

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

In the Matter of)	
)	
Petition for Declaratory Ruling to Clarify 47)	WC Docket No. 11-118
U.S.C. § 572 in the Context of Transactions)	
between Competitive Local Exchange Carriers)	
and Cable Operators)	
)	
Conditional Petition for Forbearance from)	
Section 572 in the Context of Transactions)	
between Competitive Local Exchange Carriers)	
and Cable Operators)	

**COMMENTS OF
U.S. TELEPACIFIC CORP., ACCESS POINT, INC.
FIRST COMMUNICATIONS, INC. AND BROADVIEW NETWORKS, INC.**

U.S. TelePacific Corp. (“TelePacific”), Access Point, Inc., First Communications, Inc. and Broadview Networks, Inc. (“CLEC Commenters”), by undersigned counsel, submit comments in response to the Commission’s Public Notice in the above-captioned proceeding.¹ CLEC Commenters support the National Cable and Telecommunications Association (“NCTA”) petition for declaratory ruling to clarify that Section 652 of the Communications Act of 1934, as amended (the “Act”),² does not apply to transactions between cable operators and competitive local exchange carriers (“CLECs”) or, in the alternative, to forbear from enforcing the prohibition insofar as it applies to CLEC acquisitions undertaken by in-region cable operators that are not affiliated with the incumbent local exchange carrier (“ILEC”).

TelePacific, a CLEC that provides facilities-based communications services to small-to-medium sized businesses, is an example of why this clarification should be made. TelePacific

¹ Public Notice, *Comments Sought on NCTA Petitions Regarding Section 652 of the Communications Act*, WC Docket No. 11-118, DA 11-1177 (July 8, 2011).

² 47 U.S.C. § 572.

has expanded its operations, in part, through mergers with and acquisitions of other non-dominant telecommunications providers.³ Such mergers have uniformly been approved by both the Commission and state regulators as creating a stronger, more vibrant competitor to the ILEC in all of its service areas and therefore as consistent with the public interest. However, the uncertainty surrounding the application of Section 652 to transactions between CLECs and cable operators has clearly been a deterrent to transactions whereby a cable operator and a CLEC might combine to be able to provide a stronger CLEC competitor to the ILEC and to permit the combined company to offer a “triple play” bundled service in competition with the voice, broadband and, increasingly, video distribution services of the ILEC in their region.

The clear purpose of the statute, as demonstrated by the exclusion of transactions whereby a CLEC buys an incumbent cable operator not affiliated with the in-region ILEC,⁴ is to preserve two wires into homes by generally prohibiting mergers and acquisitions of cable operators and ILECs. The statute should not be interpreted to prevent a cable operator from acquiring a CLEC without a waiver because such a transaction would not adversely affect the Congressional goal to preserve two wires into homes and such a reading would be illogical when the statute clearly allows a CLEC to acquire a cable operator.

Alternatively, should the Commission decide not to grant NCTA’s petition for declaratory ruling, CLEC Commenters also support NCTA’s petition for the Commission to forbear from enforcing Section 652 in its entirety to transactions between cable operators and

³ For example, TelePacific acquired Nextweb, Inc. in 2011 and Arrival Communications, Inc. in 2007 and acquired assets from O1 Communications, Inc. in 2010. Also, its parent company, U.S. TelePacific Holdings Corp., acquired Mpower Communications Corp. in 2006.

⁴ See, e.g., 47 U.S.C. § 572(a) and (e) (prohibiting a local exchange carrier from acquiring a cable operator within its “telephone service area,” the area where the carrier provided telephone exchange service as of January 1, 1993); see also, Section 1 *infra*.

CLECs, or at a minimum, that it forbear from enforcing the specific requirement for local franchising authority (“LFA”) approval of waiver requests. Forbearance would eliminate the presumption that a CLEC acquisition by a cable operator should be prohibited, but it would not affect the Commission’s ability, pursuant to jurisdiction over Section 214 licensees, to review and assure that these transactions are in the public interest; nor would it limit the ability of LFAs or other interested parties to file comments with the Commission to identify any competitive or other public interest concerns.

Finally, if the Commission decides not to grant NCTA’s petition for declaratory ruling or its forbearance petition, CLEC Commenters recommend that the Commission establish substantive standards and time parameters to govern the approval authority for LFAs as requested by NCTA. The statute sets forth criteria that should be applied to consideration of the merits of a waiver request but inexplicably does not expressly apply those criteria, or indeed any standards whatsoever, to an LFA’s consideration of a waiver request. The lack of any standards, procedures and time frames for consideration by LFAs creates a disincentive for CLECs and cable operators to pursue transactions.

I. The Commission Should Clarify that Section 652 Does Not Apply to Transactions Between CLECs and Cable Operators

The purpose of Section 652 is to preserve two wires into homes by generally prohibiting mergers and acquisitions of cable operators and ILECs.⁵ The Commission has acknowledged

⁵ See, e.g., Statement of Sen. Bob Kerrey, 141 Cong. Rec. S8134 (June 12, 1995) (stating “unless households have two lines coming in - a telephone line and a cable line - it is not likely that you are going to get [a] competitive situation”); Statement of Sen. Bob Kerrey, 141 Cong. Rec. S7881 (June 7, 1995) (stating “I have serious problems saying that telephone companies can acquire cable companies inside their area immediately. Mr. President, I believe we have to have two lines coming into the home.”); Statement of Sen. Bob Kerrey, 141 Cong. Rec. S8206 (June 13, 1995) (introducing letter from the State of Wisconsin Department of Justice which stated “legislation should continue to prohibit mergers of cable and telephone

this purpose, noting that “Congress’ main concern in enacting section 652, as indicated by the legislative history, was to avoid having a LEC purchase a cable operator and thus control both wires to consumers.”⁶

The text of the statute implements the purpose of preserving two wires into homes by prohibiting a local exchange carrier (“LEC”) from acquiring a cable operator within the LEC’s “telephone service area,” which is defined as the area where the carrier provided telephone exchange service as of January 1, 1993, as well as prohibiting joint ventures between LECs and cable operators with an overlapping “telephone service area” and cable franchise area.⁷ The statute makes it clear that these provisions do not apply to CLECs because CLECs were not generally providing telephone exchange service as of January 1, 1993. As a result, CLECs are not prohibited from acquiring or entering into a joint venture with a cable operator providing service within the same service area.

The text of the statute also prohibits a cable operator from acquiring a LEC that provides telephone exchange service within the cable operator’s franchise area.⁸ This provision should clearly be interpreted as preventing a cable operator from acquiring an ILEC and not to the acquisition of a CLEC. It would be inconsistent and completely illogical to interpret the statute otherwise when another provision allows a CLEC to acquire a cable operator. Neither type of CLEC-cable operator transaction would adversely affect the goal to preserve two wires into homes. If Congress was not concerned with, and did not prohibit, the acquisition of a cable operator by a CLEC, there is no reason to believe that it intended that the acquisition of a CLEC

companies in the same service area...Permitting such mergers raises the possibility of a ‘one-wire world,’ with only successful antitrust litigation to prevent it.”).

⁶ See *Applications of Ameritech Corp. & SBC Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶564, fn. 1081 (1999).

⁷ See 47 U.S.C. § 572(a), (c), and (e).

⁸ See 47 U.S.C. § 572(b).

by a cable operator be treated differently and, as noted, the competitive impact of both types of transactions is the same.

Given the uncertainty about the application of Section 652 to an acquisition of a CLEC by a cable operator (as compared with an acquisition of a cable operator by a CLEC), the Commission should clarify that Section 652 does not apply to transactions between CLECs and cable operators. Such a clarification will ensure that one type of CLEC-cable operator transaction is not burdened with additional regulatory hurdles when both types of CLEC-cable operator transactions should have similar impacts on competition and consumers.

II. Alternatively, the Commission Should Forbear From Enforcing Section 652 in its Entirety for Transactions Between CLECs and Cable Operators or Forbear From Enforcing the LFA Approval Requirement

If the Commission decides not to grant NCTA's petition for declaratory ruling and clarify Section 652, the Commission should forbear from enforcing Section 652 to transactions between cable operators and CLECs, pursuant to Section 10(a) of the Act.² Applying Section 652 to transactions between cable operators and CLECs is unnecessary to protect consumers or to ensure that the charges, practices, or regulations of a telecommunications carrier for telecommunications services are just and reasonable and non-discriminatory, particularly since the Commission has a separate right to review such transactions pursuant to its Section 214 jurisdiction.

Indeed, consumers benefit from such transactions to the extent that a combination of a CLEC and a cable operator enable the combined company to compete more effectively with the ILECs in their combined service area. Moreover, combinations of CLECs and cable operators are unlikely to raise competitive concerns because both lack market power in the provision of

² See 47 U.S.C. § 160(a).

telecommunications services,¹⁰ including telephone exchange service as referenced in Section 652, and are therefore unlikely to pose any threat of unreasonable rates, terms or conditions for such services. Forbearance from applying Section 652 to transactions between cable operators and CLECs is also consistent with the public interest and will promote competitive market conditions.¹¹

As described above, CLEC-cable operator transactions would not adversely affect the Congressional goal to preserve two wires into homes. Furthermore, the Commission, as well as other regulatory bodies (*i.e.*, state public utility commissions, Federal Trade Commission or Department of Justice), will continue to have authority to review CLEC-cable operator transactions to protect consumers, competition and the public interest. LFAs and other interested parties will also continue to have the right to file comments with the Commission to identify any concerns about a proposed transaction and to seek conditions that are specific to the transaction.¹² Accordingly, forbearance will simply eliminate the presumption that a CLEC acquisition by a cable operator should be prohibited.

¹⁰ CLECs are considered non-dominant providers of telecommunications services. *See, e.g., Implementation of Local Competition Provision in Telecommunications Act of 1996, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶80, fn. 151 (2001)* (noting CLECs are non-dominant carriers). Cable operators that provide telecommunications services are considered non-dominant providers. *See, e.g., Public Notice, Comments Invited on Application of Time Warner Cable Information Services (Texas), L.P. d/b/a Time Warner Cable to Discontinue Domestic Telecommunications Services, DA 07-4724, WC Docket No. 07-266 (2007)* (applying streamlined procedures for non-dominant carriers); *see also, 47 C.F.R. § 63.03(b).*

¹¹ *See 47 U.S.C. § 160(b).*

¹² *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6550 (2001)* (finding that the transfer process should not be used “as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act”).

At a minimum, the Commission should forbear from requiring LFA approval of a waiver request for CLEC-cable operator transactions. The principal regulatory function of LFAs is overseeing cable systems and services, not telecommunications systems and services.¹³ As such, LFA approval is unnecessary to ensure that the charges, practices, or regulations of a telecommunications carrier are just and reasonable and non-discriminatory. LFA approval of a waiver request is also unnecessary to protect consumers in CLEC-cable operator transactions. Oversight by this Commission, as well as state oversight, will ensure consumers are protected. Further, the statute does not articulate any standards for LFA approval, which can lead to indefinite delays in approval, allow demands for concessions in exchange for approval from one or more LFAs, and permit a single LFA to refuse to approve a transaction found to have significant public interest benefits.

The Commission should not allow the LFA approval requirement to hinder the potential for CLEC-cable operator transactions that would otherwise meet the waiver criteria. Granting forbearance from requiring LFA approval of a waiver request is consistent with the public interest and will ensure that a LFA cannot impede CLEC-cable operator transactions.

III. Alternatively, the Commission Should Establish Standards and Procedures for LFA Approvals if the NCTA Declaratory Ruling and Forbearance Petitions are Denied

Section 652 requires approval by the Commission *and* applicable LFAs for a waiver of the general prohibition on those transactions subject to the statute. Although the statute sets forth standards that the Commission should follow when evaluating a waiver request, it does not establish standards and procedures that LFAs should follow. The lack of standards and procedures for LFAs approvals creates a disincentive for CLECs and cable operators to pursue

¹³ See, e.g., 47 U.S.C. § 541(b)(3) (stating that LFAs have no jurisdiction over a cable operator's telecommunications services.)

transactions because of the uncertainty of obtaining LFA approval (with or without concessions). We note that the statute is also open ended about the time in which an LFA must decide whether to approve or disapprove a proposed waiver. The Commission has already – and appropriately – adopted standards and procedures for assuring that transfer applications and related Section 652 waivers are handled in an expeditious fashion.¹⁴ CLEC Commenters recommend that to the extent that the Commission decides not to grant NCTA’s petition for declaratory ruling or its forbearance petition, the Commission should establish substantive standards, and time frames, to assure that any LFA opposition to a request for waiver of Section 652 be merger-related, address the criteria set forth in the statute and not unnecessarily impede such transactions.

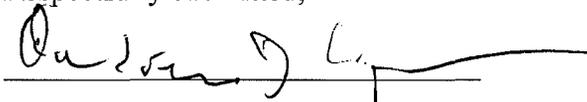
Put simply, LFAs should be subject to the same evaluation criteria as the Commission. Consistent with Section 652, LFAs should assess whether enforcement of the prohibition on a particular transaction will: (1) subject the cable operator or CLEC to undue economic distress, (2) cause the services or facilities to not be economically viable, or (3) undermine competitive and public interest effects. A requirement for LFAs to use the same evaluation criteria as the Commission (and each other) would assure that the goals of Congress are addressed but that no single LFA could demand non-merger-related concessions in exchange for approval or deny a waiver request without having to state the basis for its decision.

¹⁴ See *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*, Memorandum Opinion and Order and Order on Reconsideration, 25 FCC Rcd 3401 (2010) (“*Cimco/Comcast*”). To assure that all parties can anticipate a predictable time frame for action on a transfer application and Section 652 waiver request, CLEC Commenters urge that the 60-day notice process adopted in the *Cimco/Comcast* case be codified in the Commission’s rules.

IV. Conclusion

As described herein, CLEC Commenters support NCTA's petition for declaratory ruling to clarify that Section 652 does not apply to transactions between cable operators and CLECs or, alternatively, should the Commission decide not to grant NCTA's petition for declaratory ruling, CLEC Commenters support NCTA's petition for the Commission to forbear from enforcing Section 652 with respect to CLEC-cable operator transactions or, at a minimum, from enforcing a requirement for LFA approval of a waiver request. At the very minimum, in the event that the Commission denies NCTA's petition for declaratory ruling and petition for forbearance, CLEC Commenters support NCTA's request for the implementation of substantive standards and time limits to govern LFA approval authority.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Danielle Burt, hereby certify that on August 22, 2011, a true and correct copy of the foregoing filing was sent by electronic mail to the following:

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