

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

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

**REPLY COMMENTS OF
THE FREE STATE FOUNDATION***

These reply comments are submitted in response to the Commission's *Notice of Proposed Rulemaking* released March 16, 2015.¹ The *Notice* seeks comment on proposed changes to the Commission’s rules regarding the effective competition process. Specifically, the *Notice* asks whether the Commission “should adopt a rebuttable presumption that cable operators are subject to effective competition.”

The primary purpose of these brief reply comments, along with the attached appendix containing a recently published Free State Foundation *Perspectives*, is to urge the Commission to adopt its proposal to essentially reverse its existing presumption favoring rate regulation. The Commission proposes to do this by recognizing that “effective competition” exists in the video market unless would-be rate regulating local franchising authorities can demonstrate that a lack of competition exists. Abundant

* These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

¹ Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, *Notice of Proposed Rulemaking* (“*Notice*”), MB Docket No. 15-53 (released March 16, 2015), available at: <http://apps.fcc.gov/ecfs/document/view?id=60001042829>.

nationwide competitive conditions in the video market compel this rule change. Those competitive conditions should similarly prompt the Commission to consider other areas in which it can recalibrate its legacy video regulations to fit today's market by employing deregulatory presumptions.

Section 623 of the Communications Act provides that local franchising authorities may regulate basic tier cable rates and cable provider equipment where the local cable operator is not subject to effective competition.² And under Section 76.906 of the Commission's rules, "[i]n the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition."³

The Commission's rules for imposing cable rate regulations are premised on early 1990s suppositions about cable operators' so-called "bottlenecks."⁴ Those premises do not correspond to today's reality. Consumers now enjoy the benefits of vibrant video competition, with choices including two nationwide DBS providers, so-called "telco" entrants in the video market, and myriad online and wireless video delivery options. Data contained in the Commission's recently-released *Sixteenth Video Competition Report* (2015) highlights these dynamic and pro-consumer forces operating in the video market.⁵ These rapid market changes have rendered Section 76.906's presumption against effective competition completely unjustifiable.

Some comments filed in this proceeding have incorrectly suggested that the Commission's proposal to adopt a rebuttable presumption that "effective competition"

² 47 U.S.C. § 543.

³ 47 C.F.R. § 76.906

⁴ See, e.g., *Turner Broadcasting System v. FCC*, 512 U.S. 622, 656 (1994).

⁵ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Sixteenth Report*, MB Docket No. 14-16 (released April 2, 2015), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0402/FCC-15-41A1.pdf.

exists in local cable markets somehow lacks statutory authority or would be contrary to statutory command.⁶ Other filed comments mistakenly contend that recalibrating the Commission's "effective competition" rules to reflect current competitive market realities is unwarranted.⁷

Although Section 111 of the STELA Reauthorization Act may not be a model of clear drafting,⁸ the better reading is that Congress simply did not intend to expressly overrule Section 76.906 but otherwise left it to the discretion of the Commission to streamline the effective competition relief petition process for small cable operators. It puts the cart before the horse to suggest that Section 111 prohibits the Commission from revising a rule it previously adopted in its own discretion. The Commission has just as much authority to adopt a rule presuming that effective competition exists in the video market as the Commission had for its 1993 rule presuming the contrary. Moreover, Section 623(b)(2) provides that the FCC shall periodically revise its cable rate regulations and in so doing "shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."

Adopting a new evidentiary presumption with a deregulatory thrust is reasonably and amply supported by existing knowledge and data about today's dynamic video market. The *Notice* correctly correlates the indisputable dramatic changes in the video market since the early 1990s with the need to reduce present regulatory burdens. In the face of such evidence demonstrating market competition, maintaining a presumption favoring rate regulation is unwarranted. These points are discussed further in the

⁶ See Comments of Public Knowledge, MB Docket No. 15-53; Comments of NAB, MB Docket No. 15-53, at 7-18.

⁷ See Comments of NATOA, MB Docket No. 15-53, at 3.

⁸ Pub. L. No. 113-200, § (2014).

Perspectives from FSF Scholars paper, “FCC Should Adopt the Deregulatory Proposal for Local Cable Rates,” published on April 9, 2015, and attached as an appendix.⁹

Consistent with these reply comments, including the attached appendix, the Commission should act to streamline local cable rate regulation and effective competition relief petitions so that cable operators no longer have to jump through so many unnecessary hoops and expend resources in order to receive proper treatment. Abundant nationwide competition should lead the FCC to reverse Section 76.906’s presumption so that it recognizes “effective competition” in the video market unless would-be rate regulating local franchising authorities can demonstrate that a lack of competition exists.

Respectfully submitted,

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⁹ Seth L. Cooper, “FCC Should Adopt the Deregulatory Proposal for Local Cable Rates,” *Perspectives from FSF Scholars*, Vol. 10, No. 15 (April 9, 2015), available at: http://www.freestatefoundation.org/images/FCC_Should_Adopt_the_Deregulatory_Proposal_for_Local_Cable_Rates_040915.pdf.



Perspectives from FSF Scholars
April 9, 2015
Vol. 10, No. 15

FCC Should Adopt the Deregulatory Proposal for Local Cable Rates

by

Seth L. Cooper *

When it comes to competition in the video services market, the baseline for the FCC's local cable rate regulations is pointed the wrong way. But the FCC is proposing to reorient its local cable service rate regulations to track more closely with today's competitive market. The agency is now taking public comments on its [proposal](#), which would [establish a presumption that local cable service providers are subject to effective competition](#). If adopted, any local jurisdiction seeking to impose rate controls on basic cable services and cable equipment would have to overcome this deregulatory presumption with evidence that such competition is lacking.

The FCC should follow through with its proposal to match its local cable rate regulations to market reality. Replacement of its 1993 pro-regulatory assumption regarding effective competition in the local MVPD market with a deregulatory assumption is long overdue. The FCC's [Sixteenth Video Competition Report](#) (2015) offers the latest collection of data reinforcing the effectively competitive conditions of today's video market. So it's little wonder that in rulings made on regulatory relief petitions since 2013, the FCC has determined that effective competition existed in over 99.5% communities it evaluated.

Further, the FCC should make adoption of deregulatory presumptions a means for reforming other outdated regulations of cable and other MVPD services. The default

posture of FCC policy toward video services should favor free market competition over government controls.

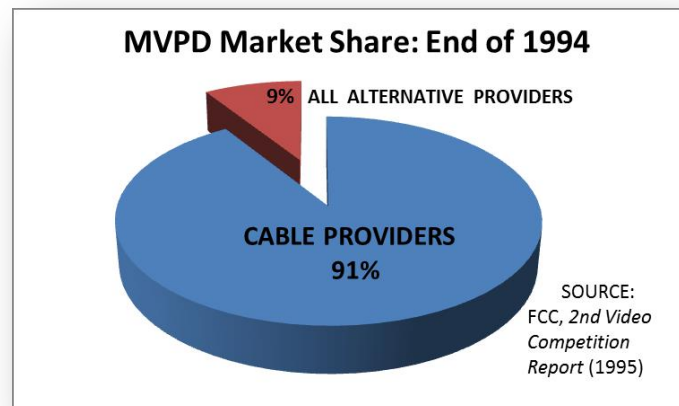
The FCC's proposal involves Section 623 of the Communications Act, originally adopted as part of the Cable Act of 1992. Section 623 permits the FCC to set standards for local regulation of rates for "basic tier" service on cable systems and related cable equipment made available to subscribers. The FCC implemented this section in 1993 by establishing a regulatory presumption: "In the absence of a demonstration to the contrary, cable systems are presumed *not* to be subject to effective competition."

In addition, the FCC typically applies a "competing provider test" for determining whether a local franchise area is effectively competitive. Under that test, effective competition exists if at least two unaffiliated MVPDs offer comparable video services to half of the area's households and the number of households subscribing to service other than the largest MVPD exceeds 15%. The FCC grants petitioning cable providers relief from local cable rate regulation in jurisdictions where the competing provider test is met.

The idea behind both Section 623 and by the FCC's 1993 regulations was to protect consumers from charges substantially and persistently above market-going rates. But the monopolistic assumptions upon which local cable rate regulation rested are no longer valid. So, continued rate regulation is no longer justifiable.

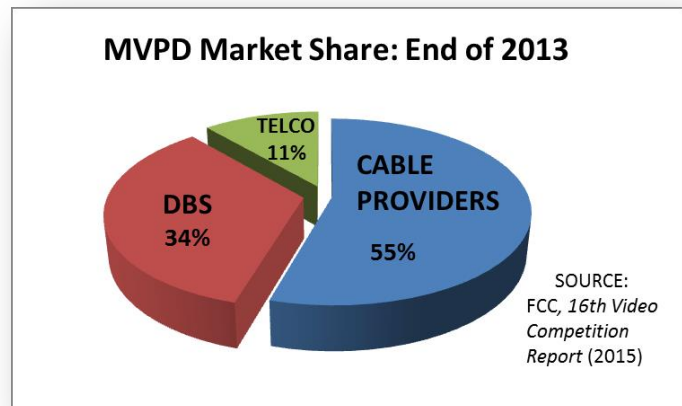
The cable market of the early 1990s is long gone. One-way analog video has given way to digital HD video with interactive, on-demand, time-shifting, whole homing, and mobility viewing options. Cable providers now compete with other MVPDs. Competitors in this space include two national direct broadcast satellite (DBS) service providers – DirecTV and Dish – as well as so-called telco MVPD entrants – including AT&T's U-Verse, Verizon FiOS, and CenturyLink's PrismTV. Subscription-based online video distributors (OVDs) such as Netflix, AmazonPrime offer consumers additional viewing content and service choices.

For the latest collection of evidence demonstrating the video market's dynamism and effectively competitive status, look no further than the FCC's [Sixteenth Video Competition Report](#). Released on April 2, the *Report* amasses data up through 2013, and in some cases 2014.



MVPD market share contained in the *Report* indicates "combined shares of all cable MVPDs accounted for approximately 53.9 percent of MVPD subscribers at the end of 2013, down from 55.8 percent at the end of 2012." Also, "combined shares of the two DBS MVPDs accounted for approximately 33.9 percent of MVPD subscribers at the end of 2013, up from 33.8 percent at the end of 2012." And "all telco MVPDs accounted for approximately 11.2 percent of MVPD subscribers at the end of 2013, up from 9.8 percent at the end of 2012."

As the FCC astutely observed in its proposed rulemaking, "on a national scale DBS alone has close to double the percentage of subscribers needed for competing provider effective competition."



The FCC's proposal to replace its 1993 pro-regulatory presumption regarding effective competition in the local MVPD market with a deregulatory presumption makes perfect sense. Data cited above from the *Sixteenth Video Competition Report* only re-confirms the effectively competitive status of the national MVPD market. And as the FCC's proposed rulemaking indicates, the vast majority of petitions for relief from local cable rate controls are granted:

From the start of 2013 to the present, the Media Bureau granted in their entirety 224 petitions requesting findings of effective competition and granted four such petitions in part; the Commission did not deny any such requests in their entirety. In these decisions, the Commission determined that 1,433 communities... have effective competition... Franchising authorities filed oppositions to only 18 (or less than 8 percent) of the 228 petitions. In the four instances in which the Commission partially granted a petition for a finding of effective competition, the Commission denied the request for a total of seven [communities], or less than half a percent of the total number of communities evaluated.

Of course, a general recognition by the FCC that the MVPD market is effectively competitive conceptually undermines the constitutional rationale for a broad swath of early 1990s MVPD regulations. U.S. Supreme Court and circuit court opinions acknowledge the First Amendment rights of MVPDs in editorial decisions regarding programming content. According to judicial precedents, many regulatory restrictions on MVPDs' First Amendment rights – including must-carry/retransmission consent, program carriage, and leased access – were deemed permissible because of the assumed existence of cable monopoly conditions. At the very least, no solid basis exists for the FCC to continue enforcing the same

regulations in a manner oblivious to the effectively competitive state of the MVPD market.

The existence of effective competition nationwide, or at least the presumed existence of such competition by the FCC, may not automatically trigger any further deregulatory actions by the agency. But the underlying facts about today's competitive video market should lead the FCC to look more carefully at other early-90s regulations that still apply to cable and DBS services.

In fact, the FCC should look for ways to reform its other outdated rules restricting MVPD services by adopting deregulatory presumptions. A useful agency precedent on point is the FCC's *Program Access Order* (2012). That order replaced the agency's ban on exclusive contracts by vertically-integrated cable programmers with a rebuttable presumption of market competitiveness, albeit with extra qualifications attached.

At the Free State Foundation's [Fifth Annual Telecom Policy Conference](#), held in March 2013, [FCC Media Bureau Chief William Lake offered insights](#) into the intent behind the Program Access Order:

The Commission recently decided not to extend the prohibition, the *per se* rule prohibiting exclusives with respect to content of vertically integrated cable companies. What we did, instead, was to move to a case-by-case approach bolstered by presumptions; for example, a presumption that a regional sports network must have programming. The reason for trying to insert presumptions is that a case-by-case approach without some presumptions or rules to guide it can be very resource intensive. Our thought was that rather than have a *per se* rule, if we could have a case-by-case approach but guide it with presumptions of that sort, we might be able to accommodate these developments and possibly develop a model that we could use in other contexts.

This is just one example of the fact that the Commission, under existing law, has the ability and the willingness to try to adjust our regulation to changing circumstances. And it will continue to do that unless and until Congress gives us a different regime to administer.

The FCC's current proposal to establish a straightforward rebuttable presumption that the MVPD market is effectively competitive for purposes of local cable rate regulation now offers opportunity for the FCC to build on the approach of the *Program Access Order*. The agency's proposal fits entirely with Bureau Chief Lake's recognition of the FCC's ability under the Communications Act to adjust its regulation to changing circumstances.

It should be axiomatic that a heavy burden belongs on parties demanding regulation for service providers in competitive markets. When it comes to cable services

offered in an effectively competitive market, local governments seeking to rate regulate those services should bear the evidentiary burden. The FCC has sensibly proposed to match its local cable rate regulations with the effectively competitive reality of the video market by adopting a deregulatory presumption.

The agency should adopt its proposal. And it should pursue additional opportunities for reforming its outdated legacy cable regulations through policies favoring free market competition over government controls.

* Seth L. Cooper is a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

Further Readings

Randolph J. May, *et al.*, "[Response to Questions in the Sixth White Paper 'Video Policy'](#)," Committee on Energy and Commerce, U.S. House of Representatives (January 23, 2015).

Seth L. Cooper, "[FCC Report Reconfirms the Reality of the Video Market's Competitiveness](#)," *FSF blog* (July 25, 2013).

Randolph J. May and Seth L. Cooper, "[The Case for Program Carriage Reform](#)," *Perspectives from FSF Scholars*, Vol. 8, No. 16 (June 10, 2013).

William T. Lake, *et al.*, "[Panel II: The Right Regulatory Approaches to Video Service Providers](#)," *Free State Foundation's Fifth Annual Telecom Policy Conference* (March 21, 2013).

Seth L. Cooper, "[FCC Over-Regulation of Video Services Undermines Free Speech](#)," *Perspectives from FSF Scholars*, Vol. 7, No. 17 (July 17, 2012).

Randolph J. May and Seth L. Cooper, "[Accelerate New Video Breakthroughs by Rolling Back Old Regulations](#)," *Perspectives from FSF Scholars*, Vol. 7, No. 12 (June 18, 2012).

Randolph J. May, "[Rolling Back Regulation at the FCC: How Congress Can Let Competition Flourish](#)," *Perspectives from FSF Scholars*, Vol. 6, No. 11 (April 18, 2011).

Randolph J. May, "[A Modest Proposal for FCC Regulatory Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory](#)," *Perspectives from FSF Scholars*, Vol. 6, No. 10 (April 7, 2011).