Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling to Clarify	)	WC Docket No. 11-118
47 U.S.C. § 572 in the Context of Transactions	)	
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	)	

ORDER

Adopted: September 12, 2012 **Released: September 17, 2012**

By the Commission: Chairman Genachowski and Commissioners McDowell and Pai issuing separate statements.

I. INTRODUCTION

1. In this order we deny the petition for declaratory ruling filed by the National Cable and Telecommunications Association (NCTA),[1] and grant, in part, the conditional petition for forbearance that NCTA filed in the alternative.[2] These petitions seek to limit or prevent the application of section 652 of the Communications Act of 1934, as amended,[3] in instances where a cable operator seeks to acquire a relevant interest in a local exchange carrier (LEC) that was not providing telephone exchange service as of January 1, 1993, principally competitive LECs.[4] We conclude that section 652(b) unambiguously prohibits a cable operator from acquiring any LEC providing telephone exchange service within the cable

[1] Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators, WC Docket No. 11-118 (filed June 21, 2011) (Petition for Declaratory Ruling).

[2] Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators, WC Docket No. 11-118 (filed June 21, 2011) (Conditional Petition for Forbearance).

[3] 47 U.S.C. § 572; *see also* 47 C.F.R. § 76.505.

[4] For ease of discussion, we use the term "competitive LEC" in this item to describe both a carrier that is not an incumbent LEC under the Act, as well as the operations of a LEC in any area where those operations are not classified as incumbent LEC operations under the Act. *See* 47 USC § 251(h).

operator's franchise area, absent an applicable statutory exception or waiver granted pursuant to the statute.[5] We therefore deny NCTA's Petition for Declaratory Ruling.

2. Nevertheless, based on our review of the record and relevant statutory provisions, we conclude that NCTA has demonstrated that the statutory criteria for forbearance are satisfied and justify granting, in part, its Petition for Forbearance. Specifically, we forbear from applying section 652(b) to acquisitions of competitive LECs. By granting limited forbearance from section 652(b), we harmonize the rules that apply to transactions between competitive LECs and cable operators regardless of which entity acquires the other. Section 652(a) generally permits competitive LECs to acquire a cable operator, and section 652(c) generally permits competitive LECs and cable operators to enter joint ventures. However, the literal language of section 652(b) generally prohibits a cable operator from acquiring a competitive LEC, even though there is evidence suggesting that Congress did not intend this result. The competitive effect of mergers between a competitive LEC and a cable operator will be similar, irrespective of which of the merging parties initiates the purchase of the other, and the result of our forbearance grant will be that such transactions will be treated similarly under section 652.[6]

3. In addition, mergers between cable operators and competitive LECs, both of which usually are non-dominant providers of telecommunications services, potentially serve many pro-competitive goals and appear consistent with the purpose and history of section 652. Streamlining the regulatory approval process for such transactions—without eliminating the important safeguards of the Commission's review of such mergers—can enhance facilities-based competition and spur technological innovation and investment that will benefit consumers.

4. Because we grant NCTA's request for limited forbearance from section 652(b), we reject other relief it sought in the alternative. We dismiss as moot NCTA's conditional petition for forbearance from the section 652(d)(6)(B) requirement that the relevant local franchising authorities (LFAs) approve of a Commission waiver of section 652(b),[7] and dismiss as moot its alternative request to establish standards to govern LFA review of Commission waivers of the prohibitions of section 652.[8]

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[5] 47 U.S.C. § 572(d).

[6] 47 U.S.C. § 160(a). The Commission has not previously determined whether section 652(b) prohibits a cable operator from acquiring a competitive LEC. At petitioners' requests, the Commission to date has processed each request for a waiver of section 652(b) on the assumption that the provision applied to the relevant transaction. *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*, WC Docket No. 09-183, Memorandum Opinion and Order and Order on Reconsideration, 25 FCC Rcd 3401, 3407, para. 13 n.34 (2010) (*Comcast/CIMCO Order*) ("Applicants request that the Commission 'process their application on the basis of their waiver request, and assume that section 652(b) applies to this transaction without deciding whether, in the context of a cable operator's acquisition of a CLEC, section 652(b) applies to competitive local exchange carriers (LECs) that were not providing telephone exchange service as of January 1, 1993.'"); *see also Applications Filed for the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc.*, WC Docket No. 10-158, Public Notice, 25 FCC Rcd 13179, 13185 (WCB 2010) (*NTELOS/FiberNet Notice*) (similar); *Applications Filed for the Transfer of Control of FiberNet from One Communications Corp. to NTELOS Inc*., WC Docket No. 10-158, Public Notice, 25 FCC Rcd 16304 (WCB 2010) (*FiberNET/NTELOS Second Notice*) (similar); *Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, Public Notice, 26 FCC Rcd 13372 (WCB 2011) (*Insight/Time Warner Notice*) (similar).

[7] *See* NCTA Petition for Forbearance at 5–6.

[8] Petition for Declaratory Ruling at 4 ("NCTA requests that the Commission establish substantive standards and time limits to facilitate expeditious consideration of waiver requests, including standards that apply to LFAs.").

II. BACKGROUND

5. With the Telecommunications Act of 1996, Congress sought to encourage facilities-based competition by facilitating the competitive entry of LECs and cable operators into each other's markets.[9] While the Act allows cable operators to construct telecommunications networks and allows LECs to construct cable systems, section 652 prohibits buyouts and certain other transactions between cable operators and LECs, subject to certain exceptions.[10] The Commission may waive this prohibition if certain criteria are satisfied, and if the relevant local franchising authorities approve of the Commission's waiver.[11] As the Commission previously has described, this "overall statutory scheme contemplates vigorous competition between LECs and cable operators, with appropriate safeguards to avoid elimination of potential sources of competition."[12]

6. *Acquisitions by LECs*. Section 652(a) states that "no local exchange carrier," or its affiliates, may acquire "more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area."[13] Section 652(e) defines "telephone service area" in relevant part as "the area within which such carrier provided telephone exchange service as of January 1, 1993."[14] Accordingly, section 652(a) only applies to acquisitions by LECs that were providing telephone exchange service as of January 1, 1993 in the relevant overlap areas. This definition effectively excludes acquisitions by most or all competitive LECs, as they were not providing such service by that date.[15]

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[9] Prior to 1996, the Communications Act generally prohibited a common carrier from providing video programming directly to subscribers in its telephone service area. *See, e.g.*, 47 U.S.C. § 613(b) (June 19, 1934, c. 652, Title VII, § 713, as added Feb. 8, 1996, Pub. L. 104-104, Title III, § 305, 110 Stat. 126). At the time, many LFAs also restricted cable operators from providing telecommunications services. The 1996 Act fundamentally changed the statutory framework for LEC entry into markets for the delivery of video programming by repealing the telephone-cable cross-ownership restriction. *See* 1996 Act, § 302(b)(1) (eliminating the cable-telephone cross-ownership ban). The 1996 Act also amended the Communications Act to prohibit LFAs from imposing requirements that have the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or by its affiliates. *See* 1996 Act, § 303, codified at 47 U.S.C. § 541(b)(3)(B).

[10] 47 U.S.C. § 572.

[11] 47 U.S.C. § 572(d)(6).

[12] *See LMD and Fixed Satellite Services Report and Order and NPRM*, 11 FCC Rcd at 19052, para. 119 (1996); *Amending Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Services and for Fixed Satellite Services*, First Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 92-297, 11 FCC Rcd 19005, 19052, para. 119 (1996) (stating that "[t]he 1996 Act contains a number of provisions designed to facilitate the entry of LECs and cable operators into each others' markets").

[13] 47 U.S.C. § 572(a).

[14] 47 U.S.C. § 572(e).

[15] *See infra* note 111; *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, Memorandum Opinion and Order, CS Docket No. 98-178, 14 FCC Rcd 3160, 3223–24, paras. 133–36 (1999) (concluding in relevant part that section 652(a) did not prevent AT&T from buying a cable operator in the service territory of one of AT&T's competitive LEC affiliates because that affiliate was not providing "telephone exchange service" as of January 1, (continued….)

7. *Acquisitions by Cable Operators*. Section 652(b) provides that "[n]o cable operator or affiliate of a cable operator" may acquire more than a 10 percent financial interest, or any management interest, "in any local exchange carrier" that is "providing telephone exchange service within such cable operator's franchise area."[16] Unlike section 652(a), section 652(b) does not refer to a LEC's "telephone service area"[17] and therefore does not exclude acquisitions of competitive LECs.

8. *Joint Ventures*. Section 652(c) prohibits cable operators and LECs from entering into joint ventures or partnerships to provide video programming or telecommunications services in markets where their cable franchise area(s) and telephone service area(s), respectively, overlap.[18] This restriction on joint ventures and partnerships contains the term "telephone service area" and thus generally does not apply to competitive LECs.

9. *Exceptions and Waivers*. Section 652(d) provides certain exceptions to sections 652(a)–(c), including exceptions for rural systems, joint use of facilities, acquisitions in competitive markets, exempt cable systems, and small cable systems in nonurban areas.[19] In addition, section 652(d)(6) authorizes the Commission to waive section 652(b) if, in relevant part: (1) "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served" and (2) the relevant local franchising authorities approve of such waiver.[20] In 2010, in the *Comcast/CIMCO* proceeding,[21] the Commission established a process for an LFA to express its approval or disapproval of the Commission's possible waiver of section 652(b).[22]

(Continued from previous page)
1993 in the overlap areas, and thus the affiliate did not have a "telephone service area" within the meaning of the statute).

[16] 47 U.S.C. § 572(b).

[17] 47 U.S.C. § 572(e).

[18] 47 U.S.C. § 572(c) (stating that "a local exchange carrier and a cable operator whose telephone service area and cable franchise area, respectively, are in the same market may not enter into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market").

[19] 47 U.S.C. § 572(d)(1)–(5). For each exception, the statute specifies which cross-ownership restriction or restrictions are affected.

[20] 47 U.S.C. § 572(d)(6)(A)(iii), (d)(6)(B). The statute also authorizes the Commission to waive the restrictions in section 652(a)–(c) in certain other circumstances that are not at issue in this proceeding. *See* 47 U.S.C. § 572(d)(6)(A)(i), (d)(6)(A)(ii).

[21] *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*, WC Docket No. 09-183, Public Notice, 24 FCC Rcd 14815 (Dec. 1, 2009) (*Comcast/CIMCO Notice*); *Comcast/CIMCO Order*, 25 FCC Rcd at 3404, para. 15.

[22] *See Comcast/CIMCO Order*, 25 FCC Rcd at 3407–09, paras. 14–20.

III. DISCUSSION

A. Petition for Declaratory Ruling

1. NCTA's Interpretation of Section 652(b)

10. On June 21, 2011, NCTA filed a petition for declaratory ruling that requests the Commission clarify that section 652 of the Communications Act does not apply to transactions between cable operators and competitive LECs that were not providing telephone exchange services as of January 1, 1993.[23] NCTA argues that Congress intended this provision only to prohibit consolidation between incumbent LECs and incumbent cable operators in overlapping territories.[24]

11. *Text and Structure of the Statute.* NCTA claims that interpreting section 652 to prohibit a cable operator from acquiring a competitive LEC is "at odds" with the structure of section 652.[25] As NCTA states, sections 652(a) and (c) only apply to acquisitions or joint ventures where a LEC's "telephone service area" overlaps with a cable operator's franchise area.[26] Because "telephone service area" describes "the area within which such carrier provided telephone exchange service as of January 1, 1993,"[27] and competitive LECs did not provide telephone exchange services at that time, NCTA contends that sections 652(a) and (c) therefore do not apply to competitive LECs.[28]

12. NCTA asserts that this statutory structure gives the Commission reason to interpret section 652(b) to be similarly limited in scope. In other words, NCTA argues that the Commission should interpret section 652(b) as not encompassing cable company acquisitions of competitive LECs. Although section 652(b) does not make reference to a LEC's "telephone service area" and the date restriction contained within it, NCTA asserts that "the best reading of Section 652(b) is that it is simply the mirror image of Section 652(a), targeted at the same class of transactions flowing in reverse."[29] NCTA argues that if section 652(b) is interpreted to limit cable operators from acquiring competitive LECs, "such a rule would lead to absurd results, because it would permit a CLEC to acquire a cable operator without any special burden, but subject the same cable operator's acquisition of the same CLEC to a presumption of illegality."[30]

13. *Legislative History.* NCTA argues that the legislative history and past Commission orders indicate that section 652 is concerned only with preserving two wires to the home. Consequently, NCTA argues, section 652 should be interpreted not to apply to transactions involving competitive LECs because "competitive LECs seldom control 'last mile' facilities to a customer's home or office and where they do,

[23] *See supra* note 1, *infra* note 111.

[24] Petition for Declaratory Ruling at 6.

[25] Petition for Declaratory Ruling at 10.

[26] 47 U.S.C. § 572(a), (c).

[27] 47 U.S.C. § 572(e).

[28] Petition for Declaratory Ruling at 7; *see also* Time Warner Reply Comments at 6.

[29] Petition for Declaratory Ruling at 11; *see also* U.S. Telepacific Corp., *et al*. Comments at 2; Citizens Against Government Waste Comments at 1; Time Warner Reply Comments at 4 and 7; Bright House Reply Comments at 3.

[30] Petition for Declaratory Ruling at 10.

the incumbent LEC continues to control its own wire."[31] NCTA's support for this contention rests primarily on the statements of two legislators regarding the importance of "preserving a two-wire, competitive world."[32] NCTA also relies for support on a footnote in the *SBC/Ameritech Merger Order*, which stated that "Congress' main concern in enacting section 652, as indicated by the legislative history, was to avoid having a LEC purchase a local cable operator and thus control both wires to consumers."[33]

2. Section 652(b) Prohibits a Cable Operator from Acquiring a Competitive LEC

14. *Statutory Language*. We find that section 652(b) on its face prohibits cable operators from acquiring any LEC, unless one of the exceptions of section 652(d) applies or the Commission grants a waiver.[34] Section 652 contains three separate cross-ownership prohibitions. Section 652(a) applies to acquisitions by LECs, section 652(b) applies to acquisitions by cable operators, and section 652(c) applies to joint ventures between cable operators and LECs. Each of these provisions contains a categorical cross-ownership prohibition.[35] Subsections (a) and (c) limit the scope of this prohibition by reference to a LEC's "telephone service area," defined to be where the LEC "provided telephone exchange service as of January 1, 1993," which effectively excludes competitive LECs.[36] Subsection (b) does not contain the "telephone service area" limitation. As NCTA acknowledges,[37] section 652(b) prohibits a cable operator from purchasing or otherwise acquiring more than a 10 percent interest or management interest "in any local exchange carrier providing telephone exchange service within such cable operator's franchise area."[38] Moreover, in other sections of the Telecommunications Act of 1996, passed at the same time as Section 652(b), Congress used the phrase "incumbent local exchange carrier" when it was referring only

[31] Petition for Declaratory Ruling at 2.

[32] Petition for Declaratory Ruling at 6–7. In particular, NCTA quotes several statements from Senator Kerry (who states, for example, that "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") and quotes a law journal article by Congressman Edward Markey (which states that "[o]ne company should not control both the phone and the cable wire running down the street. The goal of congressional action should be to preserve a two-wire competitive world."). *Id.*

[33] *See* Petition for Declaratory Ruling at 7 (citing *Applications of Ameritech Corp. & SBC Communications, Inc.*, Memorandum Opinion and Order, CC Docket No. 98-141, 14 FCC Rcd 14712, 14945, para. 564 n.1081 (1999)).

[34] *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) (it is a well-established principle of statutory construction that when congressional intent, as reflected in the statutory language, is clear, "that is the end of the matter" and the agency "must give effect to the unambiguously expressed intent of Congress"); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001); *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

[35] *See* 47 U.S.C. § 572(a)–(c).

[36] *See supra* note 111.

[37] Petition for Declaratory Ruling at 8 ("Although Section 652(b) does not refer explicitly to an 'incumbent' local exchange carrier or to the target's 'telephone service area,' there is no reason to believe that Congress intended it to extend beyond the purpose of preventing consolidation of the two wires to a customer's premises.").

[38] 47 U.S.C. § 572(b).

to such carriers.[39] Thus, section 652(b) on its face applies to *any* LEC, including any competitive LEC that is "providing telephone exchange service" in an acquiring cable operator's franchise area.[40]

15. *Absurdity Doctrine*. We reject NCTA's assertions[41] that we should interpret section 652(b) as not applying to competitive LECs because applying the provision to competitive LECs would lead to "absurd" or "illogical" results.[42] As discussed more fully below, we agree that the underlying purpose of section 652 and the legislative history suggest that Congress may not have intended section 652(b) to apply to transactions involving competitive LECs.[43] Nevertheless, the plain meaning of section 652(b) is clear and unambiguous; the provision covers any LEC. One court has stated that it would not be proper to "revise" a statutory provision by declaring it "absurd" if the provision "can be applied as written."[44] In these circumstances, it clearly is possible to apply the text as written, and we decline to read it contrary to its plain language based upon our own judgment about its wisdom. Accordingly, we deny NCTA's Petition for Declaratory Ruling.

B. Petition for Forbearance

16. In the event that the Commission denies NCTA's Petition for Declaratory Ruling, NCTA requests that the Commission forbear from applying section 652(b) to a cable operator's acquisition of a competitive LEC or, alternatively, from the requirement in section 652(d)(6)(B) that relevant LFAs must

[39] *See, e.g.*, 47 U.S.C. § 251(c) (stating that "each incumbent local exchange carrier has [certain] duties").

[40] The Act defines "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26). The Act defines "telephone exchange service" as "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). The Commission has held that competitive LECs presumptively are providers of "telephone exchange service." *See, e.g.*, *Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, First Report and Order, CC Docket No. 99-273, 16 FCC Rcd 2736, 2744, para. 14 (2001) (recognizing that "any entity that is certified as a competitive LEC by the appropriate state commission is presumptively a competing provider of telephone exchange service"). Of course, not all competitive LECs provide telephone exchange service. *See, e.g.*, *infra* note 111 (discussing certain competitive LECs that, historically, only provided exchange access and not telephone exchange service).

[41] NCTA Petition for Declaratory Ruling at 10–11.

[42] *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (when the words of a statute are unambiguous, inquiry into the meaning of a statute is complete); *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982) (other indicia of intent or meaning is unnecessary when the statutory text is plain or clear and unambiguous).

[43] *See infra* at para. 39; *see also supra* at para. 13 (summarizing NCTA's arguments relating to the legislative history of section 652).

[44] *See Soppet v. Enhanced Recovery Co*., 679 F.3d 637, 642 (7th Cir. 2012) ("Courts do try to avoid imputing nonsense to Congress. This means, however, modest adjustments to texts that do not parse. It does not mean—at least, should not mean—substantive changes designed to make the law 'better.' That would give the judiciary entirely too much law-making power. When a text can be applied as written, a court ought not revise it by declaring the legislative decision 'absurd.')".

approve of a Commission waiver.[45] For the reasons explained below, we find that forbearance from applying section 652(b) to acquisitions of competitive LECs is warranted under the criteria set forth in section 10.[46] Because the Commission grants NCTA's request for forbearance from section 652(b), we dismiss as moot NCTA's alternative request for forbearance from section 652(d)(6)(B).[47]

1. Summary of NCTA's Request

17. NCTA contends that forbearing from section 652(b) as applied to the acquisition of competitive LECs satisfies the criteria of section 10(a) of the Communications Act.[48] NCTA claims that, because cable operators and competitive LECs both lack market power and are non-dominant providers of telecommunications services, "cable-competitive LEC combinations are inherently pro-competitive and do not implicate the concerns of the underlying statute."[49] According to NCTA, section 652 is unnecessary to ensure just and reasonable rates, protect consumers, and promote the public interest.[50] NCTA further argues that, because the section 652 review process is duplicative of the section 214 review process and applicable antitrust review by the Department of Justice or the Federal Trade Commission, it is an "unjustified additional regulatory hurdle" that does not benefit the public interest.[51] Finally, NCTA

[45] NCTA Petition for Forbearance at 2 ("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.").

[46] We note that the majority of commenters support NCTA's request for forbearance from section 652(b). *See, e.g.*, NCTA Reply Comments at 13; COMPTEL Comments at 11; XO Reply Comments at 6; NCTA Reply Comments at 13 (arguing that "NASUCA offers but one conclusory sentence [that NCTA has not met the three-part test] and neither NATOA nor Public Knowledge even address the three-part test"); Time Warner Reply Comments at 12 ("None of the opponents to the petitions seriously dispute that NCTA's forbearance request satisfies Section 10(a)'s three part test.").

[47] NCTA Reply Comments at 2. To the extent necessary for purposes of section 10(c), this constitutes a denial of the alternative request for forbearance. We emphasize that our determination that forbearing from the application of section 652(b) to relevant transactions involving competitive LECs generally will advance facilities-based competition does not prejudge whether any particular cable-competitive LEC transaction is in the public interest under otherwise-applicable standards. *See infra* paras. 29, 33, and 37.

[48] Section 10(a) of the Act allows 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 nondiscriminatory 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. 47 U.S.C. § 160(a).

[49] *Id.* at 6–10; *see also* COMPTEL Comments at 11; U.S. Telepacific Corp., *et al*. Comments at 2; Bright House Reply Comments at 3.

[50] *See* NCTA Petition for Forbearance at 7–10 (claiming that such transactions are "unlikely to have anticompetitive effects").

[51] *See id.* at 12 (stating that "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"); NCTA Reply Comments at 3 (arguing that "the Commission will continue to have comprehensive authority under Section 214 of the Act to evaluate cable-
(continued….)

argues that forbearance will promote competitive market conditions because the "complementary strengths" of a cable company and a competitive LEC "hold tremendous potential to inject needed competition into the local telecommunications marketplace, especially with respect to medium-sized and enterprise business customers."[52] NCTA argues that section 652(b) serves as a "barrier to entry" which "deters these efficient and pro-competitive transactions" and "has emerged as a potentially insurmountable and wholly unjustified hurdle to cable acquisitions of competitive LECs."[53]

2. Statutory Purpose

18. Before considering whether to forbear from section 652(b), we examine the reasons that Congress initially enacted this provision. Congress enacted section 652 as part of a broad "pro-competitive, deregulatory framework" designed to stimulate opportunities for competition.[54] Prior to 1996, a cross-ownership prohibition generally prevented common carriers from providing video programming directly to subscribers in their telephone service area.[55] The Commission adopted this restriction in 1970 to ensure that incumbent LECs did not abuse their control over poles and conduit to exclude new competitors and thereby "extend . . . the telephone company's monopoly position to broadband cable facilities and the new and different services such facilities are expected to be providing in the future."[56] In 1984 Congress codified, in large part, the Commission's cross-ownership restriction.[57]

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CLEC transactions under its public interest standard"); *see also* ACA Reply at 2; Bright House Reply Comments at 8; U.S. Telepacific Corp., *et al*. Comments at 3.

[52] NCTA Petition for Forbearance at 12; *see also* Time Warner Reply Comments at 4.

[53] Petition for Declaratory Ruling at 4. *See also* para. 36. NCTA argues that this burden is significant because "a significant number of LFAs could be required to approve the transaction," and because the lack of substantive statutory standards to inform an LFA's consideration of waiver requests exacerbates the uncertainty that parties face. Petition for Declaratory Ruling at 16. *But see* NASUCA Comments at 4 (stating that NCTA's initial comments "fail to identify any mergers and acquisitions that *did not occur* because of the purportedly 'chilling' effect of Section 652 of the Act") (emphasis in original).

[54] Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (describing the purpose of the 1996 Act as "[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

[55] *See supra* note 9; *see also, e.g.*, 47 U.S.C. § 533(b), repealed. Pub. L. 104-104, Title III, § 302(b)(1), Feb. 8, 1996, 110 Stat. 124.

[56] *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, Docket No. 18509, Final Report and Order, 21 F.C.C.2d 307, paras. 46–48 (1970) (recognizing that "CATV service represents the initial practical application of broadband cable technology" and expecting that "broadband cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds"), *aff'd sub nom.*, *General Tel. Co. v. United States*, 449 F.2d 846 (5th Cir. 1971); *see also* 47 C.F.R. § 64.601 (1971).

[57] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2785 § 2; 47 U.S.C. § 533(b) (1970).

19. By 1992, the Commission had concluded that the "cross-ownership ban has fulfilled its purpose" of preventing incumbent LECs from monopolizing cable television service.[58] To further foster facilities-based competition, the Commission recommended that Congress permit incumbent LECs to enter the market for video services to allow these providers to compete on an "equal footing," subject to "appropriate safeguards."[59] At this time, federal law permitted cable operators to provide telephone exchange service, although certain LFAs had erected regulatory barriers to providing such service.[60]

20. The Telecommunications Act of 1996 introduced an array of provisions intended to encourage market entry and eliminate market barriers and regulatory restrictions.[61] Congress enacted sections 251 and 252 to foster development of competition for telecommunications services by allowing competitive LECs to use the incumbent LECs' networks (through resale or unbundled network elements), rather than forcing the new market entrants to rely exclusively on their own facilities.[62] Congress also eliminated the cross-ownership ban that generally prevented LECs and cable operators from directly competing.[63] Congress recognized, however, that eliminating the cross-ownership ban might induce consolidation, rather than head-to-head competition. Congress adopted section 652 to prevent such consolidation of facilities-based providers.[64] As Representative Markey stated at the time the legislation was under consideration, "[t]elephone companies, in particular, offer the potential for new and powerful downward pressure on cable rates. However, if they are permitted to simply buy out cable systems within

[58] *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54–63.58*, CC Docket No. 87–266, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, para. 137 (1992) (concluding that "there is little threat that the local telephone companies could preemptively eliminate competition and monopolize the market for video programming services").

[59] *Id*. at 5847, paras. 135, 137, 140 (1992) (recommending to Congress "that it amend the Cable Act to permit the local telephone companies to provide video programming directly to subscribers in their telephone service areas, subject to appropriate safeguards," which would have the effects of "increasing competition in the video marketplace, spurring the investment necessary to deploy an advanced infrastructure, and increasing the diversity of services made available to the public").

[60] *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess., at 60 (1995) (describing how some LFAs had begun regulating telecommunications services offered by cable operators); *see also Cox Cable Communications, Inc.*, Memorandum Opinion and Declaratory Ruling, CCB-DFD-83-1, 102 FCC2d, 110, 111 (1985) (finding that "the uncertainty caused by the Nebraska [certification of public convenience and necessity requirement] has impaired, and likely will continue to impair, the ability [of the cable operator's subsidiary] to provide interstate service").

[61] *See, e.g.*, 47 U.S.C. §§ 251–252 (providing a framework for competitive LECs to enter the telephone exchange service and exchange access markets without building their own complete networks); 47 U.S.C. § 257 (requiring the Commission to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision of telecommunications and information services); 47 U.S.C. § 271 (permitting incumbent LECs to provide interLATA services, subject to certain conditions and regulatory approvals).

[62] 47 U.S.C. §§ 251, 252.

[63] 47 U.S.C. § 533(b) (1995) (now repealed); 47 C.F.R. 63.56(a) (1995) (now repealed); *see also supra* note 55.

[64] *See infra* paras. 38–39.

their service territory, we will have lost the benefit of this potential competition and instead simply allowed one monopoly to be replaced with another."[65]

3. The Commission's Authority to Grant Forbearance

21. In this Order, we forbear from applying section 652(b) to the extent that it prohibits the acquisition of competitive LECs by cable operators, including their affiliates. Although most commenters agree that the Commission has authority to grant NCTA's petition for forbearance,[66] two question whether forbearance authority extends to the circumstances here.[67]

22. We agree with the majority of commenters that we have authority to forbear from applying section 652(b) to competitive LECs. Section 10(a) authorizes the Commission to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines" that the statutory criteria for forbearance are satisfied.[68] Because section 652, like section 10, is a provision of the Communications Act (or "this Act"), Congress expressly authorized the Commission to forbear from applying its provisions "to a telecommunications carrier or telecommunications service."[69] Moreover, section 10 tells the Commission to forbear from "applying *any* regulation or *any* provision of this Act . . . to a telecommunications carrier"—and the use of "any" highlights that Congress was not restricting the Commission's forbearance authority to a specific title or portion of the Act but "any" provision within it (that meets the other criteria set forth in section 10).

23. What is more, there can be little doubt that section 652(b) "applies" to telecommunications carriers, including competitive LECs. The language of section 652(b) is clear and broad and sweeps in all local exchange carriers, who are, by definition, telecommunications carriers. Since competitive LECs are a subset of local exchange carriers and we have concluded the section 652(b) applies to them as well as incumbents,[70] section 652(b) is a statutory provision that "applies to . . . a telecommunications carrier."

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[65] Edward J. Markey, *Cable Television Regulation: Promoting Competition in a Rapidly Changing World*, 46 FED. COMM. LJ 1, 5 (1993) (*Promoting Competition in a Rapidly Changing World*).

[66] *See, e.g.*, Time Warner Reply Comments at 10–11 (CLECs are telecommunications carriers and "many cable operators themselves operate as CLECs (directly or through an affiliate)"); ACA Reply Comments at 5 ("Section 10, directs the FCC to forbear from applying '*any*' regulation or '*any*' provision of this chapter") (emphasis in original).

[67] *See* Public Knowledge Comments at 2–3 (arguing that our forbearance authority only extends to the provisions of Title II of the Act); NASUCA Reply Comments at 7 (arguing that the Commission can only forbear with respect to telecommunications carriers and that "the matter at hand involves *cable providers*' acquisition of or merger with CLECs"). NASUCA also argues that if the Commission should make changes to section 652, it should do so through a rulemaking rather than forbearance. Having concluded above that the unambiguous language of the statute precludes us from issuing a declaratory ruling to provide the requested relief, the appropriate avenue for the Commission to provide relief from an unambiguous statutory prohibition is through our section 10(a) forbearance authority, rather than by adopting new rules to implement section 652, as NASUCA suggests.

[68] Communications Act § 10(a), *codified at* 47 U.S.C. § 160(a).

[69] Communications Act § 652, *codified at* 47 U.S.C. § 572; *cf. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377–78 (1999) ("Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, 1996 Act, § 1(b), 110 Stat. 56, the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions.").

[70] *See supra* Part III.A.2.

Though we recognize that the language may be read as only governing the conduct of cable operators, it is our judgment that the best reading of section 652(b) is that a restriction on cable operators' acquisition of interests in a telecommunications carrier does, within the meaning of section 10(a), "apply[] … to a telecommunications carrier … or class of telecommunications carriers." Indeed, there are real-world consequences of section 652(b)'s application to competitive LECs: it limits their ability to obtain capital and to migrate services from leased to owned facilities.[71] Our forbearance here lifts those restrictions on competitive LECs, and thus falls within the scope of our forbearance authority under section 10.

24. Likewise, section 652(b) "applies" to telecommunications services. In particular, it restricts the manner by which cable operators may compete in the marketplace for telecommunications services—i.e., by limiting their ability to acquire existing carriers rather than establishing their own carrier operations from scratch.[72] On that basis, we conclude that section 652(b) is a provision that "appl[ies] … to a … telecommunications service, or class of … telecommunications services"[73] within the meaning of section 10.

25. In sum, we conclude forbearing from applying section 652(b) to competitive LECs falls within the Commission's forbearance authority under section 10.

4. Forbearance Analysis

26. The Commission is required to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier's charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[74] In determining whether forbearance is consistent with the public interest, the Commission also must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions."[75] Forbearance is warranted under section 10(a) only if all three elements of the forbearance criteria are satisfied.[76] In a forbearance proceeding, the petitioner has the burden of proof, which encompasses both the burden of production and the burden of persuasion.[77] Finally, as the D.C.

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[71] *See infra* para. 29.

[72] *Cf. Public Utility Commission of Texas et al*., CCBPol. Nos. 96-14, 96-16, 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3496, para. 74 (1997) (concluding that state law requirements were actual or effective prohibitions on the provision of telecommunications services where they restricted the mode of entry by a carrier (in that case, by requiring use of the carrier's own facilities and limiting its use of resale or unbundled network elements)).

[73] 47 U.S.C. § 160(a).

[74] 47 U.S.C. § 160(a).

[75] 47 U.S.C. § 160(b) (providing that, in making the determination under section 10(a)(3), the Commission shall consider whether forbearance will promote competitive market conditions).

[76] *See Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong).

Circuit has held, "[o]n its face" section 10 "imposes no particular mode of market analysis or level of geographic rigor," but rather "allow[s] the forbearance analysis to vary depending on the circumstances."[78]

a. Section 10(a)(1)—Charges, Practices, Classifications, and Regulations

27. We conclude that application of section 652(b) to transactions involving competitive LECs is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with the relevant telecommunications services and providers are just and reasonable and are not unjustly or unreasonably discriminatory.[79] The major purpose of the 1996 Act was to establish "a pro-competitive, deregulatory national policy framework," and one of its key goals was to open "the local exchange and exchange access markets to competitive entry."[80] In considering the 1996 Act, Congress recognized that cable operators were likely to emerge as facilities-based competitors for local telephone services.[81] We are persuaded that forbearing from section 652(b) with respect to the acquisition of more than a 10 percent financial interest or any managerial interest in competitive LECs will likely speed the entry of cable operators into the market for telecommunications services provided to business customers and will foster increased facilities-based competition for these services. As the Commission previously has found in the context of its section 10(a)(1) analysis, "competition is the most effective means of ensuring that . . . charges, practices, classifications, and regulations . . . are just and reasonable, and not unreasonably discriminatory."[82]

28. The majority of commenters in this proceeding support NCTA's principal argument—that transactions between competitive LECs and cable operators generally are pro-competitive.[83] Many

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[77] *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, 24 FCC Rcd 9543 (2009) (*Forbearance Procedural Requirements Order*). Thus, in addition to the burden of production of stating a prima facie case in the petition, "the petitioner's evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance" (i.e., the burden of persuasion). *Id*. at 9556, para. 21.

[78] *EarthLink Inc. v. FCC*, 462 F.3d 1, 6 (D.C. Cir. 2006) (using the *Chevron* framework to review the Commission's forbearance analysis, under which the court "will uphold the FCC's interpretation as long as it is reasonable, even if 'there may be other reasonable, or even more reasonable views'" (internal citation omitted)).

[79] 47 U.S.C. § 160(a)(1).

[80] *First Local Competition Order*, 11 FCC Rcd at 15505, para. 3.

[81] *See, e.g.*, JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, S. Rep. No. 104-230, at 148 (1996) (Conf. Rep.) (JOINT EXPLANATORY STATEMENT) (recognizing the potential of cable companies to become facilities-based competitors within the meaning of section 271(c)(1)(A)).

[82] *Petition of U S WEST Communications Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*; *Petition of U S WEST Communications, Inc., for Forbearance*; *The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket Nos. 97-172, 92-105, Memorandum Opinion and Order, 14 FCC Rcd 16252, 16270, para. 31 (1999).

[83] *See, e.g.*, Comcast Comments at 4–5 (stating that cable operators offer "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"); Time Warner Reply Comments at 4–5 (stating that "as complementary (continued….)

competitive LECs have gained substantial expertise in providing telecommunications services to business customers since the enactment of the 1996 Act. To compete for these services, competitive LECs often rely on the facilities of the incumbent LEC as wholesale inputs, due to substantial economic and operational barriers to entry, particularly for the deployment of last mile network facilities.[84] In contrast, although many cable operators are relatively new entrants competing in the marketplace for the provision of telecommunications services to business customers,[85] cable operators have expansive—and in some areas, ubiquitous—network facilities that can be upgraded to compete in telecommunications services markets at relatively low incremental cost.[86]

29. Alliances between competitive LECs and cable operators can merge these entities' complementary capabilities, resulting in increased facilities-based competition.[87] For example, many

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businesses, a cable operator and a CLEC can often realize significant synergies and efficiencies by combining their operations"); XO Reply Comments at 1–2 ("Mergers and acquisitions between CLECs and cable companies promote facilities-based competition in the provision of local services."); ACA Reply Comments at 2–3 ("Because of their complementary capabilities, alliances between cable companies and CLECs can promote greater facilities-based competition with ILECs and other providers, and thus encourage lower rates, higher quality, and more innovative service offerings."). *But see* NASUCA Comments at 4 ("[I]n light of the substantial market dominance of cable companies, Consumer Advocates are not persuaded that if and when a cable company purchases a CLEC, the cable company will flow through benefits to consumers.").

[84] *See, e.g.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17035–41, paras. 85–91 (2003) (*Triennial Review Order*) (subsequent history omitted); *see also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, 2615–19, paras. 149–54 (2005) (*Triennial Review Remand Order*) (discussing barriers to entry for high-capacity loops), *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (*Covad v. FCC*); *see also Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 490 (2002) ("A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult of which would be laying down the 'last mile' of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses.").

[85] Petition for Forbearance at 8–9 (arguing that most CLEC-cable transactions would be pro-competitive because competitive LECs currently focus on business customers whereas most cable operators "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").

[86] As the Commission has previously held, "cable operators may have faced comparatively lower barriers to entering telecommunications services markets because they owned existing cable networks that could be upgraded at a feasible incremental cost." *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8667, para. 84 (2010) (*Qwest Phoenix Order*) (stating that "this does not imply that entry barriers for other competitive LECs have eased").

[87] *See* XO Communications Reply Comments at 2 ("In many respects, CLECs and cable companies are complementary businesses. CLECs have traditionally focused on providing telecommunications services to business customers . . . [and] have developed extensive operational, marketing, and technical expertise to serve these (continued….)

commenters assert that transactions between competitive LECs and cable operators can provide competitive LECs with access to "additional capital"[88] and enable competitive LECs to migrate services from leased to owned facilities.[89] Cable companies can benefit from such transactions by obtaining access to the competitive LEC's "back-office infrastructure and established relationships with business customers."[90]

30. Moreover, the Commission has recognized that mergers among non-dominant providers in a specific market are unlikely to raise competitive concerns.[91] The loss of one competitor from the market (the acquisition of a competitive LEC) is unlikely to materially decrease the amount of bottleneck facilities in the market. Such transactions often pose little risk of competitive harm and in fact "*increase* competition with entrenched incumbent providers, and thus would likely put downward pressure on the rates offered by incumbents."[92] In addition, as discussed in greater detail below, other procedures enable sufficient Commission review to ensure that particular transactions do not result in unjust, unreasonable, or unjustly or unreasonably discriminatory rates and practices.[93] Accordingly, we find that section 652(b)

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customers. In contrast, cable operators have typically concentrated on the consumer/residential market and have less experience serving business customers.").

[88] *See* NCTA Conditional Petition for Forbearance at 9 (stating that being acquired by a cable operator "may offer the best hope for cash-strapped CLECs"); *see also* Comcast Comments at 4–5 Time Warner Reply Comments at 4–5 (stating that "as 'complementary businesses,' a cable operator and a CLEC can often realize significant synergies and efficiencies by combining their operations"); ACA Comments at 3 (stating that "[g]iving a CLEC access to a cable network's facilities can reduce the CLEC's operational costs"); Bright House Comments at 2–3 (same). We agree with Time Warner that a cable operator's acquisition of a competitive LEC can accelerate that carrier's ability to compete for telecommunications customers by giving competitive LECs access to the financial resources necessary to compete successfully in telecommunications markets (*e.g.*, by lowering the cost of capital for the competitive LEC and enabling longer repayment terms), and other benefits of increasing the scale and scope of the competitive LECs business, the particulars of which would depend on the strengths of the specific entities in each transaction. Time Warner Reply Comments at 4–5.

[89] *See, e.g.*, XO Reply Comments at 2 ("Because of these complementary capabilities, alliances between CLECs and cable companies can lead to the expansion of cable services throughout business districts and the migration of CLEC services from leased to owned facilities. Such alliances can promote greater facilities-based competition with ILECs and other providers, putting downward pressure on rates, increasing the offering of innovative services, and enhancing service quality."); *see also Comcast/CIMCO Order*, 25 FCC Rcd at 3417, paras. 38–39.

[90] *See, e.g.*, ACA Comments at 3.

[91] *See, e.g.*, *Implementation of Further Streamlining Measures for Domestic 214 Authorization*, Report and Order, 17 FCC Rcd 5517, 5531–33, paras. 27–30 (2002); *see also Applications of XO Communications*, 17 FCC Rcd 19212, 19225, para. 30 (IB, WTB, WCB, 2002) (finding the combined operation of two overlapping competitive local exchange carriers would further competition rather than curtail it); ACA Comments at 8–9 ("Cable operators and CLECs are non-dominant providers of telecommunications services, lacking market power in the provision of local exchange services."); COMPTEL Comments at 11.

[92] NCTA Petition for Forbearance at 8 ("Such transactions will deliver particular benefits for small, medium-sized enterprise customers, as CLECs have focused on such customers and access to cable networks can reduce operational costs."); *see also* COMPTEL Comments at 11; U.S. Telepacific Corp., *et al*. Comments at 2; Bright House Reply Comments at 3.

[93] *See infra* para. 33.

as applied to competitive LECs is not necessary to ensure that the charges and practices in connection with the relevant telecommunications services and providers are just and reasonable and are not unjustly or unreasonably discriminatory.[94]

31. Our decision is consistent with our findings in other recent transactions between competitive LECs and cable operators. In 2010, when the Commission approved Comcast's acquisition of a competitive LEC, the Commission concluded that "Comcast's acquisition of CIMCO's assets and expertise 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."[95] Also in 2010, the Wireline Competition Bureau found the merger between FiberNet and NTELOS Inc.[96] would serve the public interest, in part, by "providing needed capital to maintain and improve FiberNet's telecommunications facilities and encouraging broadband deployment."[97] In 2012, the Wireline Competition Bureau also approved the merger between Time Warner Cable Inc. and Insight Communications Company, Inc., finding that a grant of the merger "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."[98]

b. Section 10(a)(2)—Protection of Consumers

32. We find that applying the section 652(b) prohibition on a cable company acquiring a competitive LEC, or obtaining a relevant ownership or managerial interest in a competitive LEC, is not necessary to protect consumers.[99] As we concluded above, acquisitions of competitive LECs by cable operators often will strengthen facilities-based competition for telecommunications services, which will in turn provide customers with better service and functionality and lower prices.[100] We agree with

[94] 47 U.S.C. § 160(a)(1).

[95] *See Comcast/CIMCO Order*, 25 FCC Rcd at 3403, para. 4; *see also id*. at 3417, para. 38 (stating that the merger will help speed Comcast's entry into the business markets which "require voice, data and Internet access products as well as sales expertise that are different from those needed to serve residential and small business customers" that Comcast has traditionally served); *id*. at para. 39 (finding that the transaction will enable Comcast to move CIMCO's existing customers served over facilities most likely leased from the incumbent LEC to Comcast's existing infrastructure).

[96] One Communications Corp. (One Communications), FiberNet of Virginia, Inc., FiberNet L.L.C. FiberNet Telecommunications of Pennsylvania, LLC, FiberNet of Ohio, LLC (together FiberNet).

[97] *FiberNET/NTELOS Second Notice*, 25 FCC Rcd at 16306.

[98] *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, 27 FCC Rcd 497, 507, para. 21 (WCB 2011) (*Insight/Time Warner Order*) ("[T]he proposed transaction likely will provide benefits to residential and business customers through the combined companies' increased ability to compete with the incumbent LEC in the provision of voice service and service bundles. For example, Applicants explain that the combination of their networks will create operating efficiencies and scale and scope advantages in procuring key inputs, such as long distance service, 911 connectivity, directory assistance, and other database services. We anticipate that this will allow the merged entity to offer new services to a broader range of customers.").

[99] 47 U.S.C. § 160(a)(2).

[100] *See supra* at paras. 27–30.

commenters that greater facilities-based competition will benefit consumers by "encouraging lower rates, higher quality, and more innovative service offerings."[101] As discussed more fully below, forbearance also will reduce the regulatory uncertainty that NCTA contends has created a "chilling effect" affecting these potentially pro-competitive mergers and other transactions,[102] thus helping to ensure consumers can realize the benefits of these transactions. Likewise, other transactions covered by section 652(b) that would not result in control of a competitive LEC by a cable operator, but would involve a covered ownership or managerial interest, are likely to further enhance competition due to providing additional equity and/or managerial expertise to competitive LECs.

33. Section 652(b) also is not necessary to protect consumers because consumers remain protected from the harmful effects of any proposed mergers between cable operators and competitive LECs that may not be in the public interest due to other regulatory safeguards. In particular, a cable operator's acquisition of a competitive LEC remains subject to Commission review under section 214,[103] which requires the Commission to conduct a public interest determination in the context of particular transactions.[104] This analysis will help enable the Commission ensure that transactions do not harm consumers. The Commission welcomes LFA participation in these proceedings and values the insights LFAs might have on how a transaction may affect consumers. Moreover, our decision does not limit any rights an LFA may have to review a transaction outside of the section 652 context.[105] In addition,

[101] *See, e.g.*, ACA Reply Comments at 2; *Insight/Time Warner Order*, 27 FCC Rcd at 507, para. 22 ("TWC's scale and scope suggests that it could be a stronger competitor to the incumbent telephone provider in Insight's service territory, thereby resulting in benefits for consumers. Applicants also claim that the combined companies will expand access to IP-based services for all customers. The Commission has encouraged carriers to accelerate access to modern IP-based services for homes and businesses, and we agree that TWC, as an all-IP based voice provider, will be positioned to expand service offerings to Insight customers.").

[102] NCTA Petition for Declaratory Ruling at 4. *See infra*, para. 36.

[103] 47 U.S.C. § 214; *see also* CLEC Comments at 5–7 (arguing that forbearance from section 652 is warranted "particularly since the Commission has a separate right to review such transactions pursuant to its Section 214 jurisdiction").

[104] Under section 214, the Commission will review a cable operator's acquisition of a *controlling* interest in a competitive LEC. *See* 47 U.S.C. § 214; 47 C.F.R. § 63.24(c). The Commission's section 214 public interest analysis may entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. *See, e.g.*, *AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5672, para. 20 (2007) (*AT&T/BellSouth Order*). The Commission's 214 public interest evaluation also encompasses the "broad aims of the Communications Act," which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, all of which benefit consumers. *See* 47 U.S.C. §§ 254, 332(c)(7), 1302; Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996 Act), Preamble; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18301, para. 17 (2005) (*SBC/AT&T Order*); *see also Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom Inc.*, WC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030–31, para. 9 (1998).

[105] For example, if an LFA has authority to review such transactions under its franchise agreement with the cable operator, our decision does not alter that authority.

particular transactions may be subject to other applicable federal review.[106] These reviews offer additional protections for consumers.[107]

c. Section 10(a)(3)—Public Interest

34. Finally, NCTA must demonstrate that forbearance from section 652(b) is consistent with the public interest.[108] In making that determination, we must consider whether forbearing from section 652(b) as applied to competitive LECs "will promote competitive market conditions, including the extent to which such forbearance will promote competition among providers of telecommunications services."[109] We are convinced that granting forbearance from section 652(b) as applied to competitive LECs would be consistent with the public interest under section 10(a)(3) and will help enhance facilities-based competition among providers of telecommunications services as contemplated by section 10(b).[110]

35. We find that forbearance from section 652(b) in instances where a cable operator seeks to acquire a competitive LEC serves the public interest because it affords parallel regulatory treatment to transactions between cable operators and competitive LECs, regardless of which company acquires the other.[111] Absent forbearance, section 652 imposes substantially different restrictions based solely on which of the entities is the acquiring company. We expect that the competitive impact of the transaction will be the same, regardless of which company acquires the other.[112] Thus, we conclude that such regulatory disparity does not serve the public interest.

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[106] For example, section 7A of the Clayton Act, 15 U.S.C. § 18a, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law 94–435, 90 Stat. 1390, requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions. Section 7A(a)(2) requires the Federal Trade Commission to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5). 15 U.S.C. § 18a(a)(2).

[107] Our decision to forbear is contingent on the fact that we have and continue to exercise authority to review many of the relevant transactions under section 214, and that LFAs can participate in the section 214 process should they choose to do so. Continued application of section 214 authority is critical to our decision here.

[108] 47 U.S.C. § 160(a)(3).

[109] 47 U.S.C. § 160(b).

[110] *See supra*, paras. 27–32 (concluding that forbearing from section 652(b) as applied to competitive LECs is likely to lead to pro-competitive and pro-consumer results).

[111] We note that the statute distinguishes between common carriers that were providing telephone exchange service as of January 1, 1993, and those that were not. 47 U.S.C. § 572(e). As of that date, we believe the only common carriers that were providing telephone exchange service were incumbent LECs. Other LECs had begun to emerge by that date, but apparently only as alternative providers of exchange access (i.e., as competitive access providers, or CAPs) rather than as providers of telephone exchange service. *See Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, for Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15251 para. 27 (1998).

[112] For example, the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission would not distinguish a transaction in which a cable operator acquired a competitive LEC from one in which that same competitive LEC acquired the cable operator. *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE (continued….)

36. Our public interest determination also derives from our determination that a merger between a competitive LEC and a cable operator frequently can "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."[113] We also conclude that the uncertainties inherent in the section 652 waiver approval process can impede the realization of the public interest benefits likely to result from mergers between a cable operator and a competitive LEC.[114] The current operation of the LFA waiver approval process in many jurisdictions may create an unreasonable barrier to entry for competitive LECs and cable operators that impedes the federal goal of enhanced competition because it introduces uncertainty, and can be more burdensome than competitive LEC acquisitions of cable operators that do not require an LFA waiver approval.[115] In fact, depending on the geographic area(s) impacted by the transaction, approval could be required from multiple, and in some cases, many LFAs. An executive for Bright House Networks (BHN), a cable operator with service areas in Florida, Alabama, California, Indiana, and Michigan, submitted an affidavit contending that "BHN could have developed and innovated voice services and features faster in order to fully compete with the incumbent LEC" had it acquired a competitive LEC to help grow its commercial business.[116] BHN stated it engaged in merger discussions with a competitive LEC but ultimately decided not to pursue this approach, citing as a "key factor . . . the uncertainty of obtaining a waiver of Section 652, as well as the potential delays in obtaining a waiver, and how that might have affected the purchase price and material deal terms."[117] Although the Commission

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COMMISSION, HORIZONTAL MERGER GUIDELINES (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[113] *Comcast/CIMCO Order*, 25 FCC Rcd at 3403, para. 4.

[114] *See, e.g.*, NCTA Petition for Declaratory Ruling at 16 (stating that "the lack of constraints raises the threat of hold ups or outright denials form LFAs that do not have any legitimate basis to object to the transaction").

[115] NCTA Petition for Forbearance at 2 and n.53. We note that the House Report accompanying the 1996 Act indicates that Congress preempted LFAs from regulating cable operators' provision of telecommunications services in 47 U.S.C. § 541(b)(3) to ensure that only the federal and state governments regulate telecommunications services. *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess., at 60 ("The intent of this provision is to ensure that regulation of telecommunications services, which traditionally has been regulated at the Federal and State level, remains a Federal and State regulatory activity. The Committee is aware that some local franchising authorities have attempted to expand their authority over the provision of cable service to include telecommunications service offered by cable operators. Since 1934, the regulation of interstate and foreign telecommunications services has been reserved to the Commission; the State regulatory agencies have regulated intrastate services. It is the Committee's intention that when an entity, whether a cable operator or some other entity, enters the telephone exchange service business, such entity should be subject to the appropriate regulations of Federal or State regulators.").

[116] *See* Affidavit of Leo Cloutier, Sr. Vice President Strategy & Business Development, Bright House Networks, at para. 7–10 (Cloutier Affidavit), *attached to* Letter from Daniel Brenner, Counsel for Bright House Networks, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-118 (dated Apr. 27, 2012).

[117] *Id*. at para. 8; *see also* Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, *NCTA*, *et al.* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-118 at 3–4 (dated Mar. 20, 2012) (NCTA Mar. 20, 2012 *Ex Parte* Letter) (explaining that the uncertainties of the LFA waiver approval process can skew negotiations, raise the cost of capital, and cause other issues for merging parties). *But see* NASUCA Reply Comments at 4 (stating that NCTA's initial comments "fail to identify any mergers and acquisitions that *did not occur* because of the purportedly 'chilling' effect of Section 652 of the Act").

has streamlined the timing of the section 652 waiver approval process in particular merger reviews,[118] we recognize that the streamlined process does not eliminate all of the disincentives that the waiver and approval process create when parties are considering whether they should enter into a particular transaction.

37. In addition, as noted above, our decision to forbear does not relieve cable-competitive LEC proposed mergers from regulatory scrutiny.[119] We will continue to review any transaction involving a change of controlling interest on a case-by-case basis under the public interest standard in section 214.[120] These protections further ensure that the public interest will be protected.

38. We also find strong evidence that forbearance is consistent with the intent of Congress when it enacted section 652. As the Commission previously has found, "Congress' main concern in enacting section 652" was preventing an incumbent LEC from acquiring a cable operator and thereby eliminating its only competitor with last-mile facilities.[121] The merger of a cable operator and incumbent LEC would have short-circuited competition between these facilities-based providers, which would have defeated Congress' purpose for allowing these competitors to enter each other's markets. This conclusion is buttressed by statements of individual legislators,[122] as well as by the House and Senate bills that led to section 652.[123] Mergers between competitive LECs and cable operators do not present similar risks.

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[118] *See Comcast/CIMCO Notice*, 24 FCC Rcd 14815 (establishing a process for soliciting input from the relevant LFAs and determining whether they disapprove of the requested waiver of section 652(b)).

[119] As noted above, a cable operator's acquisition of a controlling financial or management interest in a competitive LEC would remain subject to the Commission's review under section 214. *See supra* note 104; *see also* 47 C.F.R. § 63.24(c).

[120] 47 U.S.C. § 214.

[121] *See Applications of Ameritech, Corp. & SBC Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14945, n.1081 (1999) (stating that "Congress' main concern in enacting section 652, as indicated by the legislative history, was to avoid having a LEC purchase a local cable operator and thus control *both* wires to consumers") (emphasis added).

[122] *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."); Statement of Sen. Kerrey, 141 Cong. Rcd. S7881 (June 7, 1995) ("I have serious problems saying that telephone companies can acquire cable companies inside of their area immediately. Mr. President, I believe we have to have two lines coming into the home.") As NCTA notes, Senator Kerrey also introduced a letter he received from 24 state attorneys general which stated, in part, that "legislation should continue to prohibit mergers of cable and telephone companies in the same service area. Such a prohibition is essential because local cable companies are the likely competitors of telephone companies. Permitting such mergers raises the possibility of a 'one-wire world,' with only successful antitrust litigation to prevent it." 141 Cong. Rcd. S8161 (June 13, 1995). In addition, Representative Edward Markey, one of the principal authors and negotiators of the 1996 Act, stated during the period leading up to its enactment: "One company should not control both the phone and the cable wire running down the street. The goal of congressional action should be to preserve a two-wire, competitive world." *Promoting Competition in a Rapidly Changing World* at 6.

[123] Section 652 was enacted as part of the Telecommunications Act of 1996, and derives most directly from S. 652 and H.R. 1555, the two bills passed by the Senate and House, respectively, and differences were reconciled by conference agreement to ultimately produce the 1996 Act. For example, the language of sections 652(a)–(c) of the Act is in all relevant respects identical to the buy out prohibition in S. 652. However, the Senate bill did not define (continued….)

39. We find that the main concerns that motivated Congress to adopt section 652 do not extend to competitive LECs. We believe that Congress had little reason to be concerned about cable operator acquisitions of competitive LECs when it adopted section 652 because competitive LECs, particularly in 1996, did not present a significant facilities-based alternative to incumbent LECs.[124] In contrast to an incumbent LEC's acquisition of a cable operator, a cable operator's acquisition of a competitive LEC likely will not lead to one entity controlling all of the last-mile facilities,[125] or reduce incentives to upgrade existing transmission facilities to enable carriage of new services.[126] Therefore, we find that such

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"telephone service area," nor was that term statutorily defined elsewhere at that time until 1996. *See* Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong. § 202 (1995). In the absence of that definition, the most straightforward reading of sections 652(a)–(c) is that the Senate intended to prohibit transactions only where the LEC's telephone exchange service area overlapped with the cable operator's franchising area. Thus, the language of S. 652 persuades us the buy out prohibition in S. 652 would have applied to the same set of entities, regardless of whether a cable operator was acquiring a LEC or being acquired by a LEC, and regardless of whether the Senate intended these provisions to include only incumbent LECs, or also emerging competitive LECs. We also are persuaded that S. 652 was intended to exclude competitive LECs from the scope of the buy-out prohibition in that bill. S. 652 in relevant part was amending section 613(b) of the Cable Act (i.e., the cross-ownership restriction). On its face, section 613(b) prohibited "*any* common carrier" from "provid[ing] video programming directly to subscribers in its telephone service area." 47 U.S.C. § 533(b)(1) (1995); 47 C.F.R. § 63.54–63.58 (1995). As the Commission explained in the 1992 *Teleport Order*, however, although "the language of the statutory prohibition applies to 'any' common carrier, the Commission has consistently interpreted its pre-existing rules and the Section 613(b) cross-ownership prohibition to apply only to traditional local exchange carriers within their local exchange telephone service areas" and "has limited the ban to traditional landline local exchange telephone companies with monopoly control of bottleneck facilities." *Application of Teleport Communications New York*, Memorandum Opinion and Order, 7 FCC Rcd 5986, 5988, paras. 16–18 (1992) (*Teleport Order*). Against that backdrop, we believe the Senate reasonably would have expected that the Commission would interpret its amendments to section 613(b) similarly to apply only to LECs that have "monopoly control of bottleneck facilities," i.e., incumbent LECs.

Further, the definition of "telephone service area" set forth in section 652(e) derives most directly from H.R. 1555, which did not contain any restrictions of cable acquisitions of LECs. *See* Communications Act of 1995, H.R. 1555, 104th Cong. § 201(b). Although Congress chose to adopt the more restrictive versions of each S. 652 and H.R. 1555, we do not believe that either version would have imposed a one-sided restraint on cable acquisitions of competitive LECs. We thus do not find any credible evidence that Congress intended section 652 to have impacts that diverge significantly from the underlying bills on which the statute was based, in the absence of any evidence that Congress was even aware of or intended such a result.

[124] As NCTA states, "competitive LECs seldom control 'last mile' facilities to a customer's home or office and where they do, the incumbent LEC continues to control its own wire." Petition for Declaratory Ruling at 2.

[125] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees; Adelphia Communications Corporation (and Subsidiaries, Debtors-in-Possession), Assignors and Transferors to Comcast Corporation (Subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee,* MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8247, para. 91 (2006) (stating that in areas where the competitive LECs and cable providers have not overbuilt cable systems reaching the same homes, the potential harm to competition based on small instances of overbuilding is not sufficient to create a material risk of public interest harm).

[126] *See, e.g.*, *Consent to Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp*., 15 FCC Rcd 9816, 9867, para. 117 (2000) ("Largely in response to cable modem rollout, the Bell Operating Companies ('BOCs') and GTE have launched major initiatives to accelerate their deployment of DSL."); (continued….)

mergers frequently are consistent with the purposes of section 652 and advance the goal of the 1996 Act to promote competition in local telecommunications services markets.[127]

40. We also determine that it is in the public interest to forbear from section 652(b) when a cable operator is proposing to acquire a greater than ten percent equity and/or managerial position in an overlapping competitive LEC. Just as a merger between two non-dominant providers can lead to more effective competition, so too can an injection of capital or managerial expertise that cable operators could provide competitive LECs. We believe that under these circumstances where competition can be enhanced, it is in the public interest to forbear from applying the cross-ownership prohibition contained in section 652(b). We believe that our decision to forbear is consistent with the pro-competitive nature of these proposed transactions, the unique circumstances presented here, and the statutory purpose and history of section 652.

C. Other Requested Relief

41. NCTA requests that if the Commission denies both the Petition for Declaratory Ruling and the Conditional Forbearance Petition, we must "establish substantive standards and time limits to facilitate expeditious consideration of waiver requests, including standards that apply to LFAs."[128] We therefore dismiss this request as moot.[129] CenturyLink and the United States Telecom Association requested that the Commission use this opportunity to limit the scope of incumbent LECs' duties under

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Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission, Cable Services Bureau, Federal Communications Commission, at 27 (Oct. 1999) (observing that "[t]he ILECs' aggressive deployment of DSL can be attributed in large part to the deployment of cable modem service. Although the ILECs have possessed DSL technology since the late 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business. The deployment of cable modem service, however, spurred the ILECs to offer DSL or risk losing potential subscribers to cable.").

[127] *See supra* para. 38; *see also* NCTA Petition for Forbearance at 7–10 (arguing that "because cable operators and competitive LECs both lack market power and are non-dominant providers of telecommunications services, cable-competitive LEC combinations are inherently pro-competitive, and do not implicate the concerns of the underlying statute"); COMPTEL Comments at 11; U.S. Telepacific Corp., *et al*. Comments at 2; Bright House Reply Comments at 3 (same); Time Warner Reply Comments at 9.

[128] Petition for Declaratory Ruling at 4.

[129] For this reason, we decline to address NCTA's argument that "an unbounded LFA approval requirement would amount to an unconstitutional delegation of legislative power by Congress" and would "violate fundamental principles of due process." Petition for Declaratory Ruling at 20–21. We note, however, that in its first proceeding addressing a request to waive section 652(b), the Commission established streamlined LFA waiver procedures to "balance the interests of applicants, interested parties, and the public, while also preventing indefinite delay of the Commission's waiver process, and possible derailment of a transaction that could otherwise be found to be in the public interest. *Comcast/CIMCO Order*, 25 FCC Rcd at 3407, 3412, paras. 15, 27. Similarly we decline to address NATOA's argument regarding the interplay between section 652(d)(6)(A)(iii) and the LFA approval process contained in section 652(d)(6)(B). *See* NATOA Comments at 6 (emphasizing that, in considering a waiver request, section 652(d)(6)(A)(iii) requires the Commission to consider whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served").

section 251(c).[130] We find these informal requests beyond the scope of our consideration of the instant petitions and decline to address them in this order.

IV. CONCLUSION

42. For the foregoing reasons, the Commission hereby denies the petition for declaratory ruling filed by the National Cable and Telecommunications Association (NCTA); grants, in part, the conditional petition for forbearance filed by NCTA in the alternative; and dismisses as moot the conditional petition for forbearance in other respects as discussed above.

V. ORDERING CLAUSES

43. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 10, and 652 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 160, 572, that NCTA's Petition for Declaratory Ruling is DENIED, and its conditional Petition for Forbearance IS GRANTED, in part, and otherwise IS DISMISSED as described in this order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[130] *See* CenturyLink, Inc. Reply Comments at 8 (stating that "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"); United States Telecom Association Reply Comment at 3–4 (stating that "any order granting the requested relief clearly establish that a combined cable-CLEC is presumptively not entitled to purchase UNE facilities within the franchise area of the acquiring cable company—including UNEs previously being purchased by the stand-alone CLEC").

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions 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*, *WC Docket No. 11-118*

Today's Order reflects our commitments to streamline processes and promote competition. By bringing the review of cable-CLEC transactions in line with that of other similar transactions, while maintaining our own review and an important role for local authorities, we ensure that transactions that promote competition and expand broadband service deliver benefits to consumers more quickly. I thank my colleagues and the staff of the Wireline Competition Bureau for their excellent work on this Order.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions 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, WC Docket No. 11-118*

Today, the Commission forbears from Section 652(b) of the 1996 Act, thereby allowing a cable operator or its affiliate to acquire a competitive local exchange carrier that provides telephone exchange service within the cable operator's franchise area.

I am pleased that not only does the petition meet all of the legal criteria for forbearance relief, but also granting it is the right public policy outcome. Consumers will benefit from the increased efficiencies springing from strategic combinations between cable companies and competitive local telecom companies.

This is a positive and constructive order in several respects. First, as noted earlier, the requisite forbearance criteria have squarely been satisfied.[1] Second, this forbearance order promotes good public policy because it should spur competition in the telecommunications marketplace. And third, this action is consistent with my continued call for FCC policies that promote consumer choice offered through competition and abundance rather than through regulation and its unintended consequences.

In the spirit of today's deregulatory action, the FCC should be even more energetic in finding additional regulatory underbrush to clear out of the way of competitive markets. For instance, the Commission should undertake more forbearance actions on its own accord rather than waiting for outside parties to file costly petitions. Not only would such initiative be a matter of good government, it is encouraged by the Act.

I thank the Chairman and my colleagues for their support of this order. And I look forward to working with them on similar endeavors in the future.

[1] 47 U.S.C. 160(a).

STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions 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, WC Docket No. 11-118*

Today we take a modest but important step towards eliminating regulatory barriers to infrastructure investment. As I noted in Pittsburgh this past July, section 652 of the Communications Act places an unnecessary hurdle to transactions between cable operators and competitive local exchange carriers. When a cable operator purchases a competitive LEC, local competition is likely to increase and more infrastructure is likely to be deployed to serve the enterprise market. Congress entrusted the Commission with forbearance authority to eliminate counterproductive regulatory schemes just like this one, and I am glad we are exercising our authority today to do just that. The end result of our deregulatory action will be more robust, facilities-based competition.