



PUBLIC NOTICE

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MEDIA BUREAU CLARIFIES ISSUES CONCERNING FRANCHISE AUTHORITY CERTIFICATION TO REGULATE RATES

Recently, when new entrant cable operators (“new entrants”) have proposed to provide cable service in franchise areas served by incumbent cable operators, issues have arisen about regulation by the local franchise authority (“LFA”) of the new entrant’s basic cable service rates. The purpose of this Public Notice is to provide guidance to new entrants and LFAs on some of those issues.

Congress adopted Section 623 of the Communications Act as part of the Cable Television Consumer Protection and Competition Act of 1992.¹ Pursuant to Section 623, LFAs can, under certain circumstances, regulate rates for basic cable service.² In *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, the Commission adopted a process through which it would certify LFAs to regulate basic cable service rates.³ Pursuant to the process established in the *Rate Order*, LFAs can become certified to regulate the basic cable service rates of cable operators within their jurisdiction by completing and submitting to the Commission FCC Form 328: Certification of Franchise Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition.⁴ Acceptance of a Form 328 by the Commission authorizes the LFA to regulate the basic cable service rates only of the cable operator(s) specified by the LFA in response to Question 2b of Form 328. In other words, the Commission’s acceptance of a Form 328 does not authorize regulation of any cable operator’s rates in that franchise area other than those operators specified in response to Question 2b. If a new entrant commences cable service in a franchise area, the LFA is not authorized to regulate that new entrant’s basic cable service rates unless and until the Commission has accepted a Form 328 that specifies the new entrant as a rate regulated cable operator in response to Question 2b.

In completing a Form 328 with regard to a new entrant, LFAs are also required to respond to Question 6, which states “The [C]ommission presumes that the cable systems listed in [Question] 2b is (are) not subject to effective competition. Based on the [effective competition] definition[s] [set forth

¹ Pub. Law No 102-385, § 3, 106 Stat. 1460 (1992), *codified as*, 47 U.S.C. § 543.

² 47 U.S.C. § 543(a)(3)(A)-(C); 47 C.F.R. § 76.910(b)(1)-(3).

³ *In Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5686-87 (1993) (“*Rate Order*”).

⁴ See FCC Form 328 (OMB 3060-0550) available at, <http://www.fcc.gov/Forms/Form328/328.pdf> (“Form 328”).

separately] below, do you have reason to believe that this presumption is correct?”⁵ We remind LFAs seeking to certify to regulate the basic cable service rates of new entrants that they “can rely on this presumption when filing certifications with the Commission, *unless they have actual knowledge to the contrary.*”⁶ A LFA could acquire “actual knowledge” that the presumption of no effective competition is invalid as to the competitive circumstances of a new entrant in several ways. If the Commission has previously determined that the incumbent cable operator in the franchise area is subject to competing provider, governmental provider, or LEC effective competition (and the circumstances underpinning such determination have not materially altered since that determination), a LFA would be considered to have actual knowledge that the presumption of no effective competition does not apply to a new entrant. Further, even if the Commission has not made a formal determination of LEC effective competition with regard to the incumbent cable operator, if a local exchange carrier or its affiliate (or any MVPD using the facilities of such carrier or its affiliate) offers comparable video programming services directly to subscribers by any means (other than direct-to-home satellite services) to an area that substantially overlaps the franchise area of an incumbent, a LFA would be considered to have actual knowledge that the presumption of no effective competition does not apply to a new entrant. Finally, during the initial phase of its rollout of video service in a given franchise area, a new entrant would, in almost all circumstances, be subject to low penetration effective competition because it serves less than 30 percent of the households in its franchise area. A LFA could attain actual knowledge of a new entrant’s franchise area penetration rate through reports filed by the new entrant or through correspondence with the new entrant. In each of the circumstances described above, a LFA could not in good faith affirmatively respond to Question 6 of Form 328.⁷

For further information, contact Senior Deputy Chief, Policy Division, Media Bureau, Steven Broecker, (202) 418-1075, Steven.Broecker@fcc.gov, TTY (202) 418-7171.

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⁵ See Form 328 at Question 6. The term “effective competition” means that: (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system (“low penetration effective competition”); (B) the franchise area is -- (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area (“competing provider effective competition”); (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area (“governmental provider effective competition”); or (D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area (“LEC effective competition”). 47 U.S.C. §§ 543(1)(1)(A)-(D); see also 47 C.F.R. § 76.906 (presumption of no effective competition).

⁶ See *Rate Order*, 8 FCC Rcd at 5669 (emphasis added).

⁷ Form 328 states that “WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE TITLE 18, SECTION 1001).”