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	)	
	)	

NOTICE OF PROPOSED RULE MAKING

Adopted: November 3, 1998 Released: November 17, 1998

Comment Date: December 14, 1998
Reply Comment Date: January 4, 1999

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

I. INTRODUCTION

1. We are initiating this proceeding as part of our 1998 biennial review of regulations pursuant to section 11 of the Communications Act of 1934, as amended, ("the Act").[1] 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."[2] Section 11 further requires the Commission to repeal or modify any regulation it determines is no longer necessary in the public interest.[3] We tentatively conclude that Part 62 of our rules governing interlocking directorates,[4] which implements section 212 of the Act,[5] is no longer

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[1] 47 U.S.C. § 161.

[2] *Id.* § 161(a).

[3] *See id.* § 161(b).

[4] 47 C.F.R. Part 62.

[5] 47 U.S.C. § 212. In pertinent part, section 212 states, "[i]t 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[.]"

necessary to the public interest, and therefore should be repealed.[6] To the extent interlocking directorates could be used to inhibit competition in communications markets, we believe other laws, particularly antitrust laws, adequately address the potential for harm. Accordingly, we propose to repeal the requirement that application be made to the Commission "to hold interlocking positions with more than one carrier subject to the Act where any carrier sought to be interlocked" is defined as a dominant carrier or a carrier not yet found to be non-dominant.[7] We also propose to repeal the reporting requirements set forth in Part 62, which require that all persons holding "interlocking positions on more than one carrier subject to the Act" such as those between non-dominant carriers, among others, report such interlocking position to the Commission within 30 days of assuming such position and that carriers report any change in status within 30 days of such change.[8] We further propose to repeal the requirement that certain carriers obtain authorization to hold interlocking directorates based on a finding of common ownership.[9] By these proposals, we seek to promote competition by eliminating unnecessary regulations that are no longer in the public interest.

2. Further, in the Telecommunications Act of 1996 ("1996 Act"), Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[10] Integral to achieving this goal, the 1996 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.[11] In this proceeding we tentatively conclude that we should forbear from applying section 212 of the Act,[12] the statutory basis for our Part 62 rules, which prohibits any person from holding the position of officer or director of more than one carrier subject to the Act without obtaining prior Commission authorization.[13]

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6 *See* 47 U.S.C. § 161.

7 *See* 47 C.F.R. § 62.1(a).

8 *See id.* § 62.26.

9 *See id.* §§ 62.12, 62.25.

10 S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996).

11 *See* section 10, codified at 47 U.S.C. § 160, is added to the Act through section 401 of the 1996 Act.

12 47 U.S.C. § 212.

13 *Id.* We note that this notice does 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 capital account."

II. BACKGROUND

3. Congress designed section 212 to guard against the anticompetitive potential arising from the interlocking of companies through the sharing of officers or directors.[14] The Commission adopted Part 62 of its rules to implement the Congressional mandate set forth in section 212.[15] 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.[16] The Commission addressed each application on a case-by-case basis and usually found that the interlocks offended neither public nor private interests.[17] In addition, although the Commission routinely placed each application on public notice, the applications were usually unopposed.[18]

4. Therefore, in the mid-1980s, the Commission initiated a rule making proceeding to consider revising its rules relating to interlocking directorates.[19] During the course of the rule making proceeding, 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.[20] As a result of the rule making proceeding, the Commission 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 Rule Making*,[21] cellular licensees

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

15 47 C.F.R. §§ 62.1-.26.

16 *See Amendment of Part 62 of the Commission's Rules*, Notice of Proposed Rule Making, 50 FR 976 (1984) ("*Part 62 NPRM*").

17 *See Amendment of Part 62 of the Commissions Rules*, First Report and Order, 101 FCC 2d 495, 495-96 (1985) (*"Part 62 Order"*).

18 *See id.*

19 *See Part 62 NPRM*, 50 FR 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*").

20 *See Part 62 NPRM*, 50 FR at 977-78.

21 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 Rule Making, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981); Second

in different geographic markets,[22] or carriers and their parent companies,[23] stating that these interlocks would not adversely affect public or private interests.[24] The Commission instead required that such interlocks be reported to the Commission within 30 days after occurring.[25] The Commission declined, however, to remove the preauthorization requirement for those interlocks involving a dominant carrier or a carrier not yet found to be non-dominant, because market power or control of essential facilities might allow such interlocks to engage in anticompetitive conduct.[26] The Commission has not further amended its rules pertaining to interlocking directorates.[27] This Notice seeks comment on whether, in light of the limited number of filings made pursuant to these rules and the lack of

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Further Notice of Proposed Rule Making, 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 Rule Making, 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).

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

[23] *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 prior Commission approval).

[24] *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).

[25] *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.

[26] *See Part 62 Order*, 101 FCC 2d at 498, para. 7.

[27] We note, however, that 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 ("Budget Act"), the Commission concluded that it should forbear from regulating pursuant to section 212 with respect to commercial mobile radio services (CMRS). *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). In that order, although the Commission noted that the cellular market was not yet fully competitive, it stated that "[f]orbearance from enforcing Section 212 [would] reduce regulatory burdens without adversely affecting CMRS rates." The order further stated that section 212 was adopted to prevent interlocking directors and officers from engaging in anticompetitive conduct such as price fixing, and noted that the "antitrust concerns that Section 212 [were] designed to address [were] already addressed through other Title II provisions or by antitrust laws." *See id.* at 1485, para. 197 (citations omitted).

opposition to such filings, the continued presence of other laws against potentially anticompetitive interlocking directorates, and increases in competition in certain sectors of the telecommunications marketplace, such application and filing requirements are still necessary and in the public interest.

III. DISCUSSION

A. Repealing Part 62 of the Commission's Rules

5. Consistent with the 1996 Act's goal of providing a deregulatory national telecommunications framework, section 11 requires the Commission to conduct a biennial review of "regulations issued under [the] Act in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service"[28] 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."[29] Section 11 further requires that the "Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest."[30] We tentatively conclude that Part 62 of our rules is no longer in the public interest and therefore should be repealed.

6. In this proceeding, we propose to eliminate our 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;[31] (2) applications for findings of common ownership be filed if dominant carriers are involved;[32] (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;[33] and (4) any change in status as reported under Part 62 of the rules be reported to the Commission within thirty (30) days of such change.[34]

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[28] 47 U.S.C. § 161(a)(1).

[29] *Id.* § 161(a)(2).

[30] *Id.* § 161(b).

[31] 47 C.F.R. § 62.1.

[32] *Id.* §§ 62.12, 62.25.

[33] *Id.* § 62.26.

[34] *Id.* § 62.24. We specifically address whether we should eliminate the requirement of Commission approval prior to interlocking directorates, filings for findings of common ownership, post-interlock

7. We tentatively conclude that it would serve the public interest to eliminate the requirement that interlocks involving dominant carriers or those carriers not yet found to be non-dominant seek Commission approval prior to obtaining such interlocks.[35] The Commission's rules set forth in Part 62 are intended to prevent anticompetitive behavior that might arise from interlocking directorates. We note, however, that other Title II provisions[36] as well as antitrust laws, such as the Clayton Act, also exist to guard against this particular type of anticompetitive behavior. More specifically, section 8 of the Clayton Act prohibits a person from serving as an officer or director of two competing corporations[37] whose size exceeds certain statutory thresholds.[38] Section 8 requires the existence of a horizontal relationship and does not prevent interlocks among officers or directors

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filings, and change of status reports. We note, however, elimination of these rules incorporates sections 62.11, 62.21-.24 by reference, which govern the form and substance of filing requirements.

35 *Id.* § 62.1.

36 *See, e.g.,* 47 U.S.C. § 201(b).

37 We emphasize that the Clayton Act requires the presence of competition between the 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").

38 *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. 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).

of corporations in vertical relationships with one another.[39] We seek comment as to whether the presence of the Clayton Act prohibition against horizontal interlocking directorates obviates the need for Commission rules in this area. Since the Clayton Act applies only to horizontal interlocks, we also seek comment as to whether this suggests that the potential for harm arising from vertical interlocks is limited and obviates the need for rules addressing vertical interlocks.

8. When examining competitive effects, however, the Commission examines not only those firms that are currently competitors in the marketplace, but also those firms that are "precluded competitors."[40] As discussed above, however, the Clayton Act only applies where corporations are in competition with one another. Therefore, we seek comment as to whether the limitations of the Clayton Act necessitate continued Commission rules in this area. We also seek comment on whether, given the various product markets, our analysis pertaining to the deletion of this particular rule should vary from market to market and whether any situation exists where general Title II provisions or antitrust laws would not be sufficient to deter anticompetitive conduct. We further seek comment on whether and under what circumstances we should retain our pre-interlock approval requirement where certain types of carriers are involved.

9. We note that since amending our rules in 1986, the Commission has received about 300 filings under Part 62, of which approximately two dozen sought preapproval of interlocking directorates. Most of those applications did not involve dominant carriers, but instead carriers in new services.[41] Although we sought public comment on these applications, few comments were filed, and there were no oppositions to the proposed interlocks. As noted above, the Clayton Act guards against anticompetitive behavior that might arise from interlocking directorates. We tentatively conclude that the limited number of filings suggests that the Commission only receives those applications that comply with other laws such as the Clayton Act. We further tentatively conclude that the presence of other laws, such as the Clayton Act, prevents certain anticompetitive interlocks from occurring and thus that our rules are no longer necessary.

10. Moreover, the Commission's rule requiring prior authorization for interlocks where dominant carriers or carriers not yet found to be non-dominant are involved was promulgated in an

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[39] *See American Bakeries Company v. Gourmet Bakers, Inc.*, 515 F. Supp. 977 (D. Md. 1981) (stating that the Clayton Act encompasses horizontal, not vertical, interlocks).

[40] *See, e.g., Applications of NYNEX Corporation Transferor and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19,985, 20,010-11, para. 39 (1997) (discussing the "precluded competitor" analysis).

[41] The last filing seeking prior approval occurred in 1989. In addition, the number of carriers still obligated to file for prior approval is further limited by the recent 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 3271, 3323 (1995), *petitions for reconsideration denied*, 9 Communications Reg (P&F) 1187 (Oct. 9, 1997).

era where the long distance market was overshadowed by a single, dominant service provider. The present domestic, interstate, interexchange marketplace, however, is distinctly different, because there are no longer dominant carriers in this particular market.[42] Thus, we tentatively find that the harm the rule sought to prevent—protecting against anticompetitive behavior that might result from a market devoid from competition—no longer exists. We note, however, that the potential for anticompetitive conduct may be present in particular telecommunications markets, such as the local exchange market, which is not yet fully competitive,[43] and individual international routes, where a foreign carrier may be able to exercise its market power on the foreign end of the route.[44] We tentatively conclude, however, that the concerns that Part 62 of our rules sought to address can be addressed, if necessary, through other more general Title II provisions[45] or through antitrust laws.[46]

11. In addition, we tentatively conclude that eliminating the interlocking directorate reporting requirements set forth in section 62.26 of the Commission's rules also would serve the public interest.[47] 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."[48] Specifically, these rules apply to interlocks involving non-dominant carriers, cellular licensees in different markets, and interlocks with parents of carriers, among others. Since amending our rules in 1986, however,

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42 *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.

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 Nos. 96-115, 96-149, FCC 98-27, para. 168 (rel. Feb. 26, 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.*, 47 U.S.C. § 201(b).

46 *See supra* para. 7 (discussing antitrust laws such as the Clayton Act).

47 47 C.F.R. § 62.26.

48 *Id.*

the Commission has received a limited number of filings pursuant to these rules.[49] Moreover, the Commission already has concluded that it should forbear from regulating pursuant to section 212 with respect to commercial mobile radio services (CMRS) even though the Commission noted that that particular market was not yet fully competitive.[50] Therefore, we seek comment on whether the limited number of filings made pursuant to these rules and the Commission's forbearance from these rules in certain markets suggests that such rules are no longer necessary in the public interest. We further seek comment as to whether the presence of Commission rules pertaining to interlocking directorates in effect has prevented certain interlocking applications from being filed, and moreover, whether in an environment devoid of Commission rules governing interlocking directorates, future interlocks may occur that threaten to constrain competition. Additionally, we seek comment on whether the state of competition in any particular telecommunications market suggests that we should retain interlocking directorate reporting requirements for any particular class of carrier, and why these requirements would be necessary to deter anticompetitive conduct in telecommunications markets.

12. The Commission previously has found that 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.[51] Therefore, we seek 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. We also seek comment on whether repealing Part 62 of our rules would eliminate a significant and unnecessary expenditure of carrier resources. To this end, we seek comment on the direct costs incurred to comply with our rules, such as the administrative burdens carriers encounter, including: time spent on such filings; expenditures involved; and other costs associated with these requirements. We also tentatively conclude that repealing Part 62 of our rules will further the public interest by reducing the amount of paperwork incurred by both the Commission and applicants.

B. Statutory Forbearance

13. Section 10 of the Act requires the Commission to:

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[49] *See supra* para. 9.

[50] *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); *see also supra* note 27 (stating that the Commission acted pursuant to its 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 ("Budget Act")).

[51] *See Part 62 Order*, 101 FCC 2d at 498.

> [F]orbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --
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> (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 telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.[52]

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.[53]

14. We seek comment on whether the Commission should forbear from enforcing the requirements of section 212 of the Act in light of the limited number of filings made pursuant to the Act and the availability of other statutory provisions to deter anticompetitive conduct such as more general Title II provisions or antitrust laws. Specifically, we seek comment on whether we should forbear from requiring that any person seeking to hold the position of officer or director with more than one carrier subject to the Act seek prior Commission approval. We tentatively conclude that section 212 of the Act: (1) is not necessary to ensure that non-dominant interexchange 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 find that forbearance from applying interlocking directorate requirements is consistent with the public interest. Therefore, we tentatively conclude that we should forbear from applying section 212 of the Act. We recognize that section 212 applies to carriers in telecommunications markets that may not yet be fully competitive, and therefore, we seek comment on whether the analysis undertaken to consider

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[52] 47 U.S.C. § 160.

[53] *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.").

forbearance from enforcing section 212 should vary from market to market.

1. *Just and Reasonable Practices*

15. We tentatively conclude that section 212 of the Act is not necessary to ensure that a carrier's charges, practices, regulations, or classifications are just and reasonable, and not unjustly or unreasonably discriminatory. We find that the specific concerns that section 212 sought to address can be addressed, if necessary, through other Title II provisions[54] or by antitrust laws.[55] We tentatively conclude that the Act's objectives of just, reasonable, and not unjustly or unreasonably discriminatory rates can be achieved effectively through market forces and the administration of the complaint process. We also note that, as discussed above, since amending our rules in 1986, the Commission has received few filings pursuant to section 212 of the Act, which most often were unopposed. Accordingly, we seek comment as to whether the limited number of filings pursuant to the Act and its implementing rules and, more importantly, the lack of opposition to the limited number of proposed interlocks, suggest that the requirements of section 212 of the Act—including prior approval for interlocking directorates and findings of common ownership—are not necessary to ensure just and reasonable practices. Alternatively, we seek comment as to whether the limited number of filings merely suggests that our regulations deterred potential interlocks that may have constrained competition. In addition, we note that not all telecommunications markets are fully competitive. Therefore, we seek comment on whether section 212 of the Act is necessary in any particular market to ensure that a carriers' charges, practices, regulations, or classifications are just and unreasonable, and not unjustly or unreasonably discriminatory. To this end, we also seek comment on whether other Title II provisions and antitrust laws are sufficient to deter anticompetitive conduct in any particular market.

2. *Consumer Protection*

16. We also tentatively conclude that section 212 of the Act is not necessary for the protection of consumers. We tentatively find, based on our experience reviewing interlock applications and filings, that interlocking directorates rarely, if ever, raise consumer concerns. In the unlikely event that an interlocking directorate raises such concerns, the Commission's enforcement powers will protect consumers against any adverse effect that might occur. Therefore, we tentatively conclude that forbearance from section 212 will not deprive consumers of protection from unlawful carrier practices.

3. *Public Interest*

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[54] *See, e.g.*, 47 U.S.C. §§ 201(b); 272(b)(3); 274(b)(5)(A).

[55] *See, e.g.*, Clayton Act, 15 U.S.C. § 19; *see also supra* para. 7 n.38.

17. We tentatively conclude 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 thus seek comment on whether forbearance from section 212 will enable carriers to respond more quickly to competition, for example, by allowing a carrier to direct the time that would be spent on compliance with the filing or other requirements of the Act toward better service. As noted above, the Commission previously has found that elimination of unnecessary regulatory burdens and legal costs permit resources to be directed instead toward the prompt implementation of service.

IV. CONCLUSION

18. Based on the foregoing tentative determinations, we tentatively conclude that we should repeal Part 62 of our rules, which implements section 212 of the Act. Specifically, we tentatively 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;[56] 2) non-dominant carriers, connecting carriers, parent companies, and other carriers as may be required under our rules, to file post interlocking directorate reports;[57] 3) carriers desiring authorization to hold interlocking directorates based on a finding of common ownership to make specific filings with the Commission;[58] and 4) carriers that undergo a change in status with respect to interlocking directorate status to file a change of status report.[59] We also tentatively conclude that, pursuant to section 10 of the Act, we should forbear from applying section 212 of the Act. We seek comment on these tentative conclusions. With respect to each issue, parties should specify the bases on which they believe we can make the findings required to meet the statutory criteria for forbearance.

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[56] 47 C.F.R. § 62.1.

[57] *Id.* § 62.26.

[58] *Id.* §§ 62.12, 62.25.

[59] *Id.* § 62.24.

V. PROCEDURAL ISSUES

A. Ex Parte Presentations

19. This is a permit-but-disclose rule making proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.[60]

B. Initial Regulatory Flexibility Analysis

20. As required by the Regulatory Flexibility Act (RFA),[61] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on this NPRM provided above on the first page. The Commission will send a copy of this NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[62] In addition, this NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[63]

21. Need for, and Objectives of, the Proposed Action: The Commission undertakes this examination of Part 62 of its rules as part of its 1998 biennial review of regulations as required by section 11 of the Communications Act, as amended.[64] In addition, the Commission is issuing this Notice of Proposed Rule Making to review its regulatory regime for interlocking directorates, and to determine whether in light of section 10 of the 1996 Act, the Commission should forbear from applying such requirements.

22. Legal Basis: The Notice of Proposed Rule Making is adopted pursuant to sections 1, 4(i) and (j), and 11 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 154(j), and 161.

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60 *See generally id.* § 1.1206(a).

61 *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).

62 *See* 5 U.S.C. § 603(a).

63 *See id.*

64 47 U.S.C. § 161.

23. Description, potential impact, and number of small entities affected: The Commission proposes 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 proposes to forbear from enforcing section 212 of the Act. Forbearance from enforcing these rules will benefit small entities by reducing the regulatory burden to which small businesses would otherwise be subject.

24. 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."[65] 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.[66] 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).[67] 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.[68] 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.

25. 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).[69] According to data in the

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65 5 U.S.C. § 601(6).

66 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."

67 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

68 13 C.F.R. § 121.201.

69 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*).

most recent report, there are 3,459 interstate carriers.[70] 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.

26. 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."[71]

27. *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.[72] 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."[73] Additionally, we note that the number of small entities affected by this proposed rule change as set forth in this NPRM 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 providers.[74] It seems reasonable to conclude, therefore,

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70 *Id.*

71 *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.

72 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").

73 15 U.S.C. § 632(a)(1).

74 *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)).

that fewer than 3,497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this NPRM.

28. *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.[75] According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons.[76] 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 and rules recommended for adoption in this NPRM.

29. *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).[77] According to our most recent data, 1,371 companies reported that they were engaged in the provision of local exchange services.[78] 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 and rules recommended for adoption in this NPRM.

30. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest

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[75] 1992 Census, *supra*, at Firm Size 1-123.

[76] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4813.

[77] *See* 47 C.F.R. § 64.601 *et seq.*

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

applicable definition under SBA rules is for telephone communications companies other than radiotelephone companies.[79] The most reliable source of information regarding the 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.[80] 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 and rules recommended for adoption in this NPRM.

31. *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.[81] 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 and rules recommended for adoption in this NPRM.

32. *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.[82] 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, 271 companies reported that they were engaged in the provision of pay telephone services.[83] 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

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79 13 C.F.R. § 121.210, SIC Code 4813.

80 *Telecommunications Industry Revenue* at Fig. 2.

81 *Id.*

82 13 C.F.R. § 121.201, SIC Code 4813.

83 TRS Worksheet.

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.

33. *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.[84] 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 and rules recommended for adoption in this NPRM.

34. *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.[85] 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.[86] 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 and rules recommended for adoption in this NPRM.

35. *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 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

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84 *Telecommunications Industry Revenue* at Fig. 2.

85 13 C.F.R. § 121.210, SIC Code 4813.

86 *Telecommunications Industry Revenue* at Fig. 2.

which the Commission has adopted auction rules and has proposed to SBA a special small business size standard definition.

36. *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.[87] According to SBA's definition, a small business radiotelephone company is one employing no more than 1,500 persons.[88] 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 and rules recommended for adoption in this NPRM.

37. Recording, record keeping, and other compliance requirements: No additional paperwork will be required by the proposals set forth in this proceeding. This proceeding proposes to eliminate filing requirements set forth in Part 62 of the Commission's rules.

38. 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 the proposals set out in this NPRM would reduce the reporting or recordkeeping requirements on all communications common carriers. In this NPRM, we seek comment on whether any level of regulation currently within Part 62 should be retained. We also seek comment on whether we should forbear from section 212 of the Act. We expect that this revision will benefit all entities subject to the rule, including small entities.

39. Federal Rules that overlap, duplicate, or conflict with this rule: No federal rules overlap, duplicate, or conflict with this rule directly. As described above, however, we expect that the Clayton Act will protect against certain types of conduct that would tend to decrease competition.

C. Comment Filing Procedures

40. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the

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[87] 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").

[88] 13 C.F.R. § 121.201, SIC Code 4812.

Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before December 14, 1998, and reply comments on or before January 4, 1999. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

41. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

42. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 1919 M St. N.W., Room 222, Washington, D.C. 20554, with a copy to Jennifer Myers Kashatus of the Common Carrier Bureau, 2025 M Street, N.W., Room 6120, Washington, D.C. 20554.

43. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Jennifer Myers Kashatus, Common Carrier Bureau, 2025 M Street, N.W., Room 6120, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labelled with the commenter's name, proceeding (including the lead docket number in this case [Docket No. 98-195], type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label also should include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

VI. ORDERING CLAUSES

44. 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, a NOTICE OF PROPOSED RULE MAKING is hereby ADOPTED.

45. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for the Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Separate Statement of Commissioner Harold W. Furchtgott-Roth

In re: Notice of Proposed Rule Making

1998 Biennial Regulatory Review -- Repeal of Part 62 of the Commission's Rules

I support adoption of this Notice of Proposed Rule Making. In my view, any reduction of unnecessary regulatory burdens is beneficial. To that extent, this item is good and I am all for it. This item should not, however, be mistaken for complete compliance with Section 11 of the Communications Act.

As I have explained previously, the FCC is not planning to "review *all* regulations issued under this Act . . . that apply to the operations or activities of any provider of telecommunications service," as required under Subsection 11(a) in 1998 (emphasis added). *See generally 1998 Biennial Regulatory Review -- Review of Computer III and ONA Safeguards and Requirements*, 13 FCC Rcd 6040 (released Jan. 30, 1998). Nor has the Commission issued general principles to guide our "public interest" analysis and decision-making process across the wide range of FCC regulations.

In one important respect, however, the FCC's current efforts are more ambitious and difficult than I believe are required by the Communications Act. Subsection 11(a) -- "Biennial Review" -- requires only that the Commission "*determine* whether any such regulation is no longer necessary in the public interest" (emphasis added). It is pursuant to Subsection 11(b) -- "Effect of Determination" -- that regulations determined to be no longer in the public interest must be repealed or modified. Thus, the repeal or modification of our rules, which requires notice and comment rule making proceedings, need not be accomplished during the year of the biennial review. Yet the Commission plans to complete roughly thirty such proceedings this year.

I encourage parties to participate in these thirty rule making proceedings. I also suggest that parties submit to the Commission -- either informally or as a formal filing -- specific suggestions of rules we might determine this year to be no longer necessary in the public interest as well as ideas for a thorough review of all our rules

pursuant to Subsection 11(a).

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