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Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Suite TW-A325
Washington, DC 20554

Dear Commissioners:

The Institute for Policy Innovation[1], or IPI, would like to take this opportunity to respond to the FCC's, "Comment Sought On NCTA Petitions Regarding Section 652 Of The Communications Act," Docket No. WC 11-118.

In the petition being considered, the NCTA has asked the Commission to clarify that §652 does not restrict transactions between cable operators and competitive LECs. They also ask that if the Commission decides that § 652 does apply to such transactions, that the FCC then forebear in bringing the restriction, or that, at a minimum, local franchising authorities not continue to be provided the unfettered authority they are currently afforded.

Often, as markets develop, especially dynamic markets with entrenched players and new entrants, there is a temptation to look to only one part of a market, identify key players, and extrapolate market influence broadly. In fact, particularly in technology and communications, such extrapolation can quickly lead to erroneous results. In this particular case, while cable companies have certainly become competitive in the delivery of residential services, they do not have that same wherewithal in the provision of services to businesses – the main interest in a merger of a competitive LEC and a cable operator.

To be competitive (the goal of any company), a company may follow different tracks. One such opportunity is to merge with other companies when synergies can be found.

[1] The Institute for Policy Innovation (IPI) is a public policy think tank, recognized by the IRS as a 501(c)(3) non-profit organization. IPI has been involved with in depth evaluation of the communications marketplace for several years. Specifically we have worked on policy development with regards to opening, expanding and preserving markets for video, voice and Internet access.

We have found that where government at all levels – federal, state, local or other political subdivision – has engaged in reducing, streamlining or eliminating regulation that a discernable benefit to the marketplace has occurred. More specifically these actions led to an increase in capital formation, resulting in the creation of jobs; a noticeable increase in product and service development and deployment; a corresponding increase in consumer choice; and a reduction in overall consumer price.

The Unfettered Power of the Local Franchise Authority
Unfortunately, the Telecommunications Act of 1996 places undo restrictions on such mergers, but only on one part of the communications industry even while other sectors enjoy greater freedom to compete to better serve customer. Specifically §652 of the Act imposes cross ownership restrictions on cable operators and on local exchange carriers. The presumption of this section is that a cable operator may not own a local exchange carrier unless both parties obtain a waiver not just from the FCC but also from each local franchising authority.

Many years ago IPI was involved in the state by state debate about statewide video franchising. We were supportive of such efforts for a variety of reasons, as detailed then in our written and spoken testimony before many state elected bodies. One of the central reasons was that the local franchising authorities would often erect artificial barriers for cable companies wanting to deliver products and services to the town in question. A less generous characterization might be that the authorities set up schemes to loot companies interested in delivering cable service. The shakedowns were various and creative – build a public park, enhance main street shopping district, and even a requirement to hang baskets of flowers on main thoroughfares – all in all an appalling display of government abuse of power.

In another similar example, local authorities often held up petitions for placement of wireless antennae and towers. A hold up for a valid reason is one thing, but on many occasions reviews were held up indefinitely, without any public reason or in some cases without any timetable provided as to when, or if, a petition would be considered at all. Ultimately a “shot clock” system had to be imposed to set a schedule of time for the local authorities to approve or disapprove an application.

The lesson learned: The unlimited power of the local franchise authorities is of great concern particularly considering their history in very similar contexts. That they have the authority to hold up a transaction for any reason, regardless of the reason’s legitimacy such as seeking to extract a number of concessions in exchange for approval, is a recipe for continued delay in the efficiencies gained through merger. Almost distressingly, the statute does provide the FCC a concrete standard to apply, a seeming admission that such authority should be reined in, and yet no such limitations are placed on franchise authority waiver requests.

But a blanket rejection of a waiver is not even the most ridiculous result of the current system. In the case of a waiver which may involve several local franchise areas, one or more areas may refuse a grant of a waiver, leading to a patchwork of carve-outs. Such a result is a direct attack on efficiency and competition, even while introducing great market uncertainty because of the different and confusing rules placed on different parts of the communications industry in different areas.

As in this case, when regulations are a hindrance to technological innovation and advancement, especially when such stand in the way of improvement of options and services to consumers, these regulations should be reconsidered by regulators, with a strong bias towards ending them. Any other approach flies in the face of the future of the U.S. economy, statements of the Obama

Administration, and the good of the nation. The result should be that the Commission decides that at a minimum, local franchising authorities not continue to be allowed the unrestricted authority they are currently afforded.

Even Without Local Franchise Authority Interference Regulators Are Still on the Beat
Even with the abolition of local franchise authority many cops are still on the beat, and importantly with appropriately constrained authority rather than unfettered power. For example, competitive local exchange carrier-cable combinations would still be subject to the same approval process that all mergers must undergo. The reviewing authorities in these federal antitrust reviews include the Department of Justice or the Federal Trade Commission. In addition, the FCC itself would still have its “public interest” standard, and that is before the states get involved with state public utility commissions and the attorney general of the state.

Conclusion
In sum, the playing field between competitors must be leveled. Long gone should be the days of government believing that it knows better how to arrange the playing field in technology to the benefit of consumers. We have come to learn that government’s ability to pick winners and losers in any marketplace, much less in the rapidly evolving, highly engineered, highly technological communications marketplace, is at best limited.

To end this current folly, the FCC should issue a declaratory ruling that §652 does not restrict transactions between CLECs and cable companies, or at the very least instruct them to forbear from enforcing the local franchise authority approval requirement in such circumstances.

Respectfully Submitted,

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