

March 20, 2012

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

**Re: Petition for Declaratory Ruling and Conditional Petition for Forbearance,  
WC Docket No. 11-118**

Dear Ms. Dortch:

On behalf of the National Cable & Telecommunications Association (“NCTA”), American Cable Association (“ACA”), and COMPTTEL, we are writing in support of the pending petitions seeking relief from the buyout restrictions contained in Section 652 of the Communications Act of 1934, as amended (the “Act”). In particular, if the Commission determines that Section 652(b) applies to procompetitive transactions between cable operators and competitive local exchange carriers (“CLECs”), the Commission should forbear from enforcing that restriction on such transactions because it is unnecessary to protect competition or consumers and it therefore undermines, rather than advances, the public interest.

As the Commission is aware, Section 652(b) presumptively bars 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 within such cable operator’s franchise area.”<sup>1</sup> The Act provides that the Commission may waive this restriction for transactions that it deems clearly procompetitive, but only if the local franchise authority (“LFA”) in each relevant franchise area also “approves of such waiver.”<sup>2</sup> The LFA approval process is completely unbounded; the statute does not prescribe any standard for LFAs to apply when deciding whether to approve a waiver request and even creates the prospect that a single LFA could veto a transaction that the Commission has found to promote the public interest.

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<sup>1</sup> 47 U.S.C. § 572(b).

<sup>2</sup> *Id.* § 572(d)(6).

Such a threat nearly became reality when Comcast sought to acquire CIMCO, a Chicago-based CLEC, in 2010. At the parties' request, the Commission assumed without deciding that Section 652(b) applied (despite the Commission's historical approval of certain cable-CLEC transactions notwithstanding Section 652(b)).<sup>3</sup> The Commission concluded that the deal would "result in significant public interest benefits" and "foster facilities-based competition in the enterprise market," and would not cause any significant anticompetitive effects.<sup>4</sup> Yet the City of Detroit objected to the transaction and refused to approve the waiver requested under Section 652(d). Despite finding Detroit's assertions regarding potential competitive harms unpersuasive,<sup>5</sup> the Commission declined to disturb the City's disapproval, ruling that the parties would need to present proof of that LFA's acquiescence before Comcast could purchase and operate CIMCO's assets in Detroit.<sup>6</sup> Comcast ultimately was able to complete the transaction notwithstanding Detroit's objection. However, under different circumstances, parties might well be unable to complete a transaction if a single LFA (or a handful of LFAs) disapproved, irrespective of whether the LFA (or LFAs) had any legitimate, transaction-specific basis for withholding approval.

As the leading associations representing cable operators and CLECs, it is our members who are most directly affected by Section 652(b) and the obstacles it places in the way of efficient and procompetitive transactions. Many of our members have informed us that the prospect that Section 652(b) applies to cable-CLEC transactions – and in particular the threat that one or more LFAs (out of potentially hundreds with approval rights under Section 652(d)) could withhold approval of the necessary waiver for reasons unrelated to the transaction or for no reason at all – poses a significant disincentive to considering such transactions in the first place. In fact, Section 652(b) distorts every aspect of a potential transaction between a cable operator and a CLEC, from the parties' evaluation and negotiation of such a deal to their willingness to pursue the requisite regulatory clearances and weigh the concessions that may be necessary to obtain approval.

Particularly in the wake of Detroit's refusal to approve the waiver sought by Comcast and CIMCO, several of our members have indicated that the apparent applicability of Section 652(b) has dampened their willingness to pursue potential transactions that would strengthen competition vis-à-vis the dominant incumbent LEC and thereby benefit consumers. In fact, the

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<sup>3</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 and Order and Order on Reconsideration, 25 FCC Rcd 3401 ¶ 13 & n.34 (2010) ("*Comcast-CIMCO Order*"). The Wireline Competition Bureau has followed the same approach in two subsequent transactions involving cable operators and CLECs. See *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, Memorandum Opinion and Order, DA 12-113 (WCB Jan. 31, 2012) ("*TWC-Insight Order*"); *Applications Granted for the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc.*, Public Notice, 25 FCC Rcd 16304 (WCB 2010) ("*FiberNet-NTELOS PN*").

<sup>4</sup> *Comcast-CIMCO Order* ¶ 4; see also *id.* ¶¶ 32-41.

<sup>5</sup> *Id.* ¶ 34.

<sup>6</sup> *Id.* ¶¶ 24, 42.

larger the transaction (and, in all likelihood, the more substantial the procompetitive benefits at stake), the more LFAs that would need to approve of a waiver under Section 652(d)—and the greater the risk that one or more LFAs' disapproval could derail the transaction. As a result of such risks, several cable operators have indicated that they have declined to pursue potential transactions with CLECs that otherwise would have presented a more favorable risk/reward proposition.

For example, one NCTA member reports that three different small CLEC acquisitions in the Southeast U.S. created significant concerns for the cable operator's business teams because of the uncertainty of obtaining a waiver under Section 652(d) and the myriad – in one case, over 100 LFA – approvals necessary to complete the process. These regulatory burdens tipped the balance against proceeding. These acquisitions would each have allowed the cable operator-CLEC combination to compete more effectively in the small and midsize enterprise market. This enhanced competition would have provided service and price choice to customers now served by the much larger Bell ILEC.

Even if the overhang created by Section 652(b) does not scuttle a potential deal at the outset, it can cast a shadow over negotiations between cable operators and CLECs and lead to suboptimal outcomes from a public interest standpoint. For example, the risks associated with a waiver request under Section 652(d) can play a significant role in the parties' valuation of the deal, sometimes leading to wide divergences of opinion that drive the parties apart. Accordingly, even though a transaction with a cable operator might have entailed greater synergies and thus yielded a higher total valuation in the absence of regulatory distortions, a CLEC might nevertheless agree to a less-preferred buyout by a non-cable entity (such as a private equity fund) to avoid the complications presented by a cable-CLEC transaction. In such circumstances, by dissuading CLECs from entering into transactions with cable operators, Section 652 undermines the public interest by impeding strategic combinations that would most effectively boost competition vis-à-vis the dominant ILEC.

For deals that move beyond initial diligence and negotiations and onto discussions with financing sources, cable operators and CLECs must contend with additional scrutiny from lenders that are understandably concerned about the prospects of obtaining an additional layer of regulatory approval under Section 652(d). Thus, even if the parties can satisfy themselves that the benefits entailed by a potential transaction merit seeking a waiver and the approval of all relevant LFAs, they may be unable to obtain the requisite financing or may encounter more onerous restrictions and/or increased costs of capital as a result of the heightened regulatory complexity and uncertainty.

In the event that a cable operator and a CLEC can overcome these obstacles and reach a deal, they still face the daunting prospect of obtaining a waiver under Section 652(d)(6) and navigating the LFA approval process. As noted above, for deals where there is significant overlap between the relevant cable and CLEC footprints, the process can involve hundreds or thousands of LFAs. The Commission laudably has sought to prevent cable-CLEC transactions from “languish[ing] in regulatory uncertainty” while the LFA approval process plays out by

deeming LFAs to have approved a waiver request absent an affirmative objection.<sup>7</sup> But the fact remains – as illustrated by Detroit’s refusal to approve the waiver sought by Comcast and CIMCO – that an LFA can withhold its approval for any reason (whether related to the transaction or not) or for no reason at all. Thus, in addition to the prospect that a procompetitive transaction may be derailed altogether by one or more LFAs’ refusal to approve the requisite waiver, the parties may be forced at a minimum to carve out particular service territories and/or assets, resulting in significant operational complexities, increased costs, and diminished consumer welfare (as the contemplated efficiencies and procompetitive benefits are foregone in the area(s) in question).

As demonstrated above, based on all these obstacles, many of our members have concluded that the risks associated with cable-CLEC transactions too often will outweigh the benefits, especially when the geographic overlap is substantial and the number of LFAs that must approve a waiver is correspondingly large. Foregoing such transactions does not merely affect the private interests of the companies involved; also lost are the strong procompetitive benefits that result from cable-CLEC transactions. Indeed, the Commission has recognized that combining the respective strengths of a cable operator and CLEC often “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.”<sup>8</sup>

Making matters worse, such foregone competitive gains are not offset by any countervailing benefits associated with the extra layer of regulatory review under Section 652. As explained in the Petitions and in the subsequent comments, cable-CLEC transactions do not raise any of the competitive issues that motivated the enactment of Section 652(b); Congress’s concerns were limited to deals involving *incumbent* LECs.<sup>9</sup> Far from diminishing competition, transactions between cable operators and CLECs typically realize significant procompetitive synergies by combining the cable operator’s financial resources with the CLEC’s expertise and infrastructure. Cable-CLEC combinations also facilitate the migration of CLEC services from leased to owned facilities, and allow for the efficient integration of back-office operations. The combined entity thus would become a more effective competitor to the dominant incumbent LEC. In the unlikely event that a particular cable-CLEC transaction poses some concern, the Commission has adequate tools at its disposal to evaluate the competitive effects and other

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<sup>7</sup> *Id.* ¶ 29.

<sup>8</sup> *Id.* ¶ 4; *see also* *TWC-Insight Order* ¶ 21 (finding that the TWC-Insight deal “will spur greater facilities-based competition for residential and enterprise customers and result in accelerated and expanded availability of IP-based services to Insight’s customers”); *FiberNet-NTELOS PN* at 16307 (finding that NTELOS’s acquisition of FiberNet will “provide likely benefits to residential and business customers resulting from NTELOS investing in the newly acquired network and offering new and expanded broadband services in its service territory”).

<sup>9</sup> *See* Petition for Declaratory Ruling of the National Cable & Telecommunications Association, WC Docket No. 11-118, at 6-9 (filed June 21, 2011); Conditional Petition for Forbearance of the National Cable & Telecommunications Association, WC Docket No. 11-118, at 3 (filed June 21, 2011); *see also, e.g.*, Comments of the American Cable Association, WC Docket No. 11-118, at 2 (filed Aug. 22, 2011); Comments of COMPTTEL, WC Docket No. 11-118, at 4-6 (filed Aug. 22, 2011); Comments of Comcast Corp., WC Docket No. 11-118, at 2-4 (filed Aug. 22, 2011); Reply Comments of Time Warner Cable Inc., WC Docket No. 11-118, at 3-4 (filed Sep. 21, 2011).

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public interest considerations, including in particular under Sections 214(a) and 310(d).<sup>10</sup> Indeed, the Commission relies on those provisions to review far more competitively significant transactions, including the recent attempt by AT&T to acquire T-Mobile. There is no reason why generally procompetitive cable-CLEC deals should be subjected to an additional and entirely unpredictable layer of regulatory review, especially when the precise considerations presented by a waiver request under Section 652(d) are invariably raised in connection with the Commission's review of a transaction under Sections 214(a) and 310(d).

Accordingly, the Commission should eliminate the existing impediments to procompetitive cable-CLEC transactions, either by clarifying that Section 652(b) has no application to such transactions or by forbearing from the buyout restriction to the extent it does apply. Removing this unnecessary barrier to procompetitive transactions will rekindle local exchange competition and strongly benefit consumers and businesses alike.

Respectfully submitted,

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<sup>10</sup> 47 U.S.C. §§ 214(a), 310(d).