



**INTERGOVERNMENTAL ADVISORY COMMITTEE
to the
FEDERAL COMMUNICATIONS COMMISSION**

ADVISORY RECOMMENDATION No: 2015-7

**In the Matter of Amendment to the Commission's Rules Concerning
Effective Competition, Implementation of Section 111 of the STELA
Reauthorization Act (MB Docket No. 15-53 Released March 16, 2015).**

The Intergovernmental Advisory Committee ("IAC") to the Federal Communications Commission ("Commission") submits this Advisory Recommendation regarding the above referenced NPRM addressing revising the Commission rules pertaining to effective competition and implementation of Section 111 of the STELA Reauthorization Act.

1. As an initial matter, we understand that several stakeholders in this proceeding have requested additional time to submit comments and reply comments. The IAC respectfully requests that the Commission grant additional time to such stakeholders. While the Commission may be under Congressional mandate to address certain aspect of these rules particularly dealing with streamlining the process for small cable operators, it does not appear that the Commission is under any time pressure with respect to a wholesale change in the rules. In addition, there has been no pressing timeframe with respect to such matters. Often, when petitions filed by cable operators are opposed, they remain pending for many years at the Commission. Similarly, jurisdictions' petitions to overturn previous findings of effective competition when there have been changed circumstances often remain pending at the Commission for many years.¹ Thus, there has never been urgency with respect to the majority of the issues raised in this proceeding. The IAC respectfully requests that the Commission afford all stakeholders sufficient time to prepare and submit comments.
2. With respect to the substance of the NPRM, the IAC submits that adoption of a rebuttable presumption of effective competition for the entire country is contrary to the public interest.

¹ For example, the City of Coral Gables, FL submitted an application for review of a determination of effective competition in 2007, after circumstances changed when the cable operator which had petitioned for effective competition, Comcast, acquired one of its competitors in the City, Adelphia, thus reducing the number of households that subscribed to services from another provider. That application was filed in 2007, and it is believed that the Commission dismissed it as moot in 2015. See CSR 6406 *et al.* Thus, there seems to be no rush pertaining to petitions filed by such large cable operators.

3. There can be no doubt that cable services as a practical matter are not subject to effective competition, despite the language of the statute and tests established pursuant to federal law. Cable rates have risen at rates substantially higher than inflation and consumer satisfaction with cable services has consistently been a significant issue, even in areas found by the Commission to be subject to effective competition. If there were truly effective competition in the true sense of the term, rates would decrease and consumer satisfaction would increase.
4. The Commission's apparent reliance on the number of successful effective competition petitions as support for changing the standard is not appropriate. As the Commission correctly noted, in the vast majority of petitions filed by cable operators, local franchise authorities have not responded or filed any opposition. There are many reasons for this, most of which have nothing to do with whether there actually is effective competition in the jurisdiction. For example, cable operators serve the petitions on the local franchise authority and the petition may not be brought to the attention of the appropriate municipal or county official with authority to determine whether to oppose the petition for several weeks or months. Most LFAs do not have expertise in this area. Thus, even if it is brought to the attention of appropriate public officials, they are at a loss as to how to respond or address the petition. Many governments have to undertake a public hearing to decide whether to oppose such petitions, which may further delay responding. Further, LFAs lack resources to effectively oppose such petitions. The IAC submits that these are primarily the reasons why so many petitions go unopposed. It is not because there truly is effective competition in such jurisdictions. If that were the case, the few positions that are opposed would be easily dealt with by the Commission, as opposed to remaining pending for years on end, or withdrawn by the cable operators. The IAC submits that it would be appropriate to review how many petitions that were actually opposed were withdrawn by the cable operators. That may be a more **telling** statistic as to what percentage of petitions actually should be denied as not having a basis under the statute.
5. In addition, the IAC questions how many petitions for effective competition affecting how many communities were incorrectly granted by the Commission. In 2008, Time Warner Cable filed 25 petitions to determine effective competition in 725 communities in New York and Pennsylvania.² None were opposed. Unusually, the Media Bureau questioned the data when it showed on its face that by using zip code information, competitors served more households than there actually were in the jurisdictions. The Media Bureau denied on its own initiative the finding of effective competition in 226 of the 725 separate jurisdictions. The Media Bureau determined that five digit zip data may be unreliable and created the requirement effective September 1, 2008, that cable operators submit zip+4 data in such petitions.³ However, the Bureau had been granting such obviously erroneous petitions for six years, since 2002. If the Commission is now

² *In re Time Warner Cable Inc., and Time Warner Entertainment-Advance/Newhouse Partnership 25 Petitions for Determination of Effective Competition in Various Communities in the State of New York and the Commonwealth of Pennsylvania*, Memorandum Opinion and Order, DA 08-1893, MB released August 13, 2008.

³ Public Notice, *Commission Announces New Standards for Showings of effective Competition for Cable Service*, DA-08-1892, released August 13, 2008.

going to shift the burden and presumption based on its notion that a substantial number of jurisdictions have been found correctly to be subject to effective competition, the IAC submits that the Commission must audit these earlier results and determine how many jurisdictions were incorrectly found to be subject to effective competition.

6. Even when the Commission grants unopposed petitions, this is not equivalent to the Commission finding that effective competition exists. Rather, such orders routinely provide that the petitioner has satisfied the requirements of the Commission's rules.
7. More importantly, creating a presumption that the entire country is subject to effective competition, with the changes that this would mean to important consumer protection provisions, would adversely affect cable consumers. The IAC is not primarily concerned with the ability of LFAs to regulate basic service rates and rates for equipment, although that is important to many consumers. As the Commission is aware, very few LFAs have actually implemented rate regulations.
8. On the other hand, there are important consumer protections in federal law that cable operators claim disappear when there is a finding of effective competition. As indicated in the NPRM, approximately 23,000 local franchise authorities remain subject to effective competition. We do not know how many households subscribing to cable services this affects. But it is clearly millions.
9. Federal law provides numerous protections to cable consumers, *unless they are subject to effective competition*.⁴
10. When the Commission grants a Petition for Effective Competition the authority to cap the price of the basic tier and equipment not only is removed,⁵ but all cable consumers lose the protection of a uniform rate structure.⁶ In addition, cable operators may require subscribers to purchase any number of programming tiers before they may order premium and pay per view offerings.⁷ Significantly, a finding of effective competition also removes the prohibition against negative option billing.⁸ The Commission should specifically address whether regulation presumption of effective competition would preempt state laws prohibiting negative option billing. In addition, use of public rights of ways by SMATV operators serving individual properties may be allowed if there is a finding of effective competition.⁹ Further, there remains a question whether public

⁴ See 47 U.S.C. § 543(b)(1).

⁵ The requirement to maintain a low priced basic service tier is undoubtedly beneficial to low income residents and residents on fixed incomes who may not be able to afford paying for more robust tiers of programming.

⁶ 47 C.F.R. § 76.984 requires a uniform rate structure throughout a franchise area unless it is subject to effective competition.

⁷ The anti-buy through requirement of 47 C.F.R. § 76.921 is no longer applicable if the franchise area is subject to effective competition.

⁸ 47 CFR §76.981. Thus, cable operators will be able to add an a la carte service and charge customers, unless customers contact the cable operator to cancel the service. It should be pointed out that such negative option billing may violate state law and thus, create issues as to whether the application of federal law in this regard would preempt state law.

⁹ 47 C.F.R. §76.501(d) forbids a cable operator from offering SMATV service in its franchise area except under the franchise. However, subsection (f) provides that this restriction does not apply under effective competition.

educational and government (PEG) channels must still be carried on a basic tier, if such a tier is offered, where there has been a determination of effective competition.¹⁰

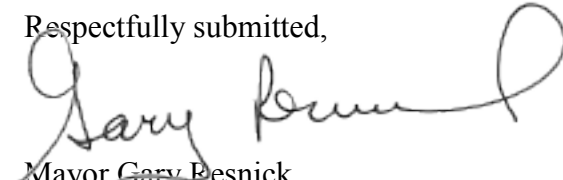
11. It is incumbent that the Commission fully understand the impacts of reversing the standard for effective competition before moving down this path. The IAC submits that if the Commission does move forward with upending the burden and creating a presumption of effective competition, the Commission clarify that it is retaining consumer protections and PEG requirements, and continuing to allow local and tribal governments to require such provisions, even if there is a finding of effective competition. These are real protections that have practical consequences that should not be lost through artificial designations. In addition, because many localities adopt the federal customer service standards in to their local franchises, we strongly urge the Commission to consider initiating a proceeding to modernize its customer service rules.
12. The Commission is aware that there is local franchising in many states. Many states, at the urging of cable operators, have adopted state cable franchising whereby a state agency is the franchising authority. This makes creating the presumption of effective competition in the “franchising authority” particularly troublesome. IAC inquired how this would work in a state with such state franchising. The Media Bureau staff indicated that a state could be divided into separate areas for purposes of effective competition petitions. IAC would request the Commission to clarify how this would work and if municipalities and counties would have standing to challenge petitions for effective competition if they are no longer the franchising authority under state law.
13. The state of the video industry indicates that there is less competition, not more. The IAC submits that it may be appropriate to create a rebuttable presumption that the entire country is subject to video competition if there were numerous cable, satellite and other providers competing aggressively throughout the nation. However, quite the opposite is the case. As the Commission has noted on numerous occasions, in many situations there is only one dominant franchised cable provider. At most, residents may have the option to subscribe to video service by a direct broadcast satellite company or potentially from a local exchange carrier. However, the vast majority of households do not have such options.
14. In addition, there are efforts to further consolidate the industry with Comcast’s recent effort to acquire Time Warner and Charter’s efforts to acquire Bright House Networks and potentially Time Warner, thus reducing cable competition, and further with AT&T seeking to acquire DirecTV, further reducing video competition. Thus, the industry seems intent on greater consolidation with fewer and fewer video providers competing in the

¹⁰ We note that some commenters indicated that local franchise authorities can require that PEG channels be carried on the basic service tier in their franchises. However, there is a significant question as to whether that is correct and how this would apply in states where the state is the franchise authority. In addition, some cable operators have informed LFAs that if there is a finding of effective competition, there is no longer any legal authority, either under a franchise or under the Cable Act, for the LFA to require that PEG channels and local broadcast channels be carried on the basic service tier.

vast majority of households in the country as opposed to smaller and more cable providers offering competing services.

15. The nationwide presumption contemplated by the NPRM is not consistent with Congress' request to the Commission. As has been explained to the IAC, Congress asked for the FCC to consider ways to streamline the process to declare effective competition in the case of small cable operators. Federal law did not ask the FCC to consider creating a nationwide presumption that the entire country is subject to effective competition. The anti-consumer impacts of a Commission decision to declare the entire country subject to effective competition will likely have the effect of further angering cable subscribers, and thus generating more complaints to members of Congress and the Commission.
16. The IAC submits that for the most part, the Commission has been very sensitive to consumer issues and applauds the Commission's actions in this regard. The Commission's recent enhancements of the consumer complaint portal is one example of the Commission's efforts to address consumer issues. However, the IAC submits that the Commission is not acting in the best interests of American consumers by seeking to change the burden and create a presumption that the entire country is subject to effective competition. States, local governments and Indian tribes simply do not have the resources to address petitions filed under such presumption, nor will they be able to counter the arguments submitted by cable operators that file petitions under this standard.
17. The IAC and its members, and previous IACs periodically addressed the issue of effective competition. We remain willing to work with the Commission if there are issues the Commission would like to address to deal effectively with federal statutes mandating Commission action with respect to effective competition. However, we caution that the Commission not move forward with a presumption that the entire United States is subject to effective competition, making it likely that all of the important consumer safeguards that go along with such finding, will be lost.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary Resnick". The signature is fluid and cursive, with a large loop at the end.

Mayor Gary Resnick
Chair of the IAC

May 15, 2015