "competitive choice is the most efficient market regulator." *See Order*, 30 FCC Rcd at 6607 (JA___) (statement of Chairman Wheeler). Statistics support this view. The "average rate for basic [cable] service is actually lower in communities with a finding of Effective Competition"—where rates are unregulated—"than in those without a finding"—where rates are subject to regulation. *Id.* n.33 (JA___) (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 29 FCC Rcd 14895, 14902 ¶ 15 (2014)).

The FCC adopted its new presumption of Competing Provider Effective Competition in order to ensure the prompt cessation of cable rate regulation in communities with effective competition, just as Congress intended. Essentially, petitioners object to the new presumption because they have a preference for regulation. In implementing section 623, however, the FCC was obligated to give effect to Congress's preference for competition—a preference the agency shares. Taking that preference into account, "the

Commission was entitled to value the free market, the benefits of which are rather well established." *MCI WorldCom*, 209 F.3d at 766.

CONCLUSION

The petition for review should be denied.

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February 2, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, ET AL., PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 15-1295

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 12,105 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

/s/ *James M. Carr*
James M. Carr
Counsel

STATUTORY ADDENDUM

Page

47 U.S.C. § 160

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a) of this section.

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise

statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 543

UNITED STATES CODE ANNOTATED
TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER V-A. CABLE COMMUNICATIONS
PART III. FRANCHISING AND REGULATION

§ 543. Regulation of rates

(a) Competition preference; local and Federal regulation

(1) In general

No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

(2) Preference for competition

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. If the Commission finds that a cable system is not subject to effective competition--

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section.

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that--

(A) the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Commission

A certification filed by a franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, 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 regulations prescribed by the Commission under subsection (b) of this section;

(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.

If the Commission disapproves a franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

(5) Revocation of jurisdiction

Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b) of this section, the Commission shall revoke the jurisdiction of such authority.

(6) Exercise of jurisdiction by Commission

If the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3). Such new certification shall be effective upon approval by the Commission. The Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

(7) Aggregation of equipment costs

(A) In general

The Commission shall allow cable operators, pursuant to any rules promulgated under subsection (b)(3) of this section, to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.

(B) Revision to Commission rules; forms

Within 120 days of February 8, 1996, the Commission shall issue revisions to the appropriate rules and forms necessary to implement subparagraph (A).

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission--

(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

(C) shall take into account the following factors:

(i) the rates for cable systems, if any, that are subject to effective competition;

(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;

(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

(3) Equipment

The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for--

(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

(B) installation and monthly use of connections for additional television receivers.

(4) Costs of franchise requirements

The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

(5) Implementation and enforcement

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include--

(A) procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

(B) procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

(C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

(D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

(6) Notice

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

(7) Components of basic tier subject to rate regulation

(A) Minimum contents

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

(ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

(8) Buy-through of other tiers prohibited

(A) Prohibition

A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

(B) Exception; limitation

The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after--

(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

(ii) 10 years after October 5, 1992, subject to subparagraph (C).

(C) Waiver

If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

(c) Regulation of unreasonable rates

(1) Commission regulations

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:

(A) criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

(B) fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

(C) the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

(2) Factors to be considered

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors--

(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

(B) the rates for cable systems, if any, that are subject to effective competition;

(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;

(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

(F) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

(3) Review of rate changes

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

(4) Sunset of upper tier rate regulation

This subsection shall not apply to cable programming services provided after March 31, 1999.

(d) Uniform rate structure required

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect

to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

(e) Discrimination; services for the hearing impaired

Nothing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from--

(1) prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.

(f) Negative option billing prohibited

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

(g) Collection of information

The Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority, as appropriate, within one year after October 5, 1992, and annually thereafter, such financial information as may be needed for purposes of administering and enforcing this section.

(h) Prevention of evasions

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

(i) Small system burdens

In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.

(j) Rate regulation agreements

During the term of an agreement made before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.

(k) Reports on average prices

(1) In general

The Commission shall annually publish statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment of cable systems that the Commission has found are subject to effective competition under subsection (a)(2) compared with cable systems that the Commission has found are not subject to such effective competition.

(2) Inclusion in annual report

(A) In general

The Commission shall include in its report under paragraph (1) the aggregate average total amount paid by cable systems in compensation under section 325 of this title.

(B) Form

The Commission shall publish information under this paragraph in a manner substantially similar to the way other comparable information is published in such report.

(l) Definitions

As used in this section--

(1) The term “effective competition” means that--

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--

(i) served by at least two unaffiliated multichannel video programming distributors 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 multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor 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.

(2) The term “cable programming service” means any video programming provided over a cable system, regardless of service tier, including installation or

rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

(m) Special rules for small companies

(1) In general

Subsections (a), (b), and (c) of this section do not apply to a small cable operator with respect to--

(A) cable programming services, or

(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994, in any franchise area in which that operator services 50,000 or fewer subscribers.

(2) "Small cable operator" defined

For purposes of this subsection, the term "small cable operator" means 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.

(n) Treatment of prior year losses

Notwithstanding any other provision of this section or of section 532 of this title, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.

(o) Streamlined petition process for small cable operators

(1) In general

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.

(2) Construction

Nothing 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.

(3) Definition of small cable operator

In this subsection, the term “small cable operator” has the meaning given the term in subsection (m)(2).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Association Of Telecommunications Officers and Advisors, *et al.*,
Petitioners,

v.

Federal Communications Commission and United States of America,
Respondents.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on February 2, 2016, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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