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

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In the Matter of)
)
Implementation of Further Streamlining)
Measures for Domestic Section 214)
Authorizations)

RECEIVED
CC Docket No. 01-150

DECLARATORY RULING AND
NOTICE OF PROPOSED RULEMAKING

Adopted: July 12, 2001

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By the Commission: Commissioner Abernathy not participating.

I. INTRODUCTION

1. In this proceeding, the Commission clarifies, and proposes further streamlining of, its rules governing requests for authorization pursuant to section 214 of the Communications Act of 1934, as amended ("the Act") to transfer domestic interstate transmission lines through an acquisition of corporate control. Under section 214, applicants must obtain Commission authorization before constructing, operating, or acquiring domestic interstate transmission lines.¹ The Commission, in Rule 63.01, granted blanket authority to domestic interstate communications common carriers to provide domestic interstate services and to construct, acquire, and operate domestic transmission lines.² The blanket authority in Rule 63.01, however, expressly does not apply to acquisitions of corporate control. When an acquisition of corporate control is involved, carriers must file a section 214 application with the Commission and obtain Commission approval prior to consummating a proposed transaction.

¹ Section 214 imposes regulatory obligations on common carriers seeking to construct, acquire, or operate transmission lines:

No carrier shall undertake the construction of a new line . . . or shall acquire or operate any line . . . or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional . . . line.

47 U.S.C. § 214(a).

² 47 C.F.R. § 63.01.

2. The Commission adopts this *Declaratory Ruling*, on its own motion, in response to questions that have been raised concerning the scope of domestic section 214 filing requirements and Rule 63.01. In this *Declaratory Ruling*, we clarify that “connecting carriers,” as defined in section 3(11) of the Act,³ are not subject to section 214 or Rule 63.01 when engaging in an acquisition of corporate control. We further clarify that, except for connecting carriers, any party, including a non-dominant carrier, that “would be a domestic interstate communications common carrier,”⁴ either before or after a proposed transaction, must obtain Commission approval prior to consummating a transaction involving an acquisition of corporate control.

3. In keeping with the pro-competitive, deregulatory goals of the Act, we also initiate a *Notice of Proposed Rulemaking* to seek comment on our proposal to streamline our rules with respect to domestic section 214 authorizations involving acquisitions of corporate control.⁵ In particular, we propose streamlined treatment of applications under section 214 of the Act for transfers of domestic interstate transmission lines through acquisitions of corporate control that require little scrutiny in order for the Commission to determine that they serve the public interest. As explained below, we request comment on the types of domestic section 214 applications that should be eligible for streamlined treatment and the streamlined procedures that should be adopted for these applications.

II. DECLARATORY RULING

4. This *Declaratory Ruling* addresses questions raised by interested parties, both formally and informally, since adoption of the Commission’s current rules governing “entry certification”⁶ under section 214.

A. Background

5. In 1999, the Commission adopted the current version of Rule 63.01, granting all carriers blanket authority under section 214 to provide domestic interstate services and to

³ 47 U.S.C. § 153(11). The Commission defines a connecting carrier as “a carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier.” 47 C.F.R. § 61.3(n).

⁴ 47 C.F.R. § 63.01.

⁵ We note that simultaneous with the release of this Notice of Proposed Rulemaking, the Common Carrier Bureau released a Public Notice clarifying the filing requirements for all domestic section 214 applications involving acquisitions of corporate control. *Common Carrier Bureau Announces Procedures for Applicants Requiring Section 214 Authorization for Acquisitions of Corporate Control*, Public Notice, DA-01-1654 (rel. July 20, 2001).

⁶ Entry certification refers to authorizations to construct, acquire, operate, or engage in transmission over lines of communication. See *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Report and Order in CC Docket No. 97-11, Second Memorandum Opinion and Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11365, ¶1 & n.1 (1999) (“1999 Streamlining Order”). Exit certification refers to authorizations to discontinue, reduce, or impair service to a community. See *id.*

construct, acquire, or operate any domestic line.⁷ This blanket authority does not extend, however, to the transfer of lines resulting from an acquisition of corporate control.⁸ As the Commission explained in the *1999 Streamlining Order*, acquisitions under section 214 can be either acquisitions of assets, such as by purchase or lease of lines, or acquisitions of corporate control, such as acquisitions of equity ownership (e.g., stock or partnership interests), veto power, or a controlling interest in a board of directors.⁹ The Commission found that acquisitions of corporate control often raise serious public interest concerns regarding the state of competition following the proposed acquisition or merger.¹⁰ The Commission also noted that such acquisitions are often contested and draw significant public comments that the Commission is bound to consider.¹¹ The Commission reasoned that the magnitude of corporate acquisitions and their potential effect on competition distinguished them from acquisitions of assets.¹² Therefore, the Commission decided to include asset acquisitions under blanket authority, while concluding that “corporate acquisitions should not be covered by blanket authority.”¹³

6. Since adoption of the current Rule 63.01, a number of parties have indicated informally to Commission staff that they are not required, or should not be required, to file applications for Commission authorization to acquire domestic interstate transmission lines through acquisitions of corporate control. Some have indicated that as “connecting” carriers,

⁷ See *id.* at 11372, ¶12; 47 C.F.R. § 63.01(a).

⁸ Rule 63.01(a) states:

Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct, acquire, or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies. This authority does not apply to acquisitions of corporate control

47 C.F.R. § 63.01.

⁹ *1999 Streamlining Order*, 14 FCC Rcd at 11374, ¶17 (citing *GTE-Telenet Merger*, 72 FCC 2d 91 (1979), in which the Commission asserted jurisdiction under section 214 to review acquisition of a resale carrier operating pursuant to section 214 authority); see also *Applications of Alascom, Inc., AT&T Corporation, and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation*, Order and Authorization, 11 FCC Rcd 732, 739, ¶ 13 (1995) (“*Alascom, Inc.*”) (pointing out that “applications filed pursuant to [s]ection 214 of the Communications Act are required for transfers of control even if no new facilities are constructed”).

¹⁰ *1999 Streamlining Order*, 14 FCC Rcd at 11374-75, ¶18. See also *id.* at 11366, 11374, ¶¶ 2, 17 & nn. 6-7 (stating that acquisitions of corporate control “entail market and economic considerations,” and citing as examples *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985 (1997), *Alascom, Inc.*, 11 FCC Rcd at 739).

¹¹ *Id.* at 11374-75, ¶18.

¹² *Id.*

¹³ *Id.*

they are exempt from the requirements of section 214 under section 2(b)(2) of the Act.¹⁴ Others have indicated that as resellers or non-dominant carriers, they have had blanket authority since the 1980s to acquire lines, and thus are not, and should not be, bound by Rule 63.01. We adopt this *Declaratory Ruling* to respond to these arguments and thereby clarify our requirements.

B. Discussion

7. After reviewing the relevant statutory provisions, we clarify that connecting carriers are not required to file domestic section 214 applications for acquisitions of corporate control. We also clarify that resellers and other non-dominant carriers are not exempt from the requirements of Rule 63.01 and must file applications for acquisitions of corporate control.¹⁵

8. *Connecting Carriers.* The Act defines a connecting carrier as a carrier described in sections 2(b)(2), (3), or (4) of the Act.¹⁶ Sections 2(b)(2), (3), and (4), in turn, generally provide that “nothing in this [Act] shall be construed to apply or to give the Commission jurisdiction with respect to” a carrier that is engaged in interstate or foreign communications solely through connection with an unaffiliated carrier.¹⁷ Although section 2(b) lists several sections of the Act that are not covered by the exemption in sections 2(b)(2) through (4), section 214 is not one of the sections listed. Because of this, and because no other statutory provision of the Act overrides the 2(b) exemption, we clarify that connecting carriers that qualify for the exemption in section

¹⁴ 47 U.S.C. § 152(b)(2).

¹⁵ As an aside, we note that, although commercial mobile radio service providers are common carriers, our rules provide that these carriers are not required to file section 214 applications for domestic services. See 47 C.F.R. § 20.15(b)(3).

¹⁶ 47 U.S.C. § 153(11).

¹⁷ 47 U.S.C. § 152(b). In their entirety, sections 152(b)(2), (3), and (4) provide:

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and Title VI, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico: except that sections 201 to 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

2(b)(2) of the Act are not required to file applications for domestic section 214 authorizations involving acquisitions of corporate control.¹⁸

9. In reaching our conclusion concerning the applicability of section 214, we note that only those carriers that fall within the specific provisions of sections 2(b)(2), (3), or (4) are statutorily exempt from section 214. In particular, a carrier that provides an interstate service by establishing a connection with another carrier that is “directly or indirectly controlling or controlled by, or under direct or indirect common control with” the first carrier may not qualify for connecting carrier status.¹⁹ In addition, because the Act applies to, and our jurisdiction reaches, all interstate carriers that are not connecting carriers,²⁰ if any party to a proposed transaction is an interstate carrier other than a connecting carrier before the proposed acquisition of corporate control, the transaction is subject to section 214 and Rule 63.01 and the Commission’s prior approval is required.

10. *Non-dominant Carriers.* In 1984, as part of the *Competitive Carrier* proceeding, the Commission adopted a rule, former Rule 63.07, granting blanket authority to non-dominant²¹ carriers to provide domestic, interstate services to any domestic point and to construct, acquire, or operate any transmission line.²² Rule 63.07 did not expressly address acquisitions of corporate control. Rather, the rule authorized any party that would be a non-dominant domestic interstate communications common carrier to provide domestic, interstate services to any domestic point and to construct, acquire, or operate any transmission line as long as it obtained all necessary authorizations from the Commission for use of radio frequencies.

11. In the *1999 Streamlining Order*, the Commission extended blanket authority to dominant carriers by adopting current Rule 63.01 and deleting Rule 63.07. Under Rule 63.01, blanket authority is granted to “[a]ny party that would be a domestic interstate communications

¹⁸ See *Application of Contel of Indiana, Inc. for Authority Pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission’s Rules and Regulations to Lease Transmission Facilities*, Memorandum Opinion and Order, 3 FCC Rcd 4298 (1988) (stating that the determination of connecting carrier status involves a range of factual determinations with respect to the operations and relationships of a particular carrier); see also *Declaratory Ruling on the Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies*, Memorandum Opinion and Order, 2 FCC Rcd 1750 (1987).

¹⁹ *Id.*

²⁰ See, e.g., 47 U.S.C. § 152(a); see also *id.* § 214(a) (covering both construction of new lines and acquisition of existing lines).

²¹ A “dominant” carrier is a carrier found by the Commission to have market power (*i.e.*, power to control prices). 47 C.F.R. § 61.3(q). A “non-dominant” carrier is a carrier not found to be dominant. 47 C.F.R. § 61.3(y).

²² See *1999 Streamlining Order*, 14 FCC Rcd at 11367, ¶ 4; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Competitive Carrier Fifth Report and Order*); 47 C.F.R. § 63.07(a)(1996) (“Any party that would be a non-dominant domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct, acquire, or operate any transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.”).

common carrier,” and the qualification that such party be “non-dominant” was removed.²³ In adopting Rule 63.01, the Commission also expressly addressed acquisitions of corporate control and, based upon the record developed in that proceeding, concluded that blanket authority should not extend to those types of transactions. Rule 63.01 does not distinguish between dominant and non-dominant carriers, and nothing in the *1999 Streamlining Order* indicates that the new language concerning acquisitions of corporate control was inapplicable to non-dominant carriers. Moreover, in granting blanket authority to all domestic carriers, the Commission affirmatively contemplated the appropriate regulatory treatment of non-dominant carriers.²⁴ There is nothing in either the *1999 Streamlining Order* or the plain language of Rule 63.01 to support the contention that acquisitions of corporate control involving non-dominant carriers are covered under the blanket authority of Rule 63.01. Therefore, we clarify that non-dominant carriers are required to file section 214 applications and obtain Commission approval before consummating a transaction involving an acquisition of corporate control involving a domestic interstate line.

III. NOTICE OF PROPOSED RULEMAKING

12. In this *Notice of Proposed Rulemaking*, we propose streamlined treatment of applications under section 214 to acquire domestic transmission lines through acquisitions of corporate control where, based upon predetermined criteria, it would require little scrutiny for the Commission to determine that grant of the applications would serve the public interest. We tentatively conclude that, at a minimum, we should streamline such applications for acquisitions of corporate control in a manner similar to the way in which we have previously streamlined domestic section 214 applications to discontinue service. Specifically, we seek comment on whether we should shorten the review period for a predetermined class of domestic section 214 applications, so that absent written notice to the contrary from the Commission, transfers involving a predetermined class of non-dominant carriers would automatically be granted after 31 days, and transfers involving a predetermined class of one or more dominant carriers would automatically be granted after 60 days. Additionally, we seek comment on: (1) what criteria to employ to determine eligibility for streamlined review; (2) how to treat a streamlined domestic section 214 application that is accompanied by a request for waiver of Commission rules; (3) whether the Commission should have discretion to remove an application from streamlined processing; (4) how the Common Carrier Bureau should treat a streamlined application when the applicants file related applications in other bureaus; and (5) whether the Commission should, as an alternative to streamlining, relieve all non-dominant carriers, or certain categories of non-dominant carriers, that have blanket domestic section 214 authority from filing transfer of control applications.

²³ 47 C.F.R. § 63.01.

²⁴ See *1999 Streamlining Order*, 14 FCC Rcd at 11370, ¶ 8 (considering whether to forbear from applying section 214 to non-dominant carriers); *id.* at 11373, ¶¶ 15-16 (noting that the public interest required blanket authority be adopted rather than forbearance so that the Commission would retain an enforcement mechanism against abusive practices by carriers, including non-dominant carriers).

A. Background

13. Because procedures governing other Commission certification and authorization processes may be relevant to our instant inquiry, we briefly describe some of those procedures below, including the domestic section 214 facilities authorization process for common carriers, the rules that apply to applications to provide international common carrier service under section 214, and the rules applicable to transfers of control of licenses involving commercial mobile radio services (CMRS) under section 310.²⁵

1. Entry and Exit Certification Rules for Domestic Common Carriers

14. As explained above, on June 30, 1999, the Commission adopted its *1999 Streamlining Order*, which simplified “entry certification” for facilities under section 214 by conferring “blanket authority” on all domestic interstate carriers, whether dominant or non-dominant, to construct and operate domestic transmission lines and to acquire lines except through acquisitions of corporate control.²⁶ By granting carriers blanket authority to operate, instead of simply rescinding the requirement that carriers obtain authorization to operate, the Commission retains the ability to enforce our rules.²⁷ Thus, the grant of blanket authority permits the construction, operation and certain acquisitions of domestic interstate lines while retaining an enforcement tool if a carrier engages in behavior inconsistent with its obligations under our rules.

15. As indicated above, the blanket authority granted under section 63.01 of the Commission’s rules does not apply to authorizations to acquire lines through “acquisitions of corporate control,” *i.e.*, direct or indirect acquisitions of control by either a dominant or non-dominant carrier.²⁸ Applications involving acquisitions of corporate control require affirmative action by the Commission before the acquisition can occur. The Commission found that acquisitions of corporate control, *e.g.*, equity ownership (such as stock or partnership interests), veto power, or a controlling interest in a board of directors, could raise serious public interest

²⁵ See *id.* at 11364; see also *In the Matter of 1998 Biennial Regulatory Review—Review of International Common Carrier Regulations*, Report and Order, 14 FCC Rcd 4909 (1999) (“*International Streamlining Order*”); *In the Matter of Federal Communications Bar Association’s Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, et al.*, Memorandum Opinion and Order, 13 FCC Rcd 6293 (1998) (“*CMRS Forbearance Order*”). CMRS is defined as “any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.” *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1417, ¶ 11 (1994) (citing 47 U.S.C. § 332(d)(11)).

²⁶ *1999 Streamlining Order*, 14 FCC Rcd at 11364. In this context, “blanket authority” refers to a deregulatory measure in which the Commission broadly granted section 214 authority to all carriers to construct, operate, or engage in transmission over lines of communication without prior approval from the Commission.

²⁷ *Id.* at 11372, ¶ 12.

²⁸ 47 C.F.R. § 63.01(a); see also *1999 Streamlining Order*, 14 FCC Rcd at 11365-66, ¶ 2.

concerns with respect to competition, and were likely to elicit significant public comment.²⁹ By contrast, with acquisitions of assets, the new operator is not required to submit a domestic section 214 application for Commission approval.³⁰ The Commission found that acquisitions of assets rarely elicited public comment, were “limited in scope,” and were generally granted because they raised few public interest concerns.³¹

16. The *1999 Streamlining Order* also amended Rule 63.71 to streamline significantly so-called “exit certification” requirements for carriers discontinuing operations. Exit requirements ensure that service to communities will not be discontinued without advance notice to the public and Commission authorization. As amended by the *1999 Streamlining Order*, Rule 63.71 provides that a non-dominant carrier automatically obtains Commission approval to cease providing service on the 31st day after filing a discontinuance application.³² Likewise, a dominant carrier automatically obtains Commission approval to cease providing service 60 days after filing a discontinuance application.³³ Under the Commission’s rules, the Commission retains the discretion to remove a discontinuance application from streamlined processing.³⁴

2. Streamlining Rules for International Common Carrier Applications

17. Under Rule 63.12, international section 214 applications meeting certain criteria may be granted without a formal written order 14 days after public notice.³⁵ As described below, a transfer of control or assignment is eligible for this streamlined procedure in circumstances where an initial, *i.e.*, new international section 214 application filed by the transferee or assignee would be eligible for streamlined processing.³⁶ Even where the Commission receives a timely-filed petition to deny, the Commission retains the discretion to grant an application on a streamlined basis.³⁷ Carriers may use the streamlined authorization process to obtain the same authorizations that any affiliate (*e.g.*, a sister company) with identical ownership has already

²⁹ *1999 Streamlining Order*, 14 FCC Rcd at 11374-75, ¶ 18.

³⁰ The discontinuing operator, however, must file an application to discontinue service under Rule 63.71. Because of this requirement, the Commission determined that it was unlikely that a transaction would be structured as an asset acquisition rather than an acquisition of corporate control for the purpose of avoiding Commission review of the transaction. *Id.* at 11374, ¶ 17, n.55.

³¹ *Id.* at 11374-75, ¶ 18.

³² *Id.* at 11380, ¶ 29; 47 C.F.R. § 63.71(c).

³³ *Id.*

³⁴ 47 C.F.R. § 63.71.

³⁵ *Id.* at § 63.12.

³⁶ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, IB Docket Nos. 97-142 and 95-22, 12 FCC Rcd 23891, 24032-33, ¶ 322 (1997), *on recon.*, 15 FCC Rcd 18158 (2000).

³⁷ *International Streamlining Order*, 14 FCC Rcd at 4914-15, 4919-20, ¶¶ 12-13, 23-24.

obtained.³⁸ Rule 63.12 also provides for streamlined processing of applications filed by carriers seeking to provide service on routes where an affiliated foreign carrier has either no facilities, limited facilities, or only mobile wireless facilities, in the destination market.³⁹ Additionally, the streamlined international rules eliminate the requirement for prior approval of *pro forma* assignments and transfers of control of international 214 authorizations.⁴⁰

18. Rule 63.12 sets forth specific exceptions to streamlined treatment of international applications. For example, streamlining does not apply where the applicant seeks to resell switched or private line services of an affiliated dominant U.S. carrier (unless the applicant agrees to be classified as a dominant carrier to the affiliated destination country).⁴¹ Nor does streamlining apply where the international application seeks to provide switched basic services over private lines to a country the Commission has not approved to provide switched services over private lines.⁴² Streamlining also generally does not apply where the applicant is affiliated with a foreign carrier in a destination market, and the foreign carrier has market power in the destination market, unless the applicants agree to be classified as dominant on those routes.⁴³ Finally, under Rule 63.12, the Commission maintains its authority to identify those particular applications that warrant additional scrutiny and public comment, and to exclude those applications from streamlined processing initially or to remove those applications from streamlining within 14 days, by written notice to the applicants.⁴⁴ If streamlining does not apply, the rule provides that the Commission will affirmatively act upon the application within 90 days

³⁸ *Id.* at 4911, ¶ 6.

³⁹ 47 C.F.R. § 63.12(c)(1)(iii); *International Streamlining Order*, 14 FCC Rcd at 4922, ¶ 29.

⁴⁰ *International Streamlining Order*, 14 FCC Rcd at 4927-29, ¶¶ 41-45. A *pro forma* assignment or transfer of control is generally one that does not result in a change in ultimate control of the carrier. *See* 47 C.F.R. § 63.24(a)(1)-(6). On November 13, 2000, the Commission adopted a *Notice of Proposed Rulemaking* that proposes, among other things, to amend its rules on *pro forma* assignments and transfers of control of international section 214 authorizations to provide carriers with greater flexibility and clarity, and to align the international procedures with those that apply to commercial mobile radio service providers. *In the Matter of 2000 Biennial Regulatory Review Amendment of Parts 43 and 63 of the Commission's Rules*, IB Docket No. 00-231, 15 FCC Rcd 24264, 24272-73, 24274, ¶¶ 18-20, 25 (2000) ("*2000 Biennial Regulatory Review*"). The Commission also proposed to end requirements that dominant international carriers seek prior agency approval before discontinuing service on a route, except where a carrier possesses market power for international service in the United States. *Id.* at ¶ 29.

⁴¹ 47 C.F.R. § 63.12(c)(2).

⁴² *Id.* at § 63.12(c)(3).

⁴³ *See id.* at § 63.12(c)(1)(i)-(v).

⁴⁴ *International Streamlining Order*, 14 FCC Rcd at 4920-21, ¶ 25-26 ("For example, additional scrutiny may be required where an application may present a significant potential adverse impact on competition, or where an assignment or transfer of control could eliminate a significant current or future competitor."); 47 C.F.R. § 63.12(c)(4).

or provide notice that an additional 90-day period is needed for review.⁴⁵ Successive 90-day periods are permitted.⁴⁶

3. Streamlining Rules Involving Commercial Mobile Radio Services Applications

19. Section 310(d) of the Act prohibits any assignment or transfer of control of a radio license without obtaining prior Commission consent.⁴⁷ However, the Commission forbears from enforcing its section 310(d) requirements with respect to transfers or assignments of radio licenses used by telecommunications carriers to provide CMRS when the transaction does not involve a “substantial change” in ownership or control, referred to as a *pro forma* transaction.⁴⁸ Where no substantial change of control would result from the transfer or assignment, no prior Commission application or approval is required.⁴⁹ Where the proposed transfer or assignment would result in a substantial change of *de jure* or *de facto* control, the transaction is not treated as *pro forma* and is outside the scope of the Commission’s forbearance in the *CMRS Forbearance Order*.⁵⁰ Licensees bear the initial responsibility for determining whether a transaction merits *pro forma* treatment.⁵¹ The Commission reserves its authority, however, to determine that a transaction involving transfers of commercial mobile radio services and classified by the licensee as *pro forma* should in fact be classified otherwise.⁵²

⁴⁵ 47 C.F.R. § 63.12(d).

⁴⁶ *Id.*

⁴⁷ 47 U.S.C. § 310(d); *see also* 47 U.S.C. § 309(d)(1), which requires the Commission to allow 30 days after public notice of acceptance for filing of broadcast, common carrier and certain other applications to permit petitions to deny to be filed.

⁴⁸ *CMRS Forbearance Order*, 13 FCC Rcd at 6299, ¶ 9. There are certain exceptions to this forbearance rule, which are not applicable to our present discussion.

⁴⁹ *Id.* at 6295, ¶ 2.

⁵⁰ *De jure* control exists where one equity holder, or two or more equity holders voting together own or control fifty percent or more of voting equity. *De facto* control is defined as actual control of the licensee, and primarily applies where the party or entity in question has the power to control or dominate management of the licensee. *De facto* control is determined on a case-by-case basis. *Id.* at 6295, 6297, ¶¶ 2, 7.

⁵¹ *Id.* at 6299, ¶ 9.

⁵² *Id.* Among the criteria the Commission considers are: (a) the size of an entity’s ownership interest; (b) the existence of power to constitute or appoint more than fifty percent of the board of directors or partnership management committee; (c) the ability to make employment decisions, control day-to-day operations, and play a role in major management decisions; (d) the existence of authority to pay financial obligations, including expenses arising out of operations; (e) the ability to receive monies and profits from the facility’s operations; and (f) the existence of unfettered use of all facilities and equipment. *Id.* at 6297-98, ¶ 7.

B. Discussion

20. We propose to streamline our requirements for approving transfers of domestic section 214 authorizations involving certain types of acquisitions of corporate control. We tentatively conclude that a substantial number of such transactions do not raise public interest concerns and therefore should be granted on an expedited basis.⁵³ Identifying certain classes of applications that are eligible for streamlined review will provide regulatory certainty and predictability and serve to enhance the transparency of the authorization process. Accordingly, we seek comment on whether, as we have tentatively concluded, there are categories of applications that should automatically qualify for streamlined treatment, and if so, what criteria we should use in identifying those applications.⁵⁴ Should combinations involving certain product or geographic markets be accorded streamlined review, and if so, what role should applicants, commenters and the Commission each play in defining the applicable product or geographic markets? Moreover, we seek comment whether certain types of transactions should always qualify for streamlined treatment. For example, should a proposed transfer of control in the face of imminent business failure or reorganization under Chapter 11 of the U.S. Bankruptcy Act routinely receive streamlined treatment or, as discussed below, should the Commission undertake a more detailed analysis where the transaction may pose public interest concerns?⁵⁵ To the extent transactions involving financially troubled firms do in fact raise public interest concerns, we seek comment whether a “failing firm” defense, or something akin to this doctrine, should apply to the Commission’s evaluation of such mergers.⁵⁶

21. In establishing such categories, the Commission hopes to draft rules that are simple and clear. Such provisions should facilitate enforcement, aid predictability and reduce controversy over whether a proposed transfer of control is eligible for streamlined treatment. Thus, in seeking comments on the proposals set forth below, the Commission also seeks

⁵³ See, e.g., *Common Carrier Bureau Grants Consent for Transfer of Control to Smart City Telecommunications of Authorizations Held by Vista-United Telecommunications*, Public Notice, 15 FCC Rcd 24910 (2000) (granting section 214 authorization by public notice after receiving no public comments).

⁵⁴ For example, if it is widely believed that a transfer involving two long distance resellers is not likely to draw significant public comment, such an application could be one type of transaction permitted streamlined review.

⁵⁵ 11 U.S.C. §§ 1101-1174 (1998).

⁵⁶ We note that in antitrust law, there is no exception from pre-merger review for the sale of bankrupt firms. However, the “failing firm” doctrine acknowledges that a competitor’s acquisition of a bankrupt firm in some cases may not lessen competition in violation of Section 7 of the Clayton Act. Merging firms relying on this defense in the antitrust context have had a difficult burden to prove that the acquired firm is truly failing and that acquisition by the potential acquiror would have the least anticompetitive result, or that the proposed acquiror is the only purchaser available. See, e.g., *Citizen Publishing Co. v. United States*, 394 U.S. 131, 137-38 (1969) (parties permitted to consummate acquisition where purchaser was “last straw at which the [failing firm] grasped”); *Pillsbury Company*, 93 F.T.C. 966, 1032 (1979) (“there must have been a good faith effort to determine whether there were other purchasers available whose acquisition of the company would have resulted in less anticompetitive effects”). See also U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 5.1 (1992, as amended 1997), reprinted in 4 Trade Reg. Rep. (CCH) P 13104 (“Merger Guidelines”).

information regarding which eligibility criteria will maximize the predictability of our processes while continuing to fulfill our statutory obligations.

22. The Regulatory Flexibility Act requires the Commission to consider the possible significant economic impact that streamlining may have on small entities.⁵⁷ In this *Notice of Proposed Rulemaking*, we expressly seek proposals that would reduce legal and business burdens associated with filing domestic section 214 applications. For example, we seek comment whether the size of the parties, either in terms of access lines, revenues or some other measure, should be a factor in determining whether a carrier should be afforded expedited treatment with minimal filing requirements? Streamlined treatment could apply, for example, if both the acquiring and acquired companies have net sales or total assets below a certain threshold. Alternatively, the size of the transaction could be a qualifying factor for streamlined treatment. Should the number of local exchange areas in which a carrier operates or the number or percentage of lines (or voice-grade equivalents) that an applicant uses to serve consumers within a particular geographic area be a qualifying factor when it is below a certain threshold?

23. Furthermore, we observe that a carrier's market share, as a measure of size relative to other competitors, may serve as a proxy for market power. It therefore may be relevant for purposes of streamlining that the applicants lack substantial market shares and that there are sufficient other competitors in the market so that the transaction would not result in a significant increase in market concentration. We seek comment whether applicants should qualify for streamlined treatment depending on what their post-merger market share would be. For example, if the combined market share were to fall beneath a certain level, should the transaction be eligible for streamlined review? If so, what should this threshold be? We also seek comment on how those market share and market concentration levels should be calculated, *e.g.*, by access lines, revenues, etc.⁵⁸

24. Commenters should also address whether certain criteria should automatically disqualify applicants from streamlined review. Such criteria could include whether one or both of the merging carriers are incumbent local exchange carriers, or otherwise are dominant carriers, or whether either carrier is affiliated with a third-party dominant carrier. Similarly, we seek comment on whether the fact that a carrier is a facilities-based provider should trigger removal from streamlining treatment. We also seek comment on whether there are other factors that may affect the potential for public interest harms resulting from the acquisition of corporate control and therefore should result in removing the application from streamlining.

⁵⁷ See 5 U.S.C. § 603. The Regulatory Flexibility Act, 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

⁵⁸ Although we note that the antitrust agencies use the Herfindahl-Hirschman Index of market concentration to estimate roughly the competitive impact of mergers, we are not specifically advocating that the Commission duplicate those procedures. See Merger Guidelines, § 1.5.

25. As stated above, the Commission's 1999 *Streamlining Order* did not extend blanket authority to acquisitions of corporate control.⁵⁹ The Commission found that—unlike transfers of assets—acquisitions of equity ownership (such as stock or partnership interests), veto power, or a controlling interest in a board of directors, for example, raised serious public interest concerns with respect to competition, and were likely to elicit significant public comment.⁶⁰ However, we believe it is appropriate within the context of this *Notice of Proposed Rulemaking* to try to harmonize Commission rules governing domestic section 214 applications where appropriate. Therefore, we seek comment whether acquisitions of corporate control, structured as asset acquisitions, could have the potential to adversely impact the public interest. Specifically, we ask whether the Commission's current regulatory distinction between asset acquisitions and stock acquisitions may provide an incentive for some firms to structure transactions to avoid rigorous Commission review.⁶¹ Commenters asserting that this existing distinction is not warranted should describe how the Commission could best harmonize its requirements and, at the same time, ensure that asset acquisitions that are unlikely to raise public interest concerns, such as sales of exchanges, are not subject to unnecessary scrutiny.

26. The Commission seeks comment on how best to streamline the application process to reduce the regulatory burden on applicants and simplify application procedures. We ask commenters to address whether the Commission should adopt review periods of the same length for streamlined domestic transfers of control under section 214 as apply to discontinuances so that the rules would be the same for both types of domestic section 214 transactions. For example, the rule for discontinuances of domestic service provides a 31-day review period for applications involving non-dominant carriers and a 60-day review period involving a dominant carrier.⁶² Therefore, we seek comment on whether a 31-day review period for non-dominant carriers and a 60-day review period for dominant carriers should similarly apply with respect to acquisitions of corporate control, even though the analytical review process may differ from that of discontinuances. Under this arrangement, applications that qualify for streamlined treatment could be granted automatically without further written notice at the end of the waiting period. The 60-day review period for dominant carriers may be warranted so that the public would have a longer opportunity to provide detailed comments and the Commission would have sufficient time to review these transactions. Moreover, a transfer of control involving a dominant carrier may be more likely to result in loss of service for consumers if, after the merger, consumers would lack a competitive alternative for telecommunications services. Commenters may also comment on lengthier or shorter review periods, or whether review periods of the same length

⁵⁹ 1999 *Streamlining Order*, 14 FCC Rcd at 11374-75, ¶ 18.

⁶⁰ *Id.*

⁶¹ We note that in the antitrust context, both the acquisition of stocks and the acquisition of assets of another company are subject to antitrust pre-merger review. See *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, 15 U.S.C. § 18(a) (1994); see also *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-23 (1962) (describing Congress's efforts in 1950 to "plug the loophole" in the Clayton Act, which exempted asset acquisitions from antitrust review).

⁶² 47 C.F.R. § 63.71.

should apply to all transactions regardless of whether the applicants are classified as dominant or non-dominant carriers.

27. The Commission also seeks comment on whether certain transactions merit treatment similar to that currently afforded *pro forma* assignments and transfers of control in the wireless and international context.⁶³ For example, where an assignment or transfer of control is *pro forma* within the meaning of Rule 63.24, an assignee or carrier that is the subject of a *pro forma* transfer of control need not obtain prior Commission approval. However, a *pro forma* assignee must notify the Commission no later than 30 days after the assignment is consummated.⁶⁴ The Commission has received notices of *pro forma* assignments or transfers of control of section 214 authorizations in the case of involuntary dispositions, including where the carrier's status has changed to "Debtor-in-Possession" after filing for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code.⁶⁵ In such cases, the Commission has viewed the transfer of control of section 214 authorizations to the "Debtor-in-Possession" as a *pro forma* transfer.⁶⁶ We request comment on whether there exists a class of domestic section 214 transactions that should be similarly treated, eliminating the need for prior Commission approval but requiring the carrier to notify the Commission of the transfer within a designated number of days.

28. We also seek comment on what, if any, treatment should apply where an internal corporate restructuring results in a new or existing subsidiary assuming interstate carrier operations under section 214 from an existing parent or affiliated company.⁶⁷ Such transactions may be afforded *pro forma* treatment, which requires notification only, with no prior approval. Alternatively, we could require a filing and a predetermined waiting period; or some other process may apply. We tentatively conclude that a provision should accompany any new rule regarding internal corporate restructurings stating that the applicant would be subject to all existing conditions of service so that, for example, a carrier that begins providing service through a differently-named subsidiary still would be subject to existing slamming and tariffing rules.⁶⁸

⁶³ See *id.* at § 63.24. Additionally, in a *Notice of Proposed Rulemaking* adopted November 13, 2000, the Commission proposed, among other things, to amend its rules governing *pro forma* assignments and transfers of international section 214 authorizations to provide carriers with greater flexibility and clarity, and to align the international procedures with those that apply to commercial mobile radio service providers. See *2000 Biennial Regulatory Review*, 15 FCC Rcd at 24267, ¶ 7.

⁶⁴ Such notification may be in the form of a letter certifying that the assignment does not result in a change of the carrier's ultimate control. See 47 C.F.R. 63.24(b).

⁶⁵ E.g., Letter from Margaret L. Tobey, Joan E. Neal, Counsel for Viatel, Inc., to Magalie Roman Salas, Secretary, FCC, May 7, 2001.

⁶⁶ *Id.*

⁶⁷ E.g., Letter from Martin L. Stern and David Thomas, Counsel for AFN Communications, LLC, to Magalie Roman Salas, May 9, 2001.

⁶⁸ See 47 C.F.R. § 63.12(c)(vi).

29. We expect commenters to identify other types of transactions and corporate restructurings that would require little scrutiny for the Commission to determine that grant of the applications would serve the public interest. Similarly, we request comment on other types of transactions and corporate restructurings where *pro forma* treatment should apply. Commenters may wish to consult Rule 63.24 on *pro forma* assignments and transfers of control in the international context for an illustrative but non-exhaustive list of the kinds of transactions that do not result in a change in the carrier's ultimate control.⁶⁹ Moreover, we seek comment on whether *de jure* and *de facto* standards used by the Wireless Telecommunications Bureau to determine whether a transfer of control would result in a "substantial change" in ownership may have some applicability in the context of domestic section 214 authorizations.⁷⁰

30. We propose that applicants seeking streamlined review will be required to provide information necessary to verify eligibility for streamlined status. We also believe that it is possible to approve applications for domestic section 214 authorization in a more expeditious manner to the extent that applicants provide information sufficient to show that the transaction raises no public interest concerns (*e.g.*, the transaction will not have an adverse effect on competition in any relevant market). We seek comment on what information applicants should provide to assist the Commission in determining whether an application merits streamlined treatment.

31. Applicants filing domestic section 214 applications sometimes request waivers of Commission rules. For example, in the *Bell Atlantic-GTE Order*,⁷¹ the Commission considered whether to grant Applicants' request for a waiver of the affiliate transaction rules, which ensure arm's length transactions between a dominant incumbent LEC and its nonregulated affiliate. The Commission denied the request and stated its reasoning in the order.⁷² We seek comment on how streamlined processing would affect commenters' ability to adequately comment on the variety of waiver requests that applicants may submit. Is there a strong policy basis to resolve waiver requests only in non-streamlined proceedings? In addition, should the filing of a waiver request extend the time period for automatically granting a streamlined application? We tentatively conclude that the Commission should make a determination on a case-by-case basis whether to accord streamlined treatment to domestic section 214 applications that are accompanied by waiver requests.

⁶⁹ 47 C.F.R. § 63.24(a)(1)-(6).

⁷⁰ See *CMRS Forbearance Order*, 13 FCC Rcd at ¶¶ 2, 7. We note that the Commission is currently considering whether to amend its rules governing *pro forma* assignments and transfers of international section 214 authorizations to more closely match those used for the assignment and transfer of control of CMRS licenses. See *2000 Biennial Regulatory Review*, 15 FCC Rcd at 24267-73, ¶¶ 7-20.

⁷¹ *In Re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (rel. Jun. 16, 2000) ("*Bell Atlantic-GTE Order*").

⁷² *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14084-86, ¶¶ 94-95.

32. We also tentatively conclude that the Commission should reserve its authority to remove applications from streamlined review, as it does in the case of international and wireless license transfers. Assuming the Commission retains its authority to remove applications from streamlined review, we ask parties to address the circumstances under which the streamlined review process should be halted and a written decision issued. Rule 63.12 gives the Commission discretion to provide streamlined grant of international section 214 applications in 14 days, even in cases where the Commission receives public comment.⁷³ We seek comment on whether similar discretion would be appropriate in the domestic common carrier context, or whether specific criteria should be used to remove the application from streamlined processing. For example, we seek comment on whether the existence of a related application in another bureau should cause the Common Carrier Bureau to remove an application from streamlined review or otherwise adjust its timeline for reviewing the application.⁷⁴ Commenters should also address other considerations that should cause the Commission to remove an application from streamlined review, and address the impact of our proposal to automatically grant streamlined applications on the public's ability to file comments.

33. Recognizing that the primary purpose of this item is to streamline the Commission's procedures pertaining to transfers of domestic section 214 authorizations, we also seek comment on an alternative to streamlining. Specifically, we seek comment on whether it would serve the public interest to amend our rules to relieve all non-dominant carriers, or certain categories of non-dominant carriers, that have blanket domestic section 214 authority from filing transfer of control applications. The rule in effect from 1984 to 1999, Rule 63.07, could be read to grant domestic non-dominant carriers blanket authority to acquire lines in all circumstances, including those involving a change in corporate control.⁷⁵ As discussed above in the *Declaratory Ruling*, however, the *1999 Streamlining Order* specifically requires all domestic interstate carriers, including dominant and non-dominant, to file applications for transfers of control. In the *1999 Streamlining Order*, the Commission did not explicitly state whether it intended to clarify existing policies relating to transfers of control of non-dominant carriers, or rather, whether the Commission intended to impose a new filing requirement on non-dominant carriers.

⁷³ 47 C.F.R. § 63.12(a).

⁷⁴ As a model, commenters may look to the International Bureau, which often conditions streamlined grants of international 214 assignments and transfers to preclude consummation of a transaction for which other applications are pending before other bureaus, and qualifies those grants to indicate that they do not prejudice other pending applications. See, e.g., International Authorizations Granted, DA 01-849, Rep. No. TEL-00377 (rel. Apr. 5, 2001) (qualifying authorization for transfer of Chorus Networks, Inc. by noting that “[s]treamlined grant of these applications is conditioned upon Applicants' agreement not to transfer these authorizations unless and until the Commission grants the related domestic section 214 and wireless transfer applications” and that “[s]treamlined grant would in no way prejudice the outcome of the pending domestic section 214 and wireless transfer applications.”)

⁷⁵ 47 C.F.R. § 63.07(a) (1996) (“Any party that would be a non-dominant domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct, acquire, or operate any transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.”).

34. We note that a number of the transactions that have raised significant public interest concerns in recent years have involved the presence of a *dominant* carrier such as an incumbent LEC.⁷⁶ With respect to transactions involving non-dominant carriers that raised public interest concerns, those transactions also included the transfer of Title III licenses and international section 214 authorizations.⁷⁷ In such cases, the Commission is required to make a public interest finding with respect to the proposed transaction, regardless whether the carriers require domestic section 214 authorization for the transfer because the transfers of Title III licenses are involved.⁷⁸ We seek comment on whether the public interest standard associated with transfers of Title III licenses and section 214 international authorizations is broad enough to encompass concerns about acquisitions of non-dominant carriers providing domestic interstate services or facilities that are subject to the blanket authority. If the public interest review is not broad enough in such circumstances, should the Commission explicitly retain authority to address public interest concerns raised by an acquisition of corporate control of a non-dominant domestic interstate carrier despite the fact that a domestic section 214 transfer of control application would not be filed with the Commission? We also seek comment on whether there are circumstances under which non-dominant carriers that do not hold Title III or international section 214 licenses should be required to file section 214 applications, for example when the transaction is likely to raise public interest concerns. We seek comment on whether and how we would be able to identify this subgroup of transactions or carriers. Furthermore, if we were able to successfully identify and describe such a subgroup, we seek comment on whether non-dominant carriers would have an incentive to modify their corporate structures or their transactions to avoid filing a transfer of control application and thereby escape Commission scrutiny.

IV. PROCEDURAL MATTERS

A. Ex Parte Presentations

35. These matters shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁷⁹ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence

⁷⁶ See, e.g., *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999).

⁷⁷ See, e.g., *Common Carrier Bureau Announces Public Forum on MCI WorldCom, Inc. and Sprint Corp. Applications for Transfer of Control*, CC Docket No. 99-333, Public Notice, DA 00-672 (CCB rel. Mar. 27, 2000) (announcing public forum to provide an opportunity for further discussion of issues raised by WorldCom and Sprint applications to transfer control of corporations holding Commission licenses and authorizations pursuant to sections 214 and 310(d) of the Act).

⁷⁸ Rule 63.01 grants blanket authority to a domestic interstate carrier “as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.” 47 C.F.R. § 63.01.

⁷⁹ 47 C.F.R. §§ 1.1200 *et seq.*

description of the views and arguments presented is generally required.⁸⁰ Other rules pertaining to oral and written presentations are set forth in section 1.1206(b) as well.

B. Initial Regulatory Flexibility Act Analysis

36. Section V sets forth the Commission's IRFA regarding policies and rules proposed in the *Declaratory Ruling and Notice of Proposed Rule Making*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Declaratory Ruling and Notice of Proposed Rule Making*. The Commission will send a copy of the *Declaratory Ruling and Notice of Proposed Rule Making*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁸¹ In addition, the *Declaratory Ruling and Notice of Proposed Rule Making* will be published in the Federal Register.⁸²

C. Comment Filing Procedures

37. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,⁸³ interested parties may file comments on or before **30 days after Federal Register publication of this *Declaratory Ruling and Notice of Proposed Rule Making***, and reply comments on or before **60 days after Federal Register publication of this *Declaratory Ruling and Notice of Proposed Rule Making***. All filings should refer to CC Docket No. 01-150. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.⁸⁴ Comments filed through ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, which in this instance is CC Docket No. 01-150. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address.>" A sample form and directions will be sent in reply.

38. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, Room TW-B204, 445 12th St. S.W., Washington, D.C. 20554.

⁸⁰ See 47 C.F.R. § 1.1206(b)(2).

⁸¹ See 5 U.S.C. § 603(a).

⁸² *Id.*

⁸³ 47 C.F.R. §§ 1.415, 1.419.

⁸⁴ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

39. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Janice Myles, Policy & Program Planning Division, Common Carrier Bureau, 445 12th Street, S.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, CC Docket No. 01-150), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036.

40. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

41. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.⁸⁵ We direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in the *Declaratory Ruling and Notice of Proposed Rulemaking* in order to facilitate our internal review process.

V. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

42. As required by the Regulatory Flexibility Act (RFA),⁸⁶ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Declaratory Ruling and Notice of Proposed Rule Making*. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Declaratory Ruling and Notice of Proposed Rule Making* provided above in section IV(D). The Commission will send a copy of the *Declaratory Ruling and Notice of Proposed Rule Making*,

⁸⁵ See 47 C.F.R. § 1.49.

⁸⁶ See 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

43. including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.⁸⁷ In addition, the *Declaratory Ruling and Notice of Proposed Rule Making* and IRFA (or summaries thereof) will be published in the Federal Register.⁸⁸

A. Need for, and Objectives of, the Proposed Rules

44. The Commission has initiated this proceeding to seek comment on how it might improve and streamline applications under section 214 to acquire domestic transmission lines through acquisitions of corporate control that require little scrutiny in order for the Commission to determine that they serve the public interest. We also propose to shorten the review periods for transfers of control. In the *Declaratory Ruling*, we clarify that connecting carriers are not required to file section 214 applications for acquisitions of corporate control, and that resellers and other non-dominant carriers must file applications for acquisitions of corporate control.

B. Legal Basis

45. The legal basis for any action that may be taken pursuant to the NPRM is contained in sections 4, 201-202, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 201-202, 303 and 403, and sections 1.1, 1.411 and 1.412 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.411 and 1.412.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

46. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rulemaking, if adopted.⁸⁹ The Regulatory Flexibility Act defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁹⁰ In addition, the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act.⁹¹ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁹²

47. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless

⁸⁷ 5 U.S.C. § 603(a).

⁸⁸ 5 U.S.C. § 603(a).

⁸⁹ 5 U.S.C. § 603(b)(3).

⁹⁰ 5 U.S.C. § 601(6).

⁹¹ 5 U.S.C. § 601(3).

⁹² 15 U.S.C. § 632.

entities, appears to be data the Commission publishes in its *Trends in Telephone Service* report.⁹³ However, in a recent news release, the Commission indicated that there are 4,144 interstate carriers.⁹⁴ These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone service, providers of telephone exchange service, and resellers.

48. The SBA has defined establishments engaged in providing "Radiotelephone Communications" and "Telephone Communications, Except Radiotelephone" to be small businesses when they have no more than 1,500 employees.⁹⁵ Below, we discuss the total estimated number of telephone companies falling within the two categories and the number of small businesses in each, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

49. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."⁹⁶ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.⁹⁷ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

50. Total Number of Telephone Companies Affected. The U.S. Bureau of the Census ("Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year.⁹⁸ This number contains a variety of

⁹³ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

⁹⁴ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

⁹⁵ 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) codes 4812 and 4813. *See also* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987).

⁹⁶ 15 U.S.C. § 632(a)(1).

⁹⁷ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996).

⁹⁸ U.S. Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("1992 Census").

different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, covered specialized mobile radio providers, and resellers. It seems certain that some of these 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."⁹⁹ For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by the proposed rules, herein adopted.

51. Wireline Carriers and Service Providers. The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992.¹⁰⁰ According to the SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.¹⁰¹ All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500 employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small incumbent LECs that may be affected by the proposed rulemaking. We further note that some of these small entities may be "connecting carriers," as defined in section 3(11) of the Act,¹⁰² and would not be subject to section 214 or Rule 63.01 when engaging in an acquisition of corporate control¹⁰³ and thus would not require prior Commission approval to consummate a transaction involving an acquisition of corporate control.

52. Local Exchange Carriers. Neither the Commission nor the SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless)

⁹⁹ See 15 U.S.C. § 632(a)(1).

¹⁰⁰ 1992 Census, *supra*, at Firm Size 1-123.

¹⁰¹ 13 C.F.R. § 121.201, SIC Code 4813; 1997 NAICS 51331.

¹⁰² 47 U.S.C. § 153(11). The Commission defines a connecting carrier as "a carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier." 47 C.F.R. § 61.3(n).

¹⁰³ 47 C.F.R. § 63.01.

companies.¹⁰⁴ According to the most recent *Trends in Telephone Service* data, 1,348 incumbent carriers reported that they were engaged in the provision of local exchange services.¹⁰⁵ We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that fewer than 1,348 providers of local exchange service are small entities or small incumbent LECs that may be affected by the proposed rulemaking.

53. Interexchange Carriers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.¹⁰⁶ According to the most recent *Trends in Telephone Service* data, 171 carriers reported that they were engaged in the provision of interexchange services.¹⁰⁷ We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 171 small entity IXCs that may be affected by the proposed rulemaking.

54. Competitive Access Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.¹⁰⁸ According to the most recent *Trends in Telephone Service* data, 212 CAP/CLECs carriers and 10 other LECs reported that they were engaged in the provision of competitive local exchange services.¹⁰⁹ We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 212 small entity CAPs and 10 other LECs that may be affected by the proposed rulemaking.

55. Operator Service Providers. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest

¹⁰⁴ *Id.*

¹⁰⁵ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

¹⁰⁶ 13 C.F.R. § 121.201, SIC code 4813; 1997 NAICS 51331.

¹⁰⁷ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

¹⁰⁸ 13 C.F.R. § 121.201, SIC code 4813; 1997 NAICS 51331.

¹⁰⁹ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.¹¹⁰ According to the most recent *Trends in Telephone Service* data, 24 carriers reported that they were engaged in the provision of operator services.¹¹¹ We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 24 small entity operator service providers that may be affected by the proposed rulemaking.

56. Pay Telephone Operators. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to pay telephone operators. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.¹¹² According to the most recent *Trends in Telephone Service* data, 615 carriers reported that they were engaged in the provision of pay telephone services.¹¹³ We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of pay telephone operators that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 615 small entity pay telephone operators that may be affected by the proposed rulemaking.

57. Resellers (including debit card providers). Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies.¹¹⁴ According to the most recent *Trends in Telephone Service* data, 388 toll and 54 local entities reported that they were engaged in the resale of telephone service.¹¹⁵ We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 388 small toll entity resellers and 54 small local entity resellers that may be affected by the proposed rulemaking.

¹¹⁰ 13 C.F.R. § 121.201, SIC code 4813; 1997 NAICS 51331.

¹¹¹ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

¹¹² 13 C.F.R. § 121.201, SIC code 4813; 1997 NAICS 51331.

¹¹³ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

¹¹⁴ 13 C.F.R. § 121.201, SIC code 4813; 1997 NAICS 51331.

¹¹⁵ FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Table 19.3 (March 2000).

58. **Toll-Free 800 and 800-Like Service Subscribers.**¹¹⁶ Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to 800 and 800-like service ("toll free") subscribers. The most reliable source of information regarding the number of these service subscribers appears to be data the Commission collects on the 800, 888, and 877 numbers in use.¹¹⁷ According to our most recent data, at the end of January 1999, the number of 800 numbers assigned was 7,692,955; the number of 888 numbers that had been assigned was 7,706,393; and the number of 877 numbers assigned was 1,946,538. We do not have data specifying the number of these subscribers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of toll free subscribers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 7,692,955 small entity 800 subscribers, fewer than 7,706,393 small entity 888 subscribers, and fewer than 1,946,538 small entity 877 subscribers may be affected by the proposed rulemaking.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

59. In this *Notice of Proposed Rulemaking*, we propose a number of steps to reduce the regulatory burden on carriers filing section 214 authorization under the Communications Act. We do not believe that small entities would be disproportionately affected by the implementation of the measures under consideration. In this *Notice of Proposed Rulemaking*, we propose to clarify existing rules and shorten the review period for a predetermined class of domestic section 214 applications. We expect these changes would save carriers time and labor in the pre-filing stage, by reducing the amount of research required and documentation to be submitted when it is apparent that the transaction would require little scrutiny in order for the Commission to determine that it serves the public interest. We also expect these changes would save carriers time and labor during the review period by reducing costs associated with uncertainty surrounding the current process. Accordingly, any costs associated with the proposed measures in this *Notice of Proposed Rulemaking* would not be greater for small carriers.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

60. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption

¹¹⁶ We include all toll-free number subscribers in this category, including 888 numbers.

¹¹⁷ FCC, CCB Industry Analysis Division, *FCC Releases Study on Telephone Trends*, Tbls. 21.2, 21.3 and 21.4 (February 19, 1999).

from coverage of the rule, or any part thereof, for small entities.¹¹⁸

61. In this *Declaratory Ruling*, the Commission clarifies that connecting carriers are not required to file section 214 applications for acquisitions of corporate control.¹¹⁹ The Commission offers this clarification of an existing rule in order to reduce the regulatory burden for connecting carriers, including small entities. We believe that by expressly articulating that connecting carriers are free from a specific section 214 filing requirement, the Commission has provided small entities the least burdensome of filing requirements, *i.e.*, carriers who were once uncertain of their obligations will now find it unnecessary to assume the costs of filing section 214 applications for acquisitions of corporate control. We note that any other interpretation of section 2(b) of the Act would increase and not decrease compliance and reporting requirements for connecting carriers, including small entities.

62. Moreover, in this *Declaratory Ruling*, we also clarify that resellers and non-dominant carriers are not exempt from Rule 63.01 and must file applications for acquisitions of corporate control.¹²⁰ As we explain in Section II(B), there is nothing in either the *1999 Streamlining Order* or the plain language of Rule 63.01 to support the contention that acquisitions of corporate control involving non-dominant carriers are covered under the blanket authority of Rule 63.01. Therefore, we clarify that non-dominant carriers are required to file applications and obtain Commission approval before consummating a transaction involving an acquisition of corporate control. Any alternative approach would violate an existing rule and frustrate the Commission's ability to perform its statutory obligation of considering the public interest in connection with proposed acquisitions of domestic interstate common carriers, including non-dominant carriers.

63. Also in this *Notice of Proposed Rulemaking* in section III(B), we seek comment on whether the established Commission review periods for transfers of control should be 31 days for non-dominant carriers.¹²¹ In considering alternatives to a 31-day review, we weighed the need for Commission time to review the application and public record (including adequate time for competitors and other interested parties to file a petition to deny a proposed application), versus the costs faced by the applicants associated with filing, as well as the business and legal uncertainty that accompanies an extended waiting period. Accordingly, it is possible that a 31-day review period would minimize application-related costs and uncertainties while preserving the Commission's ability to review the proposed transaction. The item also seeks comment whether longer or shorter review periods should apply. The review period would apply to all non-dominant carriers including small entities. The Commission staff has come to no conclusion as to what length review period should apply. However, one argument in favor of a 31-day

¹¹⁸ 5 U.S.C. § 603(c). As an initial matter, we note that the options included in this *Notice of Proposed Rulemaking* are merely proposals. The steps that may be taken to minimize any significant economic impact on small entities are not limited only to the options we have provided here.

¹¹⁹ See section II(B), ¶ 8.

¹²⁰ See section II(B), ¶ 11.

¹²¹ See section III(B), ¶ 26.

review period is that a shorter review period would have the unintended result of impacting small entities negatively rather than beneficially. Small entities commenting on the appropriate review period may wish to address whether small entities would be negatively impacted by a shorter review period because they would not be able to effectively comment on the public interest benefits or harms of competitors' proposed consolidations.

64. Finally, in section III(B), the *Notice of Proposed Rulemaking* seeks comment on whether to accord streamlined treatment to applications that are accompanied by requests for waivers of other Commission rules.¹²² The Commission has come to no conclusion whether such a rule should apply. However, one consideration in favor of considering waiver requests on a case by case basis is that small entities seeking to comment on issues raised by the waiver may lack the resources to adequately or timely respond otherwise. Therefore, we believe the Commission should maintain the flexibility to consider whether commenters representing the interests of small entities have had adequate opportunity to comment.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

65. None.

VI. ORDERING CLAUSES

66. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 2, 4(i)-(j), 201, 214, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-(j), 201, 214, and 303(r), that the *Declaratory Ruling and Notice of Proposed Rulemaking* in CC Docket No. 01-150 ARE ADOPTED.

67. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Declaratory Ruling and Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

68. IT IS FURTHER ORDERED, pursuant to sections 2, 4(i)-(j), 201, 214, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-(j), 201, 214, and 303(r), that the *Declaratory Ruling and Notice of Proposed Rulemaking* in CC Docket No. 01-150 SHALL BECOME EFFECTIVE upon publication of the text or summary thereof in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

¹²² See section III(B), ¶ 31.