ORAL ARGUMENT NOT YET SCHEDULED

Case No. 15-1295

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL ASSOCIATION OF BROADCASTERS, and NORTHERN DAKOTA COUNTY CABLE COMMUNICATIONS COMMISSION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents, and

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION and AMERICAN CABLE ASSOCIATION,

Intervenors.

On Petition for Review of an Order of the Federal Communications Commission

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INITIAL BRIEF OF NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL ASSOCIATION OF BROADCASTERS, AND NORTHERN DAKOTA COUNTY CABLE COMMUNICATIONS COMMISSION

Stephen B. Kinnaird
Counsel of Record
Matthew L. Gibson
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700
stephenkinnaird@paulhastings.com
Attorneys for Petitioners
(Additional counsel on inside cover)

December 14, 2015

Stephen Traylor
Executive Director
NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND
ADVISORS
3213 Duke Street
Suite 695
Alexandria, VA 22314

Rick Kaplan
Jerianne Timmerman
Scott Goodwin
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street NW
Washington DC 20036

Brian T. Grogan
MOSS & BARNETT
150 South Fifth Street, Suite 1200
Minneapolis, MN 55402
Attorneys for the Northern Dakota County Cable Communications Commission

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

PARTIES AND AMICI

The parties in this Court are petitioners National Association of Telecommunications Officers and Advisors, National Association of Broadcasters, and Northern Dakota County Cable Communications Commission; respondents Federal Communications Commission and United States of America; and intervenors American Cable Association and National Cable & Telecommunications Association.

The following parties submitted comments prior to the issuance of the order on review:

Allen Johnston
Alliance for Community Media
American Cable Association
American Community Television
Ann Maki
Armando John Flocchini III
Bernie Bornong
Beth Melonuk
Bob Connelly
Bonnie Karberg
Broadcaster Representatives
Cablevision Systems Corporation

Charles Ksir
Charles Magee
Charter Communications, Inc.
Christine Christian
Common Cause
Consumer Action
Consumers Union
Dan Carter
David J. Van Oss
Dr. Alan W. Maki
Dr. Sam Dorrence
Faith Rubis
Free Press
Gail M. Klein
Georganne Hunter
Gloria Hedderman
Greenlining Inst.
Hal C. Johnson
Harvey L. Klein
Intergovernmental Advisory Committee
Independent Telephone & Telecommunications Alliance
J. Twiford
Jackie Anthony
James Arsenault
James Benepe
James Ray
Jason A. Senteney
Jennifer Giese
Jonathan Arnold
K. M. Begelman
Kathleen Lowe
Kelly Hand
Kenneth Brown
Kent Harker
Kim DeAtley
KVMD Licensee Co., LLC and Rancho Palos Verdes Broadcasters, Inc.
Larry Jorgenson
Lee M. Cutler

Leslie Tate
Linda Taylor
Mandy Thomas
Margaret Gwin
Marilynn Perkins
Mary V. Scott
Massachusetts Department of Telecommunications and Cable
Media Alliance
Morgan Wick
Morticia Gosselin
NAB and Public Knowledge
Nancy Calhoun
National Association of Black Owned Broadcasters, Inc.
National Association of Broadcasters
National Association of State Utility Consumer Advocates
National Association of Telecommunications Officers and Advisors
National Cable & Telecommunications Association
National Hispanic Media Coalition
NBC Television Affiliates and CBS Television Network Affiliates Association
New Jersey Division of Rate Counsel
Northern Dakota County Cable Communications Commission (Mayor George Tourville, Chair)
Office of Cable Television, New Jersey Board of Public Utilities
Penny Twomey
Public Knowledge
Rena Appel
Rep. Dan R. Kirkbride
Rev. Sheldon Williams
Richard Sickler
Rita Farrow
Ruby Calvert
Sally Bub
Sandra Ksir
Satellite Broadcasting and Communications Association
Senator Stan Cooper
Shay Howlin
Shirley Brock

Steve Poole
Steven Brock
T. Paul Stauffer
Tarina Leithead
The Free State Foundation
The Hispanic Institute
Tracy Rosenberg
UCC OC Inc.
Univision Communications Inc.
Wayne Karberg
William Britz
William C. Beaman.

RULING UNDER REVIEW

Petitioners seek review of the final order of the Federal Communications Commission captioned *Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Final Rule, MB Docket No. 15–53, FCC 15–62, 80 Fed. Reg. 38001 (July 2, 2015) (JA___).

RELATED CASES

There are no related cases.

Respectfully submitted,

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700
(202) 551-1705
stephenkinnaird@paulhastings.com

Attorneys for the National Association of Telecommunications Officers and Advisors, the National Association of Broadcasters, and the Northern Dakota County Cable Communications Commission

Stephen Traylor
Executive Director
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS
3213 Duke Street
Suite 695
Alexandria, VA 22314

Rick Kaplan
Jerianne Timmerman
Scott Goodwin
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street NW
Washington DC 20036

Brian T. Grogan
MOSS & BARNETT
150 South Fifth Street, Suite 1200
Minneapolis, MN 55402
Attorneys for the Northern Dakota County Cable Communications Commission

December 14, 2015

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, Petitioners respectfully submit the following corporate disclosure statements.

The National Association of Telecommunications Officers and Advisors is a non-profit, incorporated association of telecommunications advisors and officers whose members include both individuals and agencies engaged in the regulation of cable systems. It has no parent company, and no publicly held corporation has a 10% or more ownership interest in the Association.

The National Association of Broadcasters is a non-profit, incorporated association of radio and television stations and broadcasting networks. It has no parent company, and no publicly held corporation has a 10% or more ownership interest in the Association.

The Northern Dakota County Cable Communications Commission is a Minnesota Joint Powers Cooperative made up of seven municipalities (Inver Grove Heights, Lilydale, Mendota, Mendota Heights, South St. Paul, Sunfish Lake, and West St. Paul) that serves its member cities by administering and enforcing the cable franchise ordinance, managing institutional programming, and overseeing local community programming on their behalf. It has no parent company, and no

publicly held corporation has a 10% or more ownership interest in the Commission.

STATEMENT REGARDING DEFERRED APPENDIX

The parties will use a deferred joint appendix.

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GLOSSARY

1984 Cable Act	Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (1984)
1992 Cable Act	The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)
1993 Order	*Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993)
Communications Act	Communications Act of 1934
Commission	Federal Communications Commission
BIA	Bureau of Immigration Appeals
DBS	Direct Broadcast Service
FCC	Federal Communications Commission
IAC	Intergovernmental Advisory Committee
LEC	Local Exchange Carrier
MVPD	Multichannel Video Programming Distributor
NAB	National Association of Broadcasters
NATOA	National Association of Telecommunications Officers and Advisors
NDC4	Northern Dakota County Cable Communications Commission
Order	*Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Final Rule, MB Docket No. 15–53, FCC 15–62, 80

	Fed. Reg. 38001 (July 2, 2015)
Petitioners	NATOA, NAB, and NDC4
STELA	Satellite Television Extension and Localism Act

JURISDICTIONAL STATEMENT

Respondent the Federal Communications Commission ("FCC" or "Commission") adopted its final order, *Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Final Rule, MB Docket No. 15–53, FCC 15–62, on June 2, 2015 ("Order"), and published it in the Federal Register on July 2, 2015. 80 Fed. Reg. 38001 (July 2, 2015) (JA__). Petitioners timely filed a petition for review in this Court on August 30, 2015. *See* 47 U.S.C. § 405(a). This Court has jurisdiction to review the Order under 47 U.S.C. § 402(a).

STATEMENT OF ISSUES

1. Where Congress requires the Commission to "find[]" that effective competition exists in specific franchise areas in order to terminate the regulatory jurisdiction of state and local franchising authorities over basic cable service, 47 U.S.C. § 543(a)(2), (*l*)(1), may the Commission merely presume that effective competition exists based on national market share data without any evidence specific to the franchise area?

2. Where Congress only authorizes the Commission to "review" certified franchising authorities' regulation of cable system rates "[u]pon petition by a cable operator or other interested party," 47 U.S.C. § 543(a)(5), may the Commission

sua sponte terminate prior certifications *en masse* and require franchising authorities to reapply for certification and prove effective competition in their franchise areas?

3. Where Congress requires the Commission "to establish a streamlined process for filing of an effective competition petition" by small cable operators, 47 U.S.C. § 543(o)(1), may the Commission abolish that process for all cable operators, large and small?

4. May the Commission rationally presume that a cable system faces effective competition in each of the more than 23,000 franchise areas across the country where such competition has never previously been found, based on national market share data of competing providers?

STATUTES AND REGULATIONS

Applicable statutes and regulations appear in a separate Addendum.

STATEMENT OF THE CASE

In the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act"), Congress required that the Commission "find[]" that a cable operator faces effective competition in specific franchise areas in order to terminate the regulatory jurisdiction of state and local franchising authorities over basic cable service in

those franchise areas. 47 U.S.C. § 543(a)(2), (*l*)(1). Congress also authorized review of the regulatory authority of previously certified franchising authorities only upon petition of a cable operator or interested third party, and in 2014 required the Commission to streamline (not abolish) the petitioning process for small cable operators. *Id.* § 543(a)(5), (o)(1) & (2).

In the Order on review, the Commission dispensed with those statutory requirements. Unwilling to evaluate evidence and make findings with regard to competitive conditions in potentially 23,506 franchise areas that had not been previously adjudicated, the Commission ignored congressional intent and adopted a rebuttable presumption that a cable operator faces effective competition from other providers in every single franchise area in the country, and shifted the burden of rebutting that presumption from cable operators to franchising authorities. Order ¶¶ 6-16 (JA___). The Commission further relieved cable operators of the requirement to petition for findings of effective competition based on evidence in franchise areas. Instead, the Commission ruled *sua sponte* that each of the certifications it previously issued to many thousands of local franchising authorities to regulate the rates of cable operators would automatically terminate within 90 days of the effective date of the new rules, unless the franchising authority filed a new application for certification with evidence rebutting the presumption. *Id.* ¶¶ 17-28 (JA___). Petitioners seek judicial review of the Order

pursuant to 47 U.S.C. § 402(a) to vindicate the statutory scheme that Congress established.

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

I. STATUTORY AND REGULATORY BACKGROUND

In the 1992 Cable Act, Congress sought to address problems of exorbitant subscriber rate increases by cable operators that had been deregulated under the Commission's prior lax effective competition rules implementing the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (the "1984 Cable Act"). In their stead, Congress adopted a statutory definition of effective competition, and required the Commission to make specific findings of effective competition in each franchise area to determine whether franchising authorities could regulate cable rates.

A. The 1984 Cable Act

Congress enacted the 1984 Cable Act to eliminate a patchwork of federal, state, and local laws that had collectively impeded the growth of the then-nascent cable television industry. *See* H.R. Rep. 102-628, at 29 (1992) (summarizing history). As part of the legislation, Congress addressed the ability of federal, state and local authorities to regulate cable rates. Specifically, the 1984 Cable Act amended the Communications Act of 1934 to add Section 623, which directed the Commission to adopt regulations authorizing local franchising authorities "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 (§ 623(b)(1)).

Congress opted not to define "effective competition" and instead instructed the Commission to "define the circumstances in which a cable system is not subject to effective competition." *Id.* § 2 (§ 623(b)(2)(a)). In response, the Commission defined effective competition in terms of broadcast signals reaching the market, concluding that "the existence of three or more off-the-air broadcast signals in the cable market provides viewers with adequate programming choices and presents an effective constraint on the market power of a cable system in the provision of basic service." *Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 Rad. Reg. 2d (P&F) 1, ¶ 100 (1985).

B. The 1992 Cable Act

Because of the expansive reach of television broadcast stations, cable operators easily satisfied the Commission's effective-competition regulations and achieved widespread deregulation of their rates across the country. As Congress concluded in the 1992 Cable Act, off-the-air television broadcast signals did not provide a true competitive check on cable operators, absent the presence of other

multichannel video programming distributors (MVPDs) in the market. "Without the presence of another multichannel video programming distributor, a cable system faces no local competition," and "[t]he result is undue market power for the cable operator as compared to that of consumers and video programmers." Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460.

Cable operators exploited their local market power to drive up rates rapidly, with Congress in 1992 finding that

> rates for cable television services have been deregulated in approximately 97 percent of all franchises since December 29, 1986. Since rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers. Although the average number of basic channels has increased from about 24 to 30, average monthly rates have increased by 29 percent during the same period. The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index since rate deregulation.

Id. § 2(a)(1); H.R. Rep. 102-628, at 30-33.

Because "some cable operators ha[d] abused their deregulated status and ha[d] unreasonably raised the rates they charge consumers," Congress amended Section 623 to add both substantive and procedural measures "to protect consumers from unreasonable cable rates." H.R. Rep. 102-628, at 79.

The revised Section 623 has five essential procedural components.[1] First, "[t]he Act divides the cable services of a system that is subject to rate regulation into three categories: (1) the basic service tier; (2) cable programming service; and (3) video programming offered on a per channel or per program basis, which alone is not subject to rate regulation." *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 162 (D.C. Cir. 1995) (citing 47 U.S.C. §§ 543(a)(1), (*l*)(2)). The 1992 Cable Act defines "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals," 47 U.S.C. § 522(3), and provides that "[e]ach 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." *Id.* § 543((b)(7)(A). The basic service tier "shall, at a minimum, consist of" (1) all signals subject to the Act's "must-carry" provisions; (2) any "public, educational, and governmental access programming" required under the cable franchise; and (3) "[a]ny 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." *Id.* § 543(b)(7)(A)(i)-(iii). "The term 'cable programming service' means any video

[1] The substantive rate provisions of section 623 are not at issue in this proceeding. *See, e.g.*, 47 U.S.C. § 543(b), (d), (e), (f).

programming provided over a cable system" that is not "carried on the basic service tier" or "offered on a per channel or per program basis." *Id.* § 543(*l*)(2).

Second, the Communications Act assigns regulatory authority over the first two categories of cable services. The Communications Act authorizes qualified state or local franchising authorities certified by the Commission to regulate basic cable service; the Communications Act also empowers the Commission to disapprove an application for certification or revoke a previously issued certification (in which case the Commission would exercise the franchising authority's jurisdiction until the authority qualified). *Id.* § 543(a)(3)-(5). The Communications Act further empowers the Commission to prescribe regulations to ensure that basic service tier rates set by franchising authorities were reasonable. *Id.* § 543(b)(1).[2]

Third, Congress intended that regulatory jurisdiction would only be exercised in franchise areas where local competitive conditions warranted it. Congress permitted franchising authorities to "regulate the rates for the provision of cable service … only to the extent provided under this section [623]," and

[2] Congress also authorized the Commission to promulgate and enforce regulations governing cable programming service rates. *Id.* § 543(c). Congress later sunset the Commission's power to regulate cable programming services rates as of 1999. *Id.* § 543(c)(4).

imposed a similar bar on federal and state authorities. *See* 1992 Cable Act, § 3(a); 47 U.S.C. § 543(a)(1). Congress made the authority of state, local, and federal agencies to regulate cable rates depend on Commission findings regarding the existence of effective competition in a specific franchise area. "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." *Id.* §543(a)(2) (emphasis added). On the other hand, "[i]f the Commission *finds* that a cable system is not subject to effective competition," then a franchising authority (or the Commission acting in its stead) may regulate the rates for basic cable service. *Id.* §543(a)(2)(A) (emphasis added).

Fourth, rather than delegating formulation of an "effective competition" standard to the Commission, as it had previously done in the 1984 Cable Act, Congress adopted a statutory definition requiring determination of the competitive circumstances in each specific franchise area. Congress thus recognized that "the extent of … [a cable operator's] market power varies from locality to locality." S. Rep. 102-92, at 18 (1992).

Specifically, the 1992 Cable Act defined effective competition to require the existence of at least one of three factual conditions in the franchise area. Pub. L.

No. 102-385, 106 Stat. 1464, § 3(a) (amending § 623*(l)* of the Communications Act). The first condition is that "fewer than 30 percent of the households *in the franchise area* subscribe to the cable service of a cable system," 47 U.S.C. § 543(*l*)(1)(A) (emphasis added). The Commission has termed this circumstance "'Low Penetration Effective Competition.'" Order ¶ 2 (JA___). The second condition requires both that "the franchise area" is "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 that more than "15 percent of the households *in the franchise area*" subscribe to programming services offered by MVPDs "other than the largest multichannel video programming distributor." 47 U.S.C. § 543(*l*)(1)(B) (emphasis added). The Commission has termed this circumstance "Competing Provider Effective Competition." Order ¶ 2 (JA___). The third is that a MVPD operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households *in that franchise area*." 47 U.S.C. § 543(*l*)(1)(C) (emphasis added). The Commission calls this circumstance "Municipal Provider Effective Competition." Order ¶ 2 (JA___). Congress added a fourth condition in 1996[3]: namely, the offering by a local exchange carrier or its

[3] Telecommunications Act of 1996, Pub. L. 104–104, tit. III, § 301(b)(3), 110 Stat. 115 (Feb. 8, 1996).

affiliate (or other persons using their facilities) of comparable video programming services "*in the franchise area* of an unaffiliated cable operator which is providing cable service in that franchise area." 47 U.S.C. § 543(*l*)(1)(D) (emphasis added). The Commission designates this circumstance "Local Exchange Carrier (LEC) Effective Competition." Order ¶ 2 (JA___).

Finally, in areas where the Commission finds no effective competition, Congress provided procedures for qualifying and certifying franchising authorities to exercise the regulatory authority Congress granted. "A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A)" – *i.e.*, the jurisdiction to regulate rates for basic cable service where the Commission finds no effective competition – "shall file with the Commission a written certification" that it would regulate rates consistently with Commission regulations; that it has the legal authority and personnel to do so; and that its procedural laws and regulations "provide a reasonable opportunity for consideration of the views of the interested parties." 47 U.S.C. § 543(a)(3). After a franchising authority has received certification, Congress also empowered the Commission, "[u]pon petition by a cable operator or other interested party" to "review the regulation of cable system rates by a franchising authority under this subsection." *Id.* § 543(a)(5). "If the Commission finds that the franchising

authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief." *Id*.

C. FCC Regulations Implementing the 1992 Cable Act

In 1993 and 1994, the Commission adopted rules to implement the 1992 Cable Act and established a presumption that the cable operator does not face effective competition, placing the burden upon the cable operator to overcome the presumption. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 ¶ 42 (1993) ("1993 Order"), *on reconsideration*, Third Order on Reconsideration, 9 FCC Rcd 4316 (1994), *rev'd in part*, *Time Warner Entm't Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

In adopting that approach, the Commission acknowledged the "franchising authorities' concern that they do not have access to the information or the resources necessary to show the absence of effective competition as a threshold matter of jurisdiction." 1993 Order ¶ 41. Although the Commission conceded that "the language of the Act requires the Commission to 'find' that a cable system is not subject to effective competition, and makes the absence of effective competition a prerequisite to rate regulation," the Commission explained that

"given the sheer number of franchise areas, our procedures cannot rely on a thorough Commission analysis of effective competition for each franchise area in any timely fashion." *Id.* The Commission cited congressional policies in favor of streamlined certification processes and expeditious implementation of rate regulation, and held that "[d]elaying certification of local franchising authorities until we make an affirmative finding in each case as to the presence or absence of effective competition would seriously undermine these objectives." *Id.*

Accordingly, the Commission declared that it would "presume that the cable operator is not subject to effective competition"; the franchising authority would rely on that presumption in filing its certification unless it knew the contrary to be true; and "[t]he cable operator w[ould] then have the burden of rebutting this presumption with evidence of effective competition." *Id.* ¶ 42. Placing that burden upon cable operators was reasonable, the Commission determined, because they would be "motivated to bring all competitive facts to light," are "locally positioned … to obtain the most precise data on competition in a given area," and have a right to request and receive competitive data under the rules. *Id.* ¶ 46. The Commission opined that this procedure would ensure "that there is sufficient data upon which to base a meaningful decision," and that "systems subject to effective competition are not subjected to rate regulation simply by operation of the presumption." *Id.* ¶ 42.

The Commission then outlined its certification procedure. Characterizing a finding of no effective competition as "a jurisdictional predicate to rate regulation," the Commission ruled that "franchising authorities may base their initial finding of effective competition on a presumption that such competition does not exist, with the burden on the operator to disprove this presumption." *Id.* ¶ 86. The local franchising authority would file a standard form (Form 328) that includes a certification that the authority believes that the presumption of no effective competition is correct in the relevant communities. *Id.* ¶ 74; *see id.* App. D (Question 6: "The Commission presumes that the cable system(s) … is (are) not subject to effective competition. Based on the definition below, do you have reason to believe that this presumption is correct? If not, state why not."). Given the statutory requirement that applications for certification become effective 30 days after being filed, 47 U.S.C. § 543(a)(4), the Commission declared that it "must rely initially on the franchising authority's statement that it does in fact meet certification standards." 1993 Order ¶ 86.

The cable operator could file a petition for reconsideration of the certification decision to challenge the effective competition finding within 30 days, which would stay any rate regulation by the franchising authority. 1993 Order ¶¶ 87-89. The Commission noted that "[t]his procedure prevents the imposition of

rate regulation until the issue of the existence of effective competition can be determined." 1993 Order ¶ 89.

If certification were granted, the cable operator could later petition the franchising authority for a change of status, and file a petition for revocation of certification with the Commission supplying evidence to rebut the presumption of competition. 1993 Order ¶ 101; *see* 47 U.S.C. § 543(a)(5).

Under the 1993 rules, the Commission has granted certificates to "thousands" of local franchising authorities, Order ¶ 12 (JA__), mostly soon after the rules took effect. The Commission had made an express finding of effective competition in only 10,129 out of 33,635 franchise areas through the end of 2014.[4]

D. The STELA Reauthorization Act of 2014

Against this backdrop, Congress in 2014 sought to alleviate the burdens upon small cable operators of petitioning for findings of effective competition. In section 111 of the STELA Reauthorization Act (an act principally concerned with satellite broadcasting issues), Congress directed the Commission to "complete a

[4] *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 29 FCC Rcd 14895 ¶ 8 (Dec. 15, 2014). The Commission treats the areas identified by separate Community Unit Identification Numbers assigned to cable operators as approximating separate franchise areas. Order ¶ 7 n.8 (JA___).

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," within 180 days of enactment. Pub. L. No. 113–200, § 111, 128 Stat. 2066 (2014); 47 U.S.C. § 543(o)(1). Congress declared, however, that "[n]othing 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." *Id.* § 543(o)(2). Congress also expressly defined what it meant by "small": namely, an 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." *Id.* § 543(m)(2), (o)(3).

II. THE COMMISSION'S ORDER ON REVIEW IMPLEMENTING THE STELA REAUTHORIZATION ACT OF 2014

Notwithstanding Congress's embrace of the cable operator's responsibility to petition for a finding of effective competition, and the narrowness of the STELA Reauthorization Act mandate to streamline petitioning procedures for small cable operators only, the Commission took the STELA Reauthorization Act's directive as an opportunity to abolish that responsibility *wholesale*, and to do so for *all* cable operators.

A. The Commission Adopted a Nationwide Presumption of Effective Competition Applicable to Every Franchise Area.

The Commission began by observing that "[i]n 1993, when the Commission implemented the statute's Effective Competition provisions, the existence of Effective Competition was the exception rather than the rule." Order ¶ 3 (JA___). "[I]ncumbent cable operators had approximately a 95 percent market share of MVPD subscribers and only a single cable operator served the local franchise area in the vast majority of franchise areas, which is very different from today's marketplace." Order ¶ 6 (JA___). The Commission noted that subsequently, for 99.5% of the franchise areas where a petition had been filed, it had granted a cable operator's petition for effective competition. Order ¶ 7 (JA___). The Commission discounted the possibility that cable operators were unlikely to file petitions where they lacked evidence of effective competition. Rather, it assumed that the 99.5% grant rate was "representative of the marketplace on the whole," speculating that cable operators were either dissuaded from filing petitions because of cost or "perhaps" because their franchising authorities chose not to regulate their rates despite having the authority to do so. *Id.* (JA___).

Even though the "Competing Provider Effective Competition" piece of the statute is defined in terms of the availability and subscription percentage of competing MVPDs "in the franchise area," 47 U.S.C. § 543(*l*)(1)(B)(i) & (ii), the

Commission proceeded to establish a presumption of franchise-area effective competition based on national data of MVPD penetration. On the first prong, requiring that the competing provider offer comparable programming to at least 50% of the households in the franchise area, the Commission ruled that "the ubiquitous *nationwide* presence of DBS [(Direct Broadcast Service)] providers, DIRECTV and DISH Network, presumptively satisfies the requirement 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*." Order ¶ 8 (JA___) (emphasis added). "With regard to the second prong of the test," the Commission declared that it "will presume that more than 15 percent of the households *in a franchise area* subscribe to programming services offered by MVPDs other than the largest MVPD" because "*on a nationwide basis* competitors to incumbent cable operators have captured approximately 34 percent of U.S. households …." *Id.* ¶ 9 (JA___) (emphasis added). Accordingly, the Commission "conclude[d] that adopting a rebuttable presumption of Competing Provider Effective Competition is consistent with the current state of the video marketplace." *Id.* ¶ 10 (JA___).

The Commission did not otherwise alter the existing presumption of no "effective competition" for the three other types of competition. *See* 47 U.S.C. § 543(*l*)(1)(B)-(D). Under the Commission's new split-presumption regime, there

is thus a presumption of effective competition for the first prong of the effective competition standard of section 623(*l*)(i), and a presumption of no effective competition for the other three prongs. 47 C.F.R. § 76.906.

B. The Commission Ruled That It Could Make a Finding of Effective Competition in a Franchise Area Based Solely on the Presumption, without Any Evidence Specific to the Franchise Area.

Despite the statutory requirement that it "find[]" the presence or absence of effective competition in specific franchise areas in determining the permissibility of rate regulatory authority, 547 U.S.C. § 543(a)(2), the Commission ruled that there was "no statutory bar" to determining effective competition based strictly on its newly adopted nationwide presumption. Order ¶ 11 (JA___). The Commission interpreted its 1993 order as declaring that a franchise-area-specific, evidence-based finding was "not mandated by statute," and that it may rely on a presumption "based on what was most efficient given the state of the marketplace at the time the presumption was adopted." *Id.* (JA___). The Commission stated that it would only evaluate evidence specific to the franchise area where the franchising authority decided to provide it: "the Commission will continue to receive evidence regarding a specific franchise area where the franchising authority deems it relevant." *Id.* (JA___).

C. The Commission Instituted New Procedures for Certifying and Revoking the Jurisdiction of Franchising Authorities to Regulate Cable Rates.

The Commission also revised its procedures for certification and revocation of the jurisdiction of franchising authorities. Under the new rules, "a franchising authority will obtain certification to regulate a cable operator's basic service tier and associated equipment by filing a revised Form 328, which shall include a demonstration rebutting the presumption of Competing Provider Effective Competition"; the franchising authority, however, may still rely on the presumption of no effective competition as to the other three types of competition identified in the statute. Order ¶¶ 17-18 (JA___). Any filed certification would be deemed effective after 30 days, whereupon the cable operator may file a petition for reconsideration within 30 days making one or more showings: namely, demonstrating that the franchising authority failed to rebut the presumption of "effective competition" under subparagraph 623(*l*)(1)(A), or rebutting the converse presumption of "no effective competition" under subparagraphs 623(*l*)(1)(B)-(C). Order ¶ 21 (JA___). The Commission declared its rule consistent with the STELA Reauthorization Act because eliminating petition responsibilities for all cable operators necessarily reduces the administrative burden on small operators. Order ¶¶ 17-20 (JA___).

The Commission also relied on the new effective-competition presumption to wipe out thousands of existing certifications *en masse*, without any evidence as to competitive conditions in the franchise area. The Commission gave franchising authorities with existing certifications only 90 days from the effective date of the rules to file new applications preserving their regulatory jurisdiction. Order ¶ 27 (JA___). The Commission ruled that "[i]f a franchising authority with an existing certification does not file a new certification (Form 328) during the 90-day timeframe, its existing certification will expire at the end of that timeframe as long as there is" no pending effective-competition proceeding. *Id.* (JA___).

The Order further directed the Media Bureau, at the end of the 90 days, to issue public notice of all authorities that *did* file new Form 328 applications or are parties to pending effective-competition proceedings, and to declare a mass "finding of Competing Provider Effective Competition applicable to all other currently certified franchising authorities." *Id.* (JA___). This mass "finding" would not be based on evidence specific to the franchise area; rather, "[t]he Media Bureau's finding of Competing Provider Effective Competition will be based on the new presumption coupled with the franchising authority's failure to attempt to retain its certification by resubmitting Form 328 accompanied by the requisite showing of no Competing Provider Effective Competition." *Id.* (JA___).

SUMMARY OF ARGUMENT

The Order on review violates the plain language of Section 623 of the Communications Act in three respects, or at a minimum unreasonably construes that statute. First, Congress denies franchising authorities jurisdiction to regulate rates for basic cable service "[i]f the Commission *finds* that a cable system is subject to effective competition" in the franchise area. 47 U.S.C. § 543(a)(2), (*l*)(1) (emphasis added). The term "finds" denotes a determination based on evidence. Thus, to find that a cable system faces effective competition from other providers, the Commission must make a finding based on evidence that (among other things) subscribers to competitive providers other than the largest MVPD "exceed 15 percent of the households in the franchise area." *Id.* § 543(*l*)(1)(B)(ii). The Commission purports to make this "finding" without any evidence specific to the franchise area, but rather solely based on a national presumption of competing-provider effective competition coupled with the failure of a franchising authority to file for a new certification. "[A]n agency is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found." *United Scenic Artists v. NLRB*, 762 F.2d 1027, 1034 (D.C. Cir. 1985). The Commission cannot make franchise-area findings based on the *absence* of evidence regarding the franchise area, especially in light of the longstanding principle that the Commission must develop

an adequate record to perform its public functions even if parties to a proceeding fail to do so.

Second, the Commission's mass termination of the certifications of thousands of franchising authorities does not comport with Section 623. Once a franchising authority has received a certification to regulate rates for basic cable service, it remains effective indefinitely, and the Commission may only "review the regulation of cable system rates by a franchising authority under this subsection" "[u]pon petition by a cable operator or other interested party." 47 U.S.C. § 543(a)(5). Section 623 does not permit the Commission *sua sponte* to terminate existing certifications automatically, with no cable operator petition and no finding that the authority's jurisdiction violates the statute, and then require a franchising authority to submit a new certification application. The Commission had previously deemed a revocation petition by a cable operator as necessary to the termination of franchising authority jurisdiction on effective competition grounds. The Commission offers no statutory basis for its automatic mass termination of existing certifications of franchising authorities 90 days from the effective date of the new rule.

Third, recognizing that cable operator petitions are necessary to revoke certifications on effective competition grounds, Congress in 2014 directed the

Commission "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," 47 U.S.C. § 543(o)(1) (emphasis added), and declared that "[n]othing 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." *Id.* § 543(o)(2). The Commission does not "establish a streamlined process for filing of an effective competition petition" by small (and particularly rural) cable operators by abolishing that process altogether. Moreover, Congress intended the Commission to streamline the petitioning process while retaining the burden of proof on cable operators, and the Commission's new rules do precisely the opposite.

Even if the Order did not so clearly violate Section 623, the Commission's adoption of a presumption of effective competition in each of 23,506 franchise areas based on national DBS market share is arbitrary and capricious. Agencies may only adopt rebuttable presumptions in adjudication if there is a "rational nexus between *the proven facts* and the presumed facts." *United Scenic Artists*, 762 F.2d at 1034 (emphasis added). Here, the presumption does not depend on any proven facts about the franchise area that would allow inference of the facts necessary to satisfy the statutory effective competition standard. A national average is not a proxy for effective competition in a local franchise area. Finally, the agency must

demonstrate a need for a presumption (*e.g.*, facts such as purpose or causation that are not readily subject to direct proof). The administrative convenience to the Commission of avoiding the factfinding that the 1992 Cable Act commands is not proper justification for a rebuttable presumption. This Court should set aside the Order as contrary to law or alternatively arbitrary and capricious.

STANDING

Petitioner Northern Dakota County Cable Communications Commission ("NDC4") is a local franchising authority in Minnesota that participated below. "NDC4 has been certified for many years to exercise rate regulation authority under the FCC's rules." *Ex Parte Comment*, Mayor George Tourville, NDC4 Chair 1 (May 14, 2015) (JA___) ("NDC4 Comment"). NDC4 is directly aggrieved by the Order because its certification to regulate the rates and practices of its franchised cable systems is subject to termination by the Order without any lawful finding of effective competition in its franchise areas. Add. A-141–A-143, Declaration of Jodie Miller, Executive Director, NDC4.[5] NDC4's regulatory jurisdiction under Section 623 is critical to the investigation of recent substantial rate increases and fee stacking by its regulated cable operator; to protecting

[5] Pursuant to *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002), Petitioners provide declarations in support of standing in the separate Addendum.

services to elderly and "low-tech" subscribers; and to enforcing the 1992 Cable Act's consumer protection measures. NDC4 Comment at 2-3 (JA__).

Petitioners National Association of Telecommunications Officers and Advisors ("NATOA") and National Association of Broadcasters (NAB), both of which filed comments below, are trade associations with associational standing. A trade association may have associational standing if "[1] its members would otherwise have standing to sue in their own right, [2] the interests it seeks to protect are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members." *Defenders of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013) (internal quotation marks omitted).

NATOA is a non-profit, incorporated association of telecommunications advisors and officers that engages in legislative, regulatory, and judicial advocacy on behalf of its members, which include both individuals and local franchising authorities engaged in the regulation of cable systems. Its members include local franchising authorities (like NDC4) that are aggrieved by the Order's provisions permitting termination of their certificates and regulatory jurisdiction over cable systems without any required finding of effective competition in their franchise

areas. *See* Add. A-137–A-139, Declaration of Stephen Paul Traylor, Executive Director, NATOA.

NAB is a non-profit, incorporated trade association of radio and television stations and broadcasting networks that represents its members before Congress, the courts, the Commission, and other governmental bodies. NAB's standing arises from the Order's effect on its members' retransmission consent negotiations with cable operators.

The Communications Act forbids a cable system or other MVPD to carry the signal of a local commercial television broadcast station (and certain other stations) without its consent. 47 U.S.C. § 325(b). The Act further provides that "[e]ach 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," and that basic service tier must include local broadcast station signals. *Id.* § 543(b)(7)(A).

As a general matter, cable operators negotiate retransmission consent agreements with television broadcasters, including NAB members. Those agreements entail the payment of compensation, including monetary fees, to broadcasters in return for consent to carriage of their signals by cable operators. *See* Add. A-35–A-40, Declaration of Scott Goodwin, NAB Associate General

Counsel, Legal and Regulatory Affairs ¶ 6. In jurisdictions deemed subject to effective competition pursuant to the Order, cable operators will refuse in negotiating retransmission consent agreements to recognize or honor any obligation to carry local broadcast signals on the basic service tier (as cable industry representatives confirm). *Id.* ¶¶ 9-10 & Ex. D (*Effective Competition Change Could Improve Cable Retrans Leverage*, Communications Daily (Mar. 31, 2015)). As a result of the Order on review and cable operators' reliance thereupon in future negotiations, NAB members will be injured (1) by cable operators' removal of their signal from the basic service tier to a higher-priced programming tier with fewer subscribers, thus reducing broadcast station viewership and potentially advertising revenues, and/or (2) by reduction of retransmission consent fees payable by cable operators as a *quid pro quo* for making the broadcaster's signal universally available to all subscribers. *Id.* ¶ 11.

Thus, NATOA's and NAB's members have standing in their own right to seek relief from the Order, and the representation of its members in this proceeding is germane to each association's purpose as advocates of those members' interests. Furthermore, because Petitioners raise legal challenges to the Order and do not seek special relief for particular members, the participation of individual NATOA and NAB members is not necessary to review of the Order or any relief requested.

Accordingly, NATOA and NAB each have associational standing. *Defenders of Wildlife*, 714 F.3d at 1323.

So long as a single petitioner has standing, this Court may proceed with this review proceeding without determining the standing of other petitioners. *Noel Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir. 2013).

STANDARD OF REVIEW

This Court may hold unlawful and set aside the Order if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). This Court reviews the Commission's interpretation of the Communications Act pursuant to the familiar two-step framework of *Chevron USA., Inc. v. NRDC*, 467 U.S. 837 (1984). Under *Chevron* Step 1, this Court inquires "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute is ambiguous, under *Chevron* Step 2, this Court defers to the agency's interpretation only if it is reasonable. *Id.* at 843-44.

ARGUMENT

I. THE COMMISSION'S NEW EFFECTIVE COMPETITION RULES VIOLATE THE STATUTE.

"When the words of a statute are unambiguous," the Supreme Court has declared, "judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal quotation marks omitted). Here, the Commission simply dispensed with statutorily mandated findings and procedures because it deemed them administratively inconvenient. The Commission had no power to terminate *en masse* the regulatory jurisdiction of thousands of franchising authorities without making the required finding of effective competition based on evidence in specific franchise areas, and without petition by the affected cable operator. If the Commission believed that making individualized findings of effective competition in franchise areas was no longer worthwhile because of market evolution since the 1992 Cable Act, its remedy was to approach Congress, not to defy the statute.

A. The Statute Requires the Commission To Make a Finding with Regard to Effective Competition in Each Franchise Area, Not Merely Presume It.

1. The Commission Cannot Employ a Presumption To Avoid the Statutory Requirement of an Evidence-Based Finding of Effective Competition in Individual Franchise Areas.

The 1992 Cable Act expressly requires the Commission to make findings on the absence or presence of effective competition for each franchise area and makes

the rate-regulation authority of local, state, and federal agencies turn on those area-specific facts: "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," then either a franchising authority or the Commission may exercise ratemaking authority. 47 U.S.C. § 543(a)(2) (emphasis added). The statute identifies four specific factual circumstances, any one of which, if present in a specific "franchise area," constitutes effective competition in that area: *i.e.*, (1) low penetration by the cable operator, *id.* § 543(*l*)(1)(A), or lack of (2) municipal, (3) competing provider, or (4) local exchange carrier competition. *Id.* § 543(*l*)(1)(B)(i)-(iv), (C), (D).

Because the 1992 Cable Act requires Commission findings regarding the presence or absence of effective competition in each franchise area as a "jurisdictional predicate to rate regulation," 1993 Order ¶ 86, and specifies the facts that constitute effective competition, the Commission must base any effective-competition finding on actual evidence concerning the presence of competition in individual franchise areas. "Findings" are determinations on evidence. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 164 (1988) ("A common definition of 'finding of fact' is, for example, '[a] conclusion by way of

reasonable inference from the evidence.'" (quoting BLACK'S LAW DICTIONARY 569 (5th ed. 1979)); *Kasravi v. INS*, 400 F.2d 675, 677 (9th Cir. 1968) ("If such a finding of fact were required by the statute, the decision of the Attorney General would be subject to review in order to determine whether such finding were supported by reasonable, substantial and probative evidence."). As the Supreme Court has declared,

> An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made prerequisite to the operation of its statutory command.

United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 489 (1942) (internal quotation marks omitted); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The agency must make findings that support its decision, and those findings must be supported by substantial evidence.")

In a related context requiring that the Commission make findings of public convenience, interest, or necessity under Section 319 of the Communications Act, this Court held:

> The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases *shall be decided according to the evidence and the law*, rather than arbitrarily or from extralegal considerations;

> and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations.

Saginaw Broad. Co. v. FCC, 96 F.2d 554, 559 (D.C. Cir. 1938) (emphasis added); *id.* at 561 (Commission must make "findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow"). Because findings enable the reviewing court to "decide whether the decision reached by the … commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence," this Court declared that "[t]he requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts." *Id.* at 559.

In the 1992 Cable Act, Congress carefully defined the conditions that would constitute effective competition, and directed the Commission to find whether they existed "in the franchise area." 47 U.S.C. § 543(*l*)(1). Whether such conditions currently exist nationally (Order ¶¶ 8-9 (JA___)) does not resolve the task Congress assigned to the Commission. The Commission has previously

acknowledged that "the finding of effective competition is essential to both franchising authority and FCC jurisdiction to regulate rates," 1993 Order ¶ 86, and "the determination of effective competition should be made on the basis of a franchise area," *id.* ¶ 47. Therefore, before authorizing or forbidding rate regulation in, for example, a particular franchise area in Davenport, Iowa, the Commission has to make findings on the evidence particular to that franchise area, such as whether more than "15 percent of the households in the franchise area" in Davenport subscribe to programming services offered by MVPDs "other than the largest multichannel video programming distributor," 47 U.S.C. § 543(*l*)(1)(B)(ii) (emphasis added).

The Commission has abandoned that inquiry under the Order on review. Instead, it abrogated *en masse* existing certifications of franchising authorities by virtue of a default "finding of Competing Provider Effective Competition applicable to all … currently certified franchising authorities" who did not reapply for certification or face pending proceedings. Order ¶ 27 (JA___). That so-called "finding" was solely "based on the new presumption coupled with the franchising authority's failure to attempt to retain its certification by resubmitting Form 328 accompanied by the requisite showing of no Competing Provider Effective Competition." *Id.* (JA___). In other words, the Commission purports to make a "finding" of effective competition in each of thousands of franchise areas based on

the *absence* of any relevant franchise-area evidence. There is no colorable interpretation of Section 623(a)(2) that permits such a maneuver.

The Commission cannot establish and rely on presumptions in lieu of the required evidence-based finding of effective competition: "an agency is not free to ignore statutory language by creating a presumption on grounds of policy to avoid the necessity for finding that which the legislature requires to be found." *United Scenic Artists*, 762 F.2d at 1034; *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 308 (2d Cir. 2007) (en banc) (noting that "the law is clear" on this point).

In *United Scenic Artists*, the National Labor Relations Act required that a union could be found to have engaged in an unlawful secondary boycott only upon "a showing of a purpose to coerce a neutral employer." 762 F.2d at 1033. The National Labor Relations Board invoked a rebuttable "presumption" to establish that object: namely, "that if a union is not denied access to information and if it is not affirmatively misled concerning the issue of control, it must be presumed to have had knowledge of the neutral status of the controlling employer and thus to have had an unlawful secondary object." *Id.* This Court rejected that presumption as inconsistent with the statute because the agency had dispensed with the statutorily imposed requirement to find unlawful purpose. *Id.* at 1034-35. So too here, the Commission cannot abrogate the regulatory jurisdiction of franchising

authorities by relying upon a nationwide presumption of effective competition, when the statute directs the Commission to determine effective competition in each franchise area based on the presence of specified factual conditions.

Similarly, in *Cerrillo-Perez v. INS*, 809 F.2d 1419 (9th Cir. 1987), the Board of Immigration Appeals ("BIA") was required to consider on a case-by-case basis the hardship to a citizen or permanent-resident child if a parent were deported, but the BIA justified its failure to make an individualized determination because it presumed that parents would not leave young children in the United States. *Id.* at 1426. The Ninth Circuit held that "[t]he BIA cannot adopt a general presumption that separation of parents and children will not occur and thereby relieve itself of its duty to consider applications on an individual basis. It must consider the specific facts and circumstances of each case. In failing to consider the factor of separation, the BIA overlooked or evaded an inquiry necessary to a reasoned decision." *Id.* (internal quotation marks omitted). Although a presumption may enable findings of certain facts from related adjudicatory evidence, *see infra* Part II, the Commission cannot resort to a general presumption to evade altogether the statutory requirement to make findings of effective competition based on evidence from franchise areas.

2. The Commission's Rationales Cannot Justify Departure from Statutory Requirements.

a. The 1993 Order Does Not Warrant Abrogation of Existing Jurisdiction Without Evidence Specific to the Franchise Area.

The Commission claims that the Order simply follows the tracks of the 1993 Order, which adopted a converse presumption of no effective competition. Order ¶ 11 (JA__). Conformity with a prior order cannot salvage a rule that violates a statute. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (concluding that Court must "give effect" to the "plain command" in a statute, "even if doing that will reverse the longstanding practice under the statute and the rule," as "[a]ge is no antidote to clear inconsistency with a statute") (internal citations omitted).

In any event, the Commission's contention is untrue. As an initial matter, the Commission adopted its original presumption for reasons of exigency that no longer apply. Given the mandate that certifications be accepted within 30 days if not disapproved, 47 U.S.C. § 543(a)(4), the Commission divined a congressional intent that the Commission "adopt a simple, streamlined process for certification of local authorities, and … expeditiously implement the rate regulation provisions of the Act." 1993 Order ¶¶ 41 (footnote omitted), 80 ("Because of the 30–day time constraint, we assumed that Congress did not intend that the Commission establish

a full pleading cycle before acting on a certification."). No such exigency justifies the mass decertification of franchising authorities in 2015.

More importantly, the presumption adopted in 1993 operated differently. The Commission crafted the 1993 Order (unlike the Order on review) to ensure that determinations of rate regulation authority were not made "simply by operation of the presumption." 1993 Order ¶ 42.

Under the prior rules, the Commission allowed franchising authorities to "base their initial finding of effective competition on a presumption that such competition does not exist," and then submit a certification that it has "reason to believe that the presumption is correct" as to its franchise areas. See 1993 Order ¶ 86 & Appendix D, Question 6. Thus, under the 1993 Order, even if the cable operator did not challenge the certification, the Commission had at least *some evidence* specific to an individual franchise area upon which to base its implicit finding of no-effective-competition in accepting the certification. Whether this evidence was legally sufficient to support a finding of effective competition was never determined; no potentially aggrieved parties (*i.e.*, cable operators) apparently challenged the legality of these procedures in the petitions for review of the 1993 Order.

By contrast, under the Order on review, the Commission automatically abrogates the regulatory authority of franchising authorities within 90 days of the final rule's effective date based strictly on the new nationwide presumption – without *any evidence* concerning the existence of effective competition in the franchise area. Order ¶ 27 (JA___). The Order flatly violates the statute, which permits such abrogation only "[i]f the Commission finds that a cable system is subject to effective competition" in the franchise area. 47 U.S.C. § 543(a)(2), (*l*)(1) (emphasis added). The Commission is thus improperly presuming the very facts that Congress has required it to find.

b. A Franchising Authority's Inaction Does Not Relieve the Commission of Its Duty to Make Findings Regarding the Existence of Effective Competition in the Franchise Area.

The Commission cannot find the requisite competition in each franchising area simply because a franchising authority does not file for a new certification or come forward with evidence. Congress placed the duty of making findings of the relevant facts of effective competition upon the Commission, and did not make that duty contingent upon any act or omission of the franchising authority. *See* 47 U.S.C. § 543(a)(2). The Commission protects the public interest by ensuring that cable operators who face no competitive discipline do not charge subscribers unreasonable rates or subject them to unfair practices with regard to basic cable

service. It cannot shrug and say that it will only consider evidence of competition "where the franchising authority deems it relevant." Order ¶ 11 (JA___).

Rather, "[t]he Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965); *accord Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) ("The Commission … ha[s] an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest.").

Indeed, this Court has refused to let administrative agencies desist from required factual inquiries because of the default of parties to the proceeding. Where an interstate compact required the Washington Metropolitan Area Transit Commission to consider the carrier's management efficiency in determining the reasonableness of bus fares, this Court held that "the failure of the staff and the protestants to produce evidence of mismanagement certainly does not support an assumption that [the carrier] was efficiently managed, and that was too vital a matter to be simply assumed away." *Democratic Central Comm. of District of*

Columbia v. Washington Metro. Area Transit Comm'n, 485 F.2d 886, 905 (D.C. Cir. 1973) (footnote omitted). This Court elaborated that

> The Commission was not at liberty to sit back and place the responsibility for initiating or carrying through essential inquiries on private parties; instead, it had an affirmative duty to assist the development of a meaningful record. The Commission's primary *raison d'etre* is furtherance of the public interest, we have said; and it could not fulfill that function if it did not assure, by its own efforts, that its decision would be based on a full record.

Id. (footnotes, brackets, and internal quotation marks omitted). The Second Circuit has embraced the same principle:

> The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in * * *."

Scenic Hudson, 354 F.2d at 621 (internal quotation marks omitted).

The Commission cannot abdicate its statutory duties because of any inaction of a franchising authority. Where Congress charged the Commission with determining the existence of effective competition in specific franchise areas, that factual question is "too vital a matter to be simply assumed away." *Democratic Central Comm.*, 485 F.2d at 905.

Nor may the Commission claim that the franchising authority's failure to seek a new certification under the Order somehow constitutes franchise-area evidence of Competing Provider Effective Competition. A certificated franchising authority may not submit a new Form 328 for numerous reasons. For example, the Commission has "recognize[d] that some franchising authorities have limited resources." Order ¶ 26 (JA___). A given franchising authority may not have the resources to gather and pay for the evidence of Competing Provider Effective Competition or to initiate what may become a contested legal proceeding, especially since many franchising authorities may regulate multiple systems in multiple franchising areas. *See* 1993 Order ¶ 48 ("if more than one cable system is authorized to operate in a franchise area, separate effective competition determinations have to be made for each system"). The Commission has characterized the burden of gathering and presenting evidence of effective competition (when borne by cable operators) as entailing "significant costs," Order ¶ 45 (JA___), and acknowledged that MVPDs may charge (unregulated) fees to franchising authorities for information necessary to prove competitive penetration, *id.* ¶ 22 (JA___). A franchising authority's choice not to expend scarce local governmental resources on these proceedings says nothing about the underlying facts of effective competition.

Reasons other than a lack of resources may also cause an authority not to file a new Form 328, independent of competitive conditions in the franchise area. Some local authorities are unsophisticated in FCC matters; the relevant officials may not be aware of requirements in a timely fashion; and certain municipal actions may require hearings. *See* Intergovernmental Advisory Committee to the Federal Communications Commission, Advisory Recommendation No. 2015-7 (May 15, 2015) (explaining reasons why local franchising authorities have in the past failed to oppose cable operator effective-competition proceedings) ("IAC Recommendation") (JA__).

Additionally, a franchising authority, in evaluating changed circumstances, may decide that it cannot provide the required written certification of the three other mandatory statutory criteria for regulating basic cable service. *See* 47 U.S.C. § 543(a)(3)(A)-(C); 47 C.F.R. § 76.910(b)(1)-(3). This underscores why the Commission must make an actual finding that effective competition now exists in individual franchise areas; if a franchising authority cannot make those certifications, and no effective competition exists, the Commission itself has the duty to regulate rates and equipment for basic cable service. 47 U.S.C. § 543(a)(6); 47 C.F.R. § 76.913(a) ("Upon denial or revocation of the franchising authority's certification, the Commission will regulate rates for cable services and

associated equipment of a cable system not subject to effective competition, as defined in § 76.905, in a franchise area.").

Thus, the Commission cannot deduce that, for every one of the many thousands of certificated authorities, inaction owes to the existence of Competing Provider Effective Competition in the franchise area. The Commission is making a phantom mass "finding" of Competitive Provider Effective Competition with regard to many thousands of certificated franchising authorities strictly based on a presumption, without *any evidence* related to the franchise areas at all. The Commission has defied Congress's directive in Sections 623(a)(2) and (*l*)(1) to "find" whether effective competition existed in a franchise area before authorizing or denying rate regulation jurisdiction.

Aversion to the 1992 Cable Act's mandatory factfinding animates the Commission's order. In applying the four-pronged effective competition test of Section 623, the Commission adopted a novel split-presumption rule where it presumes Competing Provider Effective Competition exists, and that none of the other three types of competition exists, in each of the more than 23,000 franchise areas. Order ¶ 10 (JA___). It retained the latter presumptions without any evidence or discussion of whether they were justified in 2015. The Commission addressed just one of those other three types of competition (Local Exchange

Carrier Effective competition), but only to the extent of ruling that it did not have evidence to switch the presumption; it did not justify the presumption it retained. Order ¶ 10 (JA___). The Commission has improperly substituted a presumption-based regime for the findings-based regime of Section 623.

Indeed, the Commission's global reliance on an effective-competition presumption is especially perverse in its application to franchise areas where the franchising authority prevailed on the question in adjudicated proceedings, including very recently. *See, e.g., In re Time Warner Cable Inc.*, 30 FCC Rcd 1067, 1072 (2015) (because competing provider subscribership fell short of 15%, "we conclude that the second part of the competing provider test is not satisfied and Petitioner is not subject to effective competition in the community of Adams"); *In re Time Warner Entertainment-Advance/Newhouse P'ship*, 28 FCC Rcd 16776, 16779 (2013) (ruling against cable operator on question of competing provider subscribership); *In re Time Warner Cable Inc.*, 28 FCC Rcd 3313, 3315 (2013) (denying cable operator petition for Taylorsville, Kentucky because in that franchise area "subscribership is below the 15 percent statutory minimum for competing provider effective competition"). The results in those cases underscore why Congress has mandated competition findings in each franchise area.

The Commission may now deem the requirement of individualized cable-operator petitions and franchise-area findings of effective competition an anachronistic waste of Media Bureau resources. But Congress legislated in 1992 against a history of widespread cable operator market power that varied from locality to locality, and demanded Commission findings of the existence *vel non* of effective competition in specific franchise areas. If current circumstances of emerging competition to cable systems are so compelling, the Commission may be able to convince Congress to preempt all local jurisdiction over rates and equipment of the basic service tier and associated practices unless a franchising authority proves the absence of effective competition. Until then, the Commission must adhere to the statute as written. "Neither the Court nor the Commission is warranted in departing from those [statutory] standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen," *Carolina Freight Carriers*, 315 U.S. at 489, and "only Congress can rewrite" the Communications Act. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986).

B. The Commission Cannot *Sua Sponte* Terminate an Existing Certification of a Franchising Authority without Petition by the Cable Operator and a Finding of No Effective Competition.

In its Order, the Commission has done more than cast aside the statutory requirement of franchise-area findings of effective competition. It has also disregarded the certification and revocation procedures that Congress imposed.

Section 623 does not permit the Commission *sua sponte* to terminate existing certifications automatically, and then require a franchising authority to submit a new certification application. Rather, the statute defines precise procedures for initial certification and subsequent revocation of existing certifications. "A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A)," *i.e.*, where the Commission finds effective competition, must file written certification of its qualifications. 47 U.S.C. § 543(a)(3). "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" disapproves the certification after finding that the franchising authority is unqualified. *Id.* § 543(a)(4).

Once the franchising authority's certification is approved, however, under the statute it remains effective until revoked. Congress has spelled out the requirements for review and revocation of that certification: "*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) (emphasis added). A cable operator may petition the Commission to revisit its prior finding of effective competition, and (if the Commission were to find that effective competition no longer existed) then the franchising authority's continuing exercise of its certificated rate-regulation jurisdiction would no longer be lawful. "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*," *id.* § 543(a)(1) (emphasis added), and "[i]f 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 … franchising authority under this section," *id.* § 543(a)(2). Furthermore, "[i]f the Commission *finds* that the franchising authority has acted inconsistently with the requirements of this subsection" – including subsections (a)(1) and (a)(2) – "the Commission shall grant appropriate relief." *Id.* § 543(a)(5) (emphasis added). Because the absence of effective competition is a jurisdictional predicate to rate regulation, the appropriate (and indeed mandatory) relief is to revoke the franchising authority's certificate.

Congress has thus outlined precise procedures by which the Commission may "review the regulation of cable system rates" by a franchising authority and revoke its previously certified jurisdiction. 47 U.S.C. § 543(a)(5). The Commission is not free to invent different termination procedures. It cannot simply terminate existing certifications automatically *en masse*, without a petition or finding (or even evidence) that continued regulation by the franchising authority is inconsistent with the statute. *Christensen v. Harris Cnty.*, 529 U.S. 576, 583 (2000) ("We accept the proposition that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.'") (quoting *Raleigh & G.R. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1872)); *Continental Cas. Co. v. United States*, 314 U.S. 527, 533 (1942) ("The conditions for action make action without meeting the conditions, we think, contrary to Congressional purpose, as expressed in the statute.").

This Court enforced a similar statutory limitation in *Railway Labor Executives Association v. National Mediation Board*, 29 F.3d 655 (D.C. Cir. 1994) (en banc). The National Labor Relations Act authorized the National Mediation Board to investigate a union representation dispute only "upon request of the parties" (*i.e.*, the employees). *Id.* at 665 (quoting 45 U.S.C. § 152 Ninth). This Court rejected the Board's assertion of authority to investigate also at the behest of employers or on its own accord. This Court ruled that "[t]he subordinate clause

'upon request of the parties' expresses a limiting condition," and that the statute's "limitations are utterly inconsistent with the notion that the Board blithely" may choose the circumstances of its investigation. *Id.* at 666-67. Nor could the Board claim discretion under *Chevron Step* 2 to exercise alternative investigative authority simply because the statute did not expressly forbid it: "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Id.* at 671.

So too here the statutory phrase "[u]pon petition by a cable operator or other interested party" operates to limit the Commission's power to "review the regulation of cable system rates by a franchising authority under this subsection." 47 U.S.C. § 543(a)(5). Congress intended certifications granted to be effective until revoked pursuant to the statutory procedures; it did not intend for the Commission to police tens of thousands of franchise areas when no aggrieved party sought its intervention.

Indeed, the Commission and the Media Bureau have long recognized that a petition for revocation by a cable operator is the proper vehicle for requesting revocation of a franchising authority's certification when effective competition has emerged. *See* 1993 Order ¶ 101 ("Operators denied a change in [effective-

competition] status by a franchising authority would be entitled to seek review of that finding by the Commission, by means of a petition for revocation …"); *In the Matter of CMA North Carolina Cable Associates*, 10 FCC Rcd 555, 555 n.11 (1994) ("Should CMA wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's Rules."); *In the Matter of Century Cable Of N. Cal. Inc.*, 13 FCC Rcd 24154 - 24162, n.57 (1998) (noting that "[c]able operators are permitted to seek deregulation directly from the Commission" under 47 C.F.R. § 76.914, and that "[c]able operators filing petitions for revocation on the grounds of effective competition must prove that they face competition under one of the four tests set forth in Section 76.905(b) of the Commission's rules"). Under its prior rules, the Commission routinely performed the proper-two step inquiry on petition of the cable operator of (1) determining whether effective competition existed and then (2) if the answer is in the affirmative, revoking that authority's regulatory jurisdiction.[6] The Commission has not justified, and cannot justify, its complete

[6] *See, e.g., In The Matter Of Six Unopposed Petitions For Determination Of Effective Competition*, Memorandum Opinion and Order, 30 FCC Rcd 383, 384 (2015) ("find[ing] that each petition provides sufficient and reliable evidence to establish that both elements of the competing provider test for effective competition are satisfied" for all challenged Communities, and then further ordering "that any certification to regulate basic cable service rates granted to any

about-face in the Order. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 57 (1983). Section 623 does not permit the mass termination that the Order accomplishes.

C. The Order Contravenes the STELA Reauthorization Act.

The Commission violates the statute in a third respect. By decreeing mass termination of existing certifications based on a presumption of Competing Provider Effective Competition, and by shifting the burden to franchising authorities to reapply for certification and rebut the presumption, the Commission has also run afoul of the STELA Reauthorization Act that it purportedly implemented in this rulemaking.

In that Act, Congress directed the Commission "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." Pub. L. No. 113–200, § 111, 128 Stat. 2066 (emphasis added); 47 U.S.C. § 543(o)(1). In fact, this new subsection (o) to Section 623 is entitled "Streamlined Petition

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of the [affected] Communities **IS REVOKED**"); *In the Matter of SBC Cable Co.*, 22 FCC Rcd 4065 ¶¶ 4-6 (2007) ("conclud[ing] that SusCom has submitted sufficient evidence demonstrating that its cable system serving the Community is subject to competing provider effective competition," and further ordering that "that the certification to regulate basic service rates granted to the local franchising authority overseeing SBC Cable Co. d/b/a SusCom in the affected Community **IS REVOKED**").

Process for Small Cable Operators." The Commission does not "establish a streamlined process" by abolishing that "process" and "petition[s]" altogether. Moreover, Congress specifically directed the Commission to provide relief to small (and particularly small rural) cable operators; it drew that distinction because it did not intend any relief for large cable operators, who are the principal beneficiaries of the Order.

The Commission claimed that it complied with the spirit of the STELA Reauthorization Act because ''reducing regulatory burdens on all cable operators, large and small, will ensure that Commission procedures reflect marketplace realities and allow for a more efficient allocation of Commission and industry resources.'' Order ¶ 14 (internal quotation marks omitted) (JA___). But Congress did not give the Commission a free hand to reduce burdens on small cable operators in any way it saw fit. Rather, Congress specifically commanded the Commission to "establish" a process (albeit streamlined) by which those operators would have to file effective competition petitions. The Commission failed to establish such a petitioning process, and has thus directly violated the Communications Act.

To confirm that its streamlining directive should not alter the basic petitioning process that then existed, Congress further declared that "[n]othing 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." 47 U.S.C. § 543(o)(2). The Commission does not "read this language as limiting the Commission's authority to eliminate or modify the presumption for cable operators, large or small." Order ¶ 15 (JA___). True enough. This section of the Act does not speak to presumptions at all; it speaks to the burden of proof.

The plain meaning of this provision is that, in authorizing the Commission to streamline the petitioning process for small cable operators, Congress did not alter the cable operator's existing burden of proving effective competition. In 2014, cable operators had to file effective-competition petitions to request that the Commission revoke existing certifications of franchising authorities. Section 623(a)(5) established the duty of cable operators to petition to have the Commission "review the regulation of cable system rates by a franchising authority." 47 U.S.C. § 543(a)(5). Under the statute and original implementing regulations, a cable operator seeking to change the *status quo ante* would have the burden of establishing that the franchising authority no longer may exercise jurisdiction because of changed competitive conditions, 1993 Order ¶¶ 86-88, and Congress acted upon that understanding. "When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby."

United States v. Bd. of Comm'rs, 435 U.S. 110, 134–35 (1978); *Don E. Williams Co. v. Comm'r*, 429 U.S. 569, 576–77 (1977); *Isaacs v. Bowen*, 865 F.2d 468, 475 (2d Cir.1989) ("The basic requirement for the application of the [ratification] doctrine remains congressional awareness coupled with meaningful action aimed at the agency's interpretation."). The STELA Reauthorization Act presupposes and ratifies the existing regulatory scheme that places the burden of filing a petition and proving effective competition upon a cable operator; the Order unlawfully eradicates those burdens altogether.

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For all the foregoing reasons, the Order conflicts with the plain meaning of Commission's organic statutes. The Cable Act requires the Commission to "find" effective competition "in a franchise area" before revoking a franchising authority's jurisdiction to regulate basic cable service. 47 U.S.C. § 543(a)(2), (*l*)(1). Moreover, once a certificate has been granted, the Commission only has authority to review the franchising authority's regulation of rates upon petition of a cable operator or other interested third party. *Id.* § 543(a)(5). The Commission cannot *sua sponte* grant automatic mass terminations of certifications without any finding that continued jurisdiction would violate the Communications Act. And finally the Commission cannot comply with the STELA Reauthorization Act's

directive to "establish" a streamlined effective-competition petition process for small cable operators by eliminating the petitioning process altogether and shifting the cable operator's burden of proving effective competition to the franchising authority. 47 U.S.C. § 543(o).

Under *Chevron* Step 1, the Order thus cannot survive. But even if there any ambiguity as to any of those statutory terms, the Commission's interpretation – that the Commission can base a finding of franchise-area effective competition solely on a national presumption plus the inaction of a franchising authority, and grant automatic mass terminations of longstanding regulatory certifications *sua sponte* – is an unreasonable construction of Section 623 under *Chevron* Step 2. This Court should set the Order aside as contrary to law and in excess of statutory jurisdiction. 5 U.S.C. § 706.

II. THE ORDER'S ESTABLISHMENT OF A PRESUMPTION OF FRANCHISE-AREA COMPETITION FROM NATIONAL DATA IS ARBITRARY AND CAPRICIOUS.

A. National Market Share Data Lacks a Rational Nexus to Competitive Conditions in 23,000-plus Franchise Areas Across the Country.

Provided that they are consistent with the statute, agencies may generally establish rebuttable presumptions, *Southern Co. Services Inc. v. FCC*, 313 F.3d 574, 581 (D.C. Cir. 2002), but "their validity depends as a general rule upon a

rational nexus between *the proven facts* and the presumed facts." *United Scenic Artists*, 762 F.2d at 1034 (emphasis added); *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979) (holding that "a presumption adopted and applied by the Board must rest on a sound factual connection between the proved and inferred facts").

The requirement that a presumption be founded upon "a sound and rational connection between the proved and inferred facts" relates to the facts to be adjudicated: if a party proves fact A about a party or circumstance in an adjudication, the agency may presume fact B if the existence of fact A makes it highly probable that fact B is also true, absent proof to the contrary. Thus, this Court upheld the Commission's presumption that, if it is proven that a vertically integrated cable operator withholds terrestrial regional sports network programming from another MVPD, then that same cable operator had the purpose and effect of hindering or preventing the competing MVPD from providing programming to its customers, given the programming's value and lack of replicability. *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716-17 (D.C. Cir. 2011).

Similarly, this Court upheld a Department of Transportation rule that established a rebuttable presumption "that loose closures on railroad tank cars transporting hazardous materials result from the shipper's failure to conduct a

proper inspection." *Chemical Mfrs Ass'n v. Dep't of Transp.*,105 F.3d 702, 703 (D.C. Cir. 1997). This Court found a rational nexus because the Department had required that closures be designed not to come loose during ordinary transportation, and thus alternative causes of loosening would be extraordinary. *Id.* at 706. This Court noted that the presumption "only arises once the Department has proven a fact strongly suggestive of a violation: the existence of a loose closure." *Id.* at 707. The empirical fact A proven in the adjudication (loose closure) was so closely correlated with inferred fact B (failure to inspect closure) that proof of the former reasonably served as a proxy for the latter, subject to rebuttal by actual evidence regarding fact B.

Here, even though Congress has demanded findings of effective competition specific to the franchise area, *see* 47 U.S.C. § 543(*l*)(1), the Commission proposes to apply a presumption *without any proof related to the franchise area*, much less proof of facts indicative of local competition. That alone forecloses use of a presumption.

Even apart from that defect, there is no rational nexus that would permit *national* data of effective competition to serve as proof of effective competition in each of the 23,506 franchises areas that have never previously been found to be competitive. In adopting the new presumption, the Commission noted that

nationally DBS and telephone MVPDs had increased their combined national share to 33.9%. Order ¶ 9 (JA___). As an initial matter, telephone MVPDs only serve limited jurisdictions, and cannot possibly support a universal presumption applicable to every franchise area. Order ¶ 10 (JA__).[7] Accordingly, the Commission pointed out DBS providers alone have a 25.6% national market share, which is "close to twice" the 15% competitive household penetration that must be shown to prevail under Section 623(*l*)(1)(B)(ii). Order ¶ 9 & n. 48 (JA___).

This is a non-sequitur. The statutory 15% penetration test applies at the level of the franchise area. The national share of DBS providers does not give any indication as to the DBS share in each of the 23,506 franchise areas in the United States for which the Commission has never issued a specific effective-competition finding. *See* 2014 Cable Prices Report ¶ 8. Indeed, even in contested proceedings, the Commission has very recently found effective competition not to exist in certain franchise areas. *Supra* at 45.

[7] Telephone MVPDs serve only 11.1 million subscribers and pass only 46.4 million homes, *In the Matter of: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd. 3253, Tables 1 & 7 (Apr. 2, 2015), and are concentrated in populous jurisdictions. *See* Verizon FIOS, http://fios.verizon.com/fios-coverage.html (available in 20 cities and surrounding areas); AT&T U-verse Services, http://www.att.com/local/ (available in select cities in 21 states).

An analogy illustrates the fallacy of basing a local presumption on national data. If a particular government program required a showing of the average annual precipitation in a locality, data on the average annual precipitation in the United States would be irrelevant. The average annual precipitation in the continental U.S. is 30.2 inches, but that figure varies from 9.5 inches in Nevada to 60.1 inches in Louisiana; some places in the U.S. receive only 2-3 inches annually. See Average Annual Precipitation by State, http://www.currentresults.com/Weather /US/average-annual-state-precipitation.php (last visited Dec. 9, 2015); Places in the United States with Lowest Precipitation, available at http://www.currentresults.com /Weather-Extremes/US/places-with-lowest-precipitation.php (last visited Dec. 9, 2015).

As early as the 1984 Cable Act, Congress directed the Commission to determine "on a community-by-community basis whether a cable system is subject to effective competition" because "the presence nationwide of various telecommunications services does not speak to the availability of such services in a particular community." H.R. Rep. No. 98-934, at 66 (1984). Congress in the 1992 Cable Act likewise understood that "the extent of [a cable operator's] market power varies from locality to locality." S. Rep. 102-92, at 18. The competitive situation in different franchise areas may be highly variable today, and the Commission has mustered no evidence to the contrary. National DBS market

share is not a reasonable proxy for competing-provider market share in a given franchise area, and thus the Commission has failed to show "a rational nexus between the proven facts and the presumed facts." *United Scenic Artists*, 762 F.2d at 1034.

The Commission attempted to buttress its proposed presumption by observing that in 2013 the Commission found effective competition in over 99% of the communities in which such a determination was sought, and 80% of the time on the grounds of competing-provider competition. Order ¶ 7 (JA__). This, too, is a non-sequitur. Those cable operators who petitioned for an effective-competition determination did so because they believed they could prove that the facts germane to their franchise area supported the finding under the statutory test of Section 623(l)(1); their success rate says nothing about the likely factual situation in the more than 23,000 franchise areas for which cable operators have not sought such a determination. The Commission's logic is akin to saying that if 99% of Iraq War veterans who applied for certain disability benefits received them, then presumptively all such veterans have such disabilities (even those who never applied). The Commission cannot draw a meaningful connection between the success rates of self-selected cable operators who proved effective competition based on the particular facts of their franchise areas and the competitive situation

in completely unrelated franchise areas where the cable operator did not even seek such a determination.

The Commission then attempted to support its presumption by pure speculation:

> Marketplace realities cause us to believe that in nearly all communities where cable operators have declined to file Effective Competition petitions, Effective Competition is present but the cable operator has not found it worthwhile to undertake the expense of filing an Effective Competition petition, perhaps because the vast majority of franchising authorities have chosen not to regulate rates despite the existing presumption of no Effective Competition.

Order ¶ 7 (JA__). But cable operators have substantial incentive to oust local franchising jurisdiction even when cable rates are not regulated; as the Commission's own Intergovernmental Advisory Committee pointed out, many jurisdictions that do not regulate rate levels do use their section 623 authority to enforce consumer-protection measures such as uniform rate structures and negative option billings. IAC Recommendation, at 3 (JA__). The efforts that the cable industry has expended to secure the new presumption, and to defend it on appeal, belie the Commission's speculation. This simply underscores why the Commission must perform its statutory mandate of making effective competition findings based on actual franchise-area evidence, rather than relying on contrived presumptions that bear no relation to that evidence. *See United States Telecom*

Ann'n v. FCC, 227 F.3d 450, 461 (D.C. Cir. 2000) (stating that "agency action" must "be based on a consideration of the relevant factors, and rest on reasoned decisionmaking in which" the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (citations and internal quotation marks omitted).

B. The Commission Has Not Established the Need for a Presumption of Effective Competition as a Substitute for Actual Evidence.

"The usefulness of a presumption is also a factor to be considered in assessing its validity," and an agency presumption will not be upheld if there is no need for it. *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983) ("Presumptions should not replace proof needlessly."). In *Holland Livestock Ranch*, the Bureau of Land Affairs established a presumption that cattle with unrestricted access to public lands would be presumed to have trespassed on public lands; the Ninth Circuit held that "the presumption cannot stand where it is not needed: as the sole evidence to establish a claim of trespass. The government must prove some actual trespass before relying upon the presumption." *Id.* The Ninth Circuit noted that "[p]roving that at least one animal has actually trespassed is not difficult," and that it would "not add greatly to [the agency's] labors to locate animals actually trespassing, if such trespasses are at all substantial." *Id.*

There is likewise no need here for a presumption in order to adjudicate effective competition in any particular franchise area. The evidence needed to prove effective competing-provider competition is straightforward and readily available. A cable operator can easily prove the first prong of the test – namely, that "the franchise area is … 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," 47 U.S.C. § 543(*l*)(1)(B)(i) – with evidence that the DBS provider operates in the area and advertises its services in local, national, or regional media accessible to the community. 1993 Order ¶ 32. The second prong merely requires a showing that the cumulative subscribership of competing MVPDs "exceeds 15 percent of the households in the franchise area." 47 U.S.C. § 543(*l*)(1)(B)(ii); 47 C.F.R. § 76.905(c)-(g). Under the prior rules, the cable operator had a right to request and receive all necessary information from competitors. 1993 Order ¶ 44. Once that information is gathered, it is a relatively straightforward matter to calculate whether the number of subscribers of competitive MVPDs exceeds 15% of households in the franchise area.

The utility of the presumption to the Commission is not to facilitate adjudication of these factual issues, but to relieve the Commission of the need to make potentially 23,506 evidence-based determinations of effective competition

within franchise areas. The Commission understandably may want to shed that burden given the emergence of competition nationally, but the 1992 Cable Act requires particularized findings on local conditions. The Commission's remedy lies in Congress, not in developing presumptions to escape a statutory mandate. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 376.

CONCLUSION

For the reasons stated above, this Court should set aside the Order.

Respectfully submitted,

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
PAUL HASTINGS LLP
875 15th Street, NW
Washington, DC 20005
(202) 551-1700
(202) 551-1705
stephenkinnaird@paulhastings.com
Attorneys for the National Association of Telecommunications Officers and Advisors, the National Association of Broadcasters, and the Northern Dakota County Cable Communications Commission

Stephen Traylor
Executive Director
NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

3213 Duke Street
Suite 695
Alexandria, VA 22314

Rick Kaplan
Jerianne Timmerman
Scott Goodwin
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street NW
Washington DC 20036

Brian T. Grogan
MOSS & BARNETT
150 South Fifth Street, Suite 1200
Minneapolis Minnesota, 55402
Attorneys for the Northern Dakota County Cable Communications Commission

December 14, 2015

CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the foregoing Initial Brief of Petitioners National Association of Telecommunications Officers and Advisors, National Association of Broadcasters, and Northern Dakota County Cable Communications Commission contains no more than 13,996 words, as reported by the word processing system on which it was prepared, including footnotes and citations, and excluding the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel, in compliance with Federal Rule of Appellate Procedure 32(a).

Respectfully submitted,

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
Counsel of Record
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1842
stephenkinnaird@paulhastings.com

Attorneys for Petitioners

December 14, 2015

CERTIFICATE OF SERVICE

Pursuant to Rules 25(b) and (d) and 31 of the Federal Rules of Appellate Procedure, I hereby certify that on December 14, 2015 I have electronically filed the foregoing document "Initial Brief of National Association of Telecommunications Officers and Advisors, National Association of Broadcasters, and Northern Dakota County Cable Communications Commission" with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I further certify that six copies of the foregoing will be filed by hand with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit within two business days. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully submitted,

/s/ Stephen B. Kinnaird

Stephen B. Kinnaird
Counsel of Record
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1842
stephenkinnaird@paulhastings.com

Attorneys for Petitioners

December 14, 2015