

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
National Cable and Telecommunications) WC Docket No. 11-118
Association Petitions Regarding Section)
652 of the Communications Act)

REPLY COMMENTS OF CENTURYLINK, INC.

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TABLE OF CONTENTS

Page

SUMMARY..... ii

I. INTRODUCTION 1

II. DISCUSSION..... 2

 A. A Declaratory Ruling is Inappropriate. 2

 B. Forbearance From Section 652 Restrictions Requires Corresponding
 Forbearance From Section 251(c) Obligations For Affected ILECs..... 5

 C. Forbearance from Sub-Section 652(d)(6)(B) Should Be Limited And Not
 Disadvantage ILECs In The Cable Services Market..... 9

III. CONCLUSION 10

SUMMARY

NCTA contends that Section 652 of the Communications Act of 1934, as amended, has become a potentially insurmountable and unjustified barrier to cable operator acquisitions of CLECs. This concern exists despite the fact that Section 652 provides cable operators and LECs with the ability to secure a waiver from its cable operator-LEC cross-ownership restrictions. Among other conditions, the granting of a waiver from Section 652's cross-ownership restrictions requires approval from the LFA with jurisdiction over the subject cable operator's cable service area. NCTA is particularly troubled by the fact that Section 652(d)(6)(B), the LFA waiver approval provision, imposes no standards or procedures to guide LFA consideration of Section 652 waiver requests and that this confers LFAs with an unjustifiable and unrestrained veto over cable operator-CLEC transactions. In order to address its concern, NCTA filed a Petition for Declaratory Ruling asking the Commission to declare that Section 652 does not apply to transactions between cable operators and CLECs. It also filed a Conditional Petition for Forbearance asking the Commission to forbear from enforcing Section 652 in the context of cable operator-CLEC transactions or, in the alternative, forbear from enforcing Section 652(d)(6)(B) in the context of cable operator-CLEC transactions.

CenturyLink submits that as to the application of Section 652, there is neither a controversy requiring termination nor an uncertainty to be removed that would support the Commission's issuance of the declaratory ruling sought by NCTA. As to NCTA's Conditional Petition for Forbearance, CenturyLink submits that: 1) the Commission should only grant forbearance from Section 652 to cable operator-CLEC transactions if it also grants corresponding forbearance to ILECs from their Section 251(c) obligations as to cable operators and CLECs, as well as their successors and affiliates, in their service areas benefitting from the Section 652 forbearance grant; and 2) forbearance from Section 652(d)(6)(B) should be limited to instances

where an affected ILEC has already secured a franchise, if required, to provide cable service in the overlapping service areas of cable operators and CLECs involved in a transaction utilizing such Section 652(d)(6)(B) forbearance.

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I. INTRODUCTION

CenturyLink, Inc. (CenturyLink) submits these reply comments in response to the *Public Notice*¹ of the Federal Communications Commission (Commission) in the above-captioned proceeding soliciting comments and reply comments concerning the National Cable and Telecommunications Association's (NCTA's) Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions between Competitive Local Exchange Carriers and Cable Operators (*NCTA PFDR*) and Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions between Competitive Local Exchange Carriers and Cable Operators (*NCTA Conditional Petition*) (collectively *NCTA Petitions*). CenturyLink submits that the Commission lacks authority to issue the declaratory ruling requested in the *NCTA PFDR* as there is neither a controversy requiring termination nor uncertainty to be removed² concerning the unambiguous meaning or application of Section 652³ of the Communications Act of 1934, as amended (Communications Act).⁴ The Commission should only grant forbearance from Section 652 as requested in the *NCTA Conditional Petition* if the

¹ *Public Notice*, DA 11-1177 (rel. July 8, 2011). Petition for Declaratory Ruling and Conditional Petition for Forbearance filed June 21, 2011.

² See 5 U.S.C. § 554(e); 47 C.F.R. § 1.2(a).

³ 47 U.S.C. § 572.

⁴ 47 U.S.C. § 151, *et seq.*

Commission also grants corresponding forbearance from Section 251(c) of the Communications Act⁵ to any incumbent local exchange carrier (ILEC) providing telecommunications services in the overlapping service areas of any cable operator and competitive local exchange carrier (CLEC) involved in a transaction⁶ utilizing such Section 652 forbearance, with respect to the cable operator(s) and CLEC(s) engaged in the transaction or any affiliated or successor entity resulting from the transaction. Granting cable operators and CLECs forbearance from the cross-ownership restrictions of Section 652 without also granting forbearance from Section 251(c) to any ILEC providing telecommunications services in the overlapping service areas of the forborne cable operators and CLECs would unjustly and unreasonably discriminate against affected ILECs and would disserve the public interest by competitively advantaging incumbent cable operators over ILECs. Any grant of forbearance from the application of Section 652(d)(6)(B) should be limited to those circumstances where an affected ILEC has already secured a franchise, if required, to provide cable service in the overlapping service areas of any cable operators and CLECs involved in a transaction utilizing such Section 652(d)(6)(B) forbearance.

II. DISCUSSION

A. A Declaratory Ruling is Inappropriate.

In the *NCTA PFDR*, NCTA seeks to persuade the Commission that although Congress defined “local exchange carrier” in the Communications Act to encompass any person engaged in the provision of telephone exchange service or exchange access (except commercial mobile service providers),⁷ Congress intended a different, and more limited, definition of local exchange

⁵ 47 U.S.C. § 251(c).

⁶ Transaction includes any acquisition, merger, joint venture or other transaction currently subject to the restrictions in Section 652.

⁷ 47 U.S.C. § 153(26). *The term “local exchange carrier” means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a*

carrier for the purpose of applying Section 652 without explicitly or implicitly expressing such an intention. It is an argument that cannot be reconciled with text of Section 652 or established principles of statutory interpretation,⁸ and it must be rejected.

As noted in the *NCTA PFDR*, Section 652 “effectively creates a presumption that proposed acquisitions of cable companies by LECs, or vice versa, are unlawful.”⁹ As a predicate for its argument that the Commission has the authority to declare that Section 652 was intended only to limit acquisitions of cable companies by ILECs,¹⁰ or vice versa, and should do so here, NCTA asserts that the “text, purpose, and history of Section 652 indicate that it was intended to prevent the two then-dominant incumbent service providers in each local area – incumbent LECs, which owned the telephone lines, and cable operators, which owned the cable lines – from merging or acquiring certain financial interests or management stakes in each other such that a single company would control both wires to a customer’s home or office.”¹¹ NCTA offers non-

person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term (emphasis added).

⁸ The specific terms in a statute take precedence over general terms. *See Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957), *aff’d sub nom., Transmirra Products Corp. v. Fourco Glass Co.*, 246 F.2d 538 (1957). Clear and express Congressional intent must be shown to support the existence of an exception to a statutory requirement (or in this instance, a statutory definition). *See FCC v. Nextwave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003).

⁹ *NCTA PFDR* at 2.

¹⁰ For the purpose of applying Section 251 of the Communications Act, incumbent local exchange carrier is defined at Section (h)(1) to mean: “with respect to an area, the local exchange carrier that – (A) on [the date of enactment of the Telecommunications Act of 1996], provided telephone exchange service in such area; and (B)(i) on [such date of enactment], was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission’s regulations (47 C.F.R. 69.601(b)); or (ii) is a person or entity that, on or after [such date of enactment], became a successor or assign of a member described in clause (i).” *See also* 47 C.F.R. § 51.5 *Incumbent Local Exchange Carrier*.

¹¹ *NCTA PFDR* at 2-3. *See also id.* at 6-8.

legal arguments,¹² raises questions about the meaning of other terms found in Section 652¹³ and points to conflicting Commission decisions¹⁴ in support of its request for a Commission declaration that Section 652 does not apply to transactions between cable operators and CLECs.¹⁵ But NCTA fails to address the most obvious and pertinent legal question presented by its petition, if Congress intended the application of Section 652 to be limited to transactions between cable operators and ILECs, why did it use the term “local exchange carrier” uniformly throughout Section 652 and make no reference to the term “incumbent local exchange carrier?”

Nowhere in Section 652 is the term ILEC used. Congress was certainly not oblivious to the distinction between LECs and ILECs. Had Congress intended for Section 652 to be limited to transactions between cable operators and ILECs, it could, and presumably would, have said ILEC instead of LEC in Section 652. Congress distinguished LECs from ILECs in Section 251 where it explicitly set forth the interconnection obligations of all LECs and the separate, additional interconnection obligations of ILECs. There is no credible basis on which to conclude that Congress was uncertain about who it intended Section 652 to cover when it used the term LEC. Congress defined both LEC and ILEC in the Communications Act and evidenced an

¹² *E.g.*, “Many CLECs are struggling to raise capital. CLEC-cable combinations provide a unique opportunity to mount an effective challenge to incumbent LECs, which maintain a dominant position in serving business customers, the principal customer segment served by CLECs, in most areas. But Section 652 has emerged as a potentially insurmountable and wholly unjustified hurdle to cable acquisitions of CLECs, untethered from its purpose.” *Id.* at 4.

¹³ *E.g.*, “At a minimum, Section 652(b) is ambiguous with respect to its reach. For example, the statute does not define what it means for a local exchange carrier to be ‘providing telephone exchange service’ within a cable operator’s franchise area. This language does not specify whether a LEC must serve existing customers, or simply offer service within its telephone service area.” *Id.* at 9.

¹⁴ *E.g.*, “Prior to the Commission’s decision to subject the Comcast-CIMCO transaction to Section 652’s limitations on cross-ownership, the Commission itself had suggested that Section 652(b) limits only a cable operator’s ability to acquire an incumbent LEC.” *Id.* at 11.

¹⁵ NCTA does not contend that CLECs are not LECs.

awareness of the differences between the two. The Commission has a very high hurdle to surmount in order to declare that Section 652 does not apply to transactions between cable operators and CLECs considering that Congress defined both LEC and ILEC in the Communications Act; uses the term LEC throughout Section 652; does not use the term ILEC in Section 652; and demonstrated its appreciation for the distinction between LECs and ILECs by explicitly differentiating LEC duties from ILEC duties in Section 251 of the Communications Act. CenturyLink respectfully submits that the legal basis for a declaratory ruling pursuant to Section 5(d) of the Administrative Procedure Act¹⁶ and Section 1.2(a)¹⁷ of the Commission's own rules are not demonstrated by the *NCTA PFDR*, and it should be denied.

B. Forbearance From Section 652 Restrictions Requires Corresponding Forbearance From Section 251(c) Obligations For Affected ILECs.

In the *NCTA Conditional Petition*, NCTA asks the Commission to exercise its Section 10¹⁸ authority and forbear from enforcing Section 652 “to mergers, acquisitions, and other transactions between cable operators and local exchange carriers that did not provide local exchange services as of January 1, 1993 (*i.e.*, *competitive* local exchange carriers (‘CLECs’)).”¹⁹ As stated in Section II.A., above, Section 652 effectively creates a presumption that proposed acquisitions of cable companies by LECs, or vice versa, are unlawful. Granting the *NCTA Conditional Petition* would limit the application of Section 652 to mergers, acquisitions and other transactions between cable operators and ILECs. This result would place ILECs at a competitive disadvantage. Cable operators, who are facilities-based service providers, would be free of Section 652's cross-ownership restrictions in transactions with CLECs while ILECs

¹⁶ 5 U.S.C. § 554(e).

¹⁷ 47 C.F.R. § 1.2(a).

¹⁸ 47 U.S.C. § 160.

¹⁹ *NCTA Conditional Petition* at 1.

would still be subject to the cross-ownership restrictions in transactions with cable operators. Cable operators would be free to enter the telecommunications market or augment their telecommunications facilities in their existing cable service areas through transactions with CLECs while ILECs would continue to be constrained by Section 652 from acquiring an interest in a cable operator serving their existing telephone exchange service areas. Compounding this inequity is the fact that the cable operator securing an interest in a CLEC in its cable service area would also have the ability to secure interconnection, unbundled access, resale and collocation from the ILEC in that service area pursuant to Section 251(c). These and the other 251(c) obligations imposed upon ILECs were intended to facilitate new entry into the local telecommunications service market. Forbearance from Section 652's cross-ownership restrictions that would permit a cable operator to acquire an interest in a CLEC providing telephone exchange service in its cable service area removes any justification that may remain in the current highly competitive telecommunications market for affording such a cable operator Section 251(c) rights to interconnection, unbundled access, resale and collocation from the ILEC serving the overlapping cable operator-CLEC service areas. The *NCTA Conditional Petition* should only be granted if limited Section 251(c) relief is concurrently granted to any ILEC competing with the beneficiary or beneficiaries of such Section 652 forbearance.

CenturyLink supports the principle that competitive markets should be free to operate in an economically rational manner free of unneeded regulation. The Telecommunications Act of 1996²⁰ has successfully produced robust competition for local telecommunications services. Cable operators, "the other incumbent local wireline providers," have well established themselves as formidable competitors to ILECs for both voice and data services. In the

²⁰ Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996).

Commission's recent report, *Local Telephone Competition: Status as of June 30, 2010*,²¹ it is shown that 26.2 percent of local wireline residential telephone service connections were provided in June 2010 by non-ILEC interconnected voice over Internet protocol (VoIP) service providers and 5.2 percent of such connections were provided by non-ILEC switched access service providers.²² With respect to local wireline business telephone service connections, 28 percent were provided by non-ILEC switched access service providers and 5.5 percent were provided by non-ILEC interconnected VoIP service providers.²³ In Oregon, a state widely served by CenturyLink, the non-ILEC share of total end-user switched access lines and VoIP connections in June 2010 was 36 percent.²⁴ Integra Telecom, Inc. (Integra) is among the CLECs that compete with CenturyLink in Oregon and throughout much of CenturyLink's legacy Qwest local telephone service territory. Integra operates in 11 western states, has a 3,000 route mile (160,000 fiber miles) metropolitan area network, has a 5,000-mile long haul network and serves more than 200 business communities.²⁵ It is understandable why cable service operators would want the opportunity to acquire or control assets such as those owned by Integra as they compete with ILECs in local voice and data markets. Cable operators will secure a competitive advantage over ILECs should the Commission grant the *NCTA Conditional Petition* allowing incumbent cable operators to acquire or control CLEC assets in their cable service areas while ILECs remain constrained by the cross-ownership restrictions of Section 652. The Commission should not grant the requested forbearance without ILECs also receiving limited Section 251(c) relief.

²¹ Federal Communications Commission, Industry Analysis and Technology Division, *Wireline Competition Bureau* (March 2011) (2011 Local Competition Report).

²² 2011 Local Competition Report at 4 and 5.

²³ *Id.*

²⁴ *Id.* at 22, Table 11.

²⁵ http://www.integratelecom.com/about/company_information.php.

Forbearance relief for cable operators and CLECs from the cross-ownership restrictions in Section 652 should not be granted without offsetting forbearance relief for ILECs that face competition in overlapping service areas from those cable operators and CLECs that benefit from the requested Section 652 forbearance. In the context of the *NCTA Conditional Petition*, ILEC forbearance is necessary in order to avoid exacerbating the regulatory imbalance that already exists in favor of incumbent cable operators that compete with ILECs in their respective incumbent cable services and incumbent telecommunications services markets, as well as in the broadband market. The requested Section 652 forbearance relief sought by NCTA provides cable operators with an increased opportunity to leverage their incumbency as facilities-based providers in cable services markets into an unjustified and unfair competitive advantage in telecommunications services markets. Accordingly, the Commission should only grant the requested forbearance from Section 652's cross-ownership restrictions if the Commission also grants corresponding forbearance from Section 251(c) of the Communications Act to any ILEC providing telecommunications services in the overlapping service areas of any cable operator and CLEC involved in a transaction utilizing such Section 652 forbearance, with respect to the cable operator(s) and CLEC(s) engaged in the transaction or any affiliated or successor entity resulting from the transaction.²⁶ Granting cable operators and CLECs forbearance from the restrictions of Section 652 without also granting forbearance from Section 251(c) to any ILEC providing telecommunications services in the overlapping service areas of the forborne cable operators and CLECs would unjustly and unreasonably discriminate against affected ILECs by tilting the

²⁶ The scope of the Section 251(c) forbearance proposed here would be no broader than the Section 652 forbearance relief sought by NCTA. It would only apply with respect to the entity or entities benefitting from the Section 652 forbearance relief (the surviving entity or entities of the transaction or its/their affiliates or successors) in the overlapping service areas of the transacting cable operator and CLEC in which the ILEC also provides telephone exchange service.

balance that Congress established in Section 652 in favor of cable operators and thereby disserve the public interest.

C. Forbearance from Sub-Section 652(d)(6)(B) Should Be Limited And Not Disadvantage ILECs In The Cable Services Market.

The *NCTA Conditional Petition* asks, alternatively, “that the Commission forbear from enforcing Section 652(d)(6)(B) of the Act in the context of CLEC-cable transactions.”²⁷ Sub-section 652(d)(6) is the waiver provision contained in Section 652 that allows the Commission, with the concurrence of the governing LFA (as set forth in paragraph (B)), to waive Section 652’s cross-ownership restrictions with respect to any given transaction. It is apparent from a full reading of both the *NCTA PFDR* and the *NCTA Conditional Petition* that NCTA’s concern with the role of LFAs in the waiver process is the true motivating factor for the filing of the *NCTA Petitions*. The existence of a process for obtaining waivers from Section 652’s cross-ownership restrictions should make forbearance from Section 652 or any of its subsections unnecessary.²⁸ NCTA asserts, though, that the process for obtaining a waiver of Section 652’s cross-ownership restrictions has become “highly burdensome and potentially impossible.”²⁹ NCTA lays the blame for the unnecessary hurdle in the waiver process at the feet of LFAs and “the specter that any one LFA might hold up even an obviously pro-competitive transaction for any reason – or for no reason at all – on a timetable of its choosing.”³⁰

²⁷ *NCTA Conditional Petition* at 2.

²⁸ Sub-section 652(d)(6) provides that the Commission may waive the cross-ownership restrictions of Sub-sections 652(a), (b) and (c) only if, among other conditions, “(B) the local franchising authority approves of such waiver.”

²⁹ *NCTA Conditional Petition* at 4.

³⁰ *Id.* at 4-5. *See also* “There is no legitimate basis for LFAs to have a perpetual right to hold up a transaction for any reason (or for no reason at all).” *NCTA PFDR* at 14-15.

It is clear that Congress believed that LFAs had an appropriate role in the consideration of waivers of Section 652's cross-ownership restrictions. CenturyLink takes no position here as to how LFAs have conducted themselves in reviewing Sub-section 652(d)(6) waiver requests. CenturyLink's interest is in ensuring that any action taken by the Commission in response to NCTA's petitions does not place it at a competitive disadvantage to cable operators with whom it competes in its telephone exchange service areas in both the voice and data markets, and in some places in the video services market as well. With respect to the *NCTA Conditional Petition*, a grant of forbearance from the application of Section 652(d)(6)(B) should be limited to those circumstances where an affected ILEC has already secured a franchise, if required, to provide cable service in the overlapping service areas of any cable operators and CLECs involved in a transaction utilizing such Section 652(d)(6)(B) forbearance.

Today, safeguards incorporated in Subsection 652(d)(6), including review and approval by LFAs, allow potential anti-competitive consequences in both the affected cable services and telecommunications services markets to be considered before a waiver of the Section 652 cross-ownership restrictions is granted. Forbearance from Sub-section 652(d)(6)(B), as requested in the alternative in the *NCTA Conditional Petition*, would remove a significant safeguard – LFA review and approval with respect to CLEC-cable operator transactions. Should the Commission grant the requested alternative forbearance request, it should limit the forbearance granted to those circumstances where an affected ILEC has already secured a franchise, if required, to provide cable service in the overlapping service areas of any cable operators and CLECs involved in a transaction utilizing such Section 652(d)(6)(B) forbearance.

III. CONCLUSION

For the reasons discussed above, the Commission should deny the *NCTA PFDR*. It should grant the *NCTA Conditional Petition* only if it also grants corresponding forbearance

from Section 251(c) of the Communications Act to any ILEC providing telecommunications services in the overlapping service areas of any cable operator and CLEC involved in a transaction utilizing such Section 652 forbearance, with respect to the cable operator(s) and CLEC(s) engaged in the transaction or any affiliated or successor entity resulting from the transaction. Forbearance, if granted, from the application of Section 652(d)(6)(B) should be limited to those circumstances where an affected ILEC has already secured a franchise, if required, to provide cable service in the overlapping service areas of any cable operators and CLECs involved in a transaction utilizing such Section 652(d)(6)(B) forbearance.

Respectfully submitted,

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September 21, 2011

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY**
COMMENTS OF CENTURYLINK, INC. to be: 1) filed via ECFS with the Office of the
Secretary of the FCC in WC Docket No. 11-118; 2) served via e-mail on the Competition Policy
Division, Wireline Competition Bureau at CPDcopies@fcc.gov; and 3) served via e-mail on the
FCC's duplicating contractor, Best Copy & Printing, Inc. at fcc@bcpweb.com.

/s/ Richard Grozier

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