Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters 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 TIME WARNER CABLE INC.

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September 21, 2011

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Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transaction Between Competitive Local Exchange Carriers And Cable Operators	)	WC Docket No. 11-118
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REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC") hereby submits this reply to the comments filed in the above-captioned proceeding. TWC, along with the vast majority of parties filing in the opening round of comments, strongly supports the Petition for Declaratory Ruling and the Conditional Petition for Forbearance filed by the National Cable and Telecommunications Association ("NCTA") regarding the applicability of Section 652 of the Communications Act to transactions between competitive local exchange carriers ("CLECs") and cable operators.[1] The Commission should promptly issue a declaratory ruling that Section 652 does not apply to cable-CLEC transactions or, in the alternative, forbear from applying Section 652 to such transactions.

INTRODUCTION AND SUMMARY

NCTA's petitions call attention to a significant regulatory ambiguity that, if left unresolved, will continue to deter efficient and procompetitive transactions in the

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[1] Petition for Declaratory Ruling of the National Cable & Telecommunications Association, WC Docket No. 11-118 (filed June 21, 2011) ("Petition for Declaratory Ruling"); Conditional Petition for Forbearance of the National Cable & Telecommunications Association, WC Docket No. 11-118 (filed June 21, 2011)

telecommunications industry and will deprive consumers of the resulting benefits. As explained in the petitions, Congress enacted Section 652 of the Communications Act to address competitive concerns with transactions between cable operators and *incumbent* local exchange carriers ("ILECs"),[2] yet there remains ambiguity about whether that provision also applies to inherently different cable-CLEC transactions that do not present such competitive concerns. On two occasions last year, the Commission and the Wireline Competition Bureau declined to address the applicability of Section 652 in the context of cable-CLEC transactions,[3] and thus left open the possibility that Section 652 might require the parties to such transactions to seek separate waivers from numerous local franchising authorities ("LFAs") before closing. Although neither decision expressly held that Section 652 applies to cable-CLEC transactions, the lack of clarity threatens to have a significant chilling effect on procompetitive transactions.

The Commission can and should eliminate this ambiguity by specifying that Section 652 does not apply to cable-CLEC transactions. Because these transactions are not between the entities that control the only two wires to the home, they do not implicate the competitive concerns that motivated the enactment of Section 652. To the contrary, cable-CLEC transactions would almost always be procompetitive, and would lead to lower prices, higher quality, and

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("Forbearance Petition"); *see also Comment Sought on NCTA Petitions Regarding Section 652 of the Communications Act*, Public Notice, DA 11-1177 (rel. July 8, 2011).

2 47 U.S.C. § 572.

3 *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 ¶ 13 n. 34 (2010) ("*Comcast-CIMCO Order*") (declining to address whether Section 652 applies to CLEC-cable transactions in which the CLEC was not providing service as of January 1, 1993); Public Notice, *Applications Granted for the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc.*, WC Docket No. 10-158, at 2 (rel. Nov. 29, 2010); *see also* Public Notice, *Applications Filed for the Transfer of Control of FiberNet From One Communications Corp. to NTELOS Inc.*, WC Docket No. 10-158, at 4 (rel. Sep. 16, 2010).

better service for residential and business customers alike. Moreover, an examination of the text, structure, and history of Section 652 confirms that Congress intended to impose this additional regulatory burden only on cable-ILEC transactions. Cable-CLEC transactions already are reviewed under the Commission's "public interest" standard under Sections 214(a) and 310(d) of the Act, and also are subject to potential review by state public utility commissions and antitrust authorities, and there is simply no sound legal or policy reason to subject such transactions to yet *another* layer of regulatory review.

The few objections to the petitions raised by a handful of commenters are meritless. Opponents' legal arguments regarding the scope of Section 652 are inconsistent with the text, structure, and history of the statute. Opponents fare no better when arguing that Section 652 should apply to cable-CLEC transactions as a matter of policy; they ignore the efficiencies that such transactions often generate, as well as the Commission's continued ability to review any cable-CLEC transaction that may threaten to harm the public interest. Opponents also are mistaken to the extent they argue that Section 10 of the Act prohibits the Commission from granting NCTA's alternative request for forbearance; a regulatory burden on cable-CLEC transactions plainly qualifies for forbearance under that provision, and NCTA has satisfied the Commission's three-part test for forbearance.

DISCUSSION

I. THE PETITIONS REST ON A CORRECT INTERPRETATION OF THE STATUTE AND ON SOUND POLICY CONSIDERATIONS

TWC fully agrees with NCTA and the majority of commenters that cable-CLEC transactions typically present no meaningful threat to competition, and thus should not be subject to any presumption of illegality or additional regulatory review under Section 652. As NCTA explained and as discussed below, Congress enacted Section 652 because of concerns that cable-

ILEC transactions would allow a single entity to "control both wires" to a customer's home or office, and thereby enable that entity to foreclose competition from other communications providers.[4] By contrast, cable-CLEC transactions do not implicate these concerns, as CLECs generally do not control "last mile" facilities to a customer's home or office.[5] Moreover, cable operators and CLECs often target their services to different sets of customers.[6] Accordingly, as the American Cable Association ("ACA") points out, "[c]able companies and CLECs are in many respects complementary businesses," with little overlap in infrastructure or customer bases, and so transactions between such entities ordinarily will not raise competitive concerns.[7]

In fact, as complementary businesses, a cable operator and a CLEC can often realize significant synergies and efficiencies by combining their operations. Comcast explains in its comments that cable operators can provide CLECs with the "additional capital to compete with incumbent LECs in today's marketplace," while CLECs can offer cable operators the "infrastructure and expertise [to] compete more effectively with incumbent LECs in the provision of telecommunications services, especially for business and enterprise customers."[8] ACA likewise points out that "alliances between cable companies and CLECs" can also lead to

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4 *Applications of Ameritech, Corp. & SBC Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712 ¶ 564 n.1081 (1999) ("*SBC-Ameritech Order*").

5 *See* Statement of Sen. Bob Kerrey, 141 Cong. Rec. 8134 (June 12, 1995) ("In the managers' amendment offered earlier, the managers changed the regulations as it affects in-area acquisition of cable, which I think is going to be terribly important to maintain a competitive environment. Personally, I believe strongly, at least in the short term, *unless households have two lines coming in – a telephone line and a cable line – it is not likely that you are going to get that kind of competitive situation*.") (emphasis added).

6 *See, e.g.*, *Comcast-CIMCO Order* ¶ 33.

7 Comments of the American Cable Association, WC Docket No. 11-118, at 2 (filed Aug. 22, 2011) ("ACA Comments").

8 Comments of Comcast Corp., WC Docket No. 11-118, at 4-5 (filed Aug. 22, 2011) ("Comcast Comments").

"the migration of the CLEC's services from leased to owned facilities" and offers cable companies cost-saving "access to the CLEC's back-office [operations]."[9] For these reasons, cable-CLEC combinations are almost always strongly procompetitive, as they bolster the combined entity's ability to compete effectively against the entrenched ILEC by narrowing the gap in terms of capital, infrastructure, and market expertise.

These efficiencies ultimately redound to the benefit of consumers. By promoting greater facilities-based competition with ILECs, cable-CLEC transactions "put[] downward pressure on rates, increas[e] the offering of innovative services, and enhanc[e] service quality."[10] Several public interest groups filing in this docket agree. For instance, the National Taxpayer's Union notes that "a clarification that Section 652 does not apply to cable-CLEC transactions . . . would promote competition rather than hinder it," whereas the current state of ambiguity threatens to deprive consumers "of another potential avenue to lower prices and greater choices."[11] Likewise, Citizens Against Government Waste cautions that applying unjustified regulatory burdens to procompetitive cable-CLEC transactions would lead only to "fewer choices and higher prices" for consumers, and states categorically that "it will benefit consumers if government simply steps out of the way of cable-CLEC transactions."[12] Indeed, the Commission itself found that Comcast's acquisition of CIMCO, a CLEC, would "provide benefits for CIMCO's current customers located in buildings that can be served by Comcast's existing plant"

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9 ACA Comments at 3.

10 *Id.*

11 Comments of the National Taxpayers' Union, WC Docket No. 11-118, at 2 (filed Aug. 22, 2011).

12 Comments of Citizens Against Government Waste, WC Docket No. 11-118, at 2 (filed Aug. 22, 2011).

and "advance facilities-based competition, which is likely to result in consumer benefits."[13] These benefits militate strongly in favor of excluding cable-CLEC transactions from the scope of Section 652.

TWC also agrees with NCTA's analysis showing that Congress intended for Section 652 to apply only to cable-ILEC transactions, and not to cable-CLEC transactions. Section 652(a) prohibits only those transactions in which a local exchange carrier ("LEC") acquires a cable operator whose franchise area overlaps with the LEC's "telephone service area,"[14] defined as the area in which the carrier was providing telephone exchange service as of January 1, 1993.[15] Because ILECs—and not CLECs—were the carriers providing telephone exchange services as of January 1, 1993, Section 652(a) does not, by its terms, apply to CLEC acquisitions of cable operators. This proceeding concerns the prospect that Section 652(b) prohibits transactions flowing in the opposite direction—that is, a cable operator's acquisition of a LEC in areas of geographic overlap.[16] But there is no reason to conclude that Congress contemplated (much less intended) such an anomalous result. While Section 652(b) does not expressly refer to the target LEC's "telephone service area," the structure of these provisions make clear that Section 652(b) applies to the class of transactions covered by Section 652(a) but running in reverse.[17] There is no indication in the text of the statute or the legislative history that Congress intended Section 652(b) to sweep in cable-CLEC transactions where Section 652(a) excludes such transactions

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13 *Comcast-CIMCO Order* ¶¶ 39, 40.

14 47 U.S.C. § 572(a).

15 *Id.* § 572(e).

16 *Id.* § 572(b).

17 *See also id.* § 572(c) (prohibiting local exchange carriers and cable operators from entering into certain joint ventures only where the carrier's "telephone service areas" and

from its reach. Indeed, as NCTA points out, the legislative history of Section 652 identifies the "goal" of the statute as "preserv[ing] a two-wire, competitive world," which strongly suggests that its provisions apply *only* to the ILECs that own the telephone wire leading to the home or office.[18] Particularly in light of the strong policy reasons discussed above for favoring cable-CLEC transactions, there is no good reason for the Commission to interpret the statute in a manner that creates unnecessary internal inconsistency.

In light of the clear intent of Congress and procompetitive nature of cable-CLEC transactions, the Commission should promptly grant the relief sought in NCTA's Petition for Declaratory Ruling and clarify that such transactions are outside the scope of Section 652. If, however, the Commission determines that Section 652 could be read to apply to cable-CLEC transactions, the policy considerations discussed above also support granting NCTA's Conditional Petition for Forbearance.

II. THE ARGUMENTS IN OPPOSITION TO NCTA'S PETITIONS ARE MERITLESS

In contrast to the widespread support for the petitions in the record, only a handful of parties offer any objections. Indeed, only two sets of comments—one filed by the National

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the cable operator's franchise areas overlap, and thus effectively limiting the prohibition to cable-ILEC joint ventures).

[18] Petition for Declaratory Ruling at 6 (quoting Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 FED. COMM. L.J. 1, 6 (1993)); *see also SBC-Ameritech Order* ¶ 564 n.1081 (noting that "Congress' main concern in enacting section 652" was to avoid having an ILEC purchase a local cable operator "and thus control both wires to consumers"); *US West, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 4402 ¶ 4 (CSB 1998) ("[T]he premise of Section 652 is that if *the* LEC and *the* cable operator within its local markets are not owned by one entity … there is a greater likelihood of competition as envisioned by the 1996 Act.") (emphasis added).

Association of Telecommunications Officers and Advisors ("NATOA")[19] and another filed by the National Association of State Utility Consumer Advocates ("NASUCA")[20]—oppose NCTA's petitions outright.[21] As discussed below, none of the objections raised by these commenters has merit.

A. Opponents Have Not Identified Any Persuasive Legal or Policy Reason for Denying the Petition for Declaratory Ruling.

While NATOA and NASUCA each filed comments opposing the Petition for Declaratory Ruling, only NATOA objects to NCTA's legal interpretation of Section 652. NATOA argues that the words "any local exchange carrier" in Section 652(b) do not "exclude a particular local exchange carrier" and therefore must apply to cable-CLEC transactions, and that Congress would have expressly limited the scope of Section 652 to ILECs if it had intended to do so.[22] But as discussed above, Congress *did* limit the scope of Section 652 to ILECs by specifying that the prohibitions of subsections (a) and (c) apply only to carriers providing telephone exchange services as of January 1, 1993, and by structuring subsection (b) to apply to the same class of transactions flowing in reverse. Moreover, NATOA fails to appreciate the absurd results that its interpretation of the statute would yield. NATOA's interpretation invites the Commission to allow a CLEC to acquire a cable operator under subsection (a), and to allow a CLEC and a cable operator to enter a joint venture under subsection (c), but to prohibit that same cable operator

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19 Comments of the National Association of Telecommunications Officers and Advisors, WC Docket No. 11-118 (filed Aug. 22, 2011) ("NATOA Comments").

20 Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, WC Docket No. 11-118 (filed Aug. 22, 2011) ("NASUCA Comments").

21 Public Knowledge also filed comments offering minor critiques but "tak[ing] no position on NCTA's interpretation of Section 652(b)'s restriction on cable buyouts of LECs." Comments of Public Knowledge, WC Docket No. 11-118 (filed Aug. 22, 2011) ("PK Comments").

from acquiring the CLEC under subsection (b). Nothing in the text, purpose, or history of Section 652 suggests that Congress intended to make a distinction based on which party acquires the other, there is no evidence that the competitive effects of such transactions depend on which party acquires the other, and NATOA offers no explanation as to why this distinction makes any sense.

Failing to mount an effective legal challenge to the Petition for Declaratory Ruling, NATOA resorts to halfhearted policy arguments about the supposed competitive issues posed by cable-CLEC transactions. For instance, NATOA asserts that "any merger between a cable operator and a LEC will reduce the number of providers in a given jurisdiction by one – thus, limiting competition."[23] But by that logic, the Commission should block every merger and acquisition submitted for its approval, even when such deals would yield the significant procompetitive efficiencies that flow from cable-CLEC transactions. NATOA also ignores the fact that Section 652 applies not simply to mergers and acquisitions, but to a wide array of transactions that would not affect the number of providers in a given area, including the acquisition of "more than a 10 percent financial interest" or "any management interest."[24] Accordingly, if the Commission were to apply Section 652 to in cable-CLEC context, it would prohibit a far broader set of transactions than NATOA appears to realize, including whole classes of non-merger transactions with which NATOA sees no competitive issues at all.

NATOA then argues that because "it is very probable that a CLEC is the major player in a community," CLECs should not get a "free pass" under Section 652.[25] NASUCA echoes this

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22 NATOA Comments at 3-4.

23 *Id.* at 4.

24 47 U.S.C. §§ 572(a), (b), and (c).

25 NATOA Comments at 5.

argument, asserting that "cable companies have emerged as powerful suppliers of triple-play telecommunications service," and that "allowing cable companies to have unfettered ability to acquire CLECs" would present some unspecified competitive issue.[26] Both NASUCA and NATOA overlook a fundamental point: even absent Section 652, cable-CLEC transactions are still subject to significant scrutiny at both the state and federal levels, including the Commission's thorough evaluation of the public interest effects of transactions under Sections 214(a) and 310(d).[27] Even Public Knowledge concedes that "Section 652 is not a substitute for the Commission's obligation to apply a public interest analysis to transactions within its purview."[28] NCTA's petitions seek only to eliminate an *additional* and unjustifiable barrier to cable-CLEC transactions in Section 652, not to exempt such transactions from the standard public interest review applied by the Commission, or from the review processes of state public utility commissions or state and federal antitrust agencies. Indeed, if the Commission's broad public interest authority is sufficiently robust to assess the competitive effects of massive, highly complex mergers such as AT&T/T-Mobile, it is certainly sufficient to evaluate any transaction involving cable operators and CLECs.

B. Opponents' Challenges to the Forbearance Petition Also Fail.

Opponents also attempt to raise legal objections to NCTA's Conditional Petition for Forbearance, but those objections cannot withstand scrutiny. NASUCA argues that Section 10 of the Communications Act, which sets forth the Commission's forbearance authority, does not apply in this context because cable operators are not "telecommunications carriers" or providers

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26 NASUCA Comments at 5.

27 47 U.S.C. §§ 214(a), 310(d).

28 PK Comments at 1.

of "telecommunications services."[29] This argument is plainly incorrect. NASUCA does not dispute that *CLECs* are telecommunications carriers, and that restrictions on their ability to engage in transactions with cable operators plainly fall within the ambit of Section 10. Moreover, many cable operators themselves operate as CLECs (directly or through an affiliate) and thus qualify themselves as telecommunications carriers under Section 10—a fact that NASUCA concedes just one paragraph earlier when it characterizes cable operators as "suppliers of triple-play telecommunications service."[30] Given that at least one (and typically both) parties to a cable-CLEC transaction will qualify as a telecommunications carrier burdened by the restrictions in Section 652(b), NASUCA cannot credibly maintain that those restrictions fall outside the Commission's forbearance authority.[31]

NATOA further suggests that forbearance is impermissible in this context because it would infringe on "the rights of third parties, namely local franchising authorities."[32] But regulatory bodies (whether the FCC or LFAs) do not have some *a priori* set of "rights"; they have only those powers conferred by law. The question here is whether it is appropriate to forbear, pursuant to the binding federal statute, from exercising regulatory authority against the

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29 NASUCA Comments at 5.

30 *Id.*

31 Similarly, Public Knowledge advances the misguided notion that the Commission cannot forbear from applying Section 652 because the provision does not appear in Title II. PK Comments at 2. But this argument fundamentally misapprehends the Commission's forbearance authority under Section 10 of the Communications Act. Section 10 provides that "the Commission shall forbear from applying any regulation or *any provision of this chapter* to a telecommunications carrier or telecommunications service, or class of telecommunications carrier or telecommunications services" under certain circumstances. 47 U.S.C. § 160(a) (emphasis added). Accordingly, the Commission's forbearance authority is not limited to provisions appearing in Title II; it can forbear from applying "any provision of this chapter"—that is, chapter 47 of the United States Code—to a telecommunications carrier or service, as long as the requisite showing is made. *Id.*

32 NATOA Comments at 5.

parties who would be burdened by that authority, namely the CLECs and cable operators. While Section 652 does give LFAs the ability to approve of waiver requests, Section 10 requires the Commission to eliminate that ability and to forbear from applying Section 652 when the public interest so demands.[33] Indeed, grants of forbearance, by definition, affect the "rights" or powers of the regulatory body tasked with administering the statute. If NATOA were correct, and the "rights" of regulators could trump the public interest analysis demanded by Section 10, the Commission would never be permitted to grant forbearance.

None of the opponents to the petitions seriously dispute that NCTA's forbearance request satisfies Section 10(a)'s three-part test.[34] Instead, they merely rehash their misguided policy arguments opposing the Petition for Declaratory Ruling, and flatly assert that "continuing LFA approval ensures that transactions are subject to adequate oversight."[35] This argument in favor of "regulations for regulations' sake" does not carry any weight. The Commission has long used forbearance as a tool for loosening regulatory review over certain classes of transactions that do not typically present competitive issues. For instance, the Commission has granted forbearance

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33 47 U.S.C. § 160(a).

34 *Id.* (requiring that the Commission determine that "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest"). Indeed, only one commenter even mentions the three-part test, and states in conclusory fashion that "NCTA has failed to demonstrate that its Petition satisfies even one part of the three-part test." NASUCA Comments at 6.

35 NASUCA Comments at 7; *see also* NATOA Comments at 6 (asserting that "[i]t is impossible to see how the convenience and needs of the community can be adequately addressed and protected if the Commission acts to exclude LFAs from the waiver process"); PK Comments at 3 (asserting that LFAs "can ensure that telecommunications services provide access to diverse programming at rates that make such programming accessible to their communities").

from the prior notification and approval requirements of Section 310(d) for *pro forma* assignments and transfers of control of wireless licenses, when it found that such transfers "rarely, if ever, raise consumer issues."[36] President Obama has urged the Commission to identify similar instances in which regulatory burdens stand in the way of procompetitive transactions, and to "modif[y]," "streamline[]," or "repeal[]" those burdens "so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."[37] It is difficult to imagine a more appropriate candidate for regulatory streamlining than for the Commission to eliminate an entirely unnecessary regulatory burden on cable operators and CLECs by excluding cable-CLEC transactions from the scope of Section 652.

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36 *See Forbearance From Section 310(d) Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion and Order, 13 FCC Rcd 6293 ¶ 14 (1998).

37 Exec. Order No. 13,563, § 6(a), 76 Fed. Reg. 3,821 (Jan. 21, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improvingregulation-and-regulatory-review-executive-order.

CONCLUSION

For the foregoing reasons, the Commission should issue the declaratory ruling requested by NCTA or, in the alternative, forbear from applying Section 652 in the context of CLEC-cable transactions.

Respectfully submitted,

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