WC 11-118

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

In the Matter of	)	
Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions between Competitive Local Exchange Carriers and Cable Operators	)	Docket No. ____

CONDITIONAL PETITION FOR FORBEARANCE

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Pursuant to Section 10 of the Communications Act of 1934, as amended (the "Act"), and Sections 1.53 and 1.54 of the Commission's rules,[1] the National Cable & Telecommunications Association ("NCTA")[2] respectfully requests that the Commission forbear from enforcing Section 652 of the Act 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")).[3] Section 652, which imposes cross-ownership restrictions on cable operators and local exchange carriers, is not necessary to ensure just and reasonable rates, protect consumers, and promote the public interest in the context of

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1 47 U.S.C. § 160(c); 47 C.F.R. §§ 1.53-1.54.

2 NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing over $170 billion since 1996 to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 23 million customers.

3 This petition falls within the Commission's Section 10 authority to forbear from applying the requirements of the Act pertaining to "telecommunications carriers" because cable operators are seeking relief on behalf of their CLEC divisions or affiliates. Indeed, because most transactions implicated by this petition would involve telecommunications carriers both as purchasers *and* as sellers, the restrictions at issue unquestionably pertain to telecommunications carriers and are eligible for forbearance under Section 10.

these inherently pro-competitive transactions. Indeed, enforcement of Section 652 in such circumstances would harm consumers and the public interest.

Alternatively, NCTA requests that the Commission forbear from enforcing Section 652(d)(6)(B) of the Act in the context of CLEC-cable transactions. That subsection, which provides that the Commission may waive the cross-ownership restrictions contained in Section 652 "only if . . . the local franchising authority ["LFA"] approves of such waiver," has become a potentially crippling impediment to inherently pro-competitive CLEC-cable transactions that do not implicate the purposes underlying the provision.

For the reasons stated in the accompanying Petition for Declaratory Ruling, the most straightforward way for the Commission to ameliorate the problems created by Section 652 in the context of CLEC-cable transactions is to find that Section 652 does not apply at all to that class of transactions. However, if the Commission finds that it does apply, it should forbear from enforcing Section 652 in the context of CLEC-cable transactions or, at a minimum, the Commission should forbear from enforcing the LFA waiver approval provision in the context of these transactions.

INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act") sought to promote competition for local telephone services by imposing a series of market-opening obligations on incumbent local exchange carriers ("LECs"), including the regional Bells, in an effort to mitigate their structural advantages.[4] Consistent with the 1996 Act's goal of promoting competition among formerly disparate industry segments, Congress enacted Section 652 to impose cross-ownership

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4 *See* 47 U.S.C. §§ 251, 271; *see generally* THE TELECOMMUNICATIONS ACT OF 1996: LAW & LEGISLATIVE HISTORY 19-20 (Robert E. Emeritz et al., eds., Pike & Fischer 2001); *see also* H.R. Rep. No. 103-560 (1994) (advocating the lifting of cable-telephone cross-ownership rules).

restrictions on cable operators and LECs unless the parties obtain a waiver from the Commission and the approval of each LFA.[5]

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. Transactions between cable operators and *competitive* LECs do not implicate these concerns—to the contrary, they are almost always strongly pro-competitive—because CLECs seldom control the "last mile" facilities to a customer's home or office and where they do, the incumbent LEC continues to control its own wire. Historically, the Commission appears to have assumed that Section 652 does not apply to CLEC-cable transactions. Nevertheless, the Commission recently considered a proposed transaction between Comcast and CIMCO, a Chicago-based CLEC, and, although the parties raised the issue of Section 652's scope, the Commission at the request of the parties declined to address whether Section 652 applies to CLEC-cable transactions in which the CLEC was not providing service as of January 1, 1993.[6] By failing to resolve the ambiguity, the Commission's order implied that Section 652 *may* apply to such transactions.[7]

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5 47 U.S.C. § 572(d)(6)(B).

6 *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 (rel. Mar. 15, 2010) ("Comcast-CIMCO Order"). The applications proposed to allow Comcast to acquire CIMCO, a regional CLEC that provides telecommunications services exclusively to business and enterprise customers in a limited number of markets, primarily in Illinois and Michigan.

7 Following the Comcast-CIMCO Order, another set of parties, One Communications, FiberNet, and NTELOS, filed an application seeking a waiver of Section 652(b),

Section 652 contains a waiver provision that authorizes the Commission to waive the statute's cross-ownership restrictions based on specific guidelines set forth in the Act. Although the best reading of the statute, in light of its purposes, is that Section 652 does not reach CLEC-cable transactions at all, if it does apply, the Commission possesses the authority to waive the restrictions for this category of transactions consistent with the statute's guiding factors and overarching goals.

However, Section 652(d)(6)(B) requires LFA approval of such waivers, and that additional hurdle makes obtaining a waiver highly burdensome and potentially impossible. The LFA waiver approval provision contains no guidelines whatsoever. This complete lack of any constraints raises the specter that any one LFA might hold up even an obviously pro-competitive

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apparently on the assumption that Section 652(b) applied where the acquirer of CLEC assets held attributable interests in overlapping cable systems. But that proceeding only adds to the confusion surrounding the proper application of Section 652. Specifically, the parties explained that Quadrangle Group held interests in both NTELOS (an incumbent LEC with adjacent CLEC operations) and Suddenlink (a cable operator with some franchise areas that apparently overlap with NTELOS operations), and NTELOS was acquiring CLEC assets controlled by FiberNet. In granting the requested waiver, the Wireline Competition Bureau stated that "Section 652(b) is applicable to this transaction because of Quadrangle's holdings in both NTELOS and Suddenlink." 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). It is unclear exactly what overlap the Bureau believed to trigger Section 652(b), given that NTELOS owns both ILEC and CLEC assets in the states served by Suddenlink. *See* FiberNet Initial PN at 2-3 (detailing NTELOS's ILEC and CLEC assets in Virginia and West Virginia, states in which Suddenlink also provides cable services). To the extent that the Bureau was referring to NTELOS's *ILEC* operations, then it seems clear that Quadrangle's control of overlapping ILEC and cable interests implicated the statute. But if the Bureau meant to suggest that NTELOS's *CLEC* operations overlapped with Suddenlink's franchise areas and therefore implicated Section 652(b), it is unclear why Quadrangle did not require a waiver when the NTELOS-Suddenlink overlap first arose, as opposed to requiring one in connection with a subsequent transaction that did not create the NTELOS-Suddenlink overlap at all. In any event, as explained in NCTA's Declaratory Ruling Petition, NCTA does not believe that the Bureau should have required a waiver of Section 652(b) based on any CLEC-cable overlap.

transaction for any reason—or for no reason at all—on a timetable of its choosing. Any one LFA may thus hold up or deny a transaction, or may demand any number of concessions in exchange for approval, whether or not related to the transaction's competitive effects. The prospect that these inherently pro-competitive combinations would be required to navigate a potentially endless LFA approval process creates a powerful disincentive to pursuing or entering into these transactions, and thus deprives consumers of the resultant benefits.

This concern over an unbounded LFA approval process is not hypothetical. Recently the City of Detroit asserted a right to veto Comcast's proposed acquisition of CIMCO,[8] a small CLEC serving exclusively business customers in a small number of markets in Illinois and Michigan. Indeed, the Commission specifically recognized that Detroit's objection "fails to provide any specific evidence to suggest why the proposed asset sale is likely to harm competition."[9] Although the Commission found that the "transaction, on balance, serves the public interest, convenience and necessity," the Commission noted that it could not approve the applicants' request for a waiver of Section 652 with respect to assets located within Detroit's franchise area "[b]ecause Detroit has not consented."[10] Detroit's disapproval illustrates that one LFA can derail a transaction that the Commission concludes is clearly pro-competitive and eligible for a waiver of Section 652, and confirms that the standardless LFA approval process is untenable.

To remove this unnecessary barrier to transactions that do not implicate the concerns underlying Section 652, NCTA has requested in the accompanying Petition for Declaratory

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8 Comments of the City of Detroit, Michigan, WC Docket No. 09-183, at i (filed Mar. 1, 2010) ("Detroit Comments").

9 Comcast-CIMCO Order ¶ 34.

10 *Id.* ¶ 41.

Ruling that the Commission clarify that Section 652 does not restrict transactions between CLECs and cable operators. If, however, the Commission finds Section 652 applicable to CLEC-cable transactions, NCTA requests that the Commission forbear from enforcing Section 652 in the context of CLEC-cable transactions. In the alternative, NCTA requests that the Commission forbear from enforcing the LFA approval requirement in the context of CLEC-cable transactions.[11]

DISCUSSION

Section 10(a) of the Act requires the Commission to forbear from applying any regulation or provision of the Act affecting telecommunications carriers or telecommunications services if it determines that (1) such enforcement is not necessary to ensure just, reasonable, and non-discriminatory rates and practices in connection with the telecommunications services or carriers, (2) such enforcement is not necessary for the protection of consumers, and (3) forbearance from applying such provision is consistent with the public interest.[12] All three conditions are satisfied here because CLEC-cable combinations are inherently pro-competitive and do not implicate the concerns underlying the statute. Furthermore, LFAs' approval of waiver requests in the context of CLEC-cable transactions is not necessary and indeed is affirmatively harmful to the public interest.

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11 If the Commission were to deem Section 652 to restrict transactions between CLECs and cable operators *and* deny this Conditional Petition for Forbearance, NCTA requests that the Commission establish substantive standards and time limits to facilitate expeditious consideration of waiver requests, including standards that apply to LFAs, as described in the accompanying Petition for Declaratory Ruling. NCTA's request for conditional forbearance is consistent with precedent allowing a party to seek relief only to the extent a provision of law is deemed to apply. *AT&T v. FCC*, 452 F.3d 830, 836-37 (D.C. Cir. 2006).

12 *See* 47 U.S.C. § 160(a); *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 907 (D.C. Cir. 2009).

I. THE COMMISSION SHOULD FORBEAR FROM ENFORCING SECTION 652 IN THE CONTEXT OF CLEC-CABLE TRANSACTIONS

NCTA requests that the Commission forbear from enforcing Section 652 of the Act, which limits cross-ownership of LECs and cable operators, in the context of CLEC-cable transactions. Each of the three conditions for forbearance is satisfied because CLEC-cable combinations are inherently pro-competitive and beneficial for consumers.

A. Section 652 Is Not Necessary To Ensure Just, Reasonable, and Non-Discriminatory Rates and Practices for Telecommunications Services.

Section 652 is not necessary to ensure that the rates and practices of telecommunications carriers are just, reasonable, and non-discriminatory in the context of transactions between CLECs and cable operators. Most significantly, both CLECs and cable operators are *non-dominant providers* of telecommunications services.[13] In particular, CLECs and cable operators both lack market power in the provision of local exchange services, and both thus lack the ability to impose unjust and unreasonable rates.[14] The Commission has previously recognized that combinations of non-dominant providers are unlikely to raise competitive concerns.[15] For example, transfers of telecommunications lines between non-dominant providers are afforded a

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13 *See Section 272(F)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Further Notice of Proposed Rulemaking, 18 FCC Rcd 10914 ¶ 62 n.128 (2003) (noting that competitive LECs are non-dominant); *Comments Invited on Application of Time Warner Cable Information Services (Texas), L.P. D/B/A/ Time Warner Cable To Discontinue Domestic Telecommunications Services*, 22 FCC Rcd 18554, 18554-55 (2007) (applying streamlined procedures for non-dominant carriers to Time Warner Cable's provision of telecommunications services).

14 *Implementation of Local Competition Provisions in Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151 ¶ 80 n.151 (2001) ("We note that CLEC end-user recovery is generally not regulated. As non-dominant carriers, CLECs can charge their end-users what the market will bear.")

15 *See Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order, 17 FCC Rcd 5517 ¶¶ 27-30 (2002) ("Streamlining Order").

presumption that streamlined approval procedures should apply.[16] These procedures reflect the Commission's view that transactions between non-dominant providers do not pose a risk of competitive harm, in particular because such providers lack market power and thus do not have the ability to impose unreasonable rates on consumers.

CLEC-cable transactions fall squarely within the heartland of transactions that are highly unlikely to result in unjust or unreasonable rates. Indeed, CLEC-cable transactions would inherently *increase* competition with entrenched incumbent providers, and thus would likely put downward pressure on the rates offered by the incumbents. Such transactions will deliver particular benefits for small, medium-sized, and enterprise business customers, as CLECs have focused on such customers and access to cable networks can reduce operational costs.[17] Section 652 is thus unnecessary to ensure just and reasonable rates. Critically, eliminating the cross-ownership restriction would not prevent the Commission from reviewing CLEC-cable transactions to ensure that they pose no threat of unreasonable rates, terms, or conditions; it would simply eliminate the presumption of illegality that applies under Section 652.

Accordingly, enforcement of Section 652 is not necessary to ensure just, reasonable, and non-discriminatory rates and practices of telecommunications carriers affected by CLEC-cable transactions.

B. Section 652 Is Not Necessary To Protect Consumers.

For similar reasons, Section 652 is not necessary to protect consumers in the context of CLEC-cable transactions. Combinations of CLECs and cable operators are fundamentally pro-

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16 *Id.*; 47 C.F.R. § 63.03.

17 *See infra* Section B; *see also* Federal Communications Commission, *Connecting America: The National Broadband Plan* at 47 (rel. Mar. 26, 2010) (noting that competitive carriers specializing in serving business customers may have a limited ability "to gain access to the necessary inputs to compete").

competitive, and indeed vital to facilitating greater competition in the medium-sized and enterprise business services sectors.

The 1996 Act, which adopted reforms intended to facilitate robust competition in telecommunications markets, spurred an initial surge of investment in telecommunications services as hundreds of new CLECs launched local service offerings for residential and business customers in the years following the new law.[18] But most of these CLECs have since failed, and local telecommunications competition has stalled in key industry segments, leaving incumbent LECs in a dominant position. While CLECs possess the operational and marketing experience to provide high-quality local exchange services, many do not have the financial resources to compete effectively. Cable operators have emerged as strong competitors in the residential arena, building on their extensive network facilities, but most have only just begun to make a dent in the business services marketplace, both because their networks historically were concentrated in residential areas and because they have only recently begun to develop relationships and operational experience with business customers.

CLEC-cable combinations also may offer the best hope for cash-strapped CLECs. As the Commission recently noted, cable operators offer vital network facilities and the ability to inject needed capital into CLECs, which in turn bring existing customer relationships in the business sector.[19] CLECs also have employees with operational and technical experience in the telephone services sector and sophisticated back-office infrastructure in place, experience and systems that

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18 *See generally* Larry F. Darby et al., *The CLEC Experiment: Anatomy of a Meltdown*, Progress on Point (Sept. 2002).

19 *See* Comcast-CIMCO Order ¶ 38.

enterprise customers demand.[20] CLEC-cable combinations could also lead to the migration of CLEC services from leased to cable-owned facilities and hasten the expansion of cable facilities into business districts, thus promoting greater facilities-based competition.[21] Consumers will benefit if CLECs and cable operators complete efficient combinations that bolster their ability to provide enhanced reliability, innovative new services, lower prices, and increased choice. There is accordingly significant potential for CLECs and cable operators to forge strategic combinations to compete more effectively with LECs, giving consumers a viable alternative beyond the pockets of competition that exist today and thereby achieving Congress's goal of robust competition. As the Commission noted in approving the Comcast-CIMCO transaction, combinations of CLECs and cable operators, which traditionally have focused on different market segments, are "unlikely to have anticompetitive effects."[22]

Accordingly, the enforcement of Section 652 is not necessary to protect consumers whose telecommunications services are affected by CLEC-cable transactions.

C. Forbearance Is Consistent with the Public Interest.

Forbearance from applying Section 652 will also further important public interest goals. When assessing whether forbearance is in the public interest, the Commission considers "whether forbearance ... will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications

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20 *See, e.g., SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 ¶ 75 (2005).

21 Comcast-CIMCO Order ¶¶ 38-40.

22 *Id.* ¶ 35.

services."[23] Forbearance in this context is fully consistent with the public interest and will help facilitate competition in the telecommunications services market.

Regardless of whether Section 652 properly applies to transactions between CLECs and cable operators, its limitations are not absolute. Section 652 does not limit transactions in certain rural and other non-urban areas.[24] Section 652 also does not prevent a LEC from acquiring a cable operator in a small market where the subject cable operator has been competing with another cable operator in the same franchise area since May 1, 1995.[25] Moreover, Section 652(d) authorizes the Commission to waive the cross-ownership restrictions when "the affected cable operator or local exchange carrier would be subjected to undue economic distress by enforcement," when "the system or facilities would not be economically viable if such provisions were enforced," or when "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the needs of the community to be served."[26] Thus, although the 1996 Act imposed restrictions on transactions between LECs and cable operators, Congress implemented provisions that encourage the Commission to waive these restrictions in circumstances that are consistent with the statute's animating purpose of preserving and facilitating competition.

CLEC-cable transactions do not raise any of the concerns motivating the enactment of Section 652. As noted above, CLEC-cable transactions hold tremendous potential to inject needed competition into the local telecommunications marketplace, especially with respect to

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23 47 U.S.C. § 160(b); *Earthlink, Inc. v. FCC*, 462 F.3d 1, 4 (D.C. Cir. 2006).

24 47 U.S.C. § 572(d)(1), (d)(5).

25 *Id.* § 572(d)(3).

26 *Id.* § 572(d)(6)(A). To the extent the Commission approves a waiver request based on its assessment that the anticompetitive effects of a transaction are outweighed by the pro-competitive effects, this determination will implicitly include a finding that the transaction will not result in unjust or discriminatory rates and practices.

medium-sized and enterprise business customers. Thus, forbearance from applying Section 652 in the context of CLEC-cable transactions would promote the public interest and competition. Indeed, applying Section 652(b) to CLEC-cable transactions would needlessly cause significant harm to competition and the public interest, particularly if LFAs were permitted simply to veto transactions that the Commission finds to be beneficial for consumers.

Crucially, forbearing from enforcing Section 652 would have no effect on the traditional review procedures that the Commission, state public utility commissions and, if applicable, the Federal Trade Commission or Department of Justice, will apply to any CLEC-cable transaction. Such proceedings also enable LFAs to identify any concerns relating to a particular transaction, as they may file comments or otherwise participate before the Commission and other agencies. These multiple layers of regulatory oversight have been deemed adequate to protect consumers and the public interest in industry-transforming mergers such as those involving SBC/BellSouth/AT&T and Verizon/MCI, and are surely adequate to protect the public interest in CLEC-cable transactions that are by their nature unlikely to harm competition.

For these reasons, forbearance from enforcing Section 652 in the context of CLEC-cable transactions is consistent with the Act.

II. ALTERNATIVELY, THE COMMISSION SHOULD FORBEAR FROM ENFORCING THE LFA APPROVAL REQUIREMENT IN THE CONTEXT OF CLEC-CABLE TRANSACTIONS

To the extent the Commission declines to forbear from enforcing Section 652 in its entirety in the context of CLEC-cable transactions, NCTA requests that the Commission forbear from enforcing Section 652(d)(6)(B), which requires LFA approval of requests to waive Section 652's cross-ownership restrictions for such transactions. As with NCTA's request for forbearance from Section 652 in its entirety, all three conditions for forbearance are satisfied here because CLEC-cable combinations are inherently pro-competitive. Furthermore, the LFA approval process for Section 652 waiver requests in the context of CLEC-cable transactions is not necessary and indeed affirmatively harmful to the public interest.

A. The LFA Approval Requirement Is Not Necessary To Ensure Just, Reasonable, and Non-Discriminatory Rates and Practices for Telecommunications Services.

The LFA approval requirement in Section 652 is not necessary to ensure that the rates and practices of telecommunications carriers are just, reasonable, and non-discriminatory in the context of transactions between CLECs and cable operators. As described above, combinations of CLECs and cable operators, both of which are non-dominant providers, do not raise traditional concerns regarding the imposition of unjust and unreasonable rates because neither class of carriers possesses market power in the provision of local exchange services.[27] Furthermore, review procedures administered by the Commission, state public utility commissions, and antitrust authorities (as applicable) will ensure that market power and a corresponding upward pressure on rates does not result from any CLEC-cable transaction.[28] Any LFA review is therefore unnecessary to ensure just and reasonable rates.

In any event, LFAs generally have little expertise in ensuring just and reasonable rates or practices of telecommunications carriers in the context of CLEC-cable combinations. Most LFAs do not have a role in setting rates or approving business practices applicable to telecommunications services.[29] Congress may have given LFAs a role in reviewing waiver

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27 *See supra* Part I.A.

28 *Id.*

29 *Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 As Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 ¶¶ 121-22 (2007) ("We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems. ... We further clarify that an LFA may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision

requests under Section 652, but it plainly did not authorize LFAs to review and approve the rates and practices of telecommunications carriers.[30] Moreover, LFAs' ability to exercise their core regulatory function of overseeing cable systems and cable services is circumscribed by standards set forth in the Act and the Commission's rules and does not extend to regulating rates for telecommunications services.[31] LFAs' involvement in reviewing CLEC-cable transactions thus cannot be "necessary" to ensure just and reasonable charges. To the contrary, a specific and distinct process for LFA review is entirely superfluous.[32]

B. The LFA Approval Requirement Is Not Necessary To Protect Consumers.

The LFA approval requirement in Section 652 also is not necessary to protect consumers in the context of CLEC-cable transactions. Combinations of CLECs and cable operators are fundamentally pro-competitive, and the LFA approval requirement and the associated delay and uncertainty involved simply impede these pro-competitive transactions with no corresponding benefits. Indeed, unnecessary LFA demands are highly likely to siphon away transaction efficiencies that would otherwise inure to the benefit of consumers. Thus, the enforcement of the

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of cable services."); *see also Alliance for Community Media v. FCC*, 529 F.3d 763, 882-73 (6th Cir. 2008) (rejecting challenges to the Commission's clarifications).

30 *See* 47 U.S.C. § 572(d)(6)(B).

31 By way of illustration, Congress has placed clear limitations on and established substantive standards for LFAs' exercise of their core regulatory functions in the oversight of cable systems and services. *See generally* 47 U.S.C. § 541. For example, the Commission has established substantive requirements to guide LFA approval of transactions involving the transfer of cable systems and requires that these approvals must be given within 120 days or an LFA will be deemed to have approved the transaction. *Id.* § 537. An LFA's right to authorize the construction of cable systems over public rights-of-way and through easements is also subject to specific limitations. *Id.* § 541(a)(2). More broadly, state and local government authority to regulate cable operators and cable systems is preempted when the exercise of such authority would be inconsistent with the Act. *See id.* § 556.

32 Moreover, notwithstanding the absence of any formal approval process, LFAs would remain free to file comments identifying any concerns in response to the Public Notice announcing the FCC's review of a transaction.

LFA approval requirement in Section 652 is not necessary to protect consumers whose telecommunications services are affected by CLEC-cable transactions.

C. Forbearance Is Consistent with the Public Interest.

Forbearance from applying Section 652(d)(6)(B) will also further important public interest goals. As noted above, CLEC-cable transactions do not raise any of the concerns motivating the enactment of Section 652, and, as the Comcast-CIMCO transaction illustrates, they accordingly satisfy the criteria for waiver under Section 652(d)(6)(A). There is no reason to believe that the outcome should be any different with respect to LFA approval. Yet the Act contains no substantive standards to inform an LFA's consideration of waiver requests under Section 652, nor does it impose time limits. The involvement of unconstrained LFAs in the waiver approval process denies the public the benefits of pro-competitive transactions that satisfy the statutory standard for a waiver and undermines Congress's intent that a waiver be available when certain transactions are in the public interest.[33] This unbounded discretion allows an LFA to demand any number of concessions in exchange for approval, whether or not related to the potential competitive effects of the proposed transaction. The Commission itself has recognized that the risk of indefinite delays could leave a transaction to "languish in regulatory uncertainty."[34]

Although the Commission sought to address this concern in the Comcast-CIMCO Order, it ultimately fashioned an insufficient remedy, as it left intact Detroit's purported veto of a pro-competitive and pro-consumer transaction. The Commission was unequivocal in detailing the

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33 Comcast-CIMCO Order ¶ 29 (arguing that time limits on an LFAs' exercise of its waiver approval authority are necessary to "bring[] certainty to the waiver process to ensure that the competitive benefits expected to flow from the proposed transaction could, at some reasonable point in time, be realized").

34 *Id.*

anticipated benefits of the transaction, concluding that it "will result in significant public interest benefits ... because the transaction will foster facilities-based competition in the enterprise market, a long-standing goal of the Commission."[35] The Commission further noted that the combination would bring substantial public interest benefits by facilitating upgrades to the infrastructure serving existing customers.[36] Moreover, the Commission noted that Detroit had not made any showing that the transaction would in any way harm competition.[37] Despite the Commission's finding that the transaction was plainly pro-competitive, the Commission's attempts to streamline the LFA approval process did not alleviate the central hold-up threat. The Commission wisely took steps to streamline the LFA approval process, but the fact that an LFA was able to exercise an unqualified right to hold up a transaction found to entail substantial public interest benefits, without even offering any evidence that the transaction will harm competition, illustrates precisely why forbearance is required.

As long as there is a threat that an LFA may exercise such a veto, CLECs and cable operators will be loathe to subject themselves to such burdens and uncertainty and consumers will be deprived of the benefits associated with such transactions. While most LFAs presumably will act in good faith, some may not, and the need to negotiate a significant number of individual LFA approvals[38] in any event is impracticable. In fact, the approval process established in the Comcast-CIMCO proceeding could inadvertently *encourage* LFAs to withhold their approval to gain leverage over the merging parties, enabling them to force concessions (unless the parties are

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35 *Id.* ¶ 4.

36 *Id.* ¶¶ 38-39.

37 *Id.* ¶ 34.

38 For example, the Comcast-CIMCO transaction, which would affect only a limited number of markets primarily in Illinois and Michigan, implicated the approval rights of 274 LFAs. *See* Comcast-CIMCO Order ¶ 29.

forced to restructure the transaction to carve out that territory). The public interest is not served, and Congress's intent in creating the waiver process is undermined, where companies avoid, abandon, or are compelled to modify strongly pro-competitive transactions, not because of any shortcoming affecting the deal, but because of an uncertain and unworkable regulatory approval process.

In short, the LFA approval requirement is not only unnecessary to ensuring the public interest is served by CLEC-cable transactions, but hinders the prospects of pro-competitive transactions that would otherwise satisfy Congress's criteria for a waiver and bring significant public interest benefits. In these circumstances, forbearance will affirmatively promote the public interest.

D. Enforcement of Section 652 Without Limitation Would Violate the Constitution.

Finally, NCTA notes that the Commission's enforcement of Section 652 without restricting in some way the discretion afforded to LFAs in exercising their waiver approval authority would violate bedrock constitutional principles under the non-delegation doctrine and Due Process Clause. This serious threat of constitutional harm further justifies forbearance if the Commission declines to adopt an appropriately narrow construction of the statute.

1. The Standardless LFA Approval Requirement Threatens an Unconstitutional Delegation of Legislative Power.

The Commission's enforcement of the unbounded LFA approval requirement would amount to an unconstitutional delegation of legislative power by Congress. The Constitution requires Congress, in exercising its Article I legislative power, to "lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform."[39] Whatever the contours of the non-delegation doctrine as a matter of modern constitutional law, there has never been any question that a statute that provides "literally no guidance for the exercise of discretion" is the epitome of a statute that runs afoul of the non-delegation doctrine.[40]

Broad delegations of authority are permitted under the non-delegation doctrine only to the extent the authority can be meaningfully interpreted and implemented as part of a larger statutory scheme that conveys an apparent national purpose.[41] Notably, the Commission's "public interest" authority, which is at the outer limit of permissible delegation, is part of a regulatory framework that informs the meaning of that standard. For example, in the broadcast context, the "public interest" has been defined to include considerations of competition, localism, and diversity. Because most LFAs do not have any particular regulatory expertise over CLEC services, there is no context to give meaning to the approval power that they would exercise under Section 652(d), and in any event, the statute, if applicable, does not purport to provide any context to the LFAs' exercise of their authority.

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39 *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001) (emphasis added) (internal quotation marks and citation omitted).

40 *Id.* at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down a statute authorizing the President to restrict the petroleum market where there was "no criterion to govern the President's course")).

41 *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 214-15 (1943) (approving the FCC's power to grant broadcast licenses "as public convenience, interest, or necessity requires"); *Am. Power & Light, Co. v. SEC*, 329 U.S. 90, 105 (1946) ("[I]t then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."); *see also* 47 U.S.C. § 624 ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title.").

2. The Standardless LFA Approval Requirement Denies Affected Persons Due Process of Law.

The Commission's enforcement of an unbounded LFA approval requirement also violates fundamental principles of due process. Due process requires, at a minimum, that the government put individuals on notice of what standards and rules govern their actions. A company subject to regulation must be "able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform."[42] The application of defined standards also notifies parties to an agency proceeding *in advance* what legal issues and factual questions the agency will address so that they may supply appropriate supporting or rebutting information.[43] Moreover, due process requires that *some* limitations apply to government authority lest it be entirely capricious and dictatorial. Courts have consistently held that unbridled discretion with no substantive constraints is an "intolerable invitation to abuse."[44]

The Commission's enforcement of the unbounded LFA approval requirement would not provide any notice to parties of what substantive standards will apply to waiver requests that must be approved by LFAs. And the enforcement of the LFA approval requirement, without any

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42 *ICO Global Commc'ns (Holdings) Ltd. v. FCC*, 428 F.3d 264, 268 (D.C. Cir. 2005); *see also Hill v. Fed. Power Comm'n*, 335 F.2d 355, 362 (5th Cir. 1964) (reversing an agency decision on due process grounds where "the standards to be applied were neither evolved nor announced until the decision holding them unsatisfied.").

43 *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("A party is entitled ... to know the issues on which decision will turn and to be apprised of the factual materials on which the agency relies for decision so that he may rebut it."); *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999) (finding that FERC acted improperly by modifying the applicable standards without forewarning the parties); *see also Whisenhunt v. Spradlin*, 464 U.S. 965, 969 (1983) (Brennan, J., dissenting) ("By demanding that government articulate its aims with a reasonable degree of clarity, the Due Process Clause ensures that state power will be exercised only on behalf of policies reflecting a conscious choice among competing social values; reduces the danger of caprice and discrimination in the administration of the laws; and permits meaningful judicial review of state actions.").

44 *Holmes v. N.Y. City Housing Auth.*, 398 F.2d 262, 265 (2d Cir. 1968).

limits on LFAs' discretion, would invite entirely arbitrary and unprincipled government action. Moreover, because Section 652 does not require LFAs to state *any* basis for their decision to approve or disapprove of a transaction, it denies reviewing courts a record upon which to ensure that the agency's decision was lawful.[45]

In order to save Section 652 from serious constitutional infirmities under established non-delegation and due process principles, the Commission should forbear from enforcing these unconstitutional provisions, either by granting NCTA's request for forbearance from Section 652 in its entirety in the context of CLEC-cable transactions, or by granting NCTA's request for forbearance from the LFA approval requirement contained in Section 652(d)(6)(B) in these same circumstances.

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45 *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000) ("It is well-established that an agency must cogently explain why it has exercised its discretion in a given manner and that explanation must be sufficient to enable us to conclude that the [agency's action] was the product of reasoned decisionmaking.") (internal quotation omitted).

CONCLUSION

The enforcement of Section 652 of the Act is not necessary to ensure that the rates and practices of telecommunications carriers affected by CLEC-cable transactions are just, reasonable, and non-discriminatory. The enforcement of Section 652 in connection with such transactions also is not necessary to protect consumers. Finally, forbearance from enforcing Section 652 in this context is fully consistent with the public interest. The Commission should therefore forbear from enforcing Section 652 in the context of CLEC-cable transactions if it finds that Section 652 applies to CLEC-cable transactions.

Alternatively, the Commission should forbear from enforcing Section 652(d)(6)(B) in this context. Forbearance from enforcing this LFA approval requirement not only satisfies the Act's standard for forbearance, but is vital to avoiding the harm resulting from parties' unwillingness to enter into pro-competitive transactions that otherwise hold tremendous promise to strengthen competition in business local exchange markets, and necessary to avoid a statutory interpretation that results in a violation of core constitutional values.

Respectfully submitted,

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