

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition for Declaratory Ruling to Clarify	)	WC Docket No. 11-118
47 U.S.C. § 572 in the Context of Transaction	)	
Between Competitive Local Exchange Carriers	)	
And Cable Operators	)	
	)	
Conditional Petition for Forbearance from	)	
Section 652 of the Communications Act for	)	
Transactions between Competitive Local	)	
Exchange Carriers and Cable Operators	)	

**REPLY COMMENTS OF  
BRIGHT HOUSE NETWORKS**

Bright House Networks (“Bright House”) submits these reply comments in response to comments in the above captioned proceeding.

Bright House is the sixth largest cable service operator in the United States, providing video, data, and voice services. Through its cable company and competitive local exchange provider (Bright House Information Services, LLC), it offers interconnected voice over internet protocol (VOIP) service to over one million customers. Last year for the fifth consecutive year, Bright House ranked highest in customer satisfaction among U.S. telephone service providers in the South according to J.D. Power and Associates.<sup>1</sup>

NCTA seeks a declaratory ruling from the FCC that Section 652 of the Communications Act does not apply to transactions between cable operators and CLECs. In the alternative, NCTA requests in its conditional Forbearance Petition that the FCC forbear from enforcing

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<sup>1</sup>J.D. Power and Associates, 2010 Residential Telephone Customer Satisfaction Study. See <http://brighthouse.com/corporate/about/6375.htm>. Bright House Networks customer satisfaction scores in the South Region performed particularly well in customer service, cost of service, billing and offerings, and promotions.

Section 652 to mergers, acquisitions and other transactions between cable operators and CLECs; or at least forbear from enforcing the local franchising authority (“LFA”) approval requirement contained in Section 652(d)(6). In the event the request for declaratory ruling and forbearance are denied, NCTA urges the Commission to establish governing standards and time limits to facilitate expeditious LFA consideration of waiver requests.

Bright House strongly supports the NCTA’s position, joining the overwhelming majority of commenters. Bright House adds these comments to amplify the views of those in support of the petitions and recommends an approach to address the role LFAs should play in this process.

**I. BRIGHT HOUSE ACTIVELY COMPETES AGAINST ITS ILEC COMPETITORS AND WOULD BENEFIT BY CONSIDERING CLEC ACQUISITIONS WITHOUT THE UNCERTAINTY OF SECTION 652(b).**

Bright House’s support emanates from its avid efforts to promote voice and broadband competition throughout its communities of service. Like nearly all cable operators, Bright House’s primary build-out has been in residential areas, where demand for the single service of video was strongest initially. Over time, Bright House has invested hundreds of millions of dollars to expand its menu of services as well as the areas it serves within its franchise territories. Today Bright House is a well-established provider in residential services market (and faces formidable competition from ILECs, particularly Verizon in much of its Florida residential service areas.) But it still in its growth stage in providing broadband and phone services to commercial and enterprise customers.

In many of Bright House’s service areas, there are CLECs who offer complementary strengths, especially in the business and enterprise space, where customers often have no facilities-based competitor to the ILEC. As noted by commenters, these alliances could lead to downward pressure on rates and innovative services introduced to win customers from incumbents. Such mergers would allow a CLEC, who has rolled out service using leased facilities but who may be financially strained, to combine with a facilities-based network

operated by a cable company. In the 2010 *CIMCO* case, the FCC noted the consumer benefits that accompany facilities-based competition when such cable – CLEC merges occur.<sup>2</sup>

For its part, Bright House could benefit from a CLEC's back-office infrastructure and familiarity with the expectations and demands of business customers.<sup>3</sup> And fortifying Bright House with the expertise of a merger-appropriate CLEC partner would enhance residential competition too. Broadband and the increased incidence of “working-from-home” have blurred the traditional lines between what used to be considered “business” and “residential” customers.

By declaring Section 652(b) inapplicable to cable-CLEC mergers, the Commission would strengthen, not weaken, competition. Significant antitrust issues could still be reviewed. And the FCC would be able to make a public interest determination based on the required Section 214 filing applicable to the transfer of operating authority. But the additional burden of obtaining a waiver of Section 652, particularly the inexplicable veto authority provided to LFAs, would no longer be part of the process.

Instead, by declaring Section 652(b) inapplicable to cable-CLEC mergers or by forbearing from its application in these cases, the FCC will expedite the process of ensuring a more competitive market. That market will continue to comprise service from at least two wires, the incumbent and the cable operator. Two-wire competition from strong, well-qualified players is what Section 652 was suppose to preserve, as statements by supporters of the 1996 Act, including Congressman Markey<sup>4</sup> and Senator Kerry,<sup>5</sup> suggest. Eliminating the Section 652

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<sup>2</sup> *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 & Order on Reconsideration, 25 FCC Rcd 3401, ¶ 40 (2010) (“*CIMCO*”).

<sup>3</sup> See Comments of the American Cable Association at 3; see also Comcast Comments at 4-5.

<sup>4</sup> See NCTA Petition for Declaratory ruling at 6-7 an n.14.

<sup>5</sup> See Comcast Comments at 3.

waiver hurdle from cases involving cable operators and CLECs will not change that two-wire world and may help to insure it.

## **II. THE FCC SHOULD INTERPRET SECTION 652 IN A MANNER CONSISTENT WITH THE 1996 ACT, INCLUDING SECTION 706.**

In its Comments, NATOA argues that Section 652(b) applies to all LECs, including CLECs. If Congress intended to apply Section 652(b) to only ILEC-cable mergers, NATOA argues, it would have done so explicitly.

This “plain meaning” argument is incorrect.<sup>6</sup> For one thing, as the Comments filed by a consortium of CLECs point out, Section 652 imposes no limitation on the acquisition of a cable company by a CLEC in the same territory.<sup>7</sup> Yet that merger would result in exactly the same combination that NATOA insists must remain covered by Section 652(b)’s prohibition.<sup>8</sup> Furthermore, it ignores that a merger between a cable operator and a CLEC would strengthen, not weaken, the “two wire” competition envisioned by the Act, by making the merged entity a more formidable competitor to the ILEC. It is axiomatic that a cable operator would not want to acquire a CLEC unless the combination would make it a stronger facilities-based competitor.

While there were many goals identified with the 1996 Act, foremost over the last 15 years has been to promote a healthy, competitive broadband environment. By investing

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<sup>6</sup> Comments of the National Association of Telecommunications Officers and Advisors (NATOA) at 3-4.

<sup>7</sup> This anomaly results because the term “telephone service area”, defined in Section 652(e) is used in Section 652(a) but not Section 652(b), and the consequences that flow from how Congress defined that term. No legislative history explains why Congress used the term in the first subsection but not in the second .

<sup>8</sup> Comments of U.S. TelePacific Corp, Access Point, Inc., First Communications, Inc. and Broadview Networks, Inc. at 4-5.

hundreds of millions of dollars in its infrastructure, Bright House has contributed to robust broadband offerings in its communities.

The FCC's Section 706 annual Advanced Services Inquiry focuses on identifying barriers to broadband development; Section 706(b) instructs the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."<sup>9</sup>

The Commission's consideration of NCTA's petition should be guided by this instruction from the 1996 Act. Cable companies providing advanced services may be stronger when joining forces with CLECs. Maintaining Section 652(b) as an additional hurdle in cable-CLEC mergers preserves unnecessary "barriers to infrastructure investment", exactly the opposite of Section 706(b)'s direction.

### **III. THE FCC SHOULD AT LEAST ESTABLISH STANDARDS FOR LFA PARTICIATION AND REQUIRE THAT LFA CONCERNS BE RESOLVED THROUGH THE FCC'S REVIEW, NOT THROUGH A SEPARATE WAIVER PROCEEDING.**

While Section 652(b) generally bars cable-LEC combinations, Section 652(d)(6) provides that the FCC may waive the restriction based on the criteria laid out in Sections 652(d)(6)(A)(i)-(iii). In addition to the FCC's specified criteria for considering waivers, Section 652(d)(6)(B) requires that a LFA must also approve of the Section 652(b) waiver.

Unlike the FCC's review of waivers, which includes the just-cited criteria, LFA review and approval have no criteria for decision-making. The result is that a LFA can hold up a transaction for whatever reason it chooses, even if the FCC finds that a waiver request meets all the requirements for agency approval. This is what happened with the *CIMCO* merger and one LFA,

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<sup>9</sup> 47 U.S.C. § 1302(b).

the City of Detroit.<sup>10</sup> This single LFA, for reasons unrelated to the proposed merger, was allowed derail its full consummation.

Virtually all commenters recognize that LFA participation under Section 652(d)(6)(B) is standardless. Even NASUCA/NJ Division of Rate Counsel agree that the FCC should establish substantive standards and time limits to guide review of LFA waiver requests.<sup>11</sup> Only NATOA opposes tightening these standards on its membership. But NATOA's insistence on maintaining a separate, unguided LFA review amounts to little more than the argument that a LFA can act as a barrier "because it says so."

If a LFA wishes to raise a significant issue that it believes relevant to deciding whether transfer of the Section 214 authority is in the public interest, then it can, and should, state them in response to the Commission Public Notice seeking comment on the transfer.<sup>12</sup> There is simply no reason to have a separate toll gate erected in every community for LFAs to use to seek a result unrelated to the public interest determination made by the FCC.

Should the FCC decline to grant NCTA's petitions declaring Section 652 inapplicable to cable-CLEC mergers or to forbear from applying it in those cases, it should, at the least, require a LFA to voice any concerns at the FCC as part of the agency's Section 652(d) waiver review. Even NATOA points out that the FCC's criteria – specifically Section 652(d)(6)(A)(iii) – includes a consideration of the "convenience and needs of the community to be served."<sup>13</sup> If NATOA

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<sup>10</sup> *CIMCO* supra.

<sup>11</sup> Comments of the National Association of State Utility Consumer Advocates ("NASUCA") and the New Jersey Division of Rate Counsel at 7.

<sup>12</sup> The Commission's public notice and filing requirements are found at 47 C.F.R. §§ 63.03-63.04. The FCC also established notice and comment requirements in the *CIMCO* December Public Notice, FCC 09-104 (rel. Dec. 1, 2009).

<sup>13</sup> Comments of NATOA at 6.

members wish to address a community need relevant to a merger, the FCC waiver process is the place to do it.<sup>14</sup>

Bright House respectfully suggests that Section 652(d)(6)(B) – requiring LFA approval of a waiver – be read to mean that the LFA must set forth in a Commission proceeding any objection to a proposed cable-CLEC merger. The FCC would consider the objection in reviewing the waiver request. If a LFA does not participate in response to the FCC's Public Notice or if its objection is not sustained by the FCC, then the LFA should be deemed to have approved the waiver request, as stated in Section 652(d)(6)(B).

In this regard, we note that there is nothing in Section 652(d)(6) that mandates that a LFA conduct its own review process rather than having its review incorporated into the FCC's own review under Section 214 or Section 652. In terms of efficiency it is far preferable to allow LFAs to participate at the FCC, to have any relevant objections considered, and to complete the process once and for all at that time. Given the Obama Administration's strong intention to reduce unnecessary government red tape, and its endorsement by the FCC<sup>15</sup>, Section 652 is ripe for reform in the manner just described.

Incorporating the LFA approval process into the FCC's proceeding makes particular policy sense, besides the benefit of administrative economy. The competition and Communications Act issues that a cable-CLEC merger potentially raise will seldom, if ever, require the type of expertise that LFAs bring to bear to issues under their authority.<sup>16</sup> If there

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<sup>14</sup> Indeed, as more states adopt statewide cable franchising, resulting in reduced LFA involvement with the local cable operator, the FCC may better equipped to consider any relevant considerations put forth by a LFA rather than the LFA conducting its own investigation.

<sup>15</sup> FCC News, "Statement From FCC Chairman Julius Genachowski On The Executive Order On Regulatory Reform And Independent Agencies", July 11, 2011, available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0805/DOC-308340A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0805/DOC-308340A1.pdf).

<sup>16</sup> NATOA's comments do not identify any particular expertise that requires a separate LFA-conducted review of a merger that the FCC itself will review under Section 214 in any case. And as the applicants in *CIMCO* pointed out, that transaction "involves very few customers in any individual local franchising

are valid LFA merger-related concerns, the FCC's Section 214 approval process should be adequate to address them. This process would be far better than today's situation, where a separate proceeding can amount to an opportunity for LFAs to obtain concessions on unrelated issues as the price of a Section 652(d)(6)(B) waiver approval.

This proposed process was partially established in *CIMCO*. As noted in that case, the FCC has "broad authority to implement the ambiguous provisions of Section 652."<sup>17</sup> The FCC concluded that, after notice and comment opportunity, any LFA that failed to inform the FCC of its decision approving or disapproving the proposed waiver was deemed to have approved the waiver.

Only Detroit filed comments, which led the FCC to approve the waiver for all other franchise areas. However, the FCC only granted the waiver for Detroit on condition that the LFA subsequently provide its approval. This condition was imposed even though the Commission considered, and rejected, Detroit's arguments that the merger would harm competition.<sup>18</sup> Once the FCC concluded that Detroit had no basis to deny a waiver and the FCC otherwise approved the waiver, it should have ruled that all of the waiver requirements of Section 652(d)(6) had been met.

We urge the FCC to adopt this approach here. There should be no substantial difference under Section 652(d)(6) in the treatment of LFA silence regarding approval or disapproval (where under *CIMCO* waiver approval is deemed granted); and a situation where the Commission's is not persuaded that a LFA's objections are well-grounded (where there is no basis to disapprove the waiver request.)

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authority, [and the LFAs] do not regulate CIMCO's service and CIMCO does not use any local rights of way." *CIMCO* at ¶ 29.

<sup>17</sup> Id. at ¶ 26.

<sup>18</sup> Id. at ¶ 34.

In sum, we submit that once the Commission rejects arguments put forth by an objecting LFA, or where a LFA files no objection, the FCC should conclude that LFA waiver approval under Section 652(d)(6)(B) has been obtained.

### **CONCLUSION**

Bright House respectfully requests that the Commission rule that Section 652 of the Act does not restrict transactions between CLECs and cable operators and that, for this class of transactions, a waiver under Section 652(d) is not required.

In the alternative, Bright House supports forbearance from Section 652 in its entirety in the context of cable-CLEC transactions, or at least forbearance from the LFA approval requirement in Section 652(d)(6)(B). Finally, Bright House urges the FCC to establish clear governing standards and to require LFAs to participate in the FCC proceedings under Section 214 (or under Section 652(d) if the FCC denies NCTA's foregoing requests); and that if LFAs do not object at that time or their objections are not sustained, their approval of the waiver under Section 652(d)(6)(B) is deemed granted.

Respectfully submitted,

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