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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
	)	
Applications Filed for the Acquisition of Certain Assets of CIMCO Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC	))))	WC Docket No. 09-183 ITC-ASG-20091007-00438

MEMORANDUM OPINION AND ORDER
AND ORDER ON RECONSIDERATION

Adopted: March 13, 2010 **Released: March 15, 2010**

By the Commission:

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I. INTRODUCTION

1. In this Order, we partially grant the request of CIMCO Communications, Inc. (CIMCO), and Comcast Phone, LLC (Comcast Phone), Comcast Phone of Michigan, LLC (Comcast Phone Michigan) and Comcast Business Communications, LLC (Comcast Business) (together, Comcast Entities) (CIMCO and Comcast Entities together, Applicants) for the Comcast Entities to acquire certain

CIMCO assets,[1] pursuant to sections 652(d)(6) and 214 of the Communications Act of 1934, as amended (Communications Act, or Act).[2]

2. CIMCO provides local exchange telephone services in a number of local franchise areas in which Comcast or one of its affiliates holds a franchise to offer cable television service. Section 652(b) of the Act prohibits a cable operator from acquiring more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service in the cable operator's franchise area.[3] Section 652(d)(6) authorizes the Commission to waive this prohibition if it "determines that . . . 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,"[4] and "the local franchising authority approves of such waiver."[5] The Applicants have requested a waiver of section 652(b) pursuant to section 652(d)(6).

3. Two entities filed objections to the procedures we established for review of the Application and associated waiver request.[6] One of these entities—the City of Detroit, Michigan (Detroit)—also opposes grant of the Application and waiver on substantive grounds.[7] After careful consideration, we find that our process for reviewing the transfer and assignment applications and waiver request satisfies applicable law and that a waiver will serve the public interest. Accordingly, for the reasons explained below, we grant the waiver request, except in Detroit, where a waiver will be granted upon receipt of proof by the Commission in writing that the local franchising authority approves of such waiver, satisfying section 652(d)(6)(B).[8]

4. We also conclude that the proposed transaction will serve the public interest, convenience, and necessity.[9] The transaction is not likely to result in any anticompetitive harms because

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[1] *See Application Filed for the 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, Public Notice, FCC 09-104 (rel. Dec. 1, 2009) (*December Public Notice*); *see also* CIMCO Communications, Inc. and Comcast Phone, LLC, Comcast Phone of Michigan, LLC, and Comcast Business Communications, LLC Combined International and Domestic Application, WC Docket No. 09-183 (filed October 7, 2009) (Application); ITC-ASG-20091007-00438. Applicants filed a supplement to their Application on October 28, 2009. *See* Letter from Charles W. Logan, Counsel to Assignees to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-183 (filed Oct. 28, 2009) (Oct. 28 *Ex Parte* Letter). When the Application was filed, Applicants also filed a request for confidential treatment seeking protection for proprietary or confidential information included in the Application. Accordingly, the Wireline Competition Bureau adopted and released a protective order to ensure that any documents containing such information receive adequate protection. *See Applications Filed for the Acquisition of Certain Assets and Authorizations of CIMCO Communications, Inc. by Comcast Phone, LLC, Comcast Phone of Michigan, LLC and Comcast Business Communications, LLC*, Protective Order, WC Docket No. 09-183, DA No. 09-2516 (rel. Dec. 1, 2009).

[2] 47 U.S.C. §§ 214, 572(d)(6).

[3] 47 U.S.C. § 572(b).

[4] 47 U.S.C. § 572(d)(6)(A)(iii)

[5] 47 U.S.C. § 572(d)(6)(B).

[6] *See* Mabuhay Alliance Comments at 1; Petition for Reconsideration at 1-3.

[7] Detroit Comments at 1.

[8] 47 U.S.C. § 572(d)(6)(B). We hereby grant the Wireline Competition Bureau delegated authority to consider any written proof offered in this record that Detroit approves of the waiver requested by Applicants and to issue a written acknowledgment of receipt of such proof. *See* 47 U.S.C. § 155(c)(1); *see also* 47 C.F.R. § 0.291.

[9] *See* 47 U.S.C. § 214(a).

the Applicants principally serve two different market segments, and therefore, the transaction is not likely to adversely affect competition. Moreover, Comcast's acquisition of CIMCO's assets and expertise will result in significant public interest benefits, in part because the transaction will foster facilities-based competition in the enterprise market, a long-standing goal of the Commission. We therefore grant the applications for the acquisition of the CIMCO assets by Comcast, except as to the assets located within the City of Detroit, Michigan local cable franchise area. As to the assets in Detroit, we conditionally grant the applications effective upon and subject to the Commission's written acknowledgement of its receipt of written proof that the local franchising authority approves of Commission grant of a waiver of section 652(b).

II. BACKGROUND

A. Description of the Applicants

1. CIMCO

5. CIMCO, an Illinois corporation, offers various telecommunications services including local exchange, long distance, international, and data services in Illinois (particularly in the Chicago metropolitan area), Indiana, Michigan, Ohio, and Wisconsin. CIMCO also provides interexchange long distance and international communications services in 40 other states, plus the District of Columbia.[10] CIMCO provides local exchange telephone services to business customers in approximately 298 local franchise areas throughout the states identified above in which Comcast or one of its affiliates holds a franchise to offer cable television service. CIMCO states that its customer base consists almost exclusively of medium-sized and enterprise business customers.[11] William A. Capraro, Jr., a U.S. citizen and CIMCO's founder, directly or indirectly controls 100 percent of CIMCO's equity. Capraro Development, LLC (Capraro Development), a CIMCO affiliate, provides resold wholesale local exchange services on an intra-company basis to CIMCO in Illinois.

2. Comcast

6. Comcast Corporation, a Pennsylvania corporation, provides service through its operating subsidiaries, including the Comcast Entities, which are all Delaware limited liability companies. These subsidiaries provide video and data services to customers in 39 states and the District of Columbia and also provide voice services to customers in 37 of those states plus the District of Columbia.[12] No party other than Comcast Corporation and its wholly owned intermediate subsidiaries owns a 10 percent or greater direct or indirect interest in Comcast entities, except that Brian L. Roberts, Comcast Corporation's Chairman and Chief Executive Officer, a U.S. citizen, is the beneficial owner of stock that represents 33 1/3 percent of the combined voting power of the two classes of Comcast Corporation's voting common stock.[13]

B. Description of the Transaction

7. On September 16, 2009, CIMCO and Comcast Entities entered into an Asset Purchase Agreement (Agreement) by which CIMCO will sell to Comcast Entities and their operating subsidiaries a

[10] A list of the states in which CIMCO provides service is available in the Application. *See* Application at 8.

[11] As explained below, CIMCO serves these customers via resale or by leasing the last-mile facilities of other telecommunications carriers. *See* Application at 19; *see also infra* at note 107.

[12] Lists of the states in which Comcast provides voice services, video and data services, and wholesale services are provided in Appendix A of the Applicants' supplement. *See* Oct. 28 *Ex Parte* Letter at A-1, A-2.

[13] *See* Application at 6; *see also* Oct. 28 *Ex Parte* Letter at 2 (stating that, "based on publicly-available information, no other individual or entity beneficially owns directly or indirectly a 10 percent or greater equity or voting interest in Comcast Corporation").

variety of domestic and international telecommunications assets, including telephone service customer accounts and related data, databases, and customer records needed to support the provision of interstate, interexchange and international telecommunications services to those customers in 45 states and the District of Columbia.[14] This is part of a larger transaction in which Comcast Entities will, directly and through their operating subsidiaries, acquire the telecommunications, data and information services businesses of CIMCO and its affiliate, Capraro Development.[15]

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

8. Pursuant to section 214(a) of the Act, before the Commission can authorize the proposed transaction, we must determine that the transfer of control of CIMCO's assets to Comcast Entities will serve the public interest, convenience, and necessity.[16] In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules.[17] If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed

[14] *See* Application at 3.

[15] *See id.* On March 4, 2010, the Applicants clarified that no domestic or international section 214 authorizations will be transferred as part of the proposed transaction. *See* Letter from Charles W. Logan, Counsel to Comcast Entities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-183 at 1 (filed Mar. 4, 2010). CIMCO will retain its existing international section 214 authorization, ITC-214-19930419-00064. The Comcast Entities will provide international services to their newly acquired customers pursuant to their existing section 214 authorizations, ITC-214-19961122-00593 (Comcast Business), ITC-214-19970801-00449 (Comcast Phone), and ITC-214-20031017-00480 (Comcast Phone Michigan).

[16] 47 U.S.C. § 214(a); *see also Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-32, paras. 8-10 (1998) (*WorldCom/MCI Order*). In accord with our precedent, we deny the Mabuhay Alliance's request to postpone a decision on the instant application and consider the issues raised in this proceeding in the proceeding addressing Comcast's proposed acquisition of NBC Universal. Mabuhay Alliance Comments at 1; *see, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9892-93, paras. 179, 181 (2000) (rejecting a motion to consolidate review of the AT&T/MediaOne merger with the pending AOL/Time Warner merger where anticompetitive effects relevant to the AT&T/MediaOne merger were assessed in the *AT&T/MediaOne Order*). The Commission has broad authority to order its docket "as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j); *see also, e.g., FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975); *American Telephone & Telegraph Co.*, 3 FCC Rcd 5071, 5075 n.21 (1988). We agree with the Applicants that the transaction involving CIMCO and Comcast is unrelated to the proposed transaction involving NBC and Comcast. Applicants' Reply to Comments of Mabuhay Alliance at 2. Any potential public interest harms or benefits related to the proposed transaction involving NBC and Comcast may be raised in the course of the Commission review of that transaction. Delaying our decision on the present transaction until the Commission completes its review of the NBC/Comcast transaction would unnecessarily burden CIMCO and Comcast and delay the likely benefits of the instant transaction, and would not inform our review of the transaction involving Comcast and NBC. *See id.*; *see also Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18529, para. 191 (2005) (*Verizon-MCI Order*) (dismissing a number of issues raised by commenters that were the subject of other pending proceedings).

[17] *See supra* Part III (addressing all issues arising under section 652(b), including whether the statutory conditions for waiver are satisfied).

transaction against the proposed public interest benefits.[18] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[19] If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we must designate the application for hearing.[20]

9. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[21] which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, and ensuring a diversity of license holdings.[22] Our public interest analysis may also entail assessing whether a transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[23] In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.[24]

10. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.[25] The Commission and the United

[18] *See, e.g., AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5672, para. 19 (2007) (*AT&T/BellSouth Order*); *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, CC Docket No. 98-184, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14046, paras. 20, 22 (2002); *Applications of Ameritech Corp. and SBC Communications Inc.*, WC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14737–38, para. 48 (1999) (*SBC/Ameritech Order*).

[19] *See, e.g., AT&T/BellSouth Order*, 22 FCC Rcd at 5672, para. 19.

[20] We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations. *See ITT World Commc'ns, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979). We may do so, however, if we find that a hearing would be in the public interest. With respect to the applications to transfer licenses subject to Title III of the Act, however, if we are unable to find that the proposed transaction serves the public interest, or if the record presents a substantial and material question of fact, section 309(e) of the Communications Act requires that we designate the application for hearing. 47 U.S.C. § 309(e); *see also Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12363-64, para. 30 (2008) (*XM-Sirius Order*); *News Corp. and the Direct TV Group, Inc. Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control*, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3277, para. 22 (2008)(*Liberty Media-DIRECTV Order*), *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18300, para. 16 (2005) (*SBC/AT&T Order*); *Verizon-MCI Order*, 20 FCC Rcd at 18443, para. 16; *Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee)*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20574, para. 25 (2002) (*EchoStar-DirecTV Order*).

[21] *Id.* at 5673, para. 20.

[22] *See, e.g.*, 47 U.S.C. §§ 254, 521(4), 614, 1302(b); *see also SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18301, para. 17 (2005) (*SBC/AT&T Order*); *WorldCom/MCI Order*, 13 FCC Rcd at 18030–31, para. 9.

[23] *See AT&T/BellSouth Order*, 22 FCC Rcd at 5673, para. 20.

[24] *See id.*

[25] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12365, para. 32; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3278, para. 24; *News Corp.-Hughes Order*, 19 FCC Rcd at 484, para. 17; *EchoStar-DIRECTV Order*, 17 FCC Rcd at 20575, para. 27.

States Department of Justice (DOJ) each have independent authority to examine the competitive impact of proposed communications mergers and transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by the DOJ.[26] Like the DOJ, the Commission considers how a transaction will affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction. The DOJ, however, reviews telecommunications mergers pursuant to section 7 of the Clayton Act, and if it wishes to block a merger, it must demonstrate to a court that the merger may substantially lessen competition or tend to create a monopoly.[27] Under the Commission's review, the Applicants must show that the transaction will serve the public interest; otherwise the application is set for hearing. The DOJ's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to other public interest considerations.[28] The Commission's competitive analysis under the public interest standard is somewhat broader, for example, considering whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market.[29]

IV. WAIVER PROCESS AND PROCEDURAL MATTERS

11. In connection with the proposed transaction, the Applicants have requested waiver of the prohibition in section 652(b).[30] Under procedures established by the Commission for this transaction, all relevant local franchising areas, except Detroit, are deemed to have approved of the Applicants' waiver request.[31] Detroit has objected to granting the waiver.[32] For the reasons stated below, with the exception of the franchise area of Detroit, Michigan, we grant Applicants' request for waiver of the restrictions of Section 652(b). With respect to the franchise area of Detroit, Michigan, Applicants' waiver request is conditionally granted, effective upon the Commission's acknowledgement of receipt of written proof that the local franchising authority approves of waiver of section 652(b).[33]

12. Detroit also filed a petition seeking reconsideration of the process the Commission established for soliciting responses from the relevant franchising authorities and for determining whether a local franchising authority approves of a Commission waiver of section 652(b). For the reasons stated below, we deny Detroit's petition for reconsideration.

A. Background

13. *Section 652 Prohibition and Waiver.* CIMCO provides, among other services, local exchange telephone services to business customers in approximately 298 local franchise areas throughout

[26] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12365, para. 32; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3278, para. 24; *Verizon-MCI Order*, 20 FCC Rcd at 18444, para. 18; *SBC-AT&T Order*, 20 FCC Rcd at 18302, para. 18. *See also Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (stating that the public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[27] 15 U.S.C. § 18.

[28] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12366, para. 32.

[29] *See, e.g., id.*; *Liberty Media-DIRECTV Order*, 23 FCC Rcd at 3278, para. 25.

[30] *See* Application at 11.

[31] *See* December Public Notice at 5.

[32] *See* Detroit Comments.

[33] *See supra* text accompanying note 8.

Illinois, Indiana, Michigan, Ohio and Wisconsin in which Comcast or one of its affiliates holds a franchise to offer cable television service. The Applicants request a waiver of the restrictions in section 652(b) of the Communications Act in the event the Commission deems this provision applies to the proposed transaction.[34] Section 652(b) prohibits cable operators from acquiring "directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area."[35] Section 652(d)(6) authorizes the Commission to waive section 652(b) if: (1) "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 (2) the relevant local franchising authorities approve of such waiver.[36] With respect to the latter requirement, neither the Communications Act nor Commission rules establish a particular process for a local franchising authority to express its approval or disapproval of a waiver of the restrictions of section 652(b). There appears to be no prior instance where an applicant has sought such a waiver from the Commission.

14. In their Application, the Applicants predicted that a significant number of the local franchising authorities may "take no steps to express their view regarding the waiver request, even though they have no objection to the request."[37] The Applicants maintained that inaction on the part of some local franchising authorities is likely because the "proposed transaction involves very few customers in any individual local franchising authority, as well as the fact that the local franchising authorities do not regulate CIMCO's service and CIMCO does not use any local rights of way."[38] The Applicants further stated that the "delays and uncertainty created by an indefinite [local franchising authority] approval process would have a significant adverse impact on CIMCO's business," and that without some time limit on the local franchising authority approval process, Congress's intent in establishing the waiver process would be undermined.[39]

15. *December 2009 Public Notice.* Finding the Applicants' procedural concerns reasonable, the Commission announced in a Public Notice, released December 1, 2009, a process to be used in this proceeding for soliciting responses from the relevant local franchising authorities and for determining whether a local franchising authority approves of a Commission waiver of the restrictions of section 652(b).[40] Under the prescribed process, Applicants were required to serve, within 10 days of December 1,

[34] Application at 9. The Applicants contend that the Commission reasonably could interpret section 652(b) as not applying to the proposed transaction because CIMCO did not begin offering telephone exchange service until after January 1, 1993. Application at 11 n.15, *citing* 47 U.S.C. § 572(e) (defining the term "telephone service area"). Nevertheless, the Applicants request that the Commission "process their application on the basis of their waiver request, and assume that section 652(b) applies to this transaction without deciding whether, in the context of a cable operator's acquisition of a CLEC, section 652(b) applies to competitive local exchange carriers (LECs) that were not providing telephone exchange service as of January 1, 1993." *Id.*

[35] 47 U.S.C. § 572(b). Section 652(a) places a converse prohibition on local exchange carriers and their affiliates. 47 U.S.C. § 572(a). In addition, section 652 prohibits cable operators and LECs from entering "into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services" in the overlap area of the providers' cable franchise area and telephone service area, respectively. 47 U.S.C. § 572(c). Section 652 is implemented in the Commission's rules at 47 C.F.R. § 76.505.

[36] 47 U.S.C. §§ 572(d)(6)(A)(iii), (d)(6)(B); *see also* 47 C.F.R. §§ 76.505(d)(6)(i)(C), (ii). The Applicants do not claim to satisfy the other waiver criteria set forth in section 652(d)(6)(A). *See* 47 U.S.C. §§ 572(d)(6)(A)(i) & (ii); *see also* 47 C.F.R. §§ 76.505(d)(6)(i)(A), (B).

[37] Application at 23.

[38] Application at 24.

[39] Application at 23-25.

[40] *See* December Public Notice.

2009, a copy of the Public Notice on any entity in the overlap areas that currently has local franchising authority over Comcast, and to file with the Commission certificates of service attesting that the Public Notice was timely served.[41] In addition, the Applicants were expected to inform the relevant authorities informally of the December Public Notice and of the procedures established for local franchising authorities to notify the Commission of their approval or disapproval.[42] The December Public Notice "encouraged" local franchising authorities to express approval or disapproval of the proposed waiver by filing a letter, or other appropriate format, with the Commission.[43] The Public Notice further explained that, if a local franchising authority failed to inform the Commission of its decision within 60 days after proper service by the Applicants, the Commission would deem that authority to have approved of the proposed waiver of the restrictions of section 652(b).[44] The 60 day period afforded local franchising authorities an opportunity to view petitions to deny, comments, and replies filed in the Commission's proceeding (and available online) before having to themselves file an approval or disapproval.[45] Footnote 20 of the December Public Notice addressed local franchising authority objections to a waiver, stating:

> Because the statutory criteria for whether a waiver of the restrictions of section 652(b) is warranted depends, in relevant part, on whether "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," any local franchising authority objections to the waiver should be based on reasons related to the proposed transaction rather than extraneous matters. *See* Application at 22 n.46. We therefore request any local franchising authority that does not approve of the requested waiver to explain the reasons for its disapproval.[46]

16. The Applicants certified that they served a copy of the December Public Notice by UPS Overnight Mail on all 274 local franchising authorities on December 3-4, 2009.[47]

17. *Petition for Reconsideration.* On December 30, 2009, Detroit filed a Petition for Reconsideration objecting to the process established in the December 1, 2009, Public Notice for local franchising authorities to approve or disapprove of the Applicants' requested waiver of section 652(b).[48] Detroit also objected to what it considered Commission-imposed "restrictions" placed on the grounds for disapproval, as reflected in footnote 20 of the December 1, 2009, Public Notice.[49] On January 11, 2010, Applicants filed an Opposition maintaining that the procedures adopted by the Commission in the December 1, 2009 Public Notice to implement the waiver provision of section 652(b) were reasonable

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[41] *Id.* at 4-5.

[42] *Id.* at 5.

[43] *Id.* at 5, 6-7.

[44] *Id.* at 5.

[45] *Id.*

[46] *Id.*

[47] *See* Letter from Wesley R. Heppler, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-183 (filed Dec. 9, 2009); *see also* Application at 23 (explaining that the service territories of Comcast and CIMCO overlap in 298 local franchising authority areas and that 25 of these local franchising authorities are in Indiana where the Indiana Utility Regulatory Commission has been designated as the sole franchising authority for the provision of video service); *see also* Letter from Charles W. Logan, Counsel to Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-183, Attach. (filed Oct. 22, 2009) (updating list of Comcast's local franchising areas in which CIMCO is providing telephone exchange service).

[48] Petition for Reconsideration at 2.

[49] Petition for Reconsideration at 4, 5-6.

and within the scope of the Commission's authority and that, therefore, the Petition for Reconsideration should be denied.[50] On January 18, 2010, Detroit filed a Reply to the Opposition reiterating its objections to the process and the "restrictions" placed on the grounds for disapproval established in the December Public Notice.[51]

18. *January 2010 Public Notice.* On January 29, 2010, in response to Detroit's Petition for Reconsideration, the Wireline Competition Bureau released by Public Notice a clarification regarding local franchising authorities' submissions under section 652.[52] Specifically, the January Public Notice clarified that relevant local franchising authorities could approve or disapprove of the waiver on any grounds that they believed to be consistent with section 652:

> We clarify that, while footnote 20 expressed an expectation that objections raised by a local franchising authority would arise from "reasons related to the proposed transaction," local franchising authorities may file any expression of approval or disapproval that they believe to be consistent with section 652. In the final sentence of footnote 20 the Commission merely requested that any local franchising authority that objects to the requested waiver "explain the reasons for its disapproval." We reiterate that request, but also clarify that the request is not a filing requirement.[53]

19. In order to ensure that local franchising authorities would have adequate time to prepare their submissions in light of the clarification of footnote 20, the January Public Notice extended the time for all franchising authorities to file expressions of approval or disapproval another 30 days, until March 1, 2010, before an authority will be deemed to have approved the proposed waiver of the restrictions of section 652.[54]

20. *Local Franchising Authorities Approvals and Disapprovals.* On March 1, 2010, Detroit filed "Comments," objecting to Applicants' request for waiver of the buyout prohibition under section 652(b).[55] The Commission did not receive any approvals or disapprovals of waiver from any other local franchising authority in the overlap areas.

B. Discussion

1. Applicants' Waiver Request

21. With the exception of the franchise area in Detroit, Michigan, we grant the Applicants' request for waiver of the restrictions of Section 652(b).[56] We find that the Applicants have satisfied the factors for waiver set forth in Section 652(d)(6)(A)(iii) and (B): (1) "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 (2) the relevant local

[50] Applicants' Opposition to Petition for Reconsideration at 1-2 (Opposition).

[51] Detroit's Reply to Opposition to Petition for Reconsideration (Reply).

[52] *See CIMCO Communications, Inc. and Comcast Phone, LLC, Comcast Phone of Michigan, LLC, and Comcast Business Communications, LLC, for the Acquisition of Certain Customers and Assets of an Authorized Domestic and International Carrier*, WC Docket No. 09-183, Public Notice, DA 10-211 (rel. Jan. 29, 2010) (January Public Notice).

[53] *See* January Public Notice at 3.

[54] *Id.*

[55] Detroit Comments.

[56] 47 U.S.C. § 572(b) (prohibiting cable operators from acquiring "any local exchange carrier providing telephone exchange service within such cable operator's franchise area").

franchising authorities approve of such waiver.[57]

22. First, based on the record, we find that any 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, thus satisfying the public interest factor of section 652(d)(6)(A)(iii).[58] As discussed in detail below,[59] we find that the proposed transaction is unlikely to result in anticompetitive effects because, among other reasons, Comcast and CIMCO have focused their voice services on different market segments and for the most part do not compete with each other.[60] We also find the grant of the Application will help meet the "convenience and needs of the community to be served" by promoting facilities-based competition in the medium-sized and enterprise business marketplace.[61]

23. Second, with the exception of the franchising area in Detroit, Michigan, we find the Applicants have satisfied section 652(d)(6)(B), which requires that "the local franchising authority approve of such waiver."[62] Under the process the Commission established for this transaction, local franchising authorities had until March 1, 2010, to express approval or disapproval of the proposed waiver by filing a letter, or other appropriate format, with the Commission.[63] If a local franchising authority failed to inform the Commission of its decision by March 1, 2010, that authority would be deemed to have approved of the proposed waiver of the restrictions of section 652(b). On March 1, 2010, Detroit filed an objection to the Applicants' waiver request.[64] The Commission did not receive any approvals or disapprovals of waiver from any other local franchising authority in the overlap areas. Thus, pursuant to the procedures announced in our December Public Notice, other than Detroit, Michigan, the local franchising authorities have approved of the requested waiver.

24. With the exception of the franchise area in Detroit, Michigan, we therefore grant the Applicants' request for waiver of section 652(b) of the Act. With respect to the franchise area of Detroit, Michigan, Applicants' waiver request will be granted only upon the Commission's acknowledgement of receipt of proof by the Commission in writing that the local franchising authority approves of waiver of section 652(b).[65]

2. Petition for Reconsideration

25. We deny Detroit's Petition seeking reconsideration of the approval process established for local franchising authorities in the context of this transaction. As described in more detail below, we find no merit to Detroit's claims that the established procedures conflict with the statutory requirements of section 652 or that the procedures in question violate the constitutional due process rights of local franchising authorities.[66]

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[57] 47 U.S.C. § 572(d)(6).

[58] 47 U.S.C. § 572(d)(6)(A)(iii); *see also* 47 C.F.R. § 76.505(d)(6)(i)(C).

[59] *See infra* Part V.

[60] *See infra* Part V.A; *see also* Application at 12.

[61] *See infra* Part V.B.

[62] 47 U.S.C. § 572(d)(6)(B); *see also* 47 C.F.R. § 76.505(d)(6)(ii).

[63] *Id.* at 5, 6-7.

[64] Detroit Comments.

[65] *See supra* note 8.

[66] The January Public Notice addressed Detroit's third objection concerning the Commission's alleged "efforts to constrain the grounds on which LFAs may grant or withhold their [waiver] approval." *See* Reply at 4, 5-7; Petition

26. Detroit argues that there is no statutory basis for the "deemed approved" procedure.[67] According to Detroit, there is no ambiguity in the statute; section 652 compels "affirmative" approval of a waiver by an LFA and prohibits the use of a time-limited "deemed approval" process.[68] We disagree. The Commission has broad authority to implement the ambiguous provisions of section 652.[69] Section 652(d)(6)(B) authorizes waiver only if "the local franchising authority *approves* of such waiver."[70] The term "approves" is ambiguous because the statute does not expressly state the form local franchising authority approval must take, thereby making "a variety of interpretations" possible.[71] For example, section 222 of the Act uses similar language, requiring a telecommunications carrier to obtain "the approval of the customer" prior to using customer proprietary network information ("CPNI") for purposes unrelated to its provision of service to the customer.[72] Interpreting that provision, we concluded that the use of the term "approval" in section 222 was ambiguous because the statute did not expressly state the form customer approval must take, thus giving us flexibility to consider a variety of procedures that would best fit within the statutory scheme.[73] In the CPNI context, the Commission ultimately established two different procedures for obtaining the required customer "approval," each tailored to a particular context, *i.e.*, one requiring the customer's express affirmative consent, the second involving an "opt-out" approach requiring notice to customers and assumed customer consent after a specified time period without any response.[74] Here, too, we must determine the form local franchising authority approval must take. Contrary to Detroit's assertions, the legislative history of section 652 does not shed any light on this

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for Reconsideration at 4; Detroit Comments at 2-6. The January Public Notice clarified that local franchising authorities could approve or disapprove of the waiver on any grounds that they believed to be consistent with section 652. *See* January 2010 Public Notice at 3.

[67] Petition for Reconsideration at 3-4.

[68] *Id.*; *see also* Reply at 1-2.

[69] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

[70] 47 U.S.C. § 572(d)(6)(B) (emphasis added).

[71] *See, e.g.*, *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8128, para. 87 (1998), *vacated in unrelated part*, *U S West v. FCC*, 182 F.3d 1224 (1999) (*CPNI Second Report and Order*); *see also* Opposition at 4-5.

[72] 47 U.S.C. § 222(c)(1).

[73] *CPNI Second Report and Order*, 13 FCC Rcd at 8129, 8134, paras. 89-90, 95.

[74] *Id.* at 8064-65, 8084-99, paras. 2, 31-49. We do not find persuasive Detroit's attempt at distinguishing the *CPNI Second Report and Order*. Detroit argues that section 222 is a "dissimilar provision" and that the "Commission was able to provide an 'opt-out' option as a form of 'approval' in the Section 222 context only because of a pre-existing customer-carrier relationship" where approval could be inferred. Detroit maintains that no such analogous relationship exists under section 652. *See* Petition for Reconsideration at 2. We recognize the different factual circumstances presented in this transaction and in the CPNI context. Nonetheless, what is most significant about *CPNI Second Report and Order* in relation to this case is that the Commission has previously found the term "approve" ambiguous and has previously employed an "opt-out" procedure to implement that term. Consequently, as described herein, we find that the statutory scheme of section 652 supports the application of a deemed approved process. *See also Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5138-40 (2006) (*Section 621 Report and Order*) (adopting a "deemed grant" approach under which an LFA that has not made a final decision on an application for a competitive franchise within a certain time period will be deemed to have granted the applicant an interim franchise; a 90-day time period applied to applicants holding existing authorizations to access rights-of-way; a 6-month time period applied to those applicants that did not).

issue.[75] The language Detroit points to in the Conference Committee Report basically reiterates the language set forth in the statute and says nothing about the form of approval Congress intended for section 652 waivers.[76] Faced with the task of interpreting ambiguous language, we adopted a process that best fits within the statutory scheme of section 652.

27. In addition, sections 4(i) and 4(j) of the Communications Act afford the Commission wide discretion in establishing procedures to facilitate the orderly conduct of its business.[77] It is well settled that the choice of agency procedure is committed to the agency's discretion.[78] Such principles are particularly important in the present context, where the Commission must consider the competing interests of the applicants, interested parties and the public-at-large. The procedures we have fashioned here attempt to balance these interests, by providing a reasonable period for local franchising authorities to approve or disapprove the requested waiver while at the same time preventing indefinite delay of the Commission's transaction review and waiver request process, and possible derailment of a transaction that could otherwise be found to be in the public interest.

28. Detroit further argues that adoption of a "deemed approved" process is contrary to Congressional intent because such a procedure was not expressly included in section 652. Detroit points to the "deemed granted" procedure explicitly included in section 617 of the Act,[79] and states that "[w]hen Congress intends to include a time limit and a 'deemed granted' limitation on LFA approval authority, it does so explicitly."[80] The trouble with Detroit's argument is that the two provisions "are not sufficiently parallel to draw definitive conclusions from the differences in language."[81] There is nothing to suggest that Congress intended the two provisions to be read together, or that Congress acted intentionally by including the "deemed granted" language in section 617 and omitting it in section 652. Indeed, as Detroit itself acknowledges, the provisions were enacted four years apart, section 617 with the 1992 Cable Act and section 652 with the Telecommunications Act of 1996.[82]

29. We also reject Detroit's argument that, by adopting a "deemed approved" process, the Commission improperly "changed the requirements of section 652."[83] To the contrary, the approval process used for this transaction is fully consistent with the requirements of section 652.[84] As required under the statute, the process assures that each of the 274 local franchising authorities have a full and fair opportunity to approve or disapprove of the requested waiver. Under the prescribed process, Applicants were required to serve individually each local franchising authority with a Public Notice describing the approval procedures, and then file with the Commission certificates of service attesting that Public Notice

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[75] Petition for Reconsideration at 4 (citing Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, HR 104-458, 104th Cong., 2d Sess. at 175).

[76] *Id.* (relying on the Conference Committee Report language that says that "the conferees give specific guidance to the Commission with respect to granting waivers" allowing the Commission to waive the various restrictions in this section if, among other things, "the local franchising authority approves of such waiver").

[77] 47 U.S.C. §§ 154(i), (j).

[78] *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[79] 47 U.S.C. § 537 (providing a franchising authority 120 days to act upon a request for approval of sale of a cable system; if a franchising authority fails to act within the 120 day period, the request is deemed granted).

[80] *See* Reply at 3.

[81] *See Rucker v. Lee Holding Co.*, 471 F.3d 6, 10-11 (1st Cir. 2006).

[82] *See* Reply at 3.

[83] *See* Petition for Reconsideration at 5-6; Reply at 4.

[84] *See* Opposition at 5-6.

was timely served.[85] In addition, the Applicants were expected to inform the relevant authorities informally of the December Public Notice and of the procedures established for local franchising authorities to notify the Commission of their approval or disapproval.[86] The local franchising authorities were given approximately 90 days to file approvals or disapprovals of the requested waiver. At the same time, the procedures assured that the waiver process established by Congress in section 652(d)(6) was not effectively nullified by potential undue delay and uncertainty associated with an open-ended process.[87] Based on our extensive experience in working with local franchising authorities,[88] we found reasonable the Applicants' concern that a significant number of the local franchising authorities might take "no steps to express their view regarding the waiver request, even though they have no objection to the request."[89] The Applicants maintained that inaction on the part of some local franchising authorities was likely because the "proposed transaction involves very few customers in any individual local franchising authority, as well as the fact that the local franchising authorities do not regulate CIMCO's service and CIMCO does not use any local rights of way."[90] Here, imposition of some deadline was necessary. Otherwise, as a practical matter, section 652 decisions could be delayed indefinitely simply because of franchising authority inaction, leaving the transaction proceeding to languish in regulatory uncertainty. Indeed, other than the waiver objection filed by Detroit, the Commission did not receive any filings (approval or disapproval) from any other local franchising authority, in response to the Applicants' request for waiver. The "deemed approved" procedure thus offered local franchising authorities a less burdensome option (of which all but one local franchising authority notably opted for), while at the same time bringing certainty to the waiver process to ensure that the competitive benefits expected to flow from the proposed transaction could, at some reasonable point in time, be realized.

30. We reject Detroit's argument that the process in question required notice and comment procedures before adoption and violates the constitutional Due Process rights of local franchising authorities.[91] The Administrative Procedure Act (APA) excepts from notice and comment rulemaking procedures actions that affect only agency procedure.[92] In this instance, the Commission's actions simply established procedures for local franchising authorities to follow in responding to a waiver request under section 652(d)(6) in the context of this particular transaction.[93] Such action does not require notice and comment under the APA. Nor does the Commission's action violate the Due Process clause of the Constitution. All that is required to ensure due process is reasonable notice and an opportunity to be heard.[94] In the instant matter, local franchising authorities were given actual notice of the Applicants' request for waiver and the applicable procedures for filing their approval or disapproval. Local franchising authorities were also given an opportunity to be heard, *i.e.*, a 90-day window within which to file a letter or any other format expressing their approval or disapproval of the Applicants' waiver request. Finally, because the Commission withheld the waiver to which Detroit objected, its argument about alleged deficiencies in the Commission's procedures is moot. On March 1, 2010, the City of Detroit filed

[85] *Id.* at 4-5.

[86] *Id.* at 5.

[87] *See* Opposition at 9.

[88] *See, e.g., Section 621 Report and Order*, 22 FCC Rcd 5101; *see also* Opposition at 5.

[89] Application at 23.

[90] Application at 24.

[91] Petition for Reconsideration at 6-7.

[92] 5 U.S.C. § 553(b)(3)(A); *see also Ranger v. FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961).

[93] *See* Opposition at 11.

[94] *FTC v. Kuykendall*, 371 F.3d 745, 754 (10th Cir. 2004); *Turney v. FDIC*, 18 F.3d 865, 868 (10th Cir. 1994).

"comments" objecting to grant of the waiver and thus expressed that it does not approve the requested waiver, exercising its right under the statute. Based on this, Applicants' request for waiver with respect to the franchise area of Detroit, Michigan will not be granted until the Commission's acknowledgement of written proof that the local franchising authority approves of waiver of section 652(b).

31. For the reasons stated above, Detroit has failed to raise any basis for reconsideration of the established approval procedures. We therefore deny Detroit's Petition for Reconsideration.

V. PUBLIC INTEREST REVIEW

A. Potential Public Interest Harms

32. Having found that the transaction does not violate the Communications Act based on our waiver of section 652(b), we now turn to consideration of other aspects of our public interest analysis. We consider first the potential public interest harms arising from the proposed transaction before turning to potential benefits. Because CIMCO and Comcast currently provide telecommunications services in some of the same geographic areas, our inquiry focuses on the potential horizontal effects of the transfers.[95] CIMCO provides local exchange telephone services to business customers in approximately 298 local franchise areas in which Comcast or one of its affiliates holds a franchise to offer cable television service.[96] Based on the record evidence, we find that the proposed transaction is unlikely to harm competition or potential competition in those local markets where the Applicants currently compete, or in any market where there is the potential for such competition.[97]

33. Although CIMCO and Comcast currently offer service in some of the same geographic areas, we find that Comcast and CIMCO focus on different market segments and, for the most part, do not compete with one another for specific customers. For example, Applicants state that CIMCO's customer base primarily consists of medium to large enterprise customers.[98] In contrast, Applicants state that Comcast to date primarily has focused on providing services to mass-market customers.[99] Although Comcast's mass-market customer base also includes small businesses, the Applicants maintain that the products and sales expertise needed to serve medium-sized and enterprise business customers are "quite different from those needed to serve residential and small business customers."[100] Indeed, adding CIMCO's expertise in serving enterprise customers is one of the chief benefits Applicants claim for the merger.[101]

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[95] *AT&T/BellSouth Order*, 22 FCC Rcd at 5675, para. 23. A merger is horizontal when the merging firms sell competing products that are in the same relevant markets and are therefore viewed as reasonable substitutes by purchasers of the products. *News Corp./Hughes Order*, 19 FCC Rcd at 507, para 69. Based on the record, we find no reason to be concerned about any possible vertical effects of the proposed transaction.

[96] *See* Application at 3.

[97] *Cf. Joint Applications of Telephone and Data Systems, Inc. and Chorus Communications, Ltd. for Authority to Transfer Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 22, 63 and 90 of the Commission's Rules*, CC Docket No. 01-73, Memorandum Opinion and Order, 16 FCC Rcd at 15297, paras. 8–9 (CCB/WTB 2001) (granting transfer of control involving an incumbent LEC and competitive LEC providing in-region service where merger would not harm competition).

[98] *See* Application at 12-14; *see also id.* at 9 (stating that CIMCO has no residential customers).

[99] *See* Application at 12. The Applicants state Comcast only recently began marketing voice, data, and Internet access products to the medium-sized business market segment. *See* Application at 13; *see also id.* at 14 (stating that, in the Chicago area in particular, CIMCO's primary service area, Comcast only serves a small number of medium-sized and enterprise business customers with multiple locations).

[100] Application, Stemper Declaration at 3; *see also* Application at 13.

[101] *See* Application at 17-18; Stemper Declaration, para. 9.

34. We are not persuaded by Detroit's argument that the merger will harm competition. Detroit argues that, although the transaction "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."[102] As an initial matter, we note that Detroit fails to provide any specific evidence to suggest why the proposed asset sale is likely to harm competition.[103] In addition, as previously indicated, we find that the Applicants compete in different market segments. Furthermore, as the Applicants point out, in CIMCO's main service territory, the primary incumbent LEC is AT&T, and CIMCO currently competes with "other competitive local exchange carriers ("CLECs") that target similar business customers in the Ameritech states, such as PAETEC, Access One, and First Communications."[104] Given the enhanced revenue opportunities in serving enterprise customers, we find that competitive LECs are more likely to target such customers when entering an area.[105] Thus, it is likely that, post-consummation, there will continue to be compelling economic incentives for new entrants to target enterprise customers, including small business customers in the relevant service areas.[106] We therefore find no reason to believe that combining most of the assets of two competitive carriers necessarily will have a negative impact on competition.[107] Finally, we note that no other entities submitted any evidence that the instant transaction is likely to result in anticompetitive harms.

35. Based on the record evidence, we conclude that the transaction is unlikely to have anticompetitive effects.[108]

B. Potential Public Interest Benefits

36. We next consider whether the transaction is likely to generate verifiable, transaction-

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[102] *See* Detroit Comments at 16.

[103] *See id.* at 16-17. We note that the Applicants state that no customers will lose their service as a result of this transaction. Application at 10. In addition, Comcast states it will continue to "offer service on the same rates, terms and conditions of the services that CIMCO currently offers, although, as with any other service provider, these rates, terms and conditions may be subject to change in the future as part of the normal course of business." *See id.*

[104] Application, Capraro Declaration, para. 9.

[105] *Cf. AT&T/BellSouth Order*, 22 FCC Rcd at 5690–91, para. 55 ("When competitive LECs seek to enter a new special access market, they generally concentrate their efforts in high density areas where the revenue opportunities are the greatest—such as locations where enterprise customers are located.").

[106] *See XO Communications, Inc. for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, IB Docket No. 02-50, 17 FCC Rcd 19212, 19225, para. 30 (IB/WTB/WCB 2002) (*XO Communications*) (finding no anticompetitive effects resulting from the combined operation of two overlapping competitive local exchange carriers because of the presence of other competitors and the transaction resulting in public interest benefits).

[107] *See, e.g.*, *AT&T/BellSouth Order*, 22 FCC Rcd at 5702, para. 71 (concluding that, although horizontal concentration would increase as a result of the merger of AT&T and BellSouth, the "increase is not likely to result in anticompetitive effects for medium and large enterprise customers, given the large number of competitors already participating in this market and the high level of sophistication of mid-sized and large enterprise customers"); *cf. also Interface Group v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987) ("The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors, and a consumer has no interest in the preservation of a fixed number of competitors greater than the number required to assure his being able to buy at the competitive price."). In addition, we note that CIMCO relies on the last-mile facilities of other carriers to provide service, including via resale, and that a VoIP platform is used to provision any local telephone services provided outside Indiana, Michigan, Ohio and Wisconsin—methods of offering service for which the entry barriers are comparatively low. Application, Capraro Declaration, para. 6.

[108] *See* Detroit Comments at 16-17.

specific public interest benefits.[109] The Commission applies several criteria in deciding whether a claimed benefit is cognizable. First, the claimed benefit must be transaction-specific (*i.e.*, the claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects").[110] Second, the claimed benefit must be verifiable.[111] In addition, as the Commission has noted, "the magnitude of benefits must be calculated net of the cost of achieving them."[112] Third, the Commission "will more likely find marginal cost reductions to be cognizable than reductions in fixed cost"[113] because "reductions in marginal cost are more likely to result in lower prices for consumers."[114]

37. The Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms.[115] As such, the Commission applies a "sliding scale approach" to evaluating benefit claims.[116] Under this sliding scale approach, where potential harms appear "both substantial and likely, the Applicants' demonstration of claimed benefits

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[109] *See, e.g.*, *AT&T/BellSouth Order*, 22 FCC Rcd at 5760, para. 200; *WorldCom/MCI Order*, 13 FCC Rcd at 18134–35, para. 194.

[110] *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20630, para. 189; *see also Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20063–64, para. 158 (1997) (*Bell Atlantic/NYNEX Order*) ("Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger." (footnote omitted)); *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 255 ("Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger . . . ."); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23313, para. 173 (2002) (explaining that the Commission considers whether benefits are "merger-specific"); *cf.* DOJ/FTC Guidelines § 4.

[111] Because much of the information relating to the potential benefits of the transaction is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each claimed benefit to enable the Commission to verify its likelihood and magnitude. *See AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20630, para. 190; *see also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157 ("These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies . . . are sufficiently likely and verifiable . . . ."); *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 255; *DOJ/FTC Guidelines* § 4 ("[T]he merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm's ability to compete . . . .").

[112] *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 190. Furthermore, the Commission will discount or dismiss speculative benefits that it cannot verify. Thus, as the Commission explained in the *EchoStar/DirecTV Order*, "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present." *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 190.

[113] *Id.* at para. 191; *see also AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202.

[114] *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 202; *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 191; *see also DOJ/FTC Guidelines* § 4.

[115] *See AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 201; *SBC/Ameritech Order*, 14 FCC Rcd at 14825, para. 256; *see also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

[116] *AT&T/BellSouth Order*, 22 FCC Rcd at 5761, para. 203 (internal quotation marks omitted).

also must reveal a higher degree of magnitude and likelihood than we would otherwise demand."[117] On the other hand, where potential harms appear less likely and less substantial, we will accept a lesser showing to approve a transfer of assets.[118]

38. Applying this framework, we find that the proposed transaction is likely to generate transaction-specific public interest benefits, although in some cases it is difficult to quantify the magnitude of these benefits. As an initial matter, we conclude the transaction likely will increase the level of competition in the medium-sized and enterprise business marketplace in Comcast's service territories.[119] Applicants contend that Comcast is just beginning to enter the medium-sized and enterprise business customer market and that doing so will require voice, data and Internet access products as well as sales expertise that are different from those needed to serve residential and small business customers.[120] We find that allowing Comcast to benefit from the experience, expertise and capabilities of CIMCO's sales force and key managers likely will enable Comcast to establish its brand more quickly and efficiently and thus compete more effectively than it would be able to do absent the transaction.

39. We also find the transaction likely will provide benefits for CIMCO's current customers located in buildings that can be served by Comcast's existing plant. In particular, we find credible Applicants' assertions that the transaction will enable Comcast to use its existing infrastructure to provide many of CIMCO's existing customers with Metro-Ethernet-based services and other high-capacity data products.[121] Applicants state that these services will provide CIMCO's current customers with greater bandwidth and functionality than CIMCO's current legacy TDM-based voice and data technology.[122]

40. Finally, we find that the transaction will advance facilities-based competition, which is likely to result in consumer benefits.[123] CIMCO currently relies significantly on the facilities and services of other telecommunication carriers.[124] After the transaction, the CIMCO Entities will be able to migrate Chicago area customers from leased and resold services to Comcast's own facilities, thereby furthering facilities-based competition in the medium-sized and enterprise business market.[125]

VI. CONCLUSION

41. We find that several significant public interest benefits are likely to result from the

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[117] *EchoStar/DirectTV Order*, 17 FCC Rcd at 20631, para. 192 (quoting *SBC/Ameritech Order*, 14 FCC Rcd at 14825); *cf. DOJ/FTC Guidelines* § 4 ("The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.").

[118] *See, e.g., AT&T/BellSouth Order*, 22 FCC Rcd at 5762, para. 203.

[119] *See* Application at 17-18.

[120] *See* Application, Stemper Declaration para. 9.

[121] *See* Application at 20.

[122] *See id.*

[123] Application at 20 n.42; *see also, e.g., XO Communications*, 17 FCC Rcd at 19225, para. 30 (finding the combined operation of two overlapping competitive local exchange carriers would further competition rather than curtail it).

[124] *See* Application at 19 (stating that CIMCO serves customers using loop and transport facilities leased from other carriers, and by reselling the services of other telecommunications earriers).

[125] *See id.* (stating that Comcast anticipates moving Chicago area customers from leased facilities and resold services to Comcast facilities).

proposed transaction. We further find that the potential public interest benefits from the proposed transaction, taken as a whole, outweigh any potential public interest harms. Accordingly, we find that the transaction, on balance, serves the public interest, convenience and necessity. Because Detroit has not consented to the transaction in its local franchise area, however, we do not at this time grant the requested waiver of Section 652(b) as to that franchise area. As explained above, in the event Detroit withdraws its opposition to the waiver, the waiver will be granted.[126] We therefore grant the applications for the acquisition of the CIMCO assets by Comcast, except as to the assets located within the City of Detroit, Michigan local cable franchise area. As to those assets, we conditionally grant the applications effective upon and subject to the Commission's written acknowledgement of its receipt of written proof that the local franchising authority approves of Commission grant of a waiver of section 652(b).

VII. ORDERING CLAUSES

42. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214, and 652 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214, and 572, that the Petition for Reconsideration filed by the City of Detroit, Michigan IS DENIED.

43. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), and 652 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), and 572, and section 76.505 of the Commission's rules, 47 C.F.R. § 76.505, that the Petition for Waiver filed by CIMCO and Comcast Entities IS GRANTED, except as to assets located within the City of Detroit, Michigan local cable franchise area.

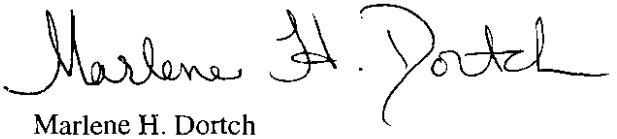
44. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214, and 652 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214, and 572, and section 76.505 of the Commission's rules, 47 C.F.R. § 76.505, that the section 214 transfer of control and assignments applications filed by CIMCO and Comcast Entities ARE GRANTED, except as to assets located within the City of Detroit, Michigan local cable franchise area.

[126] *See supra* text accompanying note 8.

45. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214, and 652 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 214, and 572, and section 76.505 of the Commission's rules, 47 C.F.R. § 76.505, that as to assets located within the City of Detroit, Michigan local cable franchise area, the requested waiver and the section 214 transfer of control and assignment applications filed by CIMCO and Comcast Entities ARE CONDITIONALLY GRANTED, effective upon and subject to the Commission's written acknowledgement of its receipt of written proof that the local franchising authority approves of Commission grant of a waiver of section 652(b) of the Communications Act of 1934, as amended, satisfying 47 U.S.C. § 572(d)(6)(B).[127]

46. IT IS FURTHER ORDERED, pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, that this Memorandum Opinion and Order and Order on Reconsideration ARE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

[127] *See supra* note 8.