

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

In the Matters of)
)
Implementation of Section 402(b)(2)(A)) CC Docket No. 97-11
of the Telecommunications Act of 1996)
Petition for Forbearance of the Independent) AAD File No. 98-43
Telephone & Telecommunications Alliance)

REPORT AND ORDER in CC Docket No. 97-11
SECOND MEMORANDUM OPINION AND ORDER in AAD File No. 98-43

Adopted: May 18, 1999 Released: June 30, 1999

By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth
concurring in part, dissenting in part, and issuing a statement; and
Commissioner Powell concurring and issuing a statement.

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I. INTRODUCTION

1. In this Report and Order, we eliminate entry certification filing requirements under section 214 of the Communications Act of 1934, as amended (the Act).¹ Further, we significantly streamline exit certification requirements under that section. With this action, we not only grant the substance of the section 214 regulatory relief requested by the members of the Independent Telephone and Telecommunications Alliance ("ITTA") in their petition for forbearance,² but also extend that relief to all other domestic carriers.

2. Rather than using forbearance from section 214, as requested by ITTA, we modify our rules so as to grant blanket authority to all domestic carriers, including ITTA's members, thus providing substantially the same regulatory relief sought by ITTA but to a larger class of carriers.³ Specifically, we grant "blanket" entry certification to all carriers seeking to construct, operate, or engage in transmission over domestic lines of communication, to the extent such authority is required under the statute.⁴ For carriers seeking authority for acquisitions, we revise our rules to grant blanket authority for acquisitions of domestic lines such as by purchase or

¹ Section 214(a) requires carriers to obtain Commission certification to construct, acquire, operate, or engage in transmission over lines of communication (entry certification) or to discontinue, reduce, or impair service to a community (exit certification). Section 214(a) provides:

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, 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 or extended line... . No carrier shall discontinue, reduce, or impair service ... unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby....

47 U.S.C. § 214(a).

² Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, filed Feb. 17, 1998. In its petition, ITTA also requested forbearance from other provisions, which we address in separate orders. Independent Telephone and Telecommunications Alliance, Petition for Forbearance for 2% Mid-Size Local Exchange Companies, AAD File No. 98-43.

³ Blanket entry certification preserves the Commission's ability later to revoke a carrier's operating authority when necessary for, *inter alia*, consumer protection.

⁴ Our revised rules are set out in Appendix B.

lease.⁵ This blanket authority does not include authorization for acquisitions of corporate control,⁶ which involve different considerations than do acquisitions under Part 63.⁷ Further, we streamline our exit certification procedures so that almost all applications for discontinuance of domestic service will be granted automatically, without additional Commission action. We also modify our rules to implement the 1996 Act's exemptions from section 214 certification for line extensions and video programming services.⁸

II. BACKGROUND

3. Congress enacted the section 214(a) entry certification requirements to prevent useless duplication of facilities that could result in increased rates being imposed on captive telephone ratepayers.⁹ Part 63 of our rules prescribes procedures for obtaining both the entry and exit certification required by section 214.

⁵ See e.g., Kendall Telephone, Inc. Application for Authority to Acquire and Provide Service over 19 Local Exchanges in Northern and Central Wisconsin Pursuant to 47 U.S.C. § 214(a), NSD File No. W-P-C-7161 and Ameritech Wisconsin (Wisconsin Bell) Application for Authority to Discontinue Service in 19 Local Exchanges in Northern and Central Wisconsin Pursuant to 47 U.S.C. § 214(a), NSD File No. W-P-D-429, *Order and Certificate* (rel. July 31, 1998).

⁶ See e.g., Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order*, FCC 97-286 (rel. Aug. 14, 1997).

⁷ See *infra* para. 17. Acquisitions of corporate control entail market and economic considerations such as those presented in *Horizontal Merger Guidelines*, issued by the U.S. Department of Justice and Federal Trade Commission April 2, 1992, which are not explicitly addressed by our Part 63 rules. See *In re Application 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*, W-P-C-7037, 11 FCC Rcd 732, 739-740 (1995). In a separate proceeding, however, we are considering a specific request to forbear from certain review of corporate control transactions, submitted in Petition for Forbearance of the Independent Telephone and Telecommunications Alliance, *Third Memorandum Opinion and Order*, AAD File No. 98-43, FCC 99-105 (rel. June 30, 1999) (asking the Commission to forbear from applying the market and economic analysis set forth in *In the 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*, File No. NSD-L-96-10, FCC 97-286 (rel. Aug. 14, 1997)).

⁸ In this proceeding we modify only those rules that affect domestic carriers. The rules governing international carrier entry and exit are found at 47 C.F.R. §§ 63.09-63.24. We have recently streamlined international section 214 authorization procedures in a separate action. 1998 Biennial Regulatory Review - Review of International Common Carrier Regulations, *Report and Order*, IB Docket No. 98-118, FCC 99-51 (rel. Mar. 23, 1999).

⁹ 78 *Cong. Rec.* 10314 (1934) (Remarks of Rep. Rayburn).

4. Under the current entry certification rules, dominant carriers must submit applications for section 214 authority.¹⁰ Non-dominant carriers are already granted blanket authority to add new lines or services by the terms of the rule itself, and they need not submit applications for certification to the Commission.¹¹ The rules also include special procedures and reporting requirements in a number of specific situations, including extensions involving small projects,¹² small projects that supplement existing facilities,¹³ temporary and emergency authority,¹⁴ termination of authority for projects not commenced promptly,¹⁵ annual program plans

¹⁰ 47 C.F.R. § 63.01. A domestic dominant carrier is defined as "a carrier found by the Commission to have market power (i.e., power to control prices)." 47 C.F.R. § 61.3(o). The Commission has classified carriers as "dominant" or "non-dominant" since 1980. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *First Report and Order*, 85 F.C.C.2d 1 (1980); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Second Report and Order*, 91 F.C.C.2d 59, 71-73 (1982); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Third Report and Order*, Mimeo 012 (rel. Oct. 6, 1983), 48 Fed. Reg. 46791 (1983); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Fourth Report and Order*, 95 F.C.C.2d 554 (1983), *vacated sub nom. American Tel. and Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985); *vacated sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (the *Competitive Common Carrier Proceeding*); Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd. 3271 (1995), *recon. pending*; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, *Second Report and Order*, CC Docket No. 96-149; Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Third Report and Order*, CC Docket No. 96-61, 12 FCC Rcd 15756 (1997), *Order on Reconsideration*, 12 FCC Rcd 8730 (1997), *Order*, 13 FCC Rcd 6427 (1998).

¹¹ See 47 C.F.R. § 61.3(u) (defining a domestic non-dominant carrier as "a carrier not found to be dominant"); 47 C.F.R. § 63.07(a) ("Any party that would be a non-dominant domestic interstate communications 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").

¹² 47 C.F.R. § 63.02.

¹³ *Id.* § 63.03.

¹⁴ *Id.* § 63.04.

¹⁵ *Id.* § 63.05.

in lieu of separate applications for supplementing existing facilities,¹⁶ and certain lines outside of a carrier's exchange service area.¹⁷

5. The section 214(a) exit requirements ensure that service to communities may not be discontinued without advanced notice to the public and Commission authorization.¹⁸ Under the current exit certification rules, both dominant and non-dominant carriers must submit discontinuance applications.¹⁹ The rules include special procedures and filing requirements in a number of specific situations, including impairment of telephone and telegraph service,²⁰ emergency discontinuances,²¹ closure of public toll stations,²² closures at military establishments,²³ and notification of service outages.²⁴ The exit certification rules do not confer any blanket exit authority. Both dominant and non-dominant carriers must file applications and must also give public notice of their requested discontinuances by the time they file their applications with the Commission. Dominant carriers must publish newspaper notices and notify state public utility Commissions;²⁵ non-dominant carriers must notify their affected customers and include a prescribed statement that the Commission "will normally authorize this proposed discontinuance ... unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier...."²⁶ Dominant carrier discontinuance applications are decided individually, based on the record in each case, whereas non-dominant carrier discontinuance applications are granted automatically after 31 days unless the Commission notifies the carrier otherwise.

¹⁶ *Id.* § 63.06.

¹⁷ *Id.* § 63.08.

¹⁸ 47 U.S.C. § 214(a).

¹⁹ *Id.* §§ 63.60, 63.71.

²⁰ *Id.* § 63.62.

²¹ *Id.* § 63.63.

²² *Id.* § 63.65.

²³ *Id.* § 63.66.

²⁴ *Id.* § 63.100.

²⁵ *Id.* § 63.90.

²⁶ *Id.* § 63.71.

6. Following enactment of the 1996 Act, the Commission issued the Notice of Proposed Rulemaking (NPRM) in this proceeding.²⁷ Section 402(b)(2)(A) of the 1996 Act exempts the "extension" of any line and section 651(c) of the Act exempts video programming systems from the requirements of section 214.²⁸ In the NPRM, the Commission proposed to (1) codify the statutory exemptions, (2) forbear from enforcing section 214 for some carriers; and (3) streamline the exit certification rules. Eighteen comments and nine reply comments were filed in response to the NPRM.²⁹ ITTA filed a separate petition on February 17, 1998, asking the Commission to forbear from, *inter alia*, applying the requirements of section 214 to its members.

7. In this Report and Order, to deregulate entry, we delete sections 63.01 - 63.06 and 63.08, which comprise the existing domestic dominant carrier entry certification rules and the special procedures in specific situations, referred to above.³⁰ We revise section 63.07, which currently confers blanket authority on non-dominant domestic carriers, to confer blanket authority on all domestic carriers, and we re-number it as section 63.01.³¹ By granting blanket authority, we substantially grant ITTA's request for regulatory relief from section 214. We further add new section 63.02 to reflect the statutory exemptions for line extensions and video programming

²⁷ Implementation of section 402(b)(2)(A) of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket No. 97-11, 12 FCC Rcd (1997).

²⁸ Section 402(b)(2)(A) of the 1996 Act, as noted earlier, states, "[t]he Commission shall permit any common carrier to be exempt from the requirements of section 214 of the Communications Act of 1934 for the extension of any line...." 47 U.S.C. § 214 nt. Section 651(c) of the Act provides, "[a] common carrier shall not be required to obtain a certificate under section 214 with respect to the establishment or operation of a system for the delivery of video programming." 47 U.S.C. § 571(c).

²⁹ See Appendix A.

³⁰ Section 63.04 (which provides for requests for temporary and emergency service) is re-numbered as section 63.25 and is revised to apply only to international carriers. Also, we note that section 63.03 (relating to small projects for supplementing facilities) pertains to international as well as domestic carriers but that no international carrier has used this rule in recent years; accordingly, its deletion is non-controversial and we find that good cause exists to eliminate the rule, in accord with 15 U.S.C. § 553(b).

³¹ We also revise section 1.763, which concerns the notice requirements when section 214 entry applications are filed, by updating obsolete language. Following its revision, section 1.763 will continue to govern applications that are filed seeking authority for mergers and similar transfers of corporate control. We add to section 1.763 references to the Secretary of Defense and the Secretary of State, which comports with the current language of 47 U.S.C. § 214(b), replacing the current obsolete references to the Secretary of the Army and the Secretary of the Navy. The obsolete references comported with the language of section 214(b) prior to a 1974 amendments in Pub. L. 93-506; 88 Stat. 1577 (Nov. 30, 1974); following that amendment, the Commission revised only the corresponding language of section 1.764, pertinent to discontinuance applications. 40 F.R. 51441 (Nov. 5, 1975).

systems. Finally, to streamline the discontinuance regulations, we revise section 63.71. Section 63.71 currently grants only non-dominant carrier discontinuance applications automatically, but as revised it will automatically grant discontinuance applications to all carriers unless the Commission otherwise notifies the applicants.

III. ENTRY CERTIFICATION

A. Blanket Authority for All Carriers.

8. Background. In the NPRM, we proposed to forbear from enforcing section 214 for new lines of some, domestic carriers -- i.e., non-dominant carriers, price-cap LECs, and average-schedule LECs. Under section 10(a) of the Act,³² the Commission must forbear from enforcing provisions of the Act when it finds that: (1) enforcement is not necessary to ensure that prices are just and reasonable and not unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. For this third factor, section 10(b) expressly requires the Commission to consider whether forbearance will promote competition.³³ The Commission may also consider other factors in determining the public interest.³⁴ We tentatively concluded that non-dominant carriers face competitive market forces and that price cap LECs and average schedule LECs face regulatory rate limits, consistent with the criteria of section 10.³⁵ We tentatively found, however, that dominant rate-of-return carriers have the ability to invest in unneeded facilities and to pass the costs of those investments onto their customers. Hence, we did not propose forbearance for such carriers. We nevertheless asked for comments on alternatives to forbearance.³⁶

³² 47 U.S.C. § 160(a).

³³ Section 10(b) illustrates the method by which competitive effect is to be weighed:

In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

³⁴ *Id.*

³⁵ NPRM at para. 37.

³⁶ We specifically asked, for example, for comments on whether to streamline our section 214 application procedures for the three identified classes of carriers instead of forbearing from the section 214 authorization requirements. NPRM at para. 49.

9. A number of commenters argue that we should forbear from exercising section 214 entry authority over certain categories of carriers.³⁷ SBC supports forbearing from applying section 214 requirements to price cap carriers.³⁸ ALLTEL, NTCA, and USTA argue specifically that forbearance should be extended to rate-of-return LECs.³⁹ ALLTEL contends that rate-of-return LECs lack the ability to "gold-plate" their investments, and argues that rate-of-return carriers have no more market power than others, because of the complexity of telecommunications market products and because they account for less than 2 percent of interstate revenues.⁴⁰ NTCA concurs that existing accounting and cost allocation rules are designed to protect captive ratepayers and believes that the Commission should not "selectively impose section 214 certification requirements on rate-of-return LECs" while forbearing from imposing those requirements on other carriers.⁴¹ USTA argues that the forbearance criteria of section 10 are already satisfied, based on statements in the NPRM that section 214 certification is intended only to prevent wasteful and duplicative investments, not preclude abusive practices, and that the Commission has other rules in place to ensure that carrier rates and practices are just, reasonable, and nondiscriminatory, including 47 C.F.R. Parts 32, 61, and 64.⁴²

10. Several commenters raise other, specific, forbearance positions. ITTA urges the Commission to forbear from requiring its members - "mid-sized independent telephone companies" - to comply with section 214 requirements.⁴³ ITTA contends that these companies exercise little, if any, market power, because they are "too small to be a threat to the industry giants, yet they are too big to be afforded many of the regulatory protections available to hundreds of small LECs."⁴⁴ US WEST proposes to expand forbearance to include sales of exchanges, regardless of whether the buyer or the seller is dominant or non-dominant, as long as (1) there will be no termination or interruption of service because of a transfer of exchanges,

³⁷ USTA Comments at 4-5.

³⁸ SBC Comments at 3-4.

³⁹ ALLTEL Comments at 1; NCTA Comments at 5; USTA Comments at 3-6.

⁴⁰ ALLTEL Comments at 4-5.

⁴¹ NTCA Comments at 3.

⁴² NPRM at paras. 24 and 45. 47 C.F.R. Part 31 governs the uniform system of accounts for telecommunications companies. 47 C.F.R. Part 61 governs tariffs. 47 C.F.R. Part 64 contains miscellaneous rules relating to common carriers.

⁴³ ITTA Comments at 6-7.

⁴⁴ *Id.* at 2. We address ITTA's separate arguments, below.

and (2) a state commission has approved the transfer.⁴⁵ GTE asks us to clarify that we intend to forbear from requiring section 214 authorizations for new lines of incumbent LECs operating as competitive local exchange carriers (CLECs) outside of their territories, once they have expanded into new territories, and that these CLECs will be considered non-dominant "just as are other CLECs."⁴⁶

11. On the other hand, MCI recommends that we retain section 214 review over price cap LECs, average schedule LECs, and rate-of-return carriers, and limit section 214 forbearance to non-dominant carriers. MCI contends that incumbent LECs may make inefficient investments to foreclose competitive entry by investing in excess capacity to support targeted, anti-competitive price reductions, to thwart the efficient operations of their competitors, or to favor their affiliates, regardless of whether the investments are inefficient for their own networks.⁴⁷ MCI argues that Congressional intent was not limited to forestalling investment in "duplicative" facilities, but included forestalling investment in "inefficient" facilities.⁴⁸

12. Discussion. We conclude that we should confer blanket section 214 authority for new lines of all carriers, rather than forbear from exercising our section 214 jurisdiction. Blanket authority will promote competition by deregulating domestic entry, allowing carriers to construct, operate, or engage in transmission over lines of communication without filing an application with the Commission. At the same time, with blanket authority, unlike forbearance, we retain the ability to stop extremely abusive practices against consumers by withdrawing the blanket section 214 authorization that allows the abusive carrier to operate.

13. Blanket authority for all domestic carriers, rather than forbearance, is clearly warranted and in the public interest -- for dominant and non-dominant carriers, price cap and rate-of-return carriers, and mid-size and other carriers. As the Commission explained in 1980, when it created the section 63.07 blanket authority regulation for non-dominant carriers in particular, broad section 214 certification obviates routine filings.⁴⁹ The Commission particularly expected that, with initial certification under section 63.07, successful domestic carriers would

⁴⁵ US WEST Comments at 9-10.

⁴⁶ GTE Comments at 8.

⁴⁷ MCI Comments at 4-5.

⁴⁸ MCI Comments at 2-4.

⁴⁹ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *First Report and Order*, 85 F.C.C.2d 1 (1980).

continue to expand incrementally within the continental United States.⁵⁰ Certainly, today, eliminating the requirement for all carriers to file applications for section 214 authority will have the same de-regulatory, pro-competitive effect. While we tentatively concluded in the NPRM in this proceeding, that gold-plating remains a problem for rate-of-return carriers, our experience in reviewing section 214 entry applications received in recent years leads us to conclude that virtually no carriers, rate-of-return carriers or others, are in fact attempting to "gold-plate" their networks at the expense of consumers. Since 1997, when the NPRM was issued, seventeen domestic section 214 applications were filed; none were opposed. Moreover, our conclusion is substantiated by the commenters to the NPRM, who generally assert that gold-plating rarely occurs.⁵¹ Rather than maintaining a regulatory regime that may stifle new and innovative services "input" regulation requiring case-by-case section 214 authorization - we believe it is more consistent with the goals of the 1996 Act to remove this hurdle. Instead, we will rely on the marketplace to ensure reasonable behavior by carriers, including dominant rate-of-return carriers, and on our enforcement authority to remedy the very few problems that may occur in the absence of entry regulation.

14. We believe that blanket section 214 authority for all carriers will accomplish the primary de-regulatory goals that Congress addressed in 1996, in the section 10 forbearance criteria. By its very terms, blanket authority removes regulatory hurdles to market entry, thereby promoting competition. Forbearance, however, is not in the public interest because it would remove an enforcement tool against abusive practices. In addition, forbearance would contravene the second forbearance criterion, section 10(a)(2), because some enforcement of section 214 is necessary for consumer protection. Were we to forbear completely, we would have no power to prevent a carrier from committing serious abuses against consumers by withdrawing the operating authority conferred under section 214.

15. Recent Commission experience illustrates that blanket authority is in the public interest and will ensure the benefits of consumer protection.⁵² Prior to last year, for example, the Fletcher Companies had obtained blanket authority as non-dominant carriers under 47 C.F.R. § 63.07. Then, last year, the Commission revoked the Fletcher Companies' section 214 authority because of the carriers' extremely abusive slamming activities. If the Fletcher Companies had been beneficiaries of forbearance, and thus able to operate without obtaining section 214 authority, this Commission would not have been able to revoke that authority and thereby

⁵⁰ *Id.*

⁵¹ *See, e.g.*, USTA Comments at 3-4.

⁵² *See, e.g.*, CCN, Inc., et al., *Order*, CC Docket No. 97-144, FCC 98-76 (rel. Apr. 21, 1998) (unanimous decision of the Commission revoking the Fletcher Companies' section 214 operating authority and imposing multi-million dollar penalties for slamming).

preclude the Fletcher Companies from continuing their illegal operations. Because of this assured consumer protection we are confident that blanket authority for dominant carriers as well as non-dominant carriers is in the public interest.

16. Accordingly, we find that the present and future public convenience and necessity require the construction and operation of all domestic new lines pursuant to blanket authority, under section 214(a). Following adoption of blanket section 214 authority for all carriers, the Commission will still be able to revoke a carrier's section 214 authority when warranted in the relatively rare instances in which carriers may abuse their market power or their common carrier obligations. This enforcement tool would not be available if carriers were permitted through forbearance to operate without having section 214 authority in the first instance. Hence, we adopt blanket section 214 authority, rather than completely forbear, so as to provide the primary de-regulatory benefits of forbearance while, at the same time, ensuring that we can take enforcement actions as necessary to protect consumers.

17. As noted above, acquisitions under the statute can be either acquisitions of assets, such as by purchase or lease of lines, or acquisitions of corporate control.⁵³ The Commission has interpreted section 214 to apply to both types of acquisitions.⁵⁴ In the NPRM, we proposed revising Part 63 of our rules, which governs domestic line construction, acquisition, and operation, but we did not address the economic and market considerations pertinent to acquisitions of corporate control. We conclude that only acquisitions of assets, such as by purchase or lease of lines, should be covered by blanket authority.⁵⁵

18. We include acquisitions of assets under the blanket authority because our experience in reviewing such filings has shown that they virtually never raise public interest concerns. These types of acquisitions are generally very limited in scope, very few, if any, comments are filed in response to our public notices, and the section 214 certification is generally granted on an almost pro forma basis as a result. Acquisitions of corporate control, by contrast, often raise serious public interest concerns regarding the state of competition following the

⁵³ See *supra* para. 2.

⁵⁴ See *G.T.E. - Telenet Merger*, 72 F.C.C.2d 91 (1979).

⁵⁵ There is no practical need for concern that a carrier could avoid having to file an application for section 214 authority by structuring a corporate control acquisition disguised as a series of line acquisitions, because the seller of a line will still be required to file a discontinuance application, even if the purchaser purportedly has blanket authority for the acquisition. Should we notice a pattern of discontinuances involving transactions between the same two carriers, we would scrutinize those transactions carefully.

proposed acquisition or merger.⁵⁶ Such acquisitions are often contested and draw significant public comments that we are bound to consider. We believe that the magnitude of corporate acquisitions and their potential effect on competition distinguishes them from acquisitions of assets and has led us to conclude that corporate acquisitions should not be covered by blanket authority.

B. ITTA Forbearance Petition

19. On February 17, 1998, ITTA filed a petition for forbearance, asking the Commission to forbear from applying nine separate regulatory requirements to its members, which ITTA characterizes as "2% mid-sized companies."⁵⁷ One of the regulatory requirements from which ITTA seeks forbearance is section 214 certification for new domestic lines. As noted in our discussion above, ITTA also requested forbearance from section 214 requirements in its comments on the NPRM in this proceeding. We deny this part of ITTA's petition.⁵⁸ ITTA and its supporting commenters have not presented information or arguments showing that the

⁵⁶ Under established Commission precedent, acquisitions of corporate control are not limited to acquisitions of equity ownership, such as stock or partnership interests, and include actual working control by whatever manner exercised (such as, for example, by veto power, controlling interest in a board of directors, or other shareholder agreement provisions). See, e.g., 47 C.F.R. § 63.09(b), Note 1 (as amended in *Report and Order*, IB Docket No. 98-118, *supra* note 8).

⁵⁷ Petition for Forbearance of the Independent Telephone & Telecommunications Alliance ("ITTA"), filed February 17, 1998 ("Petition"). ITTA characterizes its fourteen members as "2% mid-size incumbent local exchange carriers ('2% mid-sized companies'), those mid-size companies serving less than 2 percent of the nation's access lines." Appendix B of its petition identifies its members as: Aliant Communications, ALLTEL, ATU Telecommunications, Century Telephone Enterprises, Inc., Cincinnati Bell Telephone, Citizens Communications, The Concord Telephone Company, Illinois Consolidated Telephone Co., Lufkin-Conroe Telephone Exchange, Inc., North State Telephone Company, Rock Hill Telephone Company, Roseville Telephone Company, Southern New England Telephone Company (SNET), and TDS Telecom.

On April 2, 1998, a Public Notice was issued seeking comments on ITTA's petition. *Independent Telephone and Telecommunications Alliance Files Petition for Forbearance for 2% Mid-Size Incumbent Local Exchange Companies, Public Notice*, AAD File No. 98-43, DA 98-480 (rel. Apr. 2, 1998). Seven parties filed comments in response to the Public Notice (Ameritech; AT&T; Bell Atlantic; GTE; SBC; Telecommunications Resellers Association ("TRA"); and United States Telephone Association ("USTA"). Five parties filed replies (Anchorage Telephone Utility ("ATU"); Cincinnati Bell Telephone Company ("Cincinnati Bell"); General Communication, Inc. ("GCI"); and ITTA).

On January 19, 1999, the deadline for the Commission's action on ITTA's petition was extended by 90 days to May 18, 1999. See *Petition for Forbearance of the Independent Telephone and Telecommunications Alliance*, AAD 98-43, *Order*, DA No. 99-197 (adopted Jan. 19, 1999).

⁵⁸ ITTA's other eight forbearance requests are being addressed in other decisions.

conclusions about forbearance from the application of section 214 discussed above should be different for 2% mid-sized LECs. In particular, ITTA and other commenters have not shown that forbearance is in the public interest and that enforcement is not necessary to protect the public interest.

20. ITTA argues in its petition that competitive forces⁵⁹ and other regulations⁶⁰ protect consumers, but it does not identify competitors or provide any specific evidence of competition in its members' service areas.⁶¹ Supporting commenters agree with ITTA that section 214 certification requirements are unnecessary, but they similarly offer only general propositions regarding the elimination of unnecessary regulations in the presence of competition.⁶²

21. The arguments of ITTA and its supporting commenters, without supporting facts, cannot satisfy the requirements for forbearance.⁶³ In particular, ITTA's petition does not satisfy the second criterion of section 10(a), that enforcement is not necessary for the protection of consumers. The Commission must be able to take strong enforcement action against carriers that undertake abusive practices against consumers, by retaining the ability to revoke a carrier's authority to operate. As noted above, although we must therefore deny ITTA's forbearance petition, ITTA will obtain substantially identical regulatory relief through the blanket section 214 entry authority that we confer in this proceeding, applicable to all domestic carriers.

C. Statutory Exemptions - Line Extensions and Video Programming Systems

⁵⁹ Petition at 29; *see also* USTA Comments at 16.

⁶⁰ ITTA refers to "tariffing requirements, affiliate transaction rules, and the complaint process," citing 47 U.S.C §§ 204, 105. Petition at 29.

⁶¹ *See* AT&T Comments at 2.

⁶² *See, e.g.*, Bell Atlantic Comments at 2; GTE Comments at 6-8; USTA Comments at 5-6. No commenter provides specific evidence that actual or prospective competition exists, enabling consumers to be protected in the absence of section 214 certification. USTA, for example, presents only expansive generalizations in support of all nine of ITTA's forbearance requests, asserting that competitive local exchange carriers (CLECs) are certified in all 50 states and the District of Columbia, that many hold certificates in five or more states, that CLECs and competitive access providers (CAPS) have announced plans to offer service in nearly 800 cities, that CAPS have fiber networks in operation in over 300 cities and towns, and that "incumbent LECs have lost almost 1.75 million telephone lines to competitors (practically all lucrative business customers) [and] competition has reached smaller geographic areas and an ever widening range of services."

⁶³ *See* Policy and Rules Concerning the Interstate Interexchange Marketplace, Petitions for Forbearance, Memorandum Opinion and Order, CC Docket No. 96-61, FCC 98-347, para. 30 (rel. Dec. 31, 1998) ("no evidence presented to show that rate integration is not necessary for the protection of consumers").

22. Line Extensions. Section 214 states that "[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line . . . or shall engage in transmission over or by means of such additional or extended line" without a certificate from the Commission. Section 214 defines a "line" as "any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels." As discussed in the NPRM, while section 214 refers to two broad categories of lines, new lines and line extensions, the two have not previously been defined or distinguished.⁶⁴

23. Section 402(b)(2)(A) of the 1996 Act states that line extensions are exempt from section 214 requirements.⁶⁵ In the NPRM, we proposed to define "extension."⁶⁶ In our final rules, however, it is not necessary to define this term, because our decision to grant blanket entry authority for all new domestic lines means that no domestic carrier will need to submit an application for entry authority, regardless of whether its proposed line is an exempt extension or a new line. We recognize that, in specific instances, parties may dispute whether a line is an exempt extension, and in those instances we can evaluate the character of the lines on a case-by-case basis. For example, international carriers must still file applications for new lines.⁶⁷ Accordingly, to reflect the line extension exemption, we need only codify the section 402(b)(2)(A) statutory exemption, and we make it part of our regulations by incorporating the language of the section into our rules at 47 C.F.R. § 63.02(a).

⁶⁴ We observed that, historically, the certification process, standards, and requirements applicable to both new lines and line extensions were identical and that neither the courts nor the Commission previously have needed to define or distinguish different kinds of "lines." NPRM at para. 5; *see, e.g., General Tel. Co. of California v. F.C.C.*, 413 F.2d 390, 402 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1969); *American Tel. and Tel. Co.*, 10 F.C.C. 315, 320 (1944).

⁶⁵ Section 402(b)(2)(A), however, did not relieve carriers from the requirement to obtain appropriate authorization for the use of radio frequencies under Title III of the Communications Act of 1934.

⁶⁶ Addressing relevant dictionary definitions, legislative intent, geographic considerations, and capacity considerations, the Commission tentatively defined an "extension" as a line that allows a carrier to expand its service into a geographic territory that it is eligible to serve but that its network does not currently reach. It also invited comment on alternative definitions. NPRM at paras. 5-20, para. 21.

⁶⁷ We note our tentative conclusion in the NPRM that: "Because the initiation of service to a new foreign point raises an array of issues not associated with the expansion of service within the domestic United States ... such initiation of service involves the construction, acquisition, or operation of 'new lines.'" NPRM, para. 31. *See also id.* paras. 33 & 34 (tentatively concluding that few carrier activities involving the provision of international services can properly be considered line "extensions" within the meaning of section 214 or section 402(b)(2)(A)).

24. Video Programming Systems. Under section 651(c) of the Act,⁶⁸ video programming systems are exempt from the requirements of section 214. In March 1996, in a separate proceeding that implemented this provision, we modified our rules "to the extent they relate to any requirement that a common carrier obtain a certificate under section 214 to establish or operate a video programming delivery system," and we removed from our regulations the rules at 47 C.F.R. §§ 63.54-63.58 that governed section 214 certification of video programming.⁶⁹

25. In the NPRM, we proposed to add language to our rules expressly incorporating language from section 651(c): "[a] common carrier shall not be required to obtain a certificate under section 214 with respect to the establishment or operation of a system for the delivery of video programming."⁷⁰ This proposal did not generate significant controversy, although Ameritech suggested that amendment of the rules would be unnecessary based on our March 1996 action. To reflect the video programming exemption, we will codify the section 651(c) statutory exemption, making it part of our regulations, as proposed. The language of the section will be incorporated into our rules at 47 C.F.R. § 63.02(b).

IV. EXIT CERTIFICATION

26. Background. The Telecommunications Act of 1996 did not change the discontinuance provisions of section 214. In the NPRM, however, we noted that carriers assume a certain amount of risk in entering a new market and that, if there are significant barriers to exit, a carrier may be reluctant to assume these risks and may choose not to enter the market.⁷¹ Accordingly, we proposed to modify our existing discontinuance rules for domestic carriers to reduce regulatory exit burdens and advance Congress' pro-competitive and de-regulatory policies.⁷² Under our existing rules, as noted earlier, both dominant and non-dominant domestic carriers must file discontinuance applications under 47 C.F.R. §§ 63.61 and 63.71, respectively. By the time of filing with the Commission, dominant carriers must have published newspaper notices and notified the relevant state commission of their sought discontinuances,⁷³ and non-

⁶⁸ 47 U.S.C. § 571(c).

⁶⁹ See Implementation of section 302 of the Telecommunications Act of 1996, Open Video Systems, *Report and Order*, CS Docket No. 96-46, FCC 96-99, 11 FCC Rcd. 14639 (1996).

⁷⁰ NPRM at para. 73.

⁷¹ NPRM at para. 70.

⁷² *Id.*

⁷³ 47 C.F.R. § 63.90.

dominant carriers must have notified each affected customer.⁷⁴ Non-dominant carrier discontinuance applications are granted automatically after 31 days unless the Commission notifies the carrier otherwise. In the NPRM, we proposed extending that procedure to dominant carriers as well, providing 60-day automatic discontinuance certification unless the Commission notifies the carriers otherwise. We asked in our NPRM for comments on whether this proposal would provide adequate incentives to carriers and protection to consumers.⁷⁵

27. GTE contends that the customer notification requirements that apply to discontinuances should apply to all carriers. USTA argues that 31 days is sufficient to allow discontinuance without adverse impact on consumers and that the universal service requirements of 47 U.S.C. § 214(e)(4) do not require a carrier to give 60 days advance notice to the state commission in order to relinquish its designation as a carrier eligible to receive universal service support.⁷⁶

28. Observing that the 1996 Act did not alter our section 214 discontinuance authority, MCI and DNSI oppose streamlined discontinuance procedures for dominant carriers.⁷⁷ Arguing that the NPRM presumes incorrectly that carriers discontinue service only to avoid losses, DNSI contends that "incumbent LECs may seek to discontinue service in order to stifle competition" from connecting interexchange carriers such as DNSI.⁷⁸ As an illustration, DNSI refers to SBC's plan to eliminate its Operator Transfer Service, which enables payphone customers to request selection of an interexchange carrier from a randomly generated list. DNSI argues that SBC can drive carriers such as DNSI from that market by discontinuing this service and selecting interexchange carriers according to its own preference rather than from the randomly generated list.⁷⁹ AT&T further argues that the Commission should eliminate the customer-notice

⁷⁴ 47 C.F.R. § 63.71.

⁷⁵ NPRM at para. 71.

⁷⁶ USTA Comments at 8.

⁷⁷ MCI Comments at 15.

⁷⁸ DNSI Comments at 2.

⁷⁹ DNSI further believes that this risk is now exacerbated because the Commission has concluded that BOCs, including SBC, should be allowed to negotiate with pay telephone location providers to select presubscribed interLATA carriers from pay telephones. DNSI Comments at 5-7 (citing Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act of 1996, *Report and Order*, 4 Comm. Reg. (P & F) 938, *Order on Reconsideration*, 5 Comm. Reg. (P & F) 321 (1996)).

requirement entirely for non-dominant interexchange carriers, competitive access providers, and competitive local exchange carriers.⁸⁰

29. **Discussion.** Because of the potential impact on consumers of the discontinuance, reduction, or impairment of service by a carrier, we will continue to require certification under our new streamlined procedures for a domestic carrier to discontinue, reduce, or impair service over a line, regardless of whether the carrier's initial certification for the construction, acquisition, or operation of the line was obtained under blanket authority or was not required because the line is exempt as an extension. We will revise 47 C.F.R. § 63.71 to state that a domestic non-dominant carrier's discontinuance application will be granted automatically after 31 days and a domestic dominant carrier's discontinuance application granted automatically after 60 days, unless we notify the carrier during the interim period that its application will not be automatically granted. The additional time is warranted following applications by dominant carriers, to ensure adequate opportunity for comments to be filed on whether substitute service is available. This revision will promote competition and reduce regulation by applying to all carriers the automatic-grant discontinuance procedures that currently apply only to non-dominant domestic carriers.

30. Fair notice to customers should include the statement that the Commission will normally authorize discontinuances, especially under our new automatic-approval provisions. We are not persuaded by AT&T that we should require only incumbent LECs to give notice of their intent to discontinue service to their interexchange access customers but not similarly require non-dominant interexchange carriers, competitive access providers, and competitive local exchange carriers to notify their customers. Even customers with competitive alternatives need fair notice and information to choose a substitute service. Furthermore, because the rules require notice to all customers, it would appear unnecessary to require notice to interexchange access customers of incumbent LECs in particular.

31. We will, however, include the requirement suggested by APUC that notice should be given to State commissions as well as to customers.⁸¹ Furthermore, we will also include the requirement to furnish notice and a copy of the application to the Governor of the State in which the line is proposed to be discontinued and to the Secretary of Defense, required by section

⁸⁰ *Id.* at 4.

⁸¹ APUC Comments at 4.

214(b).⁸² Our regulations at sections 1.764 and 63.90 already include these notice requirements.⁸³ Consolidating them into 47 C.F.R. § 63.71(a) will clarify agency procedure and practice.⁸⁴

32. In our NPRM, we expressed concern that, as local exchange markets become increasingly competitive, many currently dominant LECs may find themselves under increasing pressure to reduce or eliminate service in unprofitable areas. With a relatively short advance customer-notification period such as that supported by USTA, an incumbent LEC might obtain automatic discontinuance authority even though it is the only carrier serving a particular community. Ensuring that applicants notify State public utility commissions will alleviate this concern. Such notification should also alleviate other concerns raised by commenters. State commissions with notice will be better able to bring to our attention the effects of discontinuances upon customers who may be unable themselves to inform us that they lack substitute service, upon interexchange access providers, and upon competing carriers who may not receive notice of anti-competitive discontinuances. Accordingly, 47 C.F.R. § 63.71 will include the requirement that the applicant must submit a copy of its application to the public utility commission as well as to the Governor of the State and the Secretary of Defense, and also notify all affected customers of the planned discontinuance, reduction, or impairment of service.

V. PROCEDURAL MATTERS

33. We certified in the NPRM that the Regulatory Flexibility Act of 1980⁸⁵ is not applicable to this rulemaking proceeding. We stated that if the proposed rule changes are promulgated, there will not be a significant economic impact on a substantial number of small

⁸² Section 214(b) provides:

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

⁸³ Section 1.764 of the rules provides for notice and copies of discontinuance applications to be filed with the Secretary of Defense and State governors, in accord with 47 U.S.C. § 214(b). Both the regulations at 47 C.F.R. § 1.764 and 47 C.F.R. § 63.90(d) provide for notice and filing with State commissions.

⁸⁴ Although the Commission did not propose consolidating these provisions in the NPRM, prior notice and comments are unnecessary. See 5 U.S.C. § 553(b)(A), under which the rule making general notice requirements do not apply to "rules of agency organization, procedure, or practice...."

⁸⁵ 5 U.S.C. §§ 601-612.

business entities because the proposed rules changes would lessen, not increase, the regulatory burden on small businesses. The Secretary sent a copy of the NPRM to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 605(b) of the Regulatory Flexibility Act.⁸⁶ No parties commented on our regulatory flexibility statement.

34. Our statement in the NPRM was not disputed by any commenters that the proposed rules changes would lessen, not increase, the regulatory burden on small businesses. We recognize that a reduction in regulatory burden does not, in itself, warrant a conclusion that there will not be a significant economic impact on a substantial number of small business entities. Nevertheless, it is clear that our action today deregulates from section 214 all domestic common carrier entry. The minimal amount of domestic section 24 certification regulation that remains will govern only service discontinuances. This remaining regulation will entail simplified applications that will normally be granted automatically, subject only to expedited review. Accordingly, because our statement in the NPRM was not disputed and because of the dramatic de-regulatory effect of this rulemaking, we again conclude that there will not be a significant economic impact on a substantial number of small business entities resulting from this rulemaking proceeding.

35. The Commission will send a copy of this final certification, along with this Report and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996,⁸⁷ and to the Chief Counsel for Advocacy of the Small Business Administration.⁸⁸ A copy of this certification will be published in the Federal Register.⁸⁹

36. Finally, we note that, because the NPRM contained either a proposed or modified information collection, we invited the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in the NPRM, as required by the Paperwork Reduction Act of 1995.⁹⁰ We received an OMB Notice of Action, under OMB Control Number 3060-0149, approving the collections. No public comments were received addressing this matter.

⁸⁶ 5 U.S.C. § 605(b) (as amended by the Contract With America Advancement Act, Pub. L. No. 104-121, 110 Stat. 847, 866 (1996)).

⁸⁷ 5 U.S.C. § 801 (a)(1)(A).

⁸⁸ 5 U.S.C. § 605(b).

⁸⁹ *Id.*

⁹⁰ Pub. L. No. 104-13, *codified at* 44 U.S.C. §§ 3501-3520.

ORDERING CLAUSES

37. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 1, 4(i), 4(j), 10, 11, 201-205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 160, 201-205, 214, 218, 403, and 571, that Part 63 the Commission's rules, 47 C.F.R. Part 63, IS HEREBY AMENDED as set forth in Appendix B of this Report and Order.

38. IT IS FURTHER ORDERED, pursuant to Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, that the petition for forbearance filed by ITTA on February 17, 1998 is DENIED as described herein.

39. IT IS FURTHER ORDERED that the policies and regulations adopted in this Order WILL BECOME EFFECTIVE thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**LIST OF PARTIES IN CC DOCKET NO. 97-11****Parties filing initial comments:**

The Alaska Public Utilities Commission (APUC)
ALLTEL Telephone Services Corporation (ALLTEL)
AmericaTel Corporation (AmericaTel)
The Ameritech Operating Companies (Ameritech)
(The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.)
AT&T Corp. (AT&T)
Bell Atlantic and Nynex
BellSouth Corporation and BellSouth Telecommunications, Inc. (BellSouth)
Digital Network Services, Inc. (DNSI)
GTE Service Corporation (GTE)
Independent Telephone & Telecommunications Alliance (ITTA)
MCI Telecommunications Corporation (MCI)
The National Telephone Cooperative Association (NTCA)
Pacific Telesis Group (Pacific Telesis)
Southwestern Bell Telephone Company (SBC)
Sprint Communications Company L.P. (Sprint)
Telefonica Larga Distancia de Puerto Rico, Inc. (TLD)
The United States Telephone Association (USTA)
US WEST, Inc. (US WEST)

Parties filing reply comments:

Ameritech
AT&T
Bell Atlantic and Nynex
GTE
MCI
Pacific Telesis
Sequel Concepts, Inc. (Sequel)
Teleglobe USA, Inc. (Teleglobe)
USTA

APPENDIX B**FINAL RULES**

Part 1 of Title 47 of the Code of Federal Regulations is revised as follows:

PART 1 - PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 151, 154, 207, 303, and 309(j), unless otherwise noted.

2. Section 1.763 is revised to read as follows:

§ 1.763 Construction, extension, acquisition or operation of lines.

* * * * *

(b) In cases under this section requiring a certificate, notice is given to and a copy of the application is filed with the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State involved.* * *

Part 63 of Title 47 of the Code of Federal Regulations is revised as follows:

PART 63 - EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for Part 63 is amended by revising the citation as follows:

AUTHORITY: Sections 1, 4(i), 4(j), 10, 11, 201-205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 160, 201-205, 214, 218, 403, and 571, unless otherwise noted.

2. Sections 63.01, 63.02, 63.03, 63.05, 63.06 and 63.08 are removed.

3. Section 63.07 is re-numbered as section 63.01 and is revised to read as follows:

§ 63.01 Authority for all domestic common carriers.

(a) 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, which are not limited to acquisitions of equity ownership, such as stock or partnership interests, and which include actual working control by whatever manner exercised (such as, for example, by veto power, controlling interest in a board of directors, or other shareholder agreement provisions).

(b) Domestic common carriers subject to this section shall not engage in any line construction that may have a significant effect on the environment as defined in § 1.1307 of this chapter without prior compliance with the Commission's environmental rules. See § 1.1312 of this chapter.

4. New section 63.02 is added as follows:

§ 63.02 Exemptions for extensions of lines and for systems for the delivery of video programming.

(a) Any common carrier is exempt from the requirements of section 214 of the Communications Act of 1934, as amended, for the extension of any line.

(b) A common carrier shall not be required to obtain a certificate under section 214 of the Communications Act of 1934 with respect to the establishment or operation of a system for the delivery of video programming.

5. Section 63.04 is re-numbered as section 63.25 and its title is revised as follows:

§ 63.25 Special provisions relating to temporary or emergency service by international carriers.

6. Section 63.52 is revised to read as follows:

§ 63.52 Copies required; fees; and filing periods.

* * * * *

(b) No application accepted for filing and subject to Part 63 of these rules, unless provided for otherwise, shall be granted * * *

* * * * *

7. Section 63.71 is amended by revising the section heading, first paragraph, and subsection (c), to read as follows:

§ 63.71 Procedures for discontinuance, reduction or impairment of service by domestic carriers.

Any domestic carrier that seeks to discontinue, reduce or impair service shall be subject to the following procedures:

(a) The carrier shall notify all affected customers of the planned discontinuance, reduction, or impairment of service and shall notify and submit a copy of its application to the public utility commission and to the Governor of the State in which the discontinuance, reduction, or impairment of service is proposed, and also to the Secretary of Defense, Attn. Special Assistant for Telecommunications, Pentagon, Washington, D.C. 20301. Notice shall be in writing to each affected customer * * *

* * * * *

(5) One of the following statements:

(i) If the carrier is non-dominant with respect to the service being discontinued, reduced or impaired, the notice shall state:

"The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments within 15 days after receipt of this notification. Address them to the Federal Communications Commission, Washington, D.C. 20554, referencing the § 63.71 Application of (carrier's name). Comments should include

specific information about the impact of this proposed discontinuance (or reduction or impairment) upon you or your company, including any inability to acquire reasonable substitute service."

(ii) If the carrier is dominant with respect to the service being discontinued, reduced or impaired, the notice shall state:

"The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments within 30 days after receipt of this notification. Address them to the Federal Communications Commission, Washington, D.C. 20554, referencing the § 63.71 Application of (carrier's name). Comments should include specific information about the impact of this proposed discontinuance (or reduction or impairment) upon you or your company, including any inability to acquire reasonable substitute service."

(b) * * *

* * * * *

(4) Whether the carrier is considered dominant or non-dominant with respect to the service to be discontinued, reduced or impaired.

(5) Any other information the Commission may require.

(c) The application to discontinue, reduce or impair service, if filed by a domestic, non-dominant carrier, shall be automatically granted on the 31st day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. The application to discontinue, reduce or impair service, if filed by a domestic, dominant carrier, shall be automatically granted on the 60th day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. For purposes of this section, an application will be deemed filed on the date the Commission releases public notice of the filing.

**Separate Statement
of
Commissioner Susan Ness**

Re: ITTA Petition for Forbearance

We are in the middle of a turbulent period as we transition from monopoly to competition. Many rules -- and even statutory provisions -- that were put into place during a monopoly regime may no longer be necessary to effectuate their intended purpose.

Recognizing that the marketplace is rapidly evolving, Congress wisely provided the Commission with a flexible tool to forbear from enforcement of provisions of law and regulations where the Commission finds it serves the public interest to do so.

The forbearance petition filed by the Independent Telephone and Telecommunications Alliance (ITTA) affords us an opportunity to review particular rules to determine whether they continue to be necessary to serve the public interest. The petition requests regulatory relief for mid-sized local exchange carriers that serve less than two percent of the nation's access lines.

Under a section 10 forbearance analysis, the Commission must forbear from applying any rule or regulation if the Commission determines that (1) enforcement is not necessary to ensure that charges and practices are just and reasonable, (2) enforcement is not necessary for the protection of consumers, and (3) forbearance is consistent with the public interest.

In a series of orders, we grant the forbearance requested in some instances; we go beyond what was requested in some instances by providing relief to a broader class of carriers; and in a few limited instances we conclude that continued enforcement is necessary for the protection of consumers.

One request that the majority does not grant is forbearance from the Commission's requirement that incumbent local exchange carriers offer certain services through separate affiliates. While our separate affiliate rules have served a very important purpose in the past, separation may be less essential as competition evolves. Based on the record in this proceeding, however, I am not convinced that competition has developed to the point where consumers will be adequately protected if we forbear from our rules. I look forward to working with the parties to develop a better record and to determine whether structural separation promotes competition or detracts from the competitive market place.

**CONSOLIDATED SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Petition for Forbearance of the Independent Telephone & Telecommunications Alliance; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area

I support these items to the extent that they provide the relief requested by the Independent Telephone & Telecommunications Alliances (ITTA) petition. I object, however, to the extent that the regulatory relief requested is denied or some lesser regulatory relief is provided. Moreover, I question the overall approach that the Commission has taken to this forbearance petition.

I start with the presumption that the ITTA petition has been "deemed granted" in full because of the Commission's failure either (i) to deny the petition within one year after receiving it, or (ii) to make an explicit finding that a 90 day extension was necessary to meet the statutory requirements. Section 10 of the Communications Act is very clear: "The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a)." The statute is thus specific that it is the "Commission" which must grant any extension and must do so upon a finding that the extension is necessary to meet the purposes of section 10(a). I do not believe that the bureau, acting on its own motion and without even prior consultation with the "Commission," can act to extend this statutory time-frame. I do not believe that the 90 day extension can be effectively used by the bureau without even briefing the Commission on the merits of the underlying petition, determining whether or not there are any new or novel questions of fact, law or policy, and receiving some signal from a majority of the "Commission" that an extension of time is warranted under these particular circumstances.

In addition, I disagree with several aspects of the approach that the Commission has taken to this forbearance petition. In several instances, the Commission determines that ITTA has not met the criteria for forbearance to the extent that the petition requests relief beyond that which is granted in a contemporaneous rulemaking proceeding. *See e.g.*, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Third Memorandum Opinion and Order in AAD File No. 98-43, at para. 10 (denying relief to the extent that petition "extends beyond the relief granted in the *LEC Classification Second Order on Reconsideration*.") *See also*, Petition for Forbearance of the Independent Telephone & Telecommunications

Alliance, Sixth Memorandum Opinion and Order in AAD File No. 98-43, at para. 2 ("Although we do not grant forbearance from our rules regarding applications for special permission at this time, we are considering whether, and how, we should modify some of our rules that necessitate applications for special permission as part of our ongoing biennial review rulemaking and expect to make a final decision on the basis of that more complete record in the near future."). I am troubled that the Commission has decided to provide some lesser form of regulatory relief than that which was requested -- doing so in a separate rulemaking where the Commission has more discretion -- and then has used that proceeding as part of the justification for denying full regulatory forbearance as requested. In other words, the Commission has determined that the simplest method of dealing with these petitions is to deny the forbearance relief at issue while at the same time providing lesser relief in a separate rulemaking proceeding. But that is not the process the statute requires. Moreover, under such an approach, the Commission is able to avoid the difficult question of why, when considering the same facts, particular regulatory relief is appropriate and other regulatory relief would contravene the statute. Such distinctions would frequently be difficult to justify as the forbearance criteria focus on general standards -- e.g. "protection of consumers," or "in the public interest." I object to the Commission's attempt to avoid the objective rigor of the section 10 forbearance test by providing regulatory relief in separate proceedings where the Commission has more discretion.

In addition, this approach lends itself to eliminating one set of requirements and at the same time adopting new -- albeit lesser -- regulatory restrictions that would not be justified under section 10 alone. *See e.g.*, Biennial Regulatory review of Accounting and Cost Allocation Requirements, Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, Fourth Memorandum Opinion and Order in AAD File No. 98-43, at par. 25 (reinterpreting ITTA petition as not asking to forbear from Class A accounting altogether but "[e]ssentially . . . asking us to change our rules, not to forbear from applying the current rules."). While section 10 provides that the Commission may be able to forbear "in whole or in part" from a particular provision or regulation, *see* section 10(c), it does not provide the Commission with any authority to *adopt* new regulations or to *impose* separate conditions in the context of a forbearance petition. Section 10's primary emphasis is on deregulation, and I will not support this provision, or any of the proceedings required by a section 10 petition, being used as an opportunity to authorize new regulatory restrictions or conditions. I fear that this type of expansive reading of the Commission's authority under the Act's forbearance provisions will lead the Commission astray from its clear statutory duties and limitations.

Finally, as I have stated previously, I am concerned that the Commission is placing too high a burden on the parties requesting forbearance relief. I believe that the Section

10 forbearance scheme requires the Commission to justify continued regulation in light of the competitive conditions in the marketplace. The Commission cannot meet their statutory obligations by simply shifting the burden to petitioners to justify forbearance.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL K. POWELL

Re: Petition for Forbearance of the Independent Telephone and Telecommunications Alliance (AAD File No. 98-43), and related proceedings (CC Docket No. 97-11, CC Docket No. 98-81; CC Docket No. 96-150, CC Docket No. 98-117, WT Docket No. 96-162, CC Docket No. 96-149, CC Docket No. 96-61)

I am pleased to join my colleagues in granting some of the regulatory relief requested in the forbearance petition filed by the Independent Telephone and Telecommunications Alliance (ITTA) on behalf of mid-sized local exchange carriers. Although I concur in the results of most of these items (especially where regulatory relief is granted), I am, however, compelled to dissent in part to three of the decisions, and I continue to be concerned about the Commission's handling and analysis of forbearance requests under section 10 of the Communications Act.

In these various items (some concern other ongoing rulemaking proceedings), we address nine regulatory requirements from which ITTA, on behalf of mid-sized LECs, requested forbearance. We adopted seven different Orders in response to the petition (and other petitions or notices). In looking at these Orders as a package and individually, while some relief is granted, I continue to be concerned that, where forbearance is denied, these petitions are not being treated in a manner fully consistent with the intent and spirit of section 10 of the Act. While I concur with the outcome of most of these items -- since I believe we are reaching the correct result -- I do continue to question (along lines similar to those I have expressed elsewhere) our means and methods for handling forbearance petitions.

I must respectfully dissent, however, from the continued application of separate affiliate requirements for the provision of in-region interexchange services and commercial mobile radio services (CMRS) by mid-sized LECs. My reasons are twofold. First, I continue to be uneasy with the degree to which reliance on this and similar regulatory devices is based on speculation about anticompetitive behavior. I fully understand that any analysis about potentially harmful future conduct entails some assessment of likely conduct. Historically, the agency has stewarded the basic principle of nondiscrimination, resulting in regulatory protections against cost misallocation and anticompetitive behavior flowing from control of a "bottleneck" facility. Our precedents, such as separate affiliate requirements, were rightly premised on the existence of a true monopolist (sanctioned by the state) and the associated risks. In that environment, not only did the incumbent have monopoly power, there was no prospect of competition nor any watchful present or future competitors. These safeguards were designed to protect consumers from the potential ill effects of such accumulated power.

I believe, however, that much has changed. The movement toward a competitive environment means that we must take into fuller consideration the necessity, viability, and the potentially

distorting competitive consequences of old familiar regulatory devices. Thus, to the extent we must speculate about potential harm (to competition and consumers) we must, too, factor in more fully the potential disciplining effects of both real competition and potential competition. I see a continued tendency to invoke the ancient mantra "to protect against discriminatory this or that" as glib justification for continued regulatory constraints. I believe we must work harder and press more heavily on the traditional rationales. I do not believe we did so in this case. Moreover, to do so will take time and resources, which we do not have when forbearance petitions are presented for deliberation with only a second or two left on the statutory shot-clock, as was the case here.

My second concern rests with the extent that the Commission expresses a tendency to justify certain regulatory restrictions in the name of promoting or advancing competition. That alone, of course, may be worthy, but we are not free to do so in a manner that involves intermediate judgements that differ from those reached by Congress. Let me explain more fully.

Prior to the 1996 Act, I believe both Judge Greene and the FCC did seek to create limited competitive markets out of the monopoly provider's control and, concomitantly, impose safeguards designed to keep the monopolist from thwarting fledgling competitors as well as ensuring that core regulatory goals were not compromised by such competitive forays. These competitive excursions were limited and usually merely incremental voyages into competitive service markets. But, we must be reminded that the fundamental paradigm remained regulation and central control over the most prized services. The key point is that Judge Greene and the Commission had a fairly wide birth to develop the conditions of their market-opening efforts.

The 1996 Act, however, altered the paradigm and structured the basic terms of competition. Competitive services were to become the rule, and regulated services the limited exceptions. By its act, Congress crafted a comprehensive competitive model, designed specifically to supplant the MFJ. In weaving this fabric, Congress made a number of significant judgements. The one most relevant here is that it concluded that, rather than restrict the ILECs to regulated wholesale service, it allowed ILECs to compete at the retail level as well. This judgement may prove unwise or unworkable, but it is the one that Congress chose.

Congress was not oblivious to the challenges or perils of allowing the ILECs to compete, however, in long distance and other services while they still controlled many of the necessary facilities and inputs that other competitors would need. It addressed this problem by crafting an access and interconnection regime (sections 251 and 252) that placed unique duties and obligations on ILECs. In addition, Congress recognized that different classes of LECs required different levels of safeguards and incentives. Bell Operating Companies (BOCs), and they alone, are subject to sections 271 and 272. ILECs have more duties and obligations than CLECs, and so on. Thus, whether one likes it or not, *Congress* substantially addressed the dangers of "bottleneck control" and discriminatory incentives in the Act.

As a consequence, I believe, the Commission is not as free (as it perhaps was prior to the Act) to steward a transition to a competition regime different than that of the one chosen by Congress. Specifically, as it relates to the question of separate affiliates, we must be careful not to impose regulatory requirements that in practical effect amount to wholesale/retail separations, where Congress intended none. (I note that in contrast to the carriers petitioning here, BOCs are expressly subject to separate affiliates for some services). For this reason, I am uncomfortable with the analysis proffered to support continued separate affiliate requirements. We cite "bottlenecks" and "incentives" in what subtly (though perhaps unintentionally) seems to me a preference for wholesale separation in a competitive market. By way of illustration, the Orders often speak of the importance of separate affiliates to ensure that they obtain facilities on an "arm's length basis" and to ensure that all competing in-region providers and other carriers have the same access (*i.e.*, wholesale).

Though Congress made judgements about the competitive ground-rules, it did not endeavor to sweep through our regulations and apply those judgments to each and every structural requirement on the books. Instead, it directed us to search out such rules and apply the new paradigm. To do so, it gave the Commission the twin engines of the biennial review and forbearance. This is one reason I believe that section 10 is important in evaluating the continued validity of separate affiliate requirements, not otherwise mandated by law, where competitive conditions and/or other regulatory or enforcement mechanisms are already in place.

I believe that the petition before us raised substantial questions with regard to the need for structural separation in light of present conditions. Accordingly, I believe that in response to ITTA's forbearance petition, we should have examined more carefully alternative methods of enforcing core ILEC responsibilities to see if there wasn't a more rational, limited approach. For example, we should have explored including a sunset of the structural separation requirement for in-region interexchange services like that available to BOCs in section 272 and treating mid-sized LECs more like rural carriers under the CMRS separate affiliate requirement.

For these reasons, I respectfully dissent in part from these particular decisions.