

Law Judge shall have the recommended decision served upon each party.

(f) *Exceptions to the recommended decision.* When the Administrative Law Judge has issued his recommended decision, the Administrative Law Judge or his representative shall contact each party by telephone at the telephone number provided by each party pursuant to § 515.703(b)(1)(iii). Within 3 calendar days of telephoning the parties, the recommended decision shall be mailed by the Administrative Law Judge to the parties. A party may file written exceptions to the recommended decision with the Secretary or the Secretary's designee within 30 calendar days of the date the telephone call is placed by the Administrative Law Judge or his representative. A supporting brief may be filed at the time the exceptions are filed.

(g) *Final decision.* The final decision of the Secretary or the Secretary's designee shall be based on a review of the Administrative Law Judge's recommended decision and the entire record of the proceeding. The final written decision shall be provided to all parties.

#### § 515.717 Judicial review.

Any person may seek judicial review as provided under 5 U.S.C. 702 for a penalty and/or forfeiture imposed pursuant to this part.

#### § 515.718 Referral to United States Department of Justice; administrative collection measures.

In the event that the respondent does not pay the penalty imposed pursuant to this part within 30 calendar days of the mailing of the written notice of the imposition of the penalty, the matter may be referred for administrative collection measures or to the United States Department of Justice for appropriate action to recover the penalty in a civil suit in a Federal district court.

Dated: January 7, 1998.

**R. Richard Newcomb,**

Director, Office of Foreign Assets Control.

Approved: February 2, 1998.

**James E. Johnson,**

Assistant Secretary (Enforcement),  
Department of the Treasury.

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR 22, 24, 27, 90, and 101

[FCC 98-18]

#### Public Mobile Radio Services, Personal Communications Services, Wireless Communications Services, Private Land Mobile Radio Services, and Fixed Microwave Services

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this *Memorandum Opinion and Order*, in response to a petition for forbearance, the Commission forbears from its existing procedures for transfers of control and assignment of licenses for non-substantial or "*pro forma*" transactions for certain wireless telecommunications licensees and adopts streamlined procedures in order to reduce such carriers' regulatory burdens.

**EFFECTIVE DATE:** April 2, 1998.

#### FOR FURTHER INFORMATION CONTACT:

David Furth at (202) 418-0620 or Rhonda Lien at (202) 418-7240 (Wireless Telecommunications Bureau/Commercial Wireless Division).

**SUPPLEMENTARY INFORMATION:** This is a summary of the *Memorandum Opinion and Order*, adopted and released February 4, 1998. The complete text of the *Memorandum Opinion and Order* is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington D.C. and also may be purchased from the Commission's copy contractor, International Transcription Services, (202) 857-3800, 1231 20th St. N.W., Washington, D.C. 20037.

### Synopsis of the Report and Order

#### I. Introduction

1. On February 4, 1997, the Wireless Telecommunications Practice Committee of the Federal Communications Bar Association (FCBA) filed a Petition for Forbearance from the application of the prior notification and approval requirements of section 310(d) of the Communications Act of 1934, as amended (the Act) to telecommunications carriers licensed by the Wireless Telecommunications Bureau of the Federal Communications Commission (Commission) for *pro forma* assignments of licenses and transfers of control. See 47 U.S.C. 310. On May 22, 1997, the Broadband Personal Communications Services Alliance of the Personal

Communications Industry Association (PCIA) filed a separate petition for forbearance, which reiterates FCBA's request for forbearance from section 310(d) and requests forbearance from other regulations as well. For the reasons discussed below, the Commission grants the FCBA Petition and that portion of the PCIA Petition relating to forbearance from section 310(d), subject to several exceptions noted below. This *Memorandum Opinion and Order (Order)* only addresses PCIA's request for forbearance from enforcement of section 310(d). PCIA's requests for forbearance of other regulations contained in PCIA's petition will be addressed in a separate order.

#### II. Background, Petition, and Comments

2. Section 310(d) of the Act forbids any assignment of a radio license or transfer of control of a radio licensee corporation without obtaining prior Commission consent, and states in relevant part: "No construction permit or station license \* \* \* shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. 310(d). Currently, transfers or assignments that do not "involve a substantial change in ownership or control," commonly referred to as *pro forma* transactions, must receive prior Commission approval but are exempt from the 30-day public notice requirement that would otherwise apply. Applicants identify whether their applications for transfer and assignment are *pro forma* in nature, and the Wireless Telecommunications Bureau (Bureau) processes *pro forma* applications through an initial determination that the application is in fact *pro forma* in nature, and a review of the application for accuracy and completeness. When these criteria are met, there is no need for additional public interest review of the application, because the person or entity retaining ultimate control of the license was subject to prior public interest review and approval by the Commission when it was originally awarded the license, whether by initial licensing or by a previous transfer or assignment. Therefore, where no substantial change of control will result from the transfer or assignment, grant of the application is presumptively in the public interest, and the application is placed on public notice as granted.

3. In its Petition, FCBA states that forbearance from the section 310(d) requirements of prior Commission application and approval of *pro forma* transfers and assignments is warranted under section 10 of the Act. Section 10 requires the Commission to forbear from applying any regulation or provision of the Act to a telecommunications carrier if it determines that: (1) Enforcement is not necessary to ensure that charges, practices, classifications and services are just and reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary for the protection of consumers; and (3) forbearance is consistent with the public interest. See Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56, Section 10, codified at 47 U.S.C. 160(a). In making the determination that forbearance is consistent with the public interest, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. 47 U.S.C. 160(b).

4. FCBA asserts that the Commission should forbear from enforcing its section 310(d) requirements with respect to *pro forma* transfers and assignments involving telecommunications carriers licensed by the Bureau because all three prongs of the section 10 forbearance standard are met. FCBA's Petition was filed on behalf of and in cooperation with numerous carriers holding radio licenses and the associations representing their interests. All of the commenters to the FCBA Petition support its request for forbearance and no oppositions were filed. PCIA's Petition was filed by the Broadband Personal Communications Services Alliance of the PCIA, representing numerous broadband personal communications services (PCS) licensees. All commenters to the section 310(d) portion of the PCIA Petition support forbearance from section 310(d). The Commission adopts streamlined procedures in response to these petitions only related to non-substantial transfer and assignments involving telecommunications carriers licensed by the Bureau. However, the Commission will continue to apply existing procedures to applications for *pro forma* transactions involving telecommunications carriers licensed by the Bureau that are subject to the Commission's unjust enrichment provisions, and proposed transactions involving changes to corporate

management through the use of proxy mechanisms.

### III. Discussion

#### A. Scope of Proposed Forbearance—*Pro Forma v. Non-Pro Forma Transactions*

5. *Background.* In its Petition, the FCBA uses the term "non-substantial" or "*pro forma*" to refer to assignments and transfers of control that do not involve a substantial change in the ultimate *de facto* or *de jure* control of a licensee.

6. *Discussion.* The streamlined procedures that the Commission adopts herein apply only to *pro forma* transfers and assignments, that is, transfers and assignments that do not cause a "substantial change in ownership or control" of the license as provided in section 309(c)(2)(B) of the Act. 47 U.S.C. 309(c)(2)(B). Where a proposed transfer or assignment would result in a substantial change of *de jure* or *de facto* control, the transaction is not treated as *pro forma* and is outside the scope of the forbearance provided for in this Order. *De jure* control is control as a matter of law. It is present where a shareholder or shareholders voting together own or control fifty percent or more of the licensee's voting shares. *De jure* control of a partnership is similarly based on holding a fifty percent or greater voting interest. *De facto* control is defined as actual control of the licensee, and primarily applies where the party or entity in question has the power to control or dominate management of the licensee. Because it inherently involves issues of fact, *de facto* control is determined on a case-by-case basis, and may vary with the circumstances presented by each licensee. While the size of a person's or entity's ownership interest is relevant, it is not necessarily a determinative factor in establishing *de facto* control. Other factors that may be relevant to a finding of *de facto* control include: (1) Power to constitute or appoint more than fifty percent of the board of directors or partnership management committee; (2) authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; (3) ability to play an integral role in major management decisions of the licensee; (4) authority to pay financial obligations, including expenses arising out of operating; (4) ability to receive monies and profits from the facility's operations; and (5) unfettered use of all facilities and equipment. See Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 59 FR

63210 (December 7, 1994). Under some circumstances, a change in corporate management resulting from a proxy contest may affect *de facto* control.

7. In general, a substantial change in ownership or control occurs when there is a transfer of fifty percent or more a licensee's stock or a transfer that results in a stockholder, whose qualifications have not been passed on by the Commission, acquiring at least a fifty percent voting interest in a licensee. However, because there are other factors that also may be found in a particular case to substantially affect *de facto* control, there is no express rule or "bright-line" test that distinguishes those transfers and assignments of telecommunications licenses that involve substantial changes in ownership or control and those that do not. In the case of common carrier transfers and assignments, the Commission has applied the same standard that is set forth in § 73.3540(f) of its broadcast rules, which identifies common categories of transactions that are considered non-substantial and therefore are eligible for *pro forma* treatment: (1) Assignment from an individual or individuals (including partnerships) to a corporation owned or controlled by such individuals or partnerships without any substantial change in their relative interests; (2) assignment from a corporation to its stockholders without effecting any substantial change in the disposition of their interests; (3) assignment or transfer by which certain stockholders retire and the interest transferred is not a controlling one; (4) corporate reorganization which involves no substantial change in the beneficial ownership of the corporation; (5) assignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests; or (6) assignment of less than a controlling interest in a partnership. See 47 CFR 73.3540(f).

8. For purposes of this Order, the Commission limits its consideration of forbearance to the above categories of *pro forma* transactions only. The Commission is not changing its procedures with respect to Commission review and approval of non-*pro forma* transactions. The Commission also notes that applicants will continue to be responsible in each instance, as they are currently, for determining whether a proposed transaction is *pro forma* or non-*pro forma*, and for complying with the relevant rules and procedures that

govern Commission approval of such transactions. This *Order* also does not limit the Commission's authority to determine that a transaction presented to us as *pro forma* should in fact be classified as non-*pro forma*, or vice versa. The Commission considers telecommunications carriers licensed by the Bureau and subject to this *Order* to include telecommunications carriers licensed under part 21 (domestic public fixed radio services), part 22 (public mobile radio services), part 24 (personal communications services), part 27 (wireless communications services), part 90 (private land mobile radio services) and part 101 (common carrier fixed microwave services) of the Commission's rules. However, licensees governed by these rule parts who do not meet the definition of "telecommunications carrier" (e.g., public safety and private microwave licensees) are beyond the scope of the Commission's § 10 forbearance authority, and therefore are not subject to the revised procedures established by this *Order*. The Commission also reiterates that its treatment of *pro forma* transactions herein does not apply in other contexts, such as transfers of broadcast permits or licenses, where different statutory and policy considerations apply.

#### B. Analysis of Section 10 Forbearance Standard

9. Section 10 provides that the Commission must forbear from applying any regulation or provision of the Act to a telecommunications carrier if it determines 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 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. 47 U.S.C. 160(a).

##### i. Just and Reasonable Practices

10. *Background.* The first prong of the section 10 standard for forbearance is that enforcement of the regulation is not necessary to ensure that charges, practices, classifications, and services are just and reasonable, and are not unjustly or unreasonably discriminatory. 47 U.S.C. 160(a)(1). FCBA asserts that applications for *pro forma* transfers and assignments do not contain information concerning a carrier's charges, practices,

classifications, or services. Additionally, FCBA notes that the Commission has expressly declined to address such issues in connection with its review of major transfers and assignments, holding that such matters should be addressed separately.

11. *Discussion.* The Commission concludes that prior approval of applications for consent to *pro forma* transfers and assignments is not necessary to ensure that licensees' charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory. Because *pro forma* transactions do not affect actual control of the licensee, they are unlikely to have any impact on the licensees' charges, practices, classifications, or services. Thus, it has not been necessary to consider these issues in the Commission's review of *pro forma* transactions, and the Commission has never done so. Given the existence of other mechanisms to deal with these issues, and the fact that the Commission has had no need to consider them in the context of *pro forma* transactions, it concludes that the first prong of the forbearance standard is met.

##### ii. Consumer Protection

12. *Background.* The second prong of the § 10 forbearance standard requires that enforcement not be necessary for the protection of consumers. 47 U.S.C. 160(a)(2). FCBA argues that the vast majority of *pro forma* assignments and transfers do not affect consumers, but merely allow licensees to modify their corporate organization or ownership structure in a non-substantial way from the structure previously approved by the Commission. FCBA notes that for substantial transactions, the Commission often engages in a competitive analysis to determine the effects of the proposed transaction on consumers and on competition. FCBA asserts, however, that the Commission does not conduct such an analysis for *pro forma* transactions because, by definition, such transactions cannot significantly change ownership or control, and thus cannot have a significant impact on consumers.

13. *Discussion.* The Commission concludes that requiring prior review of *pro forma* transfers and assignments is not necessary for the protection of consumers. First, as several commenters note, non-substantial transactions are exempt from the public notice requirement of section 309(b), indicating that Congress perceived a decreased need for public scrutiny of such transactions prior to action by the Commission. The Commission also

finds, based on its experience reviewing *pro forma* applications, that *pro forma* transfers and assignments rarely, if ever, raise consumer issues, because the ultimate control of the licensee—which has already been subject to Commission review and approval—does not change as a result of the transaction. The Commission concludes that forbearance will not deprive consumers of protection because the Commission will continue to review any transfer or assignment that would result in a substantial change in a licensee's ownership or control. Moreover, in the unlikely event that a *pro forma* transfer or assignment raises such issues, the streamlined procedures the Commission adopts herein will provide an opportunity for Commission reconsideration if necessary.

##### iii. Public Interest

14. *Background.* The third prong of the section 10 forbearance standard requires that forbearance be consistent with the public interest. FCBA makes four arguments to support its assertion that this prong is met. First, FCBA asserts that forbearance would promote the public interest by allowing carriers to make non-substantial changes to their ownership structure or internal organization without delay to respond to competition. Second, FCBA argues that advance approval for *pro forma* assignments and transfers is not needed to safeguard the public interest, because no meaningful public interest determination is made when such applications are reviewed. Third, FCBA argues that eliminating the application requirements for *pro forma* transactions will allow a more efficient use of scarce public and private resources. Finally, FCBA asserts that forbearance will promote uniformity among services because different procedures exist for processing *pro forma* applications in different wireless services. Commenters uniformly support FCBA's arguments, and offer numerous examples of the increased public benefit that would result from forbearance.

15. *Discussion.* The Commission finds that, provided certain procedures discussed below are in place, forbearance from section 310(d) requirements for *pro forma* transactions is consistent with the public interest. Forbearance will promote competition by allowing carriers to change their ownership structure or internal organization without regulatory delay where such delay serves no useful function. Such efficiency will increase wireless carriers' ability to compete in today's marketplace, a goal frequently

advocated by Congress and the Commission.

16. For example, FCBA notes that licenses often must be transferred or assigned internally as a result of merging local subsidiaries into new business units, such as regional or national corporations in order to respond to competitors' business strategies. Alternatively, after two or more carriers merge during the course of a substantial transfer or assignment, the merged company may need to reorganize internally and make non-substantial changes in order to bring different services under common management. In both of these examples, carriers currently must file applications for *pro forma* assignments or transfers well in advance of the desired transaction and wait for Commission processing and grant of such applications, despite the fact that the changes would not result in a substantial change in ownership or control. Such regulatory delay hampers carriers' ability to respond efficiently to competitive conditions.

17. The Commission also concludes that advance approval of *pro forma* assignments and transfers is not needed because such transactions, by their nature, do not change the underlying ownership or control of licensees that the Commission has already reviewed and approved. As noted above, *pro forma* transactions are considered presumptively in the public interest because no substantial change of control is involved. Therefore, the only purpose of reviewing *pro forma* applications in advance is to determine that they are, in fact, *pro forma* in nature. While this is a legitimate objective, the Commission believes the same objective can be accomplished just as effectively and far more efficiently through a notification procedure. The vast majority of *pro forma* applications are for routine transactions where the *pro forma* nature of the transaction is self-evident. The Commission uses the information in these applications merely to update its ownership and control records, which, as noted below, can be accomplished just as easily by requiring written proof of a transaction after it has occurred or by requiring licensees to file updated forms after the transaction is complete.

18. The Commission further concludes that requiring prior review of hundreds of routine applications a year is not needed to protect against the rare instance in which an applicant may file a *pro forma* application that should be treated as non-*pro forma*. Under the forbearance procedures adopted herein, interested parties will have an opportunity to challenge and seek

reconsideration of any *pro forma* transaction granted by notification, and the Commission will retain the authority to rescind its approval of any purported *pro forma* transaction that it determines involves a substantial change of control. The Commission will also continue to require prior review of all substantial transfers and assignments and will evaluate the public interest implications of such proposed transactions as required by the Act. The Commission believes that elimination of the pre-transaction application and approval requirement for *pro forma* transactions will allow a more efficient use of scarce public and private resources. Additionally, forbearance will allow Bureau personnel to focus on non-*pro forma* applications for transfers and assignments that involve actual changes of control, as well as the initial review of new licensees.

19. Forbearance will also eliminate a significant and unnecessary expenditure of carrier and Commission resources. As FCBA and numerous commenters note, carriers must devote significant time and resources to prepare and file *pro forma* applications, track their status, and ensure that the transactions are consummated in the time allotted. Forbearance will free up these resources so that carriers can concentrate on providing competitive telecommunications services. FCBA also notes that existing procedures for *pro forma* transactions are a strain on Commission resources, because staff must process filing fees, assign file numbers, review applications for completeness, and prepare public notices of grants. Forbearance from these activities will allow the Commission to deploy its resources more efficiently.

20. Finally, forbearance will promote uniformity among services, as all wireless telecommunications carriers will be subject to the forbearance adopted in this *Order*. Licensees that hold authorizations in different wireless telecommunications services, such as PCS, paging, and cellular, will be able to make *pro forma* changes efficiently without filing multiple applications for each license and service. Thus, forbearance will facilitate *pro forma* transactions that include multiple services or licenses, such as an internal reorganization of a company that holds numerous licenses.

#### iv. Licensees Affected

21. *Background.* FCBA requests that the Commission adopt forbearance of section 310(d) requirements for all non-substantial transactions involving telecommunications carriers licensed by

the Bureau. A telecommunications carrier, as defined by the Act, is "any provider of telecommunications services," and "telecommunications service" is in turn defined as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public. See 47 U.S.C. 153(44), (46). In its petition, PCIA initially proposed that forbearance be applied only to broadband PCS carriers, but in its reply comments, PCIA agrees with commenters who contend that forbearance should be applied equally to all commercial mobile radio services (CMRS) licensees. Commenters who address this issue generally urge the Commission to apply forbearance broadly, either to all CMRS licensees or to all wireless telecommunications carriers licensed by the Bureau.

22. *Discussion.* The Commission concludes that the record establishes sufficient justification to forbear from enforcing section 310(d) requirements as they apply to all wireless telecommunications carriers. The Commission finds, based on the record, that forbearance will enhance competition among telecommunications carriers and serve the public interest. As noted above, many commenters support broad forbearance for CMRS providers, based on Congress' mandate when it enacted the 1993 Omnibus Reconciliation Act that similar mobile services receive similar regulatory treatment. The Commission also believes that the same forbearance should be extended to wireless telecommunications carriers who are not CMRS providers, e.g., common carrier microwave licensees. While fewer commenters expressly addressed this issue, the Commission notes that no commenter expressly opposed FCBA's proposal to extend forbearance to all wireless telecommunications carriers, and the Commission sees no reason to distinguish among different categories of telecommunications carriers in this regard. Therefore, subject to the exceptions discussed below, the Commission will apply forbearance from section 310(d) requirements for *pro forma* applications uniformly to telecommunications carriers licensed under part 21 (domestic public fixed radio services), part 22 (public mobile radio services), part 24 (personal communications services), part 27 (wireless communications services), part 90 (private land mobile radio services), and part 101 (fixed microwave services) of the Commission's rules. However, as discussed above, the forbearance provisions of this *Order* do

not apply to licensees governed by these rule parts who do not meet the statutory definition of "telecommunications carrier." Under section 10, the Commission's forbearance authority only extends to telecommunications carriers and telecommunications services. It does not apply to services such as public safety and private point-to-point microwave, which do not involve the provision of "telecommunications service," *i.e.*, the offering of telecommunications for a fee to the public, or to such classes of users as to be effectively available to the public. 47 U.S.C. 153(44), (46). Thus, licensees in these non-telecommunications services will continue to be subject to existing procedures with respect to *pro forma* applications for assignment and transfer. The Commission recognizes that in some instances, this may cause inconvenience to licensees who hold both telecommunications and non-telecommunications licenses, because they will be unable to use the streamlined notification procedures adopted in this *Order* with respect to their non-telecommunications licenses. However, because section 10 does not extend forbearance to non-telecommunications services, the Commission is constrained from applying these procedures more broadly. Nevertheless, in order to minimize any disparity in the Commission's treatment of non-telecommunications as compared to telecommunications licenses, the Commission intends to consider adoption of expedited procedures for *pro forma* transfers and assignments of non-telecommunications licenses in an upcoming rulemaking implementing the Universal Licensing System for wireless services. The Commission is developing the Universal Licensing System to integrate its licensing databases and provide for electronic filing of wireless applications, including transfer and assignment requests.

#### v. Exceptions to Forbearance

23. While the Commission will generally apply forbearance to *pro forma* transactions involving telecommunications carriers, it concludes that existing procedures should continue to apply to applications for *pro forma* transactions involving licensees subject to the Commission's unjust enrichment provisions, *i.e.*, licensees that hold licenses on spectrum blocks restricted to designated entities, or licensees that utilize installment financing or have received bidding credits during the competitive bidding process. See 47 CFR 1.2111. Because *pro*

*forma* transactions involving these licenses may affect financial obligations to the Commission, transfer and assignment applications by these licensees are processed differently than other *pro forma* applications, and require additional review, paperwork, and coordination, as well as additional processing time. Each transaction involving a license subject to unjust enrichment provisions must be carefully scrutinized to ensure that the proposed transaction, even if *pro forma* in nature, would not violate any of the Commission's unjust enrichment rules. The Commission must also process additional paperwork related to any installment financing or bidding credits, and coordinate the approval of financial documentation with the applicant and the U.S. Department of Treasury.

24. The Commission does not find that licensees subject to its unjust enrichment provisions meet the section 10 forbearance standard. Because these licensees have received financial benefits and have continuing financial obligations to the Commission and, in turn, to the public, even a *pro forma* transfer from one affiliated entity to another may have implications with respect to the transferee's eligibility for the same financial benefits, the ability of the transferee to meet its financial obligations, and the ability of the Commission to take recourse in the event of default or unjust enrichment. The Commission believes that continued application of its section 310(d) procedures in such circumstances is in the public interest, because it enables the Commission to review the financial implications of the transfer before approving it. Therefore, the Commission will continue to enforce its section 310(d) prior notice and approval requirements as applied to those licenses subject to its unjust enrichment provisions.

25. The Commission also concludes that existing *pro forma* application procedures should be retained in connection with transfers arising out of shareholder proxy contests. The Commission has stated that changes in the composition of a licensee's board of directors resulting from a proxy contest must be carefully analyzed in terms of potential outcome in order to determine the appropriate transfer procedures. Although the Commission recognized that in many instances, such changes do not constitute a transfer of control that would require prior Commission approval, it concluded that under limited circumstances, a change in corporate management arising from a proxy contest could result in a substantial transfer of control to persons

or persons or entities who had not been subject to prior Commission review. *Id.* Therefore, the Commission concluded that transfer applications arising out of proxy contests could be filed under existing *pro forma* transfer and assignment procedures, but that applicants would also be required to supplement their applications with information on citizenship, other attributable interests, and other relevant information. *Id.*

26. Because each transaction involving a proxy mechanism requires careful analysis of the potential outcome to ensure that there is no substantial transfer of control, the Commission does not believe that forbearance from its prior notification and application procedures in this context meets the public interest prong of the section 10 forbearance standard. The Commission notes that neither FCBA nor any of the commenters have specifically addressed whether forbearance should be extended to proxy-related transfers. To ensure that a proxy contest does not result in control passing to persons or persons or entities who have not been subject to prior Commission review, the Commission continues to believe that it should review such potential changes in corporate management prospectively under existing *pro forma* procedures. Therefore, the Commission declines to extend forbearance to *pro forma* transactions involving use of proxy mechanisms at this time.

#### C. Procedures Adopted for Pro Forma Transfers and Assignments

27. *Background.* Under the Commission's current rules, when a telecommunications carrier files an application for consent to transfer control of its license or assign its license, it must file either an FCC Form 490, "Application for Assignment of Authorization or Consent to Transfer of Control of Licensee," or, if it is a common carrier microwave licensee, a Form 702, "Application for Consent to Assignment of Radio Station Construction Authorization or License for Stations in Services Other than Broadcast," or Form 704, "Application for Consent to Transfer of Control." These forms contain information on the assignee or transferee, new licensee information, basic licensee qualifications, and certifications by the assignor/assignee or transferor/transferee. The forms must be accompanied by a description of the transaction and a public interest showing. Additionally, if not a common carrier microwave licensee, the assignee or transferee must file a report qualifying it as a common carrier radio

licensee by filing an FCC Form 430 unless a current report is already on file with the Commission. See 47 CFR 22.137(a), 24.839(b)(3), 27.324, 90.153(a).

28. The Bureau makes every attempt to process *pro forma* transactions within 30 days, but cannot guarantee grant by date certain, especially at the end of the calendar year. Additionally, those non-substantial transactions subject to the Commission's unjust enrichment provisions, 47 CFR 1.2111, are processed no earlier than ninety days from the filing date of the application, as they involve additional paperwork and review and the coordination of the loan documentation with the applicant and the United States Department of Treasury. Once the transfer or assignment has been approved, the Commission places the grant of the *pro forma* transaction on public notice as approved, and sends the applicant a consent authorization, FCC Form 726-C for CMRS licensees or FCC Form 732-C for common carrier microwave licensees. Applicants other than common carrier microwave applicants must respond in writing within sixty days of the Form 726-C and certify that the approved transaction has been consummated. See 47 CFR 22.137(b), 27.324, 90.153(b). As a result of the Commission's recent part 101 proceeding, which consolidated its point-to-point microwave rules, common carrier microwave licensees are subject to streamlined procedures for transfers and assignments, which vary slightly from the procedures used by other telecommunications carriers. While they must file an application prior to a proposed transfer or assignment transaction, they do not need to file a post-consummation letter or an FCC Form 430.

29. *Discussion.* The Commission agrees with commenters that its recordkeeping needs would be best addressed by requiring written notification of a *pro forma* transaction within a certain time period after the transaction is completed. Such procedures will ensure that the Commission's records are current, and a clear public record exists of the changes that resulted from any *pro forma* transaction. Also, the procedures adopted are slight modifications of existing rules which should be familiar to every telecommunications carrier. The Commission disagrees with those commenters who suggest that no written notification of a *pro forma* transaction should be required, or that such proof should only be required in annual filings. Such procedures would allow more time to elapse after consummation

than is currently permitted, and would also allow the Commission's public records to quickly become outdated.

30. The Commission therefore adopts several of the proposals suggested by commenters as a condition of the adopted forbearance and amends the transfer and assignment sections of its rules in parts 22, 24, 27, 90, and 101. Within 30 days after consummation of a *pro forma* transaction, the licensee must submit written proof of such transaction either in letter form or by filing the appropriate transfer or assignment form currently in use, *i.e.*, Form 490, 702, or 704, so that the Commission can place its application on public notice as granted. In order to obtain streamlined processing under these procedures, licensees who use Form 490, 702, or 704, rather than a letter, to notify us of the transaction should indicate on the form, as they currently do, that the transaction is *pro forma*. This 30-day notification requirement is a slight modification of the Commission's current requirement that licensees notify it within 60 days of consummation, and of the Commission's streamlined procedures for common carrier microwave licensees. However, the Commission believes that, despite this shortened notification period, licensees will benefit from its streamlined procedures, as they will no longer have to seek pre-transaction approval by the Commission prior to consummating a *pro forma* transaction. Common carrier microwave licensees will no longer have to seek pre-transaction approval, but will only have to provide post-consummation information. This modification treats all telecommunications carriers alike and allows them to take advantage of the Commission's streamlined procedures. In addition, these requirements could be subject to further modification as a result of the Commission's upcoming development of the Universal Licensing System (ULS), which will provide for electronic filing of wireless telecommunications applications, including transfer and assignment requests. The Commission also anticipates proposing certain rule changes to implement ULS in an upcoming rulemaking. If adopted, these proposals may slightly modify the procedures the Commission adopts in this *Order* by requiring the use of a new post-consummation form for electronic filing, and the Commission will take appropriate action upon the final determination of these proposals.

31. Additionally, if a licensee chooses to notify the Commission of a *pro forma* transaction in a letter form, the post-transaction notification letter must

contain the licensee's certification that the subject transfer or assignment is non-substantial and that, together with all previous non-substantial transactions, it does not involve a change in the ultimate *de facto* or *de jure* control of the licensee. If the transfer or assignment of more than one license is involved, a single letter may be filed, so long as all licenses affected by the transfer are identified by call sign in the letter.

32. In addition to requiring post-consummation notification, the Commission concludes that licensees must concurrently provide updated ownership information in order to ensure that the public has a record of any changes that have occurred to their ownership structure. Therefore, the Commission continues to require each assignee or transferee to file an updated ownership report on FCC Form 430 when it notifies the Commission of the consummated transaction, unless an updated report is already on file with the Commission. See 47 CFR 22.137(a), 24.839(b)(3), 90.153(a). If such a report is on file, the assignee or transferee must update this report to reflect any changes. If the licensee's name has changed as a result of the transaction, it must request reissuance of the license in the new name, as is currently required. Additionally, a licensee that transfers or assigns its license within three years of receiving the license through competitive bidding remains subject to the reporting requirements of § 1.2111(a) of its rules. See 47 CFR 1.2111(a). Such licensee must file the documentation required by this rule when it files its post-consummation notification.

33. Upon receipt of the Form 490, 702, or 704 or letter notification from the parties, the Commission will place the transaction on public notice as granted. This will provide an opportunity for public scrutiny of the transaction. Moreover, any interested party who objects to the transaction may, within 30 days from the date upon which public notice is given, file a petition requesting reconsideration. See 47 U.S.C. 405; see also 47 CFR 1.106(b). The Commission believes this procedure will protect the public interest by deterring any attempt to misuse its processes and by providing the public with accurate information regarding Commission licensees.

#### IV. Procedural Matters

34. *Paperwork Reduction Act Analysis.* This *Memorandum Opinion and Order* contains an information collection that was submitted to the Office of Management and Budget

(OMB) for emergency approval under the Paperwork Reduction Act.

V. Ordering Clauses

35. Accordingly, it is Ordered That Parts 22, 24, 90, and 101 of the Commission's Rules are amended, effective April 2, 1998.

36. Additionally, it is Ordered That, pursuant to sections 4(i) and 10 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 160, the Petition for Forbearance filed by the Federal Communications Bar Association Wireless Telecommunications Practice Committee on February 4, 1997 is Granted in Part and Denied in Part to the extent discussed above.

37. Additionally, it is Ordered That, pursuant to sections 4(i) and 10 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 160, the Petition for Forbearance filed by the Broadband Personal Communications Services Alliance of the Personal Communications Industry Association on May 22, 1997 is Granted in Part and Denied in Part to the extent discussed above.

Federal Communications Commission. Magalie Roman Salas, Secretary.

Rule Changes

Parts 22, 24, 27, 90, and 101 of Title 47 of the Code of Federal Regulations are amended to read as follows:

PART 22—PUBLIC MOBILE SERVICES

1. The authority citation for part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 22.137 is amended by adding paragraphs (a)(1) and (a)(2) and revising the first sentence in paragraph (b) to read as follows:

§ 22.137 Assignment of authorization; transfer of control.

\* \* \* \* \*

(a) \* \* \*

(1) Forbearance from pro forma assignments and transfers of control. Licensees that are telecommunications carriers as defined in 47 U.S.C. 153 are subject to streamlined procedures for pro forma, i.e., non-substantial, transfers and assignments.

(2) A pro forma assignee or transferee is not required to seek prior FCC approval for the transaction, but must notify the FCC no later than 30 days after the event causing the assignment or transfer, either by filing an FCC Form 490 or in letter form. If a letter is submitted, it must contain a

certification that the transfer or assignment is non-substantial and, together with all previous non-substantial transactions, does not involve a change in the licensee's ultimate control. A single letter may be filed for a transfer or assignment of control of more than one authorization if each authorization affected is identified by call sign. Licensees must concurrently update ownership information on their FCC Form 430, if necessary.

(b) Notification of completion. Assignments and transfers of control must be completed within 60 days of FCC approval, except those licensees subject to the streamlined procedures of paragraph (a)(1). \* \* \*

\* \* \* \* \*

PART 24—PERSONAL COMMUNICATIONS SERVICES

3. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

4. Section 24.439 is amended by adding paragraph (a)(3) to read as follows:

§ 24.439 Transfer of control or assignment of station authorization.

(a) \* \* \*

(3) Forbearance from pro forma assignments and transfers of control. PCS licensees that are telecommunications carriers as defined in 47 U.S.C. 153 are subject to streamlined procedures for pro forma, i.e., non-substantial, transfers and assignments. A pro forma assignee or transferee is not required to seek prior FCC approval for the transaction, but must notify the FCC no later than 30 days after the event causing the assignment or transfer, either by filing an FCC Form 490 or in letter form. If a letter is submitted, it must contain a certification that the transfer or assignment is non-substantial and, together with all previous non-substantial transactions, does not involve a change in the licensee's ultimate control. A single letter may be filed for a transfer or assignment of control of more than one authorization if each authorization affected is identified by call sign in the letter. Licensees must concurrently update ownership information on their FCC Form 430, if necessary.

\* \* \* \* \*

5. Section 24.839 is amended by adding paragraphs (a)(1) and (a)(2) to read as follows:

§ 24.839 Transfer of control or assignment of license.

(a) \* \* \*

(1) Forbearance from pro forma assignments and transfers of control. PCS licensees that are telecommunications carriers as defined in 47 U.S.C. 153 are subject to streamlined procedures for pro forma, i.e., non-substantial, transfers and assignments.

(2) A pro forma assignee or transferee is not required to seek prior FCC approval for the transaction, but must notify the FCC no later than 30 days after the event causing the assignment or transfer, either by filing an FCC Form 490 or in letter form. If a letter is submitted, it must contain a certification that the transfer or assignment is non-substantial and, together with all previous non-substantial transactions, does not involve a change in the licensee's ultimate control. A single letter may be filed for a transfer or assignment of control of more than one authorization if each authorization affected is identified by call sign in the letter. Licensees must concurrently update ownership information on their FCC Form 430, if necessary.

\* \* \* \* \*

PART 27—WIRELESS COMMUNICATIONS SERVICES

6. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. sections 154, 301, 302, 303, 307, 309, and 332.

7. Section 27.324 is amended by adding paragraph (a)(3) and revising paragraph (b)(3) to read as follows:

§ 27.324 Transfer of control or assignment of station authorization.

(a) \* \* \*

(3) Forbearance from pro forma assignments and transfers of control. WCS licensees that are telecommunications carriers as defined in 47 U.S.C. 153 are subject to streamlined procedures for pro forma, i.e., non-substantial, transfers and assignments. A pro forma assignee or transferee is not required to seek prior FCC approval for the transaction, but must notify the FCC no later than 30 days after the event causing the assignment or transfer, either by filing an FCC Form 490 or in letter form. If a letter is submitted, it must contain a certification that the transfer or assignment is non-substantial and, together with all previous non-substantial transactions, does not involve a change in the licensee's ultimate control. A single letter may be

filed for a transfer or assignment of control of more than one authorization if each authorization affected is identified by call sign in the letter. Licensees must concurrently update ownership information on their FCC Form 430, if necessary.

\* \* \* \* \*

(b) \* \* \*

(3) *Notification of completion.* The Commission shall be notified by letter of the date of completion of the assignment or transfer of control, except those licensees subject to the streamlined procedures of paragraph (a)(3) of this section.

\* \* \* \* \*

#### **PART 90—PRIVATE LAND MOBILE RADIO SERVICES**

8. The authority citation for part 90 continues to read as follows:

**Authority:** Secs. 4, 252-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303, 309 and 332, unless otherwise noted.

9. Section 90.153 is amended by adding paragraphs (a)(1) and (a)(2) and revising the first sentence in paragraph (b) to read as follows:

#### **§ 90.153 Transfer or assignment of station authorization.**

(a) \* \* \*

(1) *Forbearance from pro forma assignments and transfers of control.* Licensees that are telecommunications carriers as defined in 47 U.S.C. 153 are subject to streamlined procedures for *pro forma, i.e.,* non-substantial, transfers and assignments.

(2) A *pro forma* assignee or transferee is not required to seek prior FCC approval for the transaction, but must notify the FCC no later than 30 days after the event causing the assignment or transfer, either by filing an FCC Form 490 or in letter form. If a letter is submitted, it must contain a certification that the transfer or assignment is non-substantial and, together with all previous non-substantial transactions, does not involve a change in the licensee's ultimate control. A single letter may be filed for a transfer or assignment of control of more than one authorization if each authorization affected is identified by call sign in the letter. Licensees must concurrently update ownership information on their FCC Form 430, if necessary.

(b) *Notification of completion.*

Assignments and transfers of control of commercial mobile radio licenses must be completed within sixty (60) days of Commission approval, except those licensees subject to the streamlined

procedures of paragraph (a)(1) of this section. \* \* \*

\* \* \* \* \*

#### **PART 101—FIXED MICROWAVE SERVICES**

10. The authority citation for part 101 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303.

11. Section 101.53 is amended by adding paragraphs (a)(1) and (a)(2) to read as follows:

#### **§ 101.53 Assignment or transfer of station authorization.**

(a) \* \* \*

(1) *Forbearance from pro forma assignments and transfers of control.* Licensees that are telecommunications carriers as defined in 47 U.S.C. 153 are subject to streamlined procedures for *pro forma, i.e.,* non-substantial, transfers and assignments.

(2) A *pro forma* assignee or transferee is not required to seek prior FCC approval for the transaction, but must notify the FCC no later than 30 days after the event causing the assignment or transfer, either by filing an FCC Form 490 or in letter form. If a letter is submitted, it must contain a certification that the transfer or assignment is non-substantial and, together with all previous non-substantial transactions, does not involve a change in the licensee's ultimate control. A single letter may be filed for a transfer or assignment of control of more than one authorization if each authorization affected is identified by call sign in the letter. Licensees must concurrently update ownership information on their FCC Form 430, if necessary.

\* \* \* \* \*

[FR Doc. 98-5336 Filed 3-2-98; 8:45 am]

BILLING CODE 6712-01-P

#### **FEDERAL COMMUNICATIONS COMMISSION**

##### **47 CFR Part 73**

[MM Docket No. 97-189; RM-9135]

##### **Radio Broadcasting Services; Nassawadox, VA**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document dismisses a petition for rule making filed by Ken Robol proposing the allotment of Channel 252A at Nassawadox, Virginia, as the community's first local aural transmission service. See 62 FR 46707,

August 4, 1997. Petitioner failed to file comments stating his intention to apply for Channel 252A if allotted. Therefore, in keeping with the Commission's policy to refrain from allotting a channel to a community absent an expression of interest, we have dismissed the petition for Nassawadox. With this action, this proceeding is terminated.

**EFFECTIVE DATE:** April 6, 1998.

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Mass Media Bureau, (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MM Docket No. 97-189, adopted February 11, 1998, and released February 20, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857-3800, 1231 20th Street, NW, Washington, DC 20036.

##### **List of Subjects in 47 CFR Part 73**

Radio broadcasting.  
Federal Communications Commission.

**John A. Karousos,**  
*Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.*

[FR Doc. 98-5439 Filed 3-2-98; 8:45 am]

BILLING CODE 6712-01-F

#### **FEDERAL COMMUNICATIONS COMMISSION**

##### **47 CFR Part 73**

[MM Docket No. 97-209; RM-9152]

##### **Radio Broadcasting Services; Coarsegold, CA**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document allots FM Channel 233A to Coarsegold, California, as that community's first local aural transmission service, in response to a petition for rule making filed on behalf of Thomas L. Whitlock d.b.a. West Coast Wireless. See 62 FR 54007, October 17, 1997. Coordinates used for Channel 233A at Coarsegold, California, are 37-18-51 and 119-42-20. With this action, the proceeding is terminated.

**EFFECTIVE DATE:** April 6, 1998. A filing window for Channel 233A at Coarsegold, California, will not be opened at this time. Instead, the issue of opening a filing window for this