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

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	
Repeal of Part 62 of the	)	CC Docket No. 98-195
Commission's Rules	)	
	)	

REPORT AND ORDER

Adopted: July 7, 1999 Released: July 16, 1999

By the Commission: Commissioner Furchgott-Roth issuing a statement.

I. INTRODUCTION

1. In this Report and Order (Order), we repeal Part 62 of our rules governing interlocking directorates,[1] which implements section 212 of the Communications Act of 1934, as amended (the Act),[2] because we conclude that Part 62 is no longer necessary in the public interest. We also conclude that we should forbear from applying those provisions in section 212 of the Act that prohibit any person from holding the position of officer or director of more than one carrier subject to the Act without obtaining prior Commission authorization.[3] These actions will serve the public interest by reducing the regulatory burden on common carriers and other interested persons required to file with the Commission pursuant to Part 62 and by allowing such resources to be directed instead toward the deployment of services and new technologies.

II. BACKGROUND

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[1] 47 C.F.R. Part 62.

[2] 47 U.S.C. ' 212.

[3] *Id.*

2. Congress intended section 212 of the Act, established as part of the original Communications Act of 1934, to guard against the anticompetitive potential arising from the interlocking of companies through the sharing of officers or directors.[4] The Commission adopted

[4] *See Congressional Hearings and Reports on Communications*, 73rd Cong. 288 (1934); *see also* H.R. Rep. No. 2540, 84th Cong. (1956) (stating that in enacting section 212 of the Act Congress sought to prevent "the exercise of indirect control over ostensibly competing carriers through such 'interlocking directorates.'"). In pertinent part, section 212 of the Act states:

> It shall be unlawful for any person to hold the position of officer or director of more than one carrier subject to this Act, unless such holding shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby: *Provided*, That the Commission may authorize persons to hold the position of officer or director in more than one such carrier, without regard to the requirements of this section, where it has found that one of the two or more carriers directly or indirectly owns more than 50 per centum of the stock of the other or others, or that 50 per centum or more of the stock of all such carriers is directly or indirectly owned by the same person.

Part 62 of its rules to implement the Congressional mandate set forth in section 212 of the Act.[5]

47 U.S.C. ' 212. The general prohibition against interlocking directorates became effective in August 1934. In 1956, after finding that most applications to the Commission to hold interlocking directorates involved companies under common ownership, Congress amended section 212 of the Act to include the above-quoted common ownership provision. *See* H.R. REP. NO. 2540, 84th Cong. (1956). *See infra* note 26 (stating that in the *Notice*, we proposed to forbear only from those provisions of section 212 of the Act addressing interlocking directorates. The interlocking directorate provisions are those quoted above.).

[5] 47 C.F.R. '' 62.1-.26.

As originally adopted by the Commission, Part 62 required an individual seeking to hold positions with more than one non-affiliated carrier to file an application containing detailed information demonstrating that neither private nor public interests would be harmed by granting authorization to hold interlocking directorates.[6] The Commission addressed each application on a case-by-case basis and usually found that the "interlocks" offended neither public nor private interests.[7] In addition, although the Commission routinely placed each application on public notice, the applications were usually unopposed.[8]

[6] *See Amendment of Part 62 of the Commission's Rules*, Notice of Proposed Rulemaking, CC Docket No. 84-1330, 50 Fed.Reg. 976 (1984) (*Part 62 NPRM*).

[7] *See Amendment of Part 62 of the Commissions Rules*, First Report and Order, CC Docket No. 84-1330, 101 FCC 2d 495, 495-96 (1985) (*Part 62 Order*).

[8] *See id.*

3. In the mid-1980s, the Commission initiated a rulemaking to consider revising its rules relating to interlocking directorates.[9] During the course of that rulemaking, the Commission noted that in light of growing competition and advances in telecommunications, the need for stringent oversight and intervention in the free market activities of carriers had lessened.[10] The Commission thus modified Part 62 of its rules by eliminating the requirement of prior Commission approval for interlocks between or among non-dominant carriers as defined in the *Competitive Carrier Proceeding*,[11] cellular licensees in different geographic markets,[12] or carriers and their parent companies.[13] The Commission, concluding that these interlocks would not adversely affect public or private interests,[14] required only that such interlocks be reported to the Commission within 30 days after occurring.[15] The Commission, however, declined to remove the preauthorization requirement for those interlocks involving a dominant carrier or a carrier not yet found to be non-dominant, concluding that market power or control of essential facilities might

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[9] *See Part 62 NPRM*, 50 Fed.Reg. at 977-78; *Part 62 Order*, 101 FCC 2d at 495; Memorandum Opinion and Order, 59 Rad.Reg.2d (P&F) 1036 (1986) (*Order on Reconsideration*).

[10] *See Part 62 NPRM*, 50 Fed.Reg. at 977-78.

[11] In the *Competitive Carrier* proceeding, the Commission distinguished two kinds of carriers -- those with market power (dominant carriers) and those without market power (non-dominant carriers). *See Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Report and Order, 48 Fed. Reg. 46, 791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated AT&T Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI Telecommunications Corp. v. AT&T Co.*, 509 U.S. 913 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier* proceeding).

[12] *See Part 62 Order*, 101 FCC 2d at 495-96, para. 2.

[13] *See Order on Reconsideration*, 59 Rad.Reg.2d at 1036, para. 2 (further amending the rules pertaining to interlocking directorates to eliminate the requirement that interlocks involving parent companies or carriers seek Commission approval prior to assuming such interlock).

[14] *See Part 62 Order*, 101 FCC 2d at 501, para. 14; *see also Order on Reconsideration*, 59 Rad.Reg.2d at 1036, paras. 5-6 (stating that monitoring interlocks involving parent or holding companies by post-interlock reports was consistent with the Commission's goal of employing the least intrusive or burdensome procedure to accomplish the statutory obligations).

[15] *See Part 62 Order*, 101 FCC 2d at 501, para. 14; *see also Order on Reconsideration*, 59 Rad.Reg.2d at 1036, paras. 5-6.

allow such interlocks to engage in anticompetitive conduct.[16]

4. We initiated this proceeding by a Notice of Proposed Rulemaking (*Notice*) released on November 17, 1998.[17] In the *Notice*, we designated this proceeding as part of our 1998 biennial review of regulations pursuant to section 11 of the Act.[18] Section 11 requires the Commission to conduct a biennial review, in every even-numbered year beginning in 1998, of "all regulations . . . that apply to the operations or activities of any provider of telecommunications service" and to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[19] Section 11 further requires the Commission to repeal or to modify any regulation it determines is no longer necessary in the public interest.[20]

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[16] *See Part 62 Order*, 101 FCC 2d at 498, para. 7; *see also infra* para. 11.

[17] *1998 Biennial Regulatory Review -- Repeal of Part 62 of the Commission's Rules*, CC Docket No. 98-195, 13 FCC Rcd 22,948 (1998).

[18] 47 U.S.C. ' 161; *see Notice*, 13 FCC Rcd at 22, 948, para. 1.

[19] 47 U.S.C. ' 161(a).

[20] *See id.* ' 161(b).

5. In the *Notice*, we tentatively concluded that Part 62 of our rules governing interlocking directorates is no longer necessary to the public interest and therefore should be repealed.[21] Specifically, we proposed to eliminate the requirements that: (1) application be made to hold interlocking positions with more than one carrier subject to the Act where one carrier sought to be interlocked is either a dominant carrier, or a carrier not yet determined to be non-dominant;[22] (2) applications for findings of common ownership be filed if dominant carriers are involved;[23] (3) interlocking positions of more than one carrier subject to the Act involving non-dominant carriers, connecting carriers, cellular licensees operating in different geographic markets, and parents of carriers, among others, be reported to the Commission within 30 days after such interlock occurs;[24] and (4) any change in status as reported under Part 62 of the rules be reported to the Commission within 30 days of such change.[25]

6. Additionally, in the *Notice*, we tentatively concluded that we should forbear from enforcing those provisions of section 212 of the Act that address interlocking directorates.[26]

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[21] *See Notice*, 13 FCC Rcd at 22,948, para. 1; *see also* 47 U.S.C. ' 161.

[22] 47 C.F.R. ' 62.1.

[23] *Id.* '' 62.12, 62.25.

[24] *Id.* ' 62.26.

[25] *Id.* ' 62.24. The *Notice* specifically addressed whether we should eliminate the requirement of Commission approval prior to interlocking directorates, filings for findings of common ownership, post-interlock filings, and change of status reports. The *Notice* indicated that elimination of these rules incorporates sections 62.11 and 62.21-.24 by reference, which govern the form and substance of filing requirements. *See Notice*, 13 FCC Rcd at 22,953 n.34. In the *Notice*, we inadvertently omitted a reference to section 62.2, the definition section of Part 62. At this time, we note that elimination of Part 62 also necessarily incorporates section 62.2. *See* 47 C.F.R. ' 1.412(c) (stating that rule changes may be adopted without prior notice if the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest).

[26] 47 U.S.C. ' 212. The *Notice* did not address the remainder of section 212 of the Act, which makes it

> unlawful for any officer or director of any carrier subject to this Act to receive for his own benefit directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of securities issued or to be issued by such carriers, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such carriers from any funds properly included in the capital account.

47 U.S.C. ' 212. *See Notice*, 13 FCC Rcd at 22,949 n.13. As discussed *infra*, one commenter proposes that we forbear from applying all provisions set forth in section 212 of the Act, not just those provisions addressing interlocking directorates. *See infra* para. 24. Unless indicated to the contrary, references to forbearing from enforcing section 212 of the Act are limited to those provisions of section 212 of the Act that address interlocking directorates only. *See supra* note 4 (quoting the applicable statutory provisions at issue in this order).

Section 10 of the Act requires the Commission to forbear from applying any provision of the Act, or any regulations, to a telecommunications carrier or telecommunications service, or class thereof, if the Commission makes certain specified findings with respect to such provisions or regulations.[27] In the *Notice*, we tentatively concluded that section 212 of the Act: (1) is not necessary to ensure that carriers' charges, practices, or classifications are just and reasonable, and are not unjustly or unreasonably discriminatory; and (2) is not necessary for the protection of consumers. We also tentatively concluded that forbearance from applying interlocking directorate requirements is consistent with the public interest.[28]

[27] *See* section 10, codified at 47 U.S.C. ' 160, which was added to the Act through section 401 of the 1996 Act; *see also infra* para. 19 (setting forth the criteria for forbearance).

[28] *See Notice*, 13 FCC Rcd at 22,949, 22,957-58, paras. 2, 14.

7. The Commission received eleven comments and one reply comment in this proceeding.[29] As discussed more thoroughly below, all but one commenter support our tentative conclusions that we should repeal Part 62 of our rules and forbear from enforcing the interlocking directorate provisions of section 212 of the Act.

[29] The commenters are as follows: Ameritech; Bell Atlantic; GST Telecom Inc. (GST); GTE Service Corporation (GTE); MCI WorldCom; Qwest Communications Corporation (Qwest); SBC; Securities Industry Association (SIA); United States Telephone Association (USTA); U S WEST Communications, Inc. (U S WEST); Viatel Inc. (Viatel). Only Bell Atlantic submitted a reply comment in this proceeding.

III. DISCUSSION

A. Repealing Part 62 of the Commission's Rules

8. We adopt our tentative conclusion that Part 62 of our rules is no longer necessary in the public interest and therefore should be repealed. Specifically, we eliminate the requirements that: (1) application be made to hold interlocking positions with more than one carrier subject to the Act where one carrier sought to be interlocked is either a dominant carrier, or a carrier not yet determined to be non-dominant;[30] (2) applications for findings of common ownership be filed if dominant carriers are involved;[31] (3) interlocking positions of more than one carrier subject to the Act involving non-dominant carriers, connecting carriers, cellular licensees operating in different geographic markets, and parents of carriers, among others, be reported to the Commission within 30 days after such interlock occurs;[32] and (4) any change in status as reported under Part 62 of the rules be reported to the Commission within 30 days of such change.[33] We find that interlocking directorates rarely threaten to constrain competition. More precisely, we find it difficult to envision a proposed interlock that the Commission would conclude to be anticompetitive, *ab initio*, such that the Commission would deny approval for such interlock. To the extent that potentially anticompetitive interlocks may occur, we further find that other Title II provisions and antitrust laws adequately protect against the particular concerns our Part 62 rules seek to address. Therefore, we find that our rules are no longer necessary in the public interest and should be repealed.

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30 47 C.F.R. ' 62.1.

31 *Id.* '' 62.12, 62.25.

32 *Id.* ' 62.26.

33 *Id.* ' 62.24.

9. In the *Notice*, we tentatively concluded that other Title II provisions and antitrust laws would be sufficient to guard against the anticompetitive behavior that might arise from interlocking directorates.[34] We noted, however, that not all telecommunications markets are fully competitive and, therefore, sought comment on whether any situation exists where other regulatory or legal mechanisms would not be sufficient to deter anticompetitive conduct.[35] We also sought comment on whether, given the various product markets and the existence of differing degrees of competition within such markets, our analysis pertaining to deleting these rules should vary from market to market.[36] As discussed more thoroughly below, although we sought comment on various product markets, commenters did not distinguish among the various telecommunications markets, with the limited exception of addressing the incumbent local exchange market.

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[34] *See Notice*, 13 FCC Rcd at 22,953-54, para. 7.

[35] *See id.*

[36] *See id.* at 22,954, para. 8.

10. We adopt our tentative conclusion that it would serve the public interest to eliminate the requirement of prior Commission approval before consummating interlocks involving dominant carriers or those carriers not yet found to be non-dominant.[37] Our rules set forth in Part 62 are designed to guard against the anticompetitive potential arising from the interlocking of companies through the sharing of officers or directors.[38] We agree with GTE, Qwest, Viatel, and U S WEST that the present telecommunications marketplace has changed significantly since the Commission adopted Part 62,[39] and thus, as

[37] 47 C.F.R. ' 62.1.

[38] *See Congressional Hearings and Reports on Communications*, 73rd Cong. 288 (1934).

[39] *See* GTE Comments at 3; Qwest Comments at 2-3; U S WEST Comments at 2; Viatel Comments at 2.

U S WEST states, that these rules are "products of a bygone era."[40] The Commission's rule requiring authorization prior to assuming an interlocking position was promulgated in an era when the telecommunications market was overshadowed by a single, dominant provider. The present domestic, interstate, interexchange marketplace, for example, is distinctly different, because there are no longer dominant carriers.[41] We specifically find that where competition exists the risk of

[40] U S WEST Comments at 2.

[41] *See Motion of AT&T to be Reclassified as a Non-dominant Carrier*, 11 FCC Rcd 3271, 3323 (1995), *petitions for reconsideration denied*, 9 Communications Reg (P&F) 1187 (Oct. 9, 1997) (classifying AT&T as a non-dominant carrier). In addition, we note that new entrants to the domestic, interstate, interexchange market are classified as non-dominant upon entry.

anticompetitive behavior as a result of interlocking directorates is extremely limited.[42]

[42] *See* Viatel Comments at 2 (stating that "today's robustly competitive domestic market place for interstate, interexchange service . . . makes it exceedingly unlikely that an interstate carrier could use interlocking directorates to its competitive advantage."); *see also* Ameritech Comments at 2 (stating that "since there is little potential for harm arising from interlocks in competitive markets, Part 62 regulation is unnecessary to prevent anticompetitive conduct."); *see also Part 62 Order*, 101 FCC2d at 496 (stating that non-dominant carriers "do not possess sufficient market power, either alone or in concert with other non-dominant carriers, to engage in predatory pricing or other anticompetitive or unjust practices . . . [and that] the ability of such carriers to engage in anticompetitive behavior via interlocking directorates has been substantially curbed by the telecommunications marketplace and the individual lack of market power of these carriers.").

11. We recognize that individual carriers continue to be dominant**C**and by definition possess market power**C**in certain telecommunications markets, particularly the local exchange market[43] and certain individual international routes.[44] We conclude, however, that even in these markets, the development of competition and the existence of other regulatory and legal safeguards provide adequate protections against the competitive harms sought to be addressed by the Part 62 rules. We agree with those commenters, including Ameritech, Bell Atlantic, and GTE, who state that we should repeal our Part 62 rules even in those markets that are not yet fully competitive, including the local exchange market.[45] We find that interlocking directorates, even where dominant carriers are involved, rarely lead to anticompetitive conduct or consumer concerns.[46] Since amending our rules in 1986, we have received approximately two dozen applications seeking preapproval of interlocking directorates.[47] Although we sought public comment on those applications, few comments were filed, and there were no oppositions to the proposed interlocks even where such interlocks involved dominant carriers.[48] This conclusion is also supported by our experience since our decision in 1994 to forbear from regulating pursuant to section 212 with respect to commercial mobile radio services (CMRS), even though we found that the cellular market was not yet fully competitive.[49] In doing so, we noted that the "antitrust

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[43] *See, e.g., Implementation of the Telecommunications Act of 1996, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, 13 FCC Rcd 8061, para. 168 (1998) (noting that the local exchange market is not yet fully competitive).

[44] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23,891, paras. 143-49 (1997).

[45] *See, e.g.,* Ameritech Comments at 3; Bell Atlantic Comments at 2; GTE Comments at 2.

[46] In fact, U S WEST states that these regulations "seem more benignly useless than harmful." U S WEST Comments at 2.

[47] *See Notice*, 13 FCC Rcd at 22,954-55, para. 9. The last filing seeking prior approval occurred in 1989. The number of carriers still obligated to file for prior approval is limited by the finding that AT&T is a non-dominant carrier. *See Motion of AT&T to be Reclassified as a Non-dominant Carrier,* 11 FCC Rcd at 3323.

[48] *See Notice*, 13 FCC Rcd at 22,954-55, para. 9; *see also* Bell Atlantic Comments at 2 (stating that it filed notifications by parent holding companies of "dominant" LECs that one or more directors of the holding company also held positions with other common carriers. Bell Atlantic further states that all of its filings were unopposed, including those involving the exchange carriers' parent companies.); U S WEST Comments at 2 (stating that it does not appear that our rules have affected the operations or decisions made by telecommunications carriers in the past).

[49] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1484-85, paras. 193, 196-97 (1994). We note that we took this action pursuant to the forbearance authority set forth in section 332(c)(1)(A) of the Act, as amended by section 6002(b) of the Omnibus Budget Reconciliation Act of 1993. In that order, we stated that "[f]orbearance from enforcing Section 212 [would] reduce regulatory burdens without adversely affecting CMRS rates." *Id.* at 1485, para. 197.

concerns that Section 212 was designed to address are already addressed through other Title II provisions or by antitrust laws."[50] We are unaware of any instances where our decision to forbear from enforcing section 212 with regard to CMRS has resulted in anticompetitive conduct.

[50] *Id.* at 1485, para. 197 (citations omitted).

12. We further conclude that our Part 62 rules are no longer necessary in the public interest, even where dominant carriers are involved, because we find that other Title II provisions and antitrust laws adequately guard against anticompetitive behavior that might arise from interlocking directorates.[51] For example, the Clayton Act prevents the potential for harm arising from interlocking positions by prohibiting a person from serving as an officer or director of two competing corporations[52] whose size exceeds certain statutory thresholds.[53] Therefore, we find that the harm that our Part 62 rules seek to prevent can be addressed, if necessary, through other statutory provisions. Accordingly, we conclude that our rules are duplicative of other interlocking directorate provisions, and therefore, are no longer necessary in the public interest.

13. Pointing to provisions adopted as part of the 1996 Act allowing Bell Operating Companies (BOCs) to obtain up to a ten percent interest in long distance, internet, or information

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[51] *See, e.g.*, section 8 of the Clayton Act, codified at 15 U.S.C. ' 19, as amended by the Interlocking Directorate Act of 1990. *See also* 17 C.F.R. ' 229.401 (requiring companies to list officers and directors). *See infra* para. 16 for a more thorough discussion of Part 229. *See also* Ameritech Comments at 2 (stating that "regardless of whether one believes that local exchange markets are sufficiently competitive since the antitrust laws, BOC separate subsidiary requirements in the Act, and general Title II provisions will deter anticompetitive interlocks, there is no basis for concluding that Part 62 should continue to apply to [ILECs]."); Bell Atlantic Comments at 1 (stating that the Commission's interlocking directorate requirements are redundant with other provisions of law); U S WEST Comments at 2.

[52] The Clayton Act only applies where there is a presence of competition between companies. Courts have looked to a variety of factors to determine whether competition exists between companies. *See, e.g., TRW, Inc. v. Federal Trade Commission*, 647 F.2d 942 (9th Cir. 1981) (stating that "competitors" are "companies that vie for the business of the same prospective purchasers, even if the products they offer, unless modified, are sufficiently dissimilar to preclude a single purchaser from having a choice of a suitable product from each."). The 1990 amendments to the Clayton Act do not affect the manner in which courts construe whether companies are in competition with one another. *See* S. Rep. No. 101-286 (1990) (stating that "[i]t is not the intention of the [Judiciary] Committee to alter the way in which the courts have determined whether products or services used by one corporation are in competition with products or services sold by another corporation").

[53] *See, e.g.*, 15 U.S.C. ' 19. Section 8 of the Clayton Act requires the existence of a horizontal market relationship. Accordingly, unlike section 212 of the Act and Part 62 of our rules, vertical interlocks are not covered. In pertinent part, section 8 provides that

> (a)(1) No person shall, at the same time, serve as a director or officer in any two corporations (other than banks, banking associations, and trust companies) that are (A) engaged in whole or in part in commerce; and (B) by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws; if each of the corporations has capital, surplus, and undivided profits aggregating more than $10,000,000 as adjusted pursuant to paragraph (5) of this subsection.

15 U.S.C. ' 19(a)(1)(A)-(B).

service companies,[54] MCI WorldCom argues that the Clayton Act is insufficient to prevent "exclusive arrangements incumbent local exchange companies (ILECs) may [now] exercise through vertical interlocks with companies" in these markets.[55] Therefore, MCI WorldCom argues, our Part 62 rules should be retained for dominant carriers.[56] MCI WorldCom also asserts that the limited number of filings is not evidence that there is little potential for abuse, arguing that Part 62 has deterred interlocks that present anticompetitive risks.[57]

[54] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

[55] MCI WorldCom Comments at 1 (stating that under the 1996 Act, BOCs may now obtain a ten percent or less equity interest in downstream long distance, internet, and information service companies without being subject to the requirements of section 272).

[56] *See id.*

[57] *See id.* at 3-4.

14. We disagree with MCI WorldCom's argument that we should retain our Part 62 rules where dominant carriers are involved. We recognize that section 8 of the Clayton Act does not prevent all types of interlocks.[58] As stated above, however, we find that, interlocking directorates rarely raise anticompetitive concerns.[59] Moreover, we find that in the unlikely event that an interlocking directorate threatens to constrain competition, other Title II provisions, such as section 201(b) of the Act and the complaint process of section 208, exist to address such harm.[60] Section 201(b) of the Act addresses the harms that may arise from anticompetitive conduct by requiring that carriers' charges, practices, and classifications be just and reasonable,[61] and these provisions may be enforced by the Commission on its own motion or though formal complaints filed pursuant to section 208 of the Act.[62] Thus, we find without merit MCI

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[58] *See supra* notes 51-52 (noting that the Clayton Act requires the presence of competition between companies and the existence of a horizontal relationship); *see also American Bakeries Company v. Gourmet Bakers, Inc.*, 515 F. Supp. 977 (D. Md. 1981) (stating that the Clayton Act encompasses horizontal, not vertical, interlocks).

[59] *See supra* para. 11.

[60] *See* 47 U.S.C. '' 201(b), 208.

[61] *See* 47 U.S.C. ' 201(b) (stating in pertinent part, "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification that is unjust or unreasonable is hereby declared to be unlawful . . . ").

[62] *See* 47 U.S.C. ' 208. Section 208 gives "[a]ny person . . . body politic or municipal organization, or State commission" the right to file a complaint with the Commission if it believes that a common carrier acted or failed to act in contravention of the Act or a Commission rule or order. Thus, although in this *Order* we eliminate our rules requiring Commission approval prior to assuming an interlocking position where certain types of carriers are involved, if an

WorldCom's argument that the new ownership provisions of the 1996 Act create an additional risk of anticompetitive interlocks.

interlock were to threaten to constrain competition or produce other anticompetitive practices, other statutory provisions such as 201(b) exist to prevent this harm. Accordingly, actions could be brought pursuant to section 208 of the Act should an interlocking directorate raise anticompetitive concerns.

15. We further disagree with MCI WorldCom's contention that our Part 62 rules, unlike other Title II provisions or antitrust laws, are the only means for us "to identify the possibility of subtle, hard-to-detect abuses involving dominant carriers and competitive firms operating in downstream, interexchange, internet, and information services markets, before the abuses occur."[63] We agree with Bell Atlantic that MCI WorldCom does not articulate what these subtle abuses might be nor how retaining our prior approval requirements would effectively serve to prevent such abuses. In particular, we find that it is unlikely that we would be presented with a particular proposed interlock that is patently anticompetitive, *ab initio*, such that the application should be denied. We also believe that any interlock that is so patently anticompetitive that we would deny an application also would be identified by the other statutory protections identified above. Accordingly, we conclude that the Part 62 rules provide little, if any, additional protections.

63 MCI WorldCom Comments at 9.

16. We also adopt our tentative conclusion that we should repeal the interlocking directorate reporting requirements set forth in our Part 62 rules.[64] All commenters, with the exception of MCI WorldCom, agree with our tentative conclusion that the reporting requirements set forth in Part 62 of our rules are no longer in the public interest and therefore should be repealed.[65] We note that this conclusion is consistent with our previous determination to forbear from enforcing section 212 with respect to CMRS even though the cellular market was not yet fully competitive.[66] As stated above, we note that forbearance from enforcing section 212 with regard to CMRS has not resulted in anticompetitive conduct.[67] As noted above, we also find that the concerns that Part 62 of our rules sought to address can be addressed, if necessary, through other more general Title II provisions as well as through antitrust or securities laws.[68] In particular, we note that certain securities regulations, such as the 10K filing and Regulation S-K, require extensive disclosure of officers and directors.[69] We find that these comprehensive filing requirements duplicate our Part 62 post-interlock filing requirements, permitting the repeal of the latter.

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[64] *See Notice*, 13 FCC Rcd at 22,955-56, para. 11. These rules require that "[a]ll persons holding interlocking positions on more than one carrier subject to the Act, including positions upon a parent or holding company of a carrier, shall report to the Commission within 30 days of assumption of the interlocking positions." 47 C.F.R. ' 62.26. These rules also require that "should any change occur in the status as reported under [Part 62], the applicant shall report such change to the Commission within 30 days after such change occurs." 47 C.F.R. ' 62.24.

[65] MCI WorldCom Comments at 5 (MCI WorldCom supports the elimination of the remaining reporting requirements involving interlocks for non-dominant carriers); *see, e.g.*, SBC Comments at 2; GST Telecom Comments at 5 (stating that the "concern that interlocking directorates among wholly-owned operating subsidiaries of non-dominant carriers would thwart competition is invalid").

[66] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd at 1484-85, paras. 193, 196-97; *see also supra* note 27.

[67] *See supra* para. 11.

[68] *See supra* paras. 11-15.

[69] *See* 17 C.F.R. ' 229.401 (discussing information to be included in a filing pursuant to Regulation S-K). In pertinent part, Item 401 requires that directors be identified as follows:

> Identification of Directors. List the names and ages of all directors of the registrant and all persons nominated or chosen to become directors; indicate all positions and offices with the registrant held by each such person; state his term of office as director and any period(s) during which he has served as such . . . .

Id. ' 229.401(a). Item 401 also contains similar disclosure requirements for executive officers and significant employees. *See id.* ' 229.401(b)-(c).

17. We agree with those commenters who argue that repealing our Part 62 rules would serve the public interest.[70] GTE and GST state that complying with our reporting requirements is a costly administrative burden.[71] Qwest similarly states that the proposed repeal "will eliminate unnecessary regulatory burdens, legal fees, and costs, direct and indirect of compliance."[72] We find that carriers seeking permission to hold interlocking directorates incur not only costs in preparing such filings, but also "substantial delays before they can implement a potentially beneficial restructuring."[73] To this end, we find that repealing Part 62 of our rules would eliminate a significant and unnecessary expenditure of carrier resources and that such benefit substantially outweighs any minimal protections afforded by their continued enforcement. We previously have found that the elimination of unnecessary regulatory burdens and legal costs incurred to fulfill such regulatory requirements permits resources to be directed instead toward the prompt implementation of service.[74] We also agree with GTE that Commission resources expended to review such filings could be used for other purposes.[75] Therefore, we conclude that

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[70] *See, e.g.*, GST Comments at 1-2; GTE Comments at 3.

[71] *See* GST Comments at 1 (stating that the reporting requirements are "a costly administrative burden that serve no useful purpose.").

[72] Qwest Comments at 3.

[73] GTE Comments at 3.

[74] *See Notice*, 13 FCC Rcd at 22,956, para. 12; *see also Amendment of Part 62 of the Commission's Rules*, First Report and Order, 101 FCC 2d 495, 498 (1985) (*Part 62 Order*). Thus, in the *Notice*, the Commission sought comment on the indirect costs associated with these regulations, such as whether compliance with existing interlocking directorate requirements may temporarily impede carrier decisional flexibility necessary for growth and the prompt and innovative provision of services. *See Notice*, 13 FCC Rcd at 22,956, para. 12.

[75] *See* GTE Comments at 3.

repealing our Part 62 rules will serve the public interest by allowing unnecessary expenditures of both the carriers and the Commission to be directed instead toward the prompt implementation of service and the deployment of new technologies.

18. We decline to adopt in this Order the recommendations of Qwest and Viatel that we also repeal other provisions of our rules regarding interlocking directorates. Specifically, these commenters request that we repeal sections 63.18(h)(2) and 1.767(a)(6) of our rules, which require applications regarding cable landing licenses to indicate whether there are interlocking directorates.[76] These commenters argue that our proposed repeal of the Part 62 rules "implicitly repeals all other provisions of the Commission's rules which require reporting of interlocking directorates."[77] These commenters further state that eliminating sections 63.18(h)(2) and 1.767(a)(6) of our rules will eliminate unnecessary regulatory burdens, legal fees, and costs of compliance.[78] We confined the *Notice* to comment on the interlocking directorates provisions set forth in Part 62 of our rules. The interlocking directorate reporting requirements set forth in sections 63.18(h)(2) and 1.767(a)(6) are separate and distinct from those requirements set forth in Part 62 and serve different policy goals from those set forth in Part 62. Accordingly, and without regard to the merits of these suggestions, we conclude that there is insufficient notice to adopt commenters' suggestions that we also repeal sections 63.18(h)(2) and 1.767(a)(6) of our rules.

B. Statutory Forbearance

1. Background

19. The 1996 Act provides for regulatory flexibility by requiring the Commission to forbear from applying any regulation or any provision of the Act, to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain conditions are satisfied.[79] Specifically, Section 10 of the Act requires the Commission to forbear from application of its rules or provisions of the Act if it finds that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations, by, for, or in connection with that

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[76] *See* Qwest Comments at 3; Viatel Comments at 3.

[77] Qwest Comments at 3.

[78] *Id.*; Viatel Comments at 3.

[79] 47 U.S.C. ' 160. Section 10 of the Act provides, however, that, except as provided in section 251(f) of the Act, the Commission may not forbear from applying the requirements of the new sections 251 and 271 of the Act until the Commission determines that those requirements have been fully implemented. *Id.*

> telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[80]

In determining whether forbearance from enforcing a particular provision or regulation is in the public interest, the Commission is required to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[81]

20. In the *Notice*, we tentatively concluded that we should forbear from enforcing the provisions of section 212 of the Act requiring any person seeking to hold the position of officer or director with more than one carrier subject to the Act to seek prior Commission approval.[82] We tentatively concluded that these provisions of section 212 of the Act: (1) are not necessary to ensure that a carrier's charges, practices, or classifications are just and reasonable, and are not unjustly or unreasonably discriminatory; and (2) are not necessary for the protection of consumers. We also tentatively concluded that forbearance from enforcing these requirements is consistent with the public interest. We recognized in the *Notice* that section 212 of the Act applies to carriers in telecommunications markets that may not yet be fully competitive, and therefore, sought comment on whether the analysis undertaken to consider forbearance from enforcing section 212 of the Act should vary from market to market.[83] No commenter opposes our tentative conclusion that we should forbear from section 212 of the Act as applied to all carriers in all telecommunications markets.[84] For all the reasons detailed previously in support of eliminating our Part 62 rules, we conclude that each of the statutory criteria for forbearance is satisfied, and therefore, that we should forbear from enforcing these provisions of section 212 of

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80 *Id.*

81 *Id.* ' 160(b) (stating in pertinent part that, "[i]f 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.").

82 *See Notice*, 13 FCC Rcd at 22,957-58, para. 14.

83 *See id.*

84 *But see supra* paras. 11-15 (discussing MCI WorldCom's suggestion that the Commission's Part 62 rules be retained as applied to dominant carriers. MCI WorldCom does not specifically address section 212 of the Act.).

the Act in all markets.[85]

2. Statutory Criteria for Forbearance

a. Just and Reasonable Practices

[85] *See* USTA Comments at 2 (stating that the Commission's forbearance test is easily met).

21. No commenter opposes our tentative conclusion in the *Notice* that enforcing section 212 of the Act is not necessary in any particular telecommunications market, including those that are not yet fully competitive, to ensure that carriers' charges, practices, regulations, or classifications are just and reasonable, and not unjustly or unreasonably discriminatory. These commenters assert that the competitive nature of most sectors of the communications marketplace will ensure that a carrier's charges and practices are just and reasonable and not unjustly or unreasonably discriminatory.[86]

22. For the reasons discussed above in conjunction with repealing our Part 62 rules, we find that we should forbear from enforcing section 212 of the Act even where dominant carriers are involved. As discussed above, we find that interlocks rarely threaten to constrain competition. We also find that in the unlikely event an interlock creates the potential for anticompetitive conduct, the specific concerns that section 212 of the Act sought to prevent can be addressed by other regulatory and legal safeguards such as other Title II provisions[87] or by antitrust laws.[88] More importantly, even if a potential threat to competition exists, it is unlikely that such threat could be identified, *ab initio*, such that the Commission would deny an application. Therefore, we adopt our tentative conclusion that enforcing section 212 of the Act

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[86] *See* GTE Comments at 4.

[87] *See, e.g.*, 47 U.S.C. '' 201(b), 208. *See, e.g.*, Ameritech Comments at 3; GTE Comments at 4.

[88] *See, e.g.*, Clayton Act, 15 U.S.C. ' 19; *see also supra* para. 12; *see also* Bell Atlantic Comments at 2 (stating that "given the limited number of filings, the non-controversial nature of the ones that have been made and the alternative tools to guard against anticompetitive practices, the standard for forbearance under section 10(a) is satisfied.").

is not necessary in any particular telecommunications market, including those that are not yet fully competitive, to ensure that carriers' charges, practices, regulations, or classifications are just and reasonable, and not unjustly or unreasonably discriminatory.

b. Consumer Protection

23. We also adopt our tentative conclusion that section 212 of the Act is not necessary for the protection of consumers. Several commenters agree with our tentative conclusion, based on our experience reviewing interlock applications and filings, that interlocking directorates rarely raise consumer concerns.[89] In the unlikely event that an interlocking directorate threatens to constrain competition, other Title II provisions, such as section 201(b) of the Act and the complaint process, adequately address such harm.[90] Specifically, section 201(b) of the Act addresses the harms that may arise from anticompetitive conduct by requiring that carriers' charges, practices, and classifications be just and reasonable,[91] and these provisions may be enforced by the Commission on its own motion or though formal complaints filed pursuant to section 208 of the Act.[92] Therefore, and for the reasons discussed previously, we conclude that forbearance from section 212 of the Act will not deprive consumers of protection from unlawful carrier practices.

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[89] *See Notice*, 13 FCC Rcd at 22,958-59, para. 16; *see also* GTE Comments at 4 (agreeing with the Commission's tentative conclusion that interlocking directorates rarely raise consumer concerns).

[90] *See* 47 U.S.C. '' 201(b), 208. We note that it is not necessary to retain section 212 to protect against anticompetitive behavior, *see Implementation of Infrastructure Sharing Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 5470, 5523, paras. 107-108 (stating that "any collusive agreement [. . .] would likely be against the public interest and be unjust and unreasonable, and, therefore, invite Title II sanctions.").

[91] *See* 47 U.S.C. ' 201(b) (stating in pertinent part, "All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification that is unjust or unreasonable is hereby declared to be unlawful . . . ").

[92] *See* 47 U.S.C. ' 208; *see also supra* note 61.

c. Public Interest

24. We also adopt our tentative conclusion that forbearance is consistent with the public interest and will promote competition in the various markets affected by the requirements set forth in section 212 of the Act. We found above that our Part 62 rules are no longer necessary to the public interest.[93] We agree with GTE that forbearance will promote competitive market conditions among providers of telecommunications services by relieving providers of the regulatory and legal costs that arise from the filing, reporting, and authorization requirements relating to interlocking directorates.[94] Thus, forbearance will serve the public interest by allowing providers of telecommunications services to respond more quickly to competition and by allowing carriers to dedicate resources to the implementation of service and the deployment of new technologies.[95] We also find that there is no public interest that necessitates retaining section 212 of the Act.[96] As discussed above, section 212 is not necessary to ensure just and reasonable rates and practices or to protect consumers.[97] Therefore, we conclude that we should forbear from those provisions of section 212 of the Act addressing interlocking directorates.

C. Other

25. In the *Notice*, we proposed to forbear solely from those provisions set forth in section 212 of the Act that address interlocking directorates.[98] In doing so, we specifically stated that the *Notice* did not address the remainder of section 212, which makes it

> unlawful for any officer or director of any carrier subject to this Act to receive for his own benefit directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of securities issued or to be issued by such carriers, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such carriers from any funds properly included in the

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93 *See supra* paras. 11-15.

94 *See* GTE Comments at 4.

95 *See id.*

96 *See* U S WEST Comments at 2 (stating that the Commission should not retain section 212 of the Act unless the Commission demonstrates a public interest that will be served by retaining the rules).

97 *See id.* (stating that the statute should be removed unless the Commission can demonstrate "a real public interest.").

98 *See Notice*, 13 FCC Rcd at 22,949 n.13.

capital account.[99]

One commenter, the Securities Industry Association (SIA), however, requests that the Commission forbear from all of section 212 of the Act including the above quoted provision, which makes it unlawful for an officer or director of a carrier to benefit from certain transactions involving that carrier's securities.[100] We did not seek comment as to whether this provision satisfied the statutory criteria for forbearance under section 10 of the Act, and therefore, forbearance from this provision of section 212 of the Act is beyond the scope of this rule making proceeding and we deny SIA's request.

[99] 47 U.S.C. ' 212.

[100] *See* SIA Comments at 2. SIA made its request for additional forbearance relief in its comments in this proceeding. SIA did not request forbearance from section 212 in a separate petition filed pursuant to section 10 of the Act and the Commission's rules, thus further justifying the denial of the forbearance request by SIA in this proceeding.

IV. CONCLUSION

26. Based on the foregoing determinations, we conclude that we should repeal Part 62 of our rules, which implements section 212 of the Act. Specifically, we conclude that we should delete our rules that require: (1) dominant carriers and those carriers not yet found to be non-dominant to seek Commission approval prior to accepting an interlocking directorate position;[101] (2) non-dominant carriers, connecting carriers, parent companies, and other carriers as may be required under our rules, to file post interlocking directorate reports;[102] (3) carriers desiring authorization to hold interlocking directorates based on a finding of common ownership to make specific filings with the Commission;[103] and (4) carriers that undergo a change in status with respect to interlocking directorate status to file a change of status report.[104] We also conclude that, pursuant to section 10 of the Act, we should forbear from enforcing the interlocking directorate provisions of section 212 of the Act.

V. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

27. As required by the Regulatory Flexibility Act (RFA),[105] the Commission

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[101] 47 C.F.R. ' 62.1.

[102] *Id.* ' 62.26.

[103] *Id.* '' 62.12, 62.25.

[104] *Id.* ' 62.24.

[105] *See* 5 U.S.C. ' 603. The RFA, *see* 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).

incorporated an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in the *Notice*.[106] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[107]

[106] *See Notice*, 13 FCC Rcd at 22,960-67, paras. 20-39.

[107] *See* 5 U.S.C. ' 604.

28. Need for, and Objectives of, this Action: The Commission initiated its examination of its Part 62 rules as part of its 1998 biennial review of regulations as required by section 11 of the Communications Act of 1934, as amended.[108] The Commission also issued the *Notice* to review its regulatory regime for interlocking directorates, and to determine whether in light of section 10 of the Act, the Commission should forbear from applying such requirements. The purpose of this Order is to delete Part 62 of the Commission's rules, which the Commission finds are no longer necessary in the public interest. The Commission also has determined that it should forbear from addressing those provisions in section 212 of the Act that address interlocking directorates.

29. Summary of Significant Issues Raised by Public Comments in Response to the IRFA: In the IRFA, the Commission sought comment on whether repealing Part 62 of its rules and forbearing from section 212 would benefit small entities. The Commission received no comments in response to the IRFA. Several commenters, including one small entity, however, indicated that the proposals in the *Notice* would benefit small entities by reducing unnecessary regulatory burdens.[109]

30. Description, potential impact, and number of small entities affected: In this order, the Commission has decided to repeal Part 62 of its rules, which includes eliminating the post-interlock filing requirement for non-dominant carriers, many of whom may be small entities. The Commission also has decided to forbear from enforcing those provisions of section 212 of the Act addressing interlocking directorates. Forbearance from enforcing these rules will benefit small entities by reducing the regulatory burden to which small businesses would otherwise be subject.

[108] 47 U.S.C. ' 161.

[109] *See, e.g.,* GST Comments at 1-3.

31. To estimate the number of small entities that would benefit from this positive economic impact, we first consider the statutory definition of "small entity" under the RFA. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."[110] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[111] Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[112] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[113] We first discuss the number of small telephone companies falling within these SIC categories, then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

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[110] 5 U.S.C. ' 601(6).

[111] 5 U.S.C. ' 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. ' 632). Pursuant to 5 U.S.C. ' 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

[112] 15 U.S.C. ' 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[113] 13 C.F.R. ' 121.201.

32. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS).[114] According to data in the most recent report, there are 3,459 interstate carriers.[115] 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 toll service, providers of telephone exchange service, and resellers.

[114] FCC, *Telecommunications Industry Revenue: TRS Fund Worksheet Data*, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997) (*Telecommunications Industry Revenue*).

[115] *Id.*

33. Although some affected incumbent local exchange carriers (ILECs) may have 1,500 or fewer employees, we do not believe that such entities should be considered small entities within the meaning of the RFA because they are either dominant in their field of operations or are not independently owned and operated, and therefore by definition not "small entities" or "small business concerns" under the RFA. Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small ILECs. Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will separately consider small ILECs within this analysis and use the term "small ILECs" to refer to any ILECs that arguably might be defined by the SBA as "small business concerns."[116]

34. *Total Number of Telephone Companies Affected.* The United States Bureau of the Census ("the 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.[117] This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."[118] Additionally, we note that the number of small entities affected by this rule change as set forth in this Order is less than the total number of telephone companies as stated herein, because as discussed above, the Commission already has decided to forbear from applying section 212 of the Act with regard to CMRS

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[116] *See* 13 C.F.R. ' 121.201, SIC code 4813. Since the time of the Commission's 1996 decision, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996), 61 FR 45476 (Aug. 29, 1996), the Commission has consistently addressed in its regulatory flexibility analyses the impact of its rules on such ILECs.

[117] United States 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").

[118] 15 U.S.C. ' 632(a)(1).

providers.[119] It seems reasonable to conclude, therefore, that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this Order.

[119] *See supra* note 27 (citing *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1484-85, paras. 193, 196-97 (1994)).

35. *Wireline Carriers and Service Providers.* SBA has developed a definition of small entities for telephone communications companies other than radiotelephone 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.[120] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[121] 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. Although it seems certain that some of these carriers are not independently owned and operated, we 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 SBA's definition. Consequently, we estimate that there are fewer than 2,295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions in this Order.

36. *Local Exchange Carriers*. Neither the Commission nor SBA has developed a definition of small providers of local exchange services (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with the Telecommunications Relay Service (TRS).[122] According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.[123] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,371 small entity LECs or small incumbent LECs that may be affected by the decisions in this Order.

37. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies.[124] The most reliable source of information regarding the

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120 1992 Census, *supra*, at Firm Size 1-123.

121 13 C.F.R. ' 121.201, Standard Industrial Classification (SIC) Code 4813.

122 *See* 47 C.F.R. ' 64.601 *et seq.*

123 *Telecommunications Industry Revenue* at Fig. 2.

124 13 C.F.R. ' 121.210, SIC Code 4813.

number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services.[125] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions in this Order.

[125] *Telecommunications Industry Revenue* at Fig. 2.

38. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.[126] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions in this Order.

39. *Pay Telephone Operators*. Neither the Commission nor 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 except radiotelephone (wireless) companies.[127] The most reliable source of information regarding the number of pay telephone operators nationwide is the data that we collect annually in connection with the TRS Worksheet. According to our most recent data, 441 companies reported that they were engaged in the provision of pay telephone services.[128] We do not have information on the number of carriers that are not independently owned and operated, nor 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 SBA's definition. Consequently, we estimate that there are fewer than 271 small pay telephone operators.

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126 *Id.*

127 13 C.F.R. ' 121.201, SIC Code 4813.

128 *Telecommunications Industry Revenue* at Fig. 2.

40. *Operator Service Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of operator services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies. The most reliable source of information regarding the number of operator service providers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 27 companies reported that they were engaged in the provision of operator services.[129] Although it seems certain that some of these companies are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of operator service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 27 small entity operator service providers that may be affected by the decisions in this Order.

41. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies.[130] The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.[131] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions adopted in this Order.

42. *Private Paging*. At present, there are approximately 24,000 Private Paging licenses. 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 paging carriers that would qualify as small business

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[129] *Id.*

[130] 13 C.F.R. ' 121.210, SIC Code 4813.

[131] *Telecommunications Industry Revenue* at Fig. 2.

concerns under the SBA's definition. We estimate that the majority of private paging providers would qualify as small entities under the SBA definition. We note that private paging does not include common carrier paging, for which the Commission has adopted auction rules and has proposed to SBA a special small business size standard definition.

43. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[132] According to SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[133] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies that may be affected by the decisions adopted in this Order.

44. Recording, record keeping, and other compliance requirements: No additional paperwork will be required by the decisions adopted in this proceeding. This proceeding eliminates filing requirements set forth in Part 62 of the Commission's rules.

45. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered: The impact of this proceeding should be beneficial to small businesses, because eliminating the Commission's Part 62 rules will reduce the reporting or recordkeeping requirements on all communications common carriers.

46. Report to Congress: The Commission will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. ' 801(a)(1)(A). In addition, the Commission will send a copy of this Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.

VI. ORDERING CLAUSES

[132] United States 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").

[133] 13 C.F.R. ' 121.201, SIC Code 4812.

47. Accordingly, IT IS ORDERED that pursuant to sections 1, 4, 10, 11, and 212, of the Communications Act of 1934, as amended, 47 U.S.C. '' 151, 154, 160, 161, and 212, the policies, rules, and requirements set forth herein ARE ADOPTED.

48. IT IS FURTHER ORDERED that pursuant to section 11 of the Communications Act of 1934, as amended, 47 U.S.C. ' 161, that Part 62 of the Commission's rules, 47 C.F.R. Part 62, is no longer in the public interest, and therefore is REMOVED, effective 30 days after publication of the text thereof in the Federal Register.

49. IT IS FURTHER ORDERED that pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. ' 160, the Commission WILL FORBEAR from those provisions of section 212 addressing interlocking directorates, 47 U.S.C. ' 212, effective 30 days after publication of the text thereof in the Federal Register.

50. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A: Parts Removed

Accordingly, under the authority 47 U.S.C. ' 154, amend 47 C.F.R. chapter I by removing Part 62.

Statement of Commissioner Harold W. Furchtgott-Roth

Re: 1998 Biennial Regulatory Review -- Repeal of Part 62 of the Commission's Rules, *Report and Order*, CC Docket No. 98-195

I support adoption of this Report and Order wherein, pursuant to the Commission=s duty under Section 11(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sect. 161(b), we have repealed or modified regulations that we have determined to be no longer necessary in the public interest. The regulations at issue here were chosen for repeal or modification as part of the Commission=s 1998 Biennial Review, which was conducted pursuant to Section 11(a) of the Act, *Id.* at Sect. 161(a). However, as thoroughly described in my *Report on Implementation of Section 11 by the Federal Communications Commission* (Dec. 21, 1998), which can be found on the FCC WWW site at <http://www.fcc.gov/commissioners/furchtgott-roth/reports/sect11.html>, I believe that the 1998 Section 11(a) review was not as thorough as it should have been. I look forward to working with the chairman and other commissioners on the 2000 Biennial Review, planning for which should begin in mid-1999.

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