

August 15, 2005

The Honorable Kevin Martin, Chairman
Federal Communications Commission
445 12th Street, SW
Room TW B204
Washington, DC 20554

Re: Revisions to Cable Television Rate Regulations, MB Docket No. 02-144; Implementation of Sections of the Cable Television Consumer Protection And Competition Act of 1992, Rate Regulation, MM Docket No. 92-266, MM Docket No. 93-215..., FCC 02-177, released June 19, 2002 (17 FCCR 11550).

Dear Chairman Martin:

Section R addresses Effective Competition Showings and in paragraph 52, the Commission notes that rate regulation ends when effective competition is present and in the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition. The Commission further notes that cable operators bear the burden of rebutting the presumption with evidence sufficient to demonstrate effective competition in the franchise area.

In paragraph 53, the Commission notes that its Eighth Competition Report states that DBS penetration now exceeds 20% of television households in 30 states and 30% in five states. The Commission states that the “growth and development in DBS services has suggested to some that the effective competition determination process should be expedited, for example, by altering the burden of proof in areas of high DBS penetration so that community-by-community decisions might not always be needed.” The Commission sought comment on techniques consistent with the Communications Act to improve and expedite effective competition showings and review as competition becomes more prevalent.

The IAC has received significant input on the Commission’s current procedures regarding effective competition showings and the status of DBS competition to cable. We have also met several times with staff members from the Media Bureau to discuss these issues.

Based on our study of this issue and the comments and input we have received from FCC staff and others, we offer the following comments.

1. The Commission's present procedures do not afford Local Franchise Authorities and other interested parties (state consumer advocates, etc.) sufficient opportunity to review such petitions in a meaningful way. Local Franchise Authorities, the Media Bureau, and other parties do not have ready access to DBS subscriber numbers or any way to check the accuracy of data submitted by cable operators. Also, the Commission's time frame (20 days after public notice) to respond to such petitions does not allow an adequate opportunity for review and response.
2. Cable operators are well aware of the inability of the Media Bureau and Local Franchise Authorities to review effectively their claims of effective competition and are therefore filing such petitions frequently and aggressively even if actual data would not support the finding of effective competition.
3. While the Bureau provides in its Orders that the presumption is in favor of no effective competition and the burden remains on the cable operator, the Bureau's actions have de facto shifted the burden to Local Franchise Authorities. If a Local Franchise Authority does not oppose a petition, the Bureau automatically grants it, deregulating hundreds of areas without questioning the data in the petition. This has occurred even though data presented on the face of the petition could not be accurate – for example, more total subscribers than households in a community. Even if a Local Franchise Authority manages to file a response questioning the facts submitted by the cable operator, the Bureau has not delved into the facts but has accepted without further evidence, the data submitted by the cable operator. For example, many Local Franchise Authorities have opposed cable operators' data as to the number of occupied households and DBS subscribers attributed to jurisdictions based on zip codes that do not match jurisdictional boundaries, but the Bureau has merely accepted the cable operators' data.
4. As a result, hundreds of communities around the country have been deregulated, not only resulting in higher cable rates for basic service and equipment and more frequent rate increases, but also eliminating uniform rate and anti-buy through safeguards. Such deregulated cable operators are also free to manipulate packages to force consumers to pay for services that they may not want.
5. FCC and GAO reports have recognized that although DBS is a fast growing service, it has not created price competition with cable. Cable rates continue to climb faster than inflation. In addition, there are many factors weighing on DBS' ability to compete effectively, such as access to programming and access to subscribers in MDU (multidwelling unit) environments, which the Commission has not addressed to foster competition.

6. The Communications Act provides that effective competition should be determined on a “franchise area” basis, and, as previously interpreted by the Commission, does not allow for such determinations statewide or regional basis on general DBS penetrations.
7. Prior to adopting the present procedures for determining effective competition by petitioning the FCC, we understand that cable operators made such showings to Local Franchise Authorities. This ensured that Local Franchise Authorities had an ability to review relevant data in an appropriate time period

In summary, the IAC:

- Does not favor shifting the burden to Local Franchise Authorities to challenge a cable operators’ effective competition. Local Franchise Authorities would not have access to data to make such a showing and most Local Franchise Authorities do not have the resources to address these issues.
- Supports giving Local Franchise Authorities and other interested parties full access to data to determine DBS penetration and realistic time frames to review claims of effective competition.
- Supports changing the procedures to require that cable operators present data in the first instance to Local Franchise Authorities and allow Local Franchise Authorities a reasonable time period to review such data and take action. If a Local Franchise Authority does not act within such reasonable timeframe, the cable operator should be deregulated. If the LFA denies the cable operator’s petition, then the cable operator may appeal to the FCC.
- Supports procedures that provide for imposing a penalty or sanction for the filing of frivolous petitions for effective competition or for ordering reimbursement of an opposing party’s costs if the cable operator withdraws a petition after an opposition is filed.
- Believes this would support the intent of the Communications Act to ensure that cable rates either are truly checked by effective competition or remain regulated to protect consumers.

We appreciate your time to read our recommendations. If you have any questions, please contact Gary Resnick (954-763-4242) at your convenience.

Respectfully submitted,

Jim Dailey
Chair, FCC Intergovernmental Advisory Committee