

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

In the Matter of)
)
Application Filed for the Acquisition of) WC Docket No. 09-183
Certain Assets and Authorizations of)
CIMCO Communications, Inc. by Comcast)
Phone, LLC, Comcast Phone of Michigan,)
LLC, and Comcast Business Communications,)
LLC)

COMMENTS OF THE CITY OF DETROIT, MICHIGAN

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SUMMARY

The City of Detroit, Michigan ("City" or "Detroit") objects to the proposed waiver of the buyout prohibition under Section 652(b) of the Communications Act of 1934, as amended, that has been requested by Comcast and CIMCO in WC Docket No. 09-183. Section 652(d) requires the approval of local franchising authorities ("LFAs") in communities where affiliates of Comcast provide cable service in order for the Commission to grant the waiver.

Detroit is one such LFA. It hereby notifies the Commission that it expressly does not grant the waiver required under Section 652(d) for Comcast's proposed acquisition of CIMCO. The proposed acquisition thus cannot occur.

As the local franchising authority under the Federal Cable Act, the City has had a long history with Comcast's operations in the City and State of Michigan and oversees Comcast's current cable operations in the City. That local history and experience with Comcast is not only relevant to the present inquiry, but is the very reason that in the statute LFAs are provided with veto authority over such waivers. The City's history, experiences with Comcast and knowledge about Comcast are therefore an appropriate bases for the City's refusal to approve the requested waiver, and prevent the Commission as well from agreeing to the waiver (Section 572 waivers require the approval of both the Commission and LFAs).

Over its history in the City, Comcast has distinguished itself by its refusal to perform the public interest obligations it agreed to in its cable franchises. For example, although Congress has stressed the importance of channels for local public, educational and governmental use ("PEG channels"), Comcast has repeatedly violated franchise provisions supporting such channels, such as by refusing to pay (or timely pay) fees to support PEG programming.

One of the most recent examples of this "scofflaw" behavior by Comcast has been its closing of approximately thirteen local PEG studios throughout Michigan. These studios served approximately 1 million people, and were where residents, schools and cities would go to record programs for carriage on PEG channels. Comcast was required by its franchises to provide these studios for public use, but in 2007 unilaterally closed all of them, violating both its franchises and Cable Act Section 625, which although allowing franchise modifications under certain limited circumstances, absolutely forbids the modification of franchise requirements for PEG services. 47 U.S.C. 545(e). Comcast claimed it was allowed to shut the PEG studios under a state video law which it claimed trumped Federal law, but would not reopen the studios even after a Federal Court rejected its claim that the state video law superseded Federal law.

In addition Comcast has overcharged its customers and provided poor customer service.

The proposed transaction is anticompetitive on its face, by eliminating a competitor for Comcast from a market that Comcast is just now beginning to enter. If, as the City expects, Comcast's level of service in the local telecommunications market currently served by CIMCO proves to be similar to that experienced by its cable service customers, then local consumers will be poorly served and will have one less alternative to turn to if the waiver is granted.

Due to its violations of franchises and the Cable Act, Comcast cannot meet the waiver standard of 47 U.S.C. Section 572(d)(6)(A)(iii). The Commission cannot make the assumption that Comcast will comply with applicable provisions of the Communications Act and other Federal, state and local laws and contractual requirements. For the high standard ("clearly outweighed in the public interest") of Section 572(d)(6)(A)(iii) to be met, it is first necessary to assume that the applicant will comply with applicable law. Comcast does not meet that standard, and thus the Commission must deny the waiver request.

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COMMENTS OF THE CITY OF DETROIT, MICHIGAN

I. INTRODUCTION. CIMCO Communications, Inc. ("CIMCO"), Comcast Phone, LLC ("Comcast Phone"), Comcast Phone of Michigan, LLC ("Comcast-MI") and Comcast Business Communications, LLC (all four entities collectively, "Applicants"; the latter three entities collectively "Comcast Applicants"), have filed an Application for a waiver of the buyout prohibition in Section 652(b) of the Communications Act of 1934, as amended (the "Act") in WC Docket No. 09-183. They request this so that the several Comcast Applicants can acquire CIMCO. Section 652(d) requires the approval of local franchising authorities ("LFAs") in communities where affiliates of Comcast Applicants provide cable service in order for the Commission to grant the waiver.

The City of Detroit ("City") is one such LFA. It hereby notifies the Commission that the City expressly does not grant the waiver required under Section 652(d) for Comcast Applicants' proposed acquisition of CIMCO. The acquisition proposed thus cannot occur.

The City also provides the comments requested by the Commission in its Public Notices in this matter¹ as to why it, too, should deny the requested waiver.

As a preliminary matter, it should be noted that the City has filed a Petition for Reconsideration ("Petition for Reconsideration") in this docket because it finds two aspects of the Commission's initial Public Notice to be without legal foundation: 1) the Commission's alteration of the statutory standard that an LFA "approves of such waiver" (47 U.S.C. § 572(d)(6)(B)) to a requirement that no LFA disapprove of the waiver; and 2) the purported restriction of the grounds upon which an LFA can disapprove its waiver under Section 572(d)(6)(B) to those required for FCC approval under Section 572(d)(6)(A)(iii). On January 29, 2010, the Commission issued a further Public Notice, that sought to clarify the apparent restriction on the scope of acceptable LFA comments in the December 1 Public Notice.² In its clarification, the Commission stated that "local franchising authorities may file any expression of approval or disapproval that they believe to be consistent with section 652." The filing of these Comments by the City should not in any way be construed as the City receding from the positions it has taken in its Petition for Reconsideration and Reply to Opposition to Petition for Reconsideration ("Reply").

II. THE CITY IS NOT RESTRICTED TO THE GROUNDS IN SECTION 572(D)(6)(A)(III) FOR THE BASIS OF ITS DISAPPROVAL UNDER SECTION 572(d)(6)(B).

The standard that Comcast must meet to obtain FCC approval of its proposed acquisition of CIMCO is that "the anticompetitive effects of the proposed transaction are clearly outweighed

¹ See the Commission's initial public notice, Public Notice, re Application Filed for Acquisition of Certain Assets and Authorizations of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC, WC Docket No. 09-183, FCC 09-104, released December 1, 2009, and the clarification discussed next.

² Public Notice: Clarification Regarding Local Franchising Authorities' Submissions Under Section 652(d)(6) of the Act", DA 10-211, released January 29, 2010.

in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." 47 U.S.C. Section 572(d)(6)(A)(iii). In contrast, with respect to LFA approval of the proposed transaction, the statute says that the waiver shall be granted only if "the local franchising authority approves of such waiver." Section 572(d)(6)(B). Congress did not restrict the grounds for LFA approval or disapproval. In particular, Congress did not say (as Applicants argue) that LFA approval shall be made on the same grounds as the FCC's determination. In addition to being nonsensical (as discussed below), Applicants' attempt to shoehorn that meaning into the phrase "such waiver" ignores what is otherwise obvious, that the phrase merely refers to the waiver possibility provided for in the initial portion ("The Commission may waive . . .") of the text of Section 572(d)(6) preceding paragraph (A). *See Application*, p. 22 and note 46.

Viewing Section 572(d)(6) in full illuminates the preceding and why and how the waiver approvals under subparagraphs (A) and (B) function independently:

(6) Waivers

The Commission may waive the restrictions of subsections (a), (b), or (c) of this section only if - -

(A) the Commission determines that, because of the nature of the market served by the affected cable system or facilities used to provide telephone exchange service - -

(i) the affected cable operator or local exchange carrier would be subjected to undue economic distress by the enforcement of such provisions;

(ii) the system or facilities would not be economically viable if such provisions were enforced; or

(iii) the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served; and

(B) the local franchising authority approves of such waiver.

47 U.S.C. Section 572(d)(6).

In terms of the structure of Section 572(d)(6), subsections (A) and (B) both refer back to the opening statement that "the Commission may grant a waiver if...". They are independent requirements which do not refer to each other. There is therefore no basis in the statute for reading the several restrictions on Commission decision-making in Subsection (A) into the LFA approval required under Subsection (B).³ As discussed in the City's Reply, this structural analysis makes sense because LFAs have a unique role with respect to Comcast and cable service under Title VI ("Cable Act") of the Communications Act. That role is different and broader than that of the Commission, because LFA's are the Congressionally created principal regulator of cable companies via Title VI. Thus it is the City as LFA which:

- Reviews Comcast's past performance in determining the terms on which Comcast's franchise to provide cable service should be renewed.⁴
- Makes the critical determination as to which franchise terms are necessary going forward to "meet the future cable-related needs and interests" of the community during the term of the renewed franchise.⁵ This is one of only four grounds on which a cable franchise renewal can be denied (*see* Cable Act Section 626 (c)(1) (A)-(D) for the listing). The key role of a community's determination of its future cable-related needs is evidenced by the great deference given it by the courts, which will uphold such determinations if there is any evidence in the record to support them. *See Union CATV v City of Sturgis, KY*, 107 F3d 434 (6th Cir. 1997).

³ This is reinforced by the legislative history of Section 572 where Congress was careful to state that it was giving "specific guidance" and limitations on the Commission's role regarding such waivers, but made no similar statement regarding LFA approval. *See Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference*, HR-104-458, 104th Cong., 2d Sess. at 175.

⁴ *See, e.g.*, Cable Act Section 626(a)(1)(B) relating to a proceeding to "review[] the performance of the cable operator under the franchise during the then current term" and (c)(1)(A), where one of the grounds for denying renewal is whether the cable operator has "substantially complied with the material terms of the franchise and applicable law". As noted below, Comcast fails the latter test.

⁵ *See, e.g.*, Cable Act Section 626(a)(1)(A) relating to "identifying the future cable-related community needs and interests."

- Regulates customer service, which includes express Congressional authorization both to enforce customer service standards adopted by this Commission, and to "impose[] customer service requirements that exceed the standards set by the [FCC], or that address matters not addressed by the standards set by the [FCC]." Cable Act Section 632(c)(2).
- Regulates basic rates for cable service. *See* Cable Act Section 623.

This broad, Congressionally created, hands-on, day-to-day cable regulatory role is unique to LFAs.⁶ It is they, and not this Commission, who have the day-to-day contact with cable companies and their customers that provides them with knowledge of a cable company's actual performance. The information LFAs possess as a result of fulfilling this Congressionally assigned role is why LFA approval or disapproval of Section 572 waivers is important. And it makes the City, as the LFA, uniquely able to provide this Commission with facts as to why the public interest is best served by the Commission, as well as the City, denying the waiver which Applicants have requested.

LFA comments in this docket thus can and should be broadly based, and not narrowly restricted to circumstances directly involved in the proposed transaction (as Applicants would have it), *see Application*, p. 22, note 46. The Applicants' approach would put blinders on the Commission, causing it to ignore public detriments that would result from a waiver, and making impossible a full and accurate determination of the public "convenience and needs." 47 U.S.C. Section 572(d)(6)(A)(iii).

In this regard, the terms "public interest" and public "convenience and needs" chosen by Congress for Section 572 are broad and all-encompassing. Comments to the Commission from

⁶ In the Cable Act, Congress specified the primary role of municipalities with respect to cable companies, stating, for example, that "[The Cable Act] establishes a national policy that clarifies the current system of . . . regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation . . . [The Cable Act] will preserve the critical role of municipal governments in the franchise process." Congressional Report on the 1984 Cable Act, H.R. Rep. No. 934, 98th Cong. 2d Sess. 21 (1984).

LFAs thus can and should be equally broad as well, and may be based on past and current experiences with and knowledge about the Applicants. Such comments provide useful information for the Commission with respect to whether the public interest, convenience, and needs of the community are likely to be met by allowing Comcast to increase its ownership and control of telecommunications facilities and services in the community.

To repeat, by attempting to narrow and restrict the grounds on which LFAs may comment, Applicants seek to have the Commission disregard the Applicants' past histories and current practices and so devalue the benefit that LFAs bring to the process, as the local regulatory authorities with experience with Applicants' operations in practice in local communities. If LFAs were limited to the same basis for approving the waiver as the FCC, there would be a duplication of effort by the governmental entities and useful and relevant local information and experience would not be considered. It is, in fact, the history and experiences that LFAs have with providers that give value to their participation in the approval process. It would therefore be counter-productive to disregard an LFAs disapproval that was based on its experiences with and knowledge about the provider in other contexts (for example as a cable operator).

III. THE "NEEDS OF THE COMMUNITY TO BE SERVED" HAS PARTICULAR MEANING IN THE CABLE ACT THAT IS RELEVANT TO A WAIVER DETERMINATION.

The standard for FCC approval under Section 572(d)(6)(A)(iii) emphasizes "meeting the convenience and needs of the community to be served." The phrase "needs of the community" or its equivalent occurs in several other places in the Cable Act, and these shed light on what is intended here. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("*Merrill Lynch*") ("Generally, identical words used in different parts of the same statute are ...

presumed to have the same meaning”). It is therefore relevant and useful to examine how these words are used elsewhere in the Cable Act.

As stated in the first section of the Cable Act, one of its main purposes is to "assure that cable systems are responsive to the needs and interests of the local community". 47 U.S.C. § 521(2) (emphasis added). This is accomplished, in part, during the franchising process created by that Act. So, as mentioned above, under the Cable Act's franchise renewal process, the LFA is tasked with "identifying the future cable-related community needs and interests" during the franchise renewal process before evaluating the renewal terms proposed by a cable operator. 47 U.S.C. § 546(a)(1) (emphasis added). The evaluation of the cable operator's proposed renewal terms is to take place according to four criteria, two of which explicitly invoke the "needs of the community":

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;

* * * *

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

47 U.S.C. Section 546(c)(1)(B)&(D) (emphasis added).⁷

It is therefore one of the responsibilities of an LFA under the Federal Cable Act to ensure that local community needs are considered both in the context of a cable franchise renewal, and in the context of a waiver review under Section 572. Because both these responsibilities devolve upon the LFA under the Cable Act, and because similar language is used in both cases, it is to be

⁷ As discussed below, Congress reinforced the importance of franchise terms satisfying community needs by preventing amendments to a franchise unless strict substantive standards are met. See 47 U.S.C. Section 545.

presumed that a similar standard of review is intended for both Sections of the Cable Act. *See Merrill Lynch, supra*, and *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998) (recognizing "the presumption that equivalent words have equivalent meaning when repeated in the same statute").

It is noteworthy that in the context of the Cable Act, the "needs of the community to be served" is a broad and inclusive phrase that covers such things as:

- Where service will be provided - - universal service throughout a city - - or subject to a density requirement
- Service without discrimination on the basis of race, nationality, demographics or the income of an area (known as "redlining")⁸
- The minimum number of channels to be provided
- Public, educational, and governmental ("PEG") access to the cable system and support for such local, community-based programming. This includes the number of such PEG channels and in-kind or direct financial support for them.
- Signal quality, such as enforcement of the Commission's technical standards for cable signals found in 47 CFR Section 76.605
- Consumer protection, consumer complaints, and billing practices
- Use and restoration of the public streets
- Enforcement by the LFA of franchise provisions
- Security for performance, such as bonds and insurance and indemnity provisions.

In short, "community needs" is a phrase deliberately chosen to indicate the broad breadth of the permissible inquiry. Therefore, when the same words and concept are used in Section 572, the Congressional intent is for it to have a similarly broad meaning. To interpret it as narrowly as the Applicants seek would frustrate Congressional intent.

It is therefore clear that one role of the City in this proceeding is to share with the Commission its knowledge and experiences about Comcast's performance of its public interest obligations in it and other local communities and to provide the Commission with many of the

⁸ See, e.g., Cable Act Section 621(a)(3) requiring franchises to prohibit redlining based on the income of certain areas.

reasons for the City's determination about why Comcast has not met those public interest obligations, as these embody the means by which Comcast was supposed to meet the "community needs" referred to repeatedly in the Cable Act.

IV. CONTROL OF A LARGER PORTION OF THE LOCAL COMMUNICATIONS MARKET BY COMCAST IS NOT IN THE LOCAL PUBLIC INTEREST.

Based on the City's knowledge and experience with Comcast, providing Comcast with a larger share of the local telecommunications market will not be in the public interest nor will it meet the "convenience and needs of the community," but quite the reverse. This is especially the case where Comcast, a cable duopolist⁹ leverages its cable duopoly by buying out a competitor in a related field as opposed using to its own "superior skill, foresight and industry"¹⁰ to legitimately expand in telecommunications. As is set forth next, Comcast's past and present actions in the City and State of Michigan have demonstrated a consistent pattern of disregard for applicable law, its franchise contracts, the public interest and the established and documented needs of the community.

A. Comcast has a History of Blatant Disregard for its Public Interest Obligations and the Needs of the Community.

To meet community needs Comcast agreed to many public interest obligations in its cable franchise with the City and with municipalities across Michigan. To be blunt, Comcast has been a serial violator of many of those public interest obligations. It is thus not in the public's interest, nor will it help to meet community needs for a scofflaw such as Comcast to become an even more dominant force in the communications market in the City.

⁹ AT&T is the only other franchised video operator in the City.

¹⁰ *United States v. Aluminum Corp. of America* ("Alcoa"), 148 F.2d 416, 430 (2nd Cir., 1945) (L. Hand, J.).

Support for PEG Channels: Comcast initially operated in the City under a 1985 franchise.¹¹ That franchise provided several local channels, commonly called PEG channels, for use by the public, educational institutions (schools), and local government (the City) and significant financial and in-kind support from Comcast for studios and other facilities to create programming for the PEG channels.

By way of background, when Congress amended the Federal Cable Act in 1992, it discussed the important local role of public, educational, and governmental access ("PEG") channels:

Public access provides ordinary citizens, non-profit organizations, and traditionally underserved minority communities an opportunity to provide programming for distribution to all cable subscribers. Educational access allows local schools to supplement classroom learning and to reach those students who are beyond school age or unable to attend classes. Governmental channels allow the public to see its local government at work, thus contributing to an informed electorate, which is essential to the proper functioning of our democratic form of government. PEG channels serve a substantial and compelling government interest in diversity, a free market of ideas, and an informed and well-educated citizenry.

H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992). PEG channels thus provide a readily available means for local residents to view civic, governmental, educational and other valuable local programming about their own community, and provide local residents, local governments, and local educational institutions with a means to reach and inform residents in their community. Under the Federal Cable Act, the number of and rules for PEG channels and their operation, and the enforcement of the provider's PEG support requirements are the responsibility of the LFA, and are to be determined in accordance with community needs. *See* Cable Act Section 611.

¹¹ The 1985 franchise by its terms expired on February 28, 2007. While the City in March 2007 issued a new franchise to Comcast under Michigan's Uniform Video Services Local Franchise Act, 2006 P.A. 480, Comcast has refused to recognize that franchise.

PEG Fee: Under its 1985 franchise, Comcast agreed to pay Detroit's Public Benefit Corporation (a non-profit corporation) \$250,000 per year, escalating with inflation, to support local PEG programming in the City, and agreed to enter into a contract with the Public Benefit Corporation setting forth specific terms and conditions for the financial support to be provided. However, rather than Comcast readily making the payments it had contractually agreed to in support of local PEG programming, the City was forced to expend great effort and expense in attempting to get Comcast to partially fulfill its contractual obligations.

For example, Comcast repeatedly disputed both the amounts it was required to pay and the due dates for such payments and did not make all the required payments. Comcast did this to minimize or avoid having to support local public access programming in the City.

PEG Studio: Comcast was also required under its 1985 franchise to provide and operate a public access studio where people could tape programs to be broadcast on the PEG channels. The studio was required to be located inside the City limits of Detroit, in order to be readily accessible to its residents.

Instead Comcast shut down its public access studio in the City!

Thus, Comcast has created barriers to access to its cable system for the local public, governmental and educational institutions by repeated violations of its franchise obligations.

Closing Other PEG Studios: Comcast's "war on PEG" is not an isolated or one-time event confined to the City of Detroit. Instead it is part of a broader pattern of deliberate violation of its public interest obligations. Among other things, as discussed more below, Comcast has violated its franchises with numerous Michigan communities by unilaterally closing approximately one dozen PEG studios located throughout the State of Michigan. It was obligated by its franchises to own, provide and operate these PEG studios so that the public,

cities and schools in the communities in question could use them to create programming to be broadcast on local PEG channels. (See Michigan newspaper articles on Comcast's closing of PEG studios attached as Exhibits A-C.)

Customer Service: In addition to this history of intransigence with respect to living up to its commitments to public, educational and governmental access to the cable system, Comcast has a poor record of customer service generally in the City. This has in the past left the City in the position of having to handle a very large number of customer complaints about Comcast's service, requiring the City to employ several employees for this task alone. Comcast's past history of poor customer service in the City with respect to its cable operations bodes ill for how it would perform if it expands its operations further as a provider of telecommunications services under the proposed transaction.

Overcharges of Customers: Comcast has taken advantage of its position as the incumbent cable operator in the City to charge rates well in excess of those allowed by law. In the past, the City has had repeated rate disputes with Comcast in which the City determined that (due to positions taken by Comcast which were not in compliance with applicable law, but which Comcast abandoned only after extensive rate regulation proceedings and appeals) Comcast was charging the City's residents rates in excess of those allowed by law. In 2002 the City settled these disputes for \$1 million in direct credits to subscribers, plus rate freezes and free coupons for subscribers for pay-per-view service or digital upgrades. However, the City is concerned that the same attitude toward its customers and the City's residents shown by Comcast in the past prevails today. While there is no current rate dispute with Comcast, the ongoing disputes with Comcast in other areas (see below) show a continuing pattern of behavior by Comcast which disregards the public interest.

Current Failure to Pay PEG Support Fee: The City approved a new franchise for Comcast on March 17, 2007, based on a community needs assessment and the form of franchise promulgated by the Michigan Public Service Commission ("MPSC"). The franchise provided, inter alia, for the 2% fee for the support of PEG channels allowed by recent Michigan video legislation.

Nonetheless, Comcast has refused to pay the 2% fee. Instead, in violation of an MPSC order ruling that is for an LFA (not a cable provider) to specify the amount of any franchise or PEG support fee, Comcast has attempted to unilaterally modify the franchise to remove the PEG fee. As discussed below, any such unilateral modification is also a violation of Section 625 of the Cable Act, unless the procedures there are followed, which Comcast needless to say has not followed. Comcast's recalcitrance on this issue is ongoing.

It is noteworthy that the City's current dispute with Comcast relating to PEG fees is similar to those it and other Michigan communities have had in the past. To the City, this indicates that Comcast's unwillingness to recognize its local commitments is more than a temporary conflict or misunderstanding, but reflects a corporate disdain for the local public interest that is wholly incompatible with the idea of a waiver under Section 572(6)(d).

B. Comcast's Scofflaw Behavior Violates the Public Interest. Comcast has routinely and explicitly violated the U.S. Constitution, the Federal Cable Act and multiple local franchises in its operations in Michigan. A recent and notorious example is Comcast's closure of multiple PEG access studios in Michigan without going through the franchise modification procedure required by Section 625 of the Federal Cable Act.

As noted above, in franchise renewals communities are required to obtain franchise terms which meet the future needs of their communities. In many communities this included having

the cable company operate a studio ("PEG studio") where local residents, schools and units of government could come to create video programming to be broadcast on PEG channels. As the Commission can appreciate, having a cable company provide PEG channels for use by the community is of little benefit unless there is a local studio with cameras, etc. where the community can go to create programming to be broadcast on the PEG channels. In thirteen metropolitan areas in Michigan Comcast agreed in its franchises with LFA's to own and operate a PEG studio for community use.

Once in a franchise, such PEG studio terms were intended by Congress to be sacrosanct. That is because Cable Act Section 625 sets forth a procedure that must be followed by a provider seeking to modify its existing franchise. That procedure requires that the provider "obtain from the franchising authority modifications of the requirements in such franchise." 47 U.S.C. § 545(a)(1). The Cable Act sets forth the standard that the provider must meet to obtain the LFA's consent ("commercial impracticability") and requires that a decision to modify the franchise be made in a public proceeding and within 120 days of receipt of a request for modification from the provider. 47 U.S.C. § 545(a)(1)&(2).

Furthermore, and of key importance with respect to Comcast's provision of PEG studios, the Section 625 of the Cable Act flatly prohibits modifications of PEG access-related services: "A cable operator may not obtain modification under this section of any requirement for services relating to public, educational, or governmental access." 47 U.S.C. 545(e).

Despite these provisions of federal law, in 2007 Comcast unilaterally claimed to modify its franchise terms in many Michigan communities, and among the unilateral changes it made was to shut down PEG studios and other facilities required under by franchise in approximately

thirteen communities¹², including the City of Detroit. The studios served approximately 1 million people. Comcast did not even attempt to seek a modification of its franchises under Section 625 of the Cable Act, but ignoring the Supremacy Clause¹³ claimed that a newly passed state law (!) authorized its unilateral actions, superceding the Communications Act.

Comcast's claims that state law somehow preempts federal law were promptly addressed and rejected by the Federal District Court in Michigan. *See City of Dearborn, et al. v. Comcast of Michigan, III, et al.*, No. 08-10156, 2008 U.S. Dist. LEXIS 108053, at *13-15 (E.D. Mich. November 2, 2008) (Attached as Exhibit D) (holding that where the state act conflicts with the federal act, the state act is preempted). Nonetheless, Comcast has refused to recognize the validity of the Federal Cable Act or local franchise requirements and reinstate the PEG studios in any of the communities.

In its actions regarding the public interest requirement for it to own and operate local PEG studios Comcast has thus violated each of the following:

- Local franchise requirements
- Section 625 of the Cable Act
- The Supremacy Clause of the U.S. Constitution.

In light of experiences such as those described above of the City of Detroit and other Michigan communities with Comcast's failures to live up to its public interest obligations, and its disregard for governing law, the City does not approve of the requested waiver.

¹² *See* the description of the closing of the PEG studio in the Port Huron/New Haven, Michigan "along with 12 others across the state [of Michigan]" in "Comcast Stations to Shut Down", December 2, 2007 *Port Huron Times Herald*, attached as Exhibit B.

¹³ "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, Article VI, Clause 2.

In sum, Comcast is a "scofflaw" who abides by applicable law and franchise requirements only so long as it determines that it is in its interest to do so. This ingrained corporate attitude - - especially as it relates to Comcast's violation of its public interest obligations - - prevents the Commission from finding that the waiver standard of 47 U.S.C. Section 572(d)(6)(A)(iii) is met, in part because the Commission cannot make the assumption that Comcast will comply with applicable provisions of the Communications Act and other Federal, state and local laws and contractual requirements. For the high standard ("clearly outweighed in the public interest") of Section 572(d)(6)(A)(iii) to be met, it is first necessary to assume that the applicant will comply with applicable law. Comcast does not meet that standard.

For these and other reasons, the Commission should not grant a waiver under Section 572(6)(d).

V. THE PROPOSED TRANSACTION IS ANTI-COMPETITIVE ON ITS FACE.

Finally, it is worth noting that despite what Applicants assert, the proposed transaction is anti-competitive on its face. Applicants' arguments that the proposed deal will somehow increase competition are absurd. Applicants pretend that because Comcast asserts that it has not "focused" its services on the same market segment as CIMCO, by taking over CIMCO's operations Comcast will "promote facilities-based competition." *See Application*, p. 12. While this takeover might make Comcast itself more competitive (*i.e.*, better able to beat its competition), it will not add players to the competitive marketplace, but will in fact remove one.

Applicants admit that Comcast has recently "initiated efforts to market voice, data, and internet access products to the medium-sized business market segment," which is the very market that CIMCO serves. *Application*, p. 13. It is therefore clear that "facilities-based

competition" would be increased by having Comcast continue to compete with CIMCO rather than taking CIMCO's place and removing a competitor from the market.

It is therefore entirely disingenuous for Applicants to assert, as they do, that the proposed transaction will have no anticompetitive effects. Clearly by removing one of its competitors from the market place there will be an anti-competitive effect. And while there will be a benefit to Comcast's competitive position, that is not the same as a benefit to the public, as much as the Applicants appear to believe that these two things are the same.

VI. CONCLUSION.

For the reasons stated above, the City of Detroit, Michigan does not approve of the requested waiver under Section 572(6)(d), and as set forth above respectfully requests that the Commission determine that Applicants have failed to meet the standards of both Section 572(d)(6)(A) and (B), and that the proposed transaction is prohibited by the plain language of Section 572(b).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2010, I caused a true and correct copy of the foregoing Opposition to Petition for Reconsideration to be mailed by first class U.S. mail and electronic mail to:

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