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

In the Matter of		
1998 Biennial Regulatory Review -- Review of Depreciation Requirements for Incumbent Local Exchange Carriers	)	CC Docket No. 98-137
Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, *et. al.*	)	CC Docket No. 99-117
GTE Telephone Operating Companies Release of Information Obtained During Joint Audit	)	AAD File No. 98-26

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: March 31, 2000 Released: April 3, 2000

Comment Date: April 17, 2000
Reply Comment Date: April 28, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

I. INTRODUCTION

1. On December 30, 1999, the Commission adopted streamlined procedures for depreciation and identified conditions under which price cap incumbent local exchange carriers (ILECs) may seek a waiver of the depreciation requirements.[1] The *Depreciation Order* set forth specific conditions under which the Commission may find it appropriate to grant a waiver of the depreciation prescription process, emphasizing that these conditions are necessary to ameliorate any harmful impact that unrestricted changes in depreciation expenses could have on consumers and competition.[2]

2. The Coalition for Affordable Local and Long Distance Service (CALLS) has submitted to the

[1] *See* 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers, *Report and Order in CC Docket No. 98-137,* FCC 99-397, released December 30, 1999 ("*Depreciation Order*").

[2] *Id*. at paras. 24 – 35.

Commission a modified proposal[3] that generally sets forth a five-year framework for universal service and interstate access charge reform.[4] In conjunction with the CALLS proposal, participant ILECs have indicated that "the ILEC members of the CALLS coalition propose to take contemporaneous steps over the life of the CALLS proposal to eliminate the disparity that exists between the regulatory and the financial accounting for depreciation expense and associated reserve balances."[5] The ILEC participants stated their intent to file a joint request for waiver of the Commission's depreciation requirements pursuant to the *Depreciation Order*.[6]

3. The waiver process set forth in the *Depreciation Order* contemplates Commission review of carriers' requests for depreciation regulatory relief on a case-by-case basis.[7] However, since the ILEC participants represent almost the entire class of carriers subject to our depreciation rules, we are initiating this rulemaking to evaluate the conditions under which our existing depreciation rules may be eliminated or changed for all price-cap carriers.[8] In this further rulemaking, we take notice of the principles and

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[3] CALLS submitted its original proposal on July 29, 1999. *See* Access Charge Reform, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service, CC Docket Nos. 96-262, 94-1, 990249 and 96-45, *Notice of Proposed Rulemaking*, FCC 99-235 (re. Sept. 15, 1999). A modified proposal was filed by CALLS on March 8, 2000.

[4] The Commission issued a Public Notice seeking comment from interested parties on the March 8, 2000 modified proposal filed by CALLS. *See* Public Notice, Coalition For Affordable Local and Long Distance Services (CALLS) Modified Proposal, CC Docket No. 96-262, CC Docket No. 94-1, CC Docket No. 99-249, CC Docket No. 96-45, *Pleading Cycle Established*, DA 00-533 (rel. March 8, 2000).

[5] *See* March 3, 2000 *ex parte* letter to Mr. Lawrence Strickling, Chief, Common Carrier Bureau from Frank J. Gumper, Bell Atlantic Network Services, Robert Blau, BellSouth Corporation, Donald E. Cain, SBC Telecommunications, Inc. and Alan F. Ciamporcero, GTE Service Corporation ("ILEC participants") in CC Docket No. 96-262 – Access Charge Reform; CC Docket No. 94-1 – Price Cap Performance Review for Local Exchange Carriers; CC Docket No. 99-249 – Low-Volume Long Distance Users; and CC Docket No. 96-45 – Federal-State Joint Board on Universal Service ("*March 3, 2000 letter*").

[6] *Id.* at p. 1.

[7] In the *Depreciation Order* we stated that our concerns about potential adverse impacts when carriers are given the freedom to select their own depreciation lives and procedures could be mitigated under certain conditions and set forth a process by which carriers could seek a waiver of the Commission's depreciation requirements. *See Depreciation Order* at paras. 24 – 35.

[8] The waiver process contemplates that in particular circumstances there may be public interest justification for granting relief to an entity from full application of a Commission policy or rule. As provided under our rules, a deviation from strict application of the Commission rules may be permitted for good cause shown. *See* 47 C.F.R. § 1.3. The Commission may grant a waiver where special circumstances warrant a deviation from the general rule, such deviation serves the public interest, and the waiver is consistent with the principles underlying the rule. *See* United States Telephone Association Petition for Waiver of Part 32 of the Commission's Rules, *Order*, 13 FCC Rcd 214 (Com. Car. Bur. 1997) (citing *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) ("*Northeast Cellular*"); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972) ("*WAIT Radio*")); *see also* Aliant Communications Co. Petition for Waiver of Section 32.27 of the Commission's Rules, *Order on Reconsideration*, DA 99-664, para. 6 (Com. Car. Bur. rel. Apr. *6, 1999).* By contrast, ILECs participating in the CALLS plan seek a change in the application of our depreciation rules that would apply to the

objectives defined in the *Depreciation Order*. For example, we remain concerned, and seek to assure, that any changes in depreciation practices do not adversely impact consumers and competition.

II. BACKGROUND

4. In the *Depreciation Order*, we denied a petition for forbearance of the depreciation prescription process, but found that a waiver of these requirements may be appropriate in certain instances.[9] Specifically, we found that a waiver may be appropriate when an ILEC voluntarily, in conjunction with its request for waiver: (1) adjusts the net book costs on its regulatory books to the level currently reflected in its financial books by a below-the-line write-off; (2) uses the same depreciation factors and rates for both regulatory and financial accounting purposes; (3) foregoes the opportunity to seek recovery of the write-off through a low-end adjustment, an exogenous adjustment, or an above-cap filing; and (4) agrees to submit information concerning its depreciable plant accounts, including forecast additions and retirements for major network accounts and replacement plans for digital central offices.[10] We also stated that waiver requests must comply with the waiver requirements under the Commission's rules.[11]

5. The first condition required ILECs to adjust the net book costs on their regulatory books to the levels currently reflected in their financial books by below-the-line write-offs.[12] We found that this condition would likely eliminate any disparity that exists between financial and regulatory book levels by increasing the depreciation reserves on the regulatory books. We determined that this accounting treatment would likely ensure that any increase in depreciation expense would not raise the prices of services charged to ratepayers. We indicated that if the difference were accounted for above-the-line, there could be an increase in a carrier's annual depreciation expenses, thereby reducing the carrier's earnings, and possibly providing an opportunity for carriers to seek a low-end adjustment or to seek recovery through exogenous cost treatment or above-cap filings.[13]

6. The second condition required that ILECs use the same depreciation factors[14] and rates for both

majority of carriers subject to these rules.

[9] *Id*. at para. 2. Because the issues presented in the Commission's biennial review proceeding and the petition for forbearance of depreciation requirements filed by the United States Telephone Association raised similar issues, we consolidated our review of the proceedings. *See* United States Telephone Association's Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers, *Memorandum Opinion and Order in ASD 98-91*, *Depreciation Order* at paras. 41 – 72.

[10] *Id.* at para. 25.

[11] *Id.*

[12] The term "below-the-line" is used to distinguish costs that are presumed not to be chargeable to ratepayers. Accounting for an expense "above-the-line," on the other hand, creates the rebuttable presumption that the expense will be allowed in the revenue requirement and charged to ratepayers. *See* Accounting for Judgments and Other Costs Associated with Litigation, *Report and Order*, 12 FCC Rcd 5112, 5116 (1997).

[13] *Depreciation Order* at paras. 26 – 28.

[14] The depreciation factors referred to here are life estimates, salvage estimates and accumulated depreciation

regulatory and financial accounting purposes. We found that using the same factors and rates would ensure that established accounting procedures are being followed and would prevent carriers from using any unjustified depreciation factors or rates for regulatory purposes.[15]

7. The third condition was established to protect ratepayers from any increases in rates due to a change in regulatory oversight of the depreciation prescription process. We required that ILECs forego the opportunity to seek recovery of the write-off from interstate ratepayers through a low-end adjustment, an exogenous adjustment, or an above-cap filing. This condition, in conjunction with the first and second conditions, was intended to ensure that customers would suffer no adverse rate impacts should a carrier employ new depreciation methods.[16]

8. The fourth condition was established to enable the Commission to continue to establish ranges for use in cost models. We were concerned about the impact that new depreciation methods could have on cost models for determining universal service high cost loop support and on forward looking cost studies for determining interconnection and unbundled network element (UNE) rates.[17] We noted that the current depreciation prescription process is important in the calculation of high cost support amounts because it provides the input for the depreciation expense component of the carriers' average costs per loop. An increase in these expenses by large ILECs could lead to reductions in the high cost support for other, primarily rural, carriers, many of which rely on high cost support to keep their local rates affordable.[18] We also noted that state regulatory commissions have approved rates for interconnection and UNEs, and in many instances, have based the rates on Commission-prescribed depreciation factors. We were concerned that ILECs, acting as wholesale providers of critical facilities to their competitors, could independently establish depreciation rates that could result in unreasonably high interconnection and UNE rates, which competitors would be compelled to pay in order to provide competing local exchange service.[19] We determined that in order to prevent any inappropriate fluctuations in high cost support or the rates for interconnection and UNEs due to any changes in depreciation factors or rates caused by carriers receiving a waiver, we would continue to maintain realistic ranges of depreciable life and salvage factors for each of the major plant accounts.[20] We stated that these ranges can continue to be relied upon by federal and state regulatory commissions for determining the appropriate depreciation factors to use in establishing high cost support and interconnection and UNE prices. Thus, we determined that the ILECs must submit information necessary for us to maintain realistic equipment life and salvage ranges, including forecast

ratios.

[15] *Id*. at para. 26.

[16] *Id*. at para. 27. We noted that carriers no longer subject to Commission oversight of the depreciation process would be responsible for their own depreciation rate decisions and that we would carefully scrutinize these decisions if they triggered a low-end adjustment or other recovery mechanism. *Id*. at n. 84.

[17] *Id*. at para. 31.

[18] *Id*. at paras. 29, 32.

[19] *Id*. at paras. 28, 33.

[20] *Id*. at para. 34.

additions and retirements for major network accounts, replacement plans for digital central office, and information concerning relative investments in fiber and copper cable.[21]

9. Finally, we stated that alternative proposals by carriers seeking a waiver of the depreciation requirements would be considered on a case-by-case basis. We emphasized, however, that any such proposal must provide the same protections to guard against any adverse impacts on consumers and competition as provided by the conditions adopted in the *Depreciation Order*.[22]

III. DISCUSSION

10. In their *March 3, 2000 letter*, ILECs participating in the CALLS modified plan identified a potential alternative joint waiver approach to achieving the objectives set forth in the *Depreciation Order*.[23] Specifically, the letter outlines steps that the ILECs propose to take to achieve freedom from depreciation requirements, including: (1) use of the same depreciation factors and rates for both federal regulatory and financial accounting purposes; (2) submission of information concerning their depreciation accounts when significant changes to depreciation factors are made; and (3) use of a straight-line amortization over a five-year period to account for the difference between the reserve balances on their regulatory books and the corresponding balances on their financial books.[24] The ILECs indicated that, under their proposal, the amortization expense for each year would be included in the calculation of regulated earnings (treated as an above-the-line expense) when reporting to the Commission. The ILECs would agree, however, that the amortization would have no effect on interstate price caps or their interstate rates and would commit not to seek recovery of the amortization expense through a low-end adjustment, an exogenous adjustment, or an above-cap filing. Also, under this proposal, the ILECs would commit not to seek recovery of the interstate amortization expense through any action at the state level, including any action on UNE rates.[25]

11. The primary goal of this proceeding is to determine whether there are circumstances under which our depreciation requirements could be eliminated for price-cap carriers in a manner that serves the public interest. In reaching this goal, it is important to ensure that consumers are protected against harmful rate impacts that could result from unregulated depreciation practices.[26] Further, while we seek to

[21] *Id.*

[22] *Id.* at para. 25.

[23] *See supra*. n. 5.

[24] *March 3, 2000 letter* at p. 1.

[25] *Id.* at p. 2. While the commitment in the letter refers to interstate amortizations, we believe the ILECs intend to commit not to seek recovery, at the state level, of any portion of the amortization (*i.e.*, both state and interstate). We expressly seek comment from ILECs as to whether there is a firm commitment with regard to both state and interstate with respect to any recovery of any portion of the amortization.

[26] In the *Depreciation Order* we found that unrestricted depreciation practices could: prevent us from ensuring that increases in carriers' rates are just and reasonable (*id.* at paras. 43 – 56); result in potentially significant increases in depreciation expenses that would be harmful to ratepayers and competition by leading to potentially substantial increases in access charges and rates for interconnection and UNEs (*id.* at paras. 28, 63, 68, 69); and potentially lead to substantial reductions in universal support to rural carriers (*id.* at paras. 28, 29, 60, 61).

eliminate burdensome regulatory requirements, we remain committed to assuring that such elimination does not have any adverse impact on the development of local competition. Also, because many of the state regulatory commissions use our cost models and often rely on our depreciation prescriptions for state ratemaking purposes, we seek to ensure that elimination of our depreciation requirements will not have any adverse impact at the state level.

12. The conditions we established in the *Depreciation Order*, pursuant to which a carrier could seek a waiver from the depreciation requirements, were found to largely mitigate any adverse impacts that could occur when carriers are given freedom from depreciation regulation. Prominent among these conditions was a requirement to write-off, below-the-line, the difference between the carriers' regulatory and financial book costs. The *Depreciation Order* identified this one-time write-off as one means to eliminate the disparity that exists between financial and regulatory books and to ensure that these expenses would not be unjustifiably recovered in consumer rates. Under a five-year amortization proposal, the differential between the carriers' financial and regulatory books would be eliminated in five years. We seek comment on whether an above-the-line amortization of the difference between the price-cap carriers' regulated and financial book costs over a five-year period, combined with a commitment not to seek recovery of the amortization and not to base any application for federal or state rate increases (through a low-end adjustment or other means) on any portion of the amortization over the course of the five year period adequately protects consumers from adverse rate impacts and otherwise meets the policy goals of the *Depreciation Order*. If not, are there additional steps that would eliminate or minimize these concerns? We specifically invite state commissions to comment on whether the depreciation changes discussed herein will have an adverse impact on local rates or competition. If so, we seek comment from states on specific actions we might take to protect against such adverse impacts.[27]

13. We also seek comment on whether it is appropriate, under a five-year amortization approach, coupled with a commitment not to seek recovery of any portion of the amortization from federal or state rates, to include the amortization amount in the calculation of regulated earnings in the carriers' reports to the Commission. If so, what protections, if any, will ensure that the carriers' reported earnings, which would include the amortization expense, are not used in applications for rate increases under low-end adjustment, above cap price filings, or other mechanisms to justify rate increases. For example, should price-cap ILECs be required to periodically report costs that reflect what their costs would have been had the write-off been taken as a one-time below-the-line event or maintain records that reflect the amortization factored-in and factored-out, particularly where the carrier may be seeking price increases under low-end adjustments or some other mechanism? We seek comment on whether a five-year amortization accounting treatment has an adverse impact on reported earnings, and if so, what, if any, action the Commission should take to address these impacts. We also seek comment on what measures we should take to account for and monitor the proposed amortization process.

14. In the *Depreciation Order,* we found that, in order to prevent any inappropriate and undesirable fluctuations in high cost support or the rates for interconnection and UNEs due to changes in

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[27] We recognize the states' jurisdiction in this area and do not suggest that any action taken in this proceeding will preempt the states' ratemaking authority. We are concerned, however, that because of the historical close relationship between Commission depreciation practices and those of many states, that our actions not have unintended consequences for any related ratemaking issues under consideration by a state.

depreciation factors or rates caused by carriers no longer subject to the Commission's depreciation requirements, we would continue to maintain realistic ranges of depreciable life and salvage factors for each of the major plant accounts for use in the cost models. Thus, we required that carriers agree to provide information about their depreciable plant accounts, including forecast additions and retirements for major network accounts, replacement plans for digital central offices, and information concerning relative investments in fiber and copper cable. We seek comment on the timing of the carriers' data submissions to the Commission and the scope of such submissions that will be needed to periodically update depreciation factors for use in the cost models.

15. Finally, we note that audits of the continuing property records (CPR) of the Regional Bell Operating Companies (RBOCs) are before the Commission, as are the results of a joint State-Federal audit of GTE's CPRs.[28] The CPR audits found that, combined, these carriers could not account for approximately $5 billion of central office equipment and recommended that these amounts be written-off their regulatory books of account.[29] We estimate that a five-year amortization, if applied to these carriers, would result in a reduction of approximately $28 billion in asset value from their regulated books of accounts.[30] Given the size of the write-off proposed by the audits, we seek comment on whether, if the RBOCs and GTE bring their regulatory book balances to the levels of their financial book levels, the CPR audit findings are rendered moot. In particular, we seek comment on whether an accounting treatment that

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[28] The audit reports of the RBOC's and the companies' comments were publicly released by the Commission on March 12, 1999. Following the release of the Audit Reports, the Commission initiated a Notice of Inquiry seeking comment on the issues arising from the audits. *See* In the Matter of Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, Bell Atlantic (North) Telephone Companies' Continuing Property Records Audit; Bell Atlantic (South) Telephone Companies' Continuing Property Records Audit; BellSouth Telecommunications' Continuing Property Records Audit; Pacific Bell and Nevada Bell Telephone Companies' Continuing Property Records Audit; Southwestern Bell Telephone Company's Continuing Property Records Audit, and US West Telephone Operating Companies' Continuing Property Records Audit, CC Docket No. 99-117, *Notice of Inquiry*, 14 FCC Rcd 7019 (1999). In an earlier action, the Commission released a joint State-Federal audit report of GTE's continuing property records. *See* In the Matter of GTE Telephone Operating Companies, Release of Information Obtained During Joint Audit, *Memorandum Opinion and Order*, 13 FCC Rcd 9179. The results of the GTE audit, which found inaccuracies in GTE's continuing property records, could be used by the Commission or state regulators to initiate other investigations of or actions against GTE's operating companies. *Id.* at 9182. Additional audit work regarding GTE's CPR is planned.

[29] In the RBOC's CPR audit reports, the auditors recommended that the carriers write-off $5.2 billion from their regulatory books of account. *See* Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, *Order*, 14 FCC Rcd 4273; BellSouth Telecommunications' Continuing Property Records Audit, *Order*, 14 FCC Rcd 4258; Southwestern Bell Telephone Company's Continuing Property Records Audit, *Order*, 14 FCC Rcd 4242; Pacific Bell and Nevada Bell Telephone Companies Continuing Property Records Audit, *Order*, 14 FCC Rcd 5839; Bell Atlantic (North) Telephone Companies' Continuing Property Records Audit, *Order*, 14 FCC Rcd 5855; Bell Atlantic (South) Telephone Companies' Continuing Property Records Audit, *Order*, 14 FCC Rcd 5541; and US West Telephone Operating Companies' Continuing Property Records Audit, *Order*, 14 FCC 5731. Additional write-off amounts would likely be recommended when all CPR audit work is complete for GTE.

[30] This estimate is based on a comparison of the RBOCs' and GTEs' 1998 regulatory books as reported in Automated Reporting Management Information System (ARMIS) and their 1998 annual 10-K reports filed with the Security Exchange Commission.

results in a non-recoverable amortization of a substantial portion of a carrier's investment provides a legitimate basis to terminate the CPR audits.

IV. PROCEDURAL ISSUES

A. *Ex Parte* Presentations

16. This is a permit but disclose rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206.

B. Supplemental Initial Regulatory Flexibility Analysis

17. The Regulatory Flexibility Act (RFA)[31] requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[32] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[33] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[34] 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) satisfies any additional criteria established by the Small Business Administration (SBA).[35] The SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[36]

18. This rulemaking action is supported by sections 4(i), 4(j), 201-205, 254, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, 254, and 403.

19. This Further Notice seeks comment on what conditions would be appropriate to eliminate the

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[31] 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).

[32] 5 U.S.C. § 605(b).

[33] 5 U.S.C. § 601(6).

[34] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 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(s) in the Federal Register."

[35] Small Business Act, 15 U.S.C. § 632.

[36] 13 C.F.R. § 121.201.

prescription of depreciation rates for price-cap ILECs. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small ILECs are not dominant in their field of operation because any such dominance is not "national" in scope.[37] We have therefore included small ILECs in the RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts. We note, however, that the action we propose in this rulemaking proceeding does not apply to small ILECs, but would apply only to price-cap ILECs subject to Commission depreciation requirements.[38]

20. We certify that the proposal in this Further Notice, if adopted, will not have a significant economic impact on a substantial number of small entities. Pursuant to long-standing rules, ILECs with annual operating revenues exceeding the indexed revenue threshold must comply with the Commission's depreciation prescription process. This Further Notice proposes, under appropriate conditions, to eliminate these depreciation requirements. These changes should be easy and inexpensive for ILECs to implement and will not require costly or burdensome procedures. We therefore expect that the potential impact of the proposed rules, if such are adopted, is beneficial and does not amount to a possible significant economic impact on affected entities. If commenters believe that the proposals discussed in the Further Notice require additional RFA analysis, they should include a discussion of these issues in their comments.

21. The Commission's Office of Public Affairs, Reference Operations Division, will send a copy of this Further Notice, including this initial certification, to the Chief Counsel for Advocacy of the Small Business Administration.[39] A copy will also be published in the Federal Register.

C. Paperwork Reduction Act

22. This Further Notice seeks comment on the timing of price-cap ILECs' data submissions to the Commission and the scope of such submissions that are needed by the Commission to periodically update depreciation factors for use in the cost models. As part of our continuing effort to reduce paperwork burdens, we invite the general public to take this opportunity to comment on information collections

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[37] *See* letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent local exchange carriers in its regulatory flexibility analyses. *See* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996).

[38] The Commission prescribes depreciation factors for price cap incumbent LECs whose revenues exceed an indexed revenue threshold, currently set at $112 million in annual revenue. The revenue threshold is adjusted annually by an index for inflation. *See* Implementation of the Telecommunications Act of 1996: Reform of Filing Requirements and Carrier Classifications, *Order and Notice of Proposed Rulemaking*, 11 FCC Rcd 11716, 11745-47 (1996); Public Notice, Annual Adjustment of Revenue Threshold, DA 99-805 (rel. Apr. 28, 1999).

[39] 5 U.S.C. § 605(b).

contained in this Further Notice of Proposed Rulemaking, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this Further Notice of Proposed Rulemaking. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

23. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before April 17, 2000. Interested parties may file reply comments on or before April 28, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[40]

24. 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.

25. Parties who choose to file by paper must file an original and four copies of each filing. 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, 445 12th Street, S.W. Room TW-A325, Washington, D.C. 20554.

26. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Debbie Byrd, Accounting Safeguards Division, 445 12th Street, S.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word 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 labeled with the commenter's name, proceeding (including the docket number, in this case CC Docket No. 98-137, CC Docket No. 99-117, and AAD File No. 98-26), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original." Each diskette should contain only one party's 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.

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[40] *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

27. Written comments by the public on the proposed and/or modified information collections are due on or before a date that will be designated by a public notice. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

V. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), 201(b), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), 303(r), and 403, this Further Notice of Proposed Rulemaking IS ADOPTED.

29. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration, 5 U.S.C. § 605(b).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

CONCURRING STATEMENT
OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers and Ameritech Corporation Telephone Operating Companies' Continuing Property Records, Further Notice of Proposed Rulemaking, CC Docket Nos. 98-137, 99-117.

In ordinary circumstances, I would have no reason to comment on this Notice of Proposed Rulemaking. In fact, if I were able to accept this Notice at face value, I would endorse the Commission's decision to take action in these dockets. As I indicated last year, I do not believe that the Commission's depreciation requirements continue to serve a useful purpose. *See* Dissenting Statement, *1998 Biennial Regulatory Review: Review of Depreciation Requirements for Incumbent Local Exchange Carriers, United States Telephone Association's Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers,* CC Docket 98-137 (Dec. 17, 1999). At a minimum, then, waiver of these requirements is appropriate. I also agree that such a waiver would render moot the Commission's audit of the regional Bell operating companies' continuing property records.

This Notice, however, cannot properly be understood without also understanding the circumstances that prompted the Commission to issue it. Last summer, the Coalition for Affordable Local and Long Distance Service ("CALLS") submitted to the Commission a proposal for reforming universal service and interstate access charges, and the Commission sought comment on this proposal. *See* Notice of Proposed Rulemaking, *Access Charge Reform, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 92-262, 94-1, 99-249, 96-45 (Sept. 15, 1999). In the usual case, the Commission would simply have rendered a decision after it had reviewed comments submitted by interested parties.

Here, however, the Commission did something quite different. Instead of limiting itself to a review of the record before it, the Commission, acting chiefly through the Common Carrier Bureau, set itself up as a kind of mediator between a small, select group of some of the parties with interests in this proceeding. For several weeks in the early part of this year, the Bureau initiated a series of meetings between these parties. The substance of what was discussed at these meetings was not made public, nor were a number of parties with interests in the outcome of this proceeding allowed to participate in these discussions.

At some point in this process, proceedings that were unrelated to the issue of access charge reform became part of the negotiations. Although the details are murky, the incumbent local exchange carrier members of the Coalition apparently contended that they could not commit to certain modifications of the CALLS proposal unless they had confidence that two separate matters – this depreciation waiver item and the pending

special access proceeding, which concerns the circumstances in which carriers may purchase combinations of unbundled loops and transport network elements, *see, e.g.,* Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98 (Nov. 24, 1999) – would be resolved favorably to them. As a consequence, part of the final agreement reached by the participants to the CALLS negotiations concerned these two separate matters. With respect to this depreciation item, the Bureau agreed to recommend to the Commission that it approve the waiver that is the subject of this Notice and terminate the CPR audits. Additionally, the Bureau agreed to recommend to the Commission that it "clarify" the existing rules regarding special access and defer further rulemaking until 2001.

This Notice is thus a product of the agreement that was struck by the Common Carrier Bureau and select private parties that participated in the negotiations that led to the modified CALLS proposal. Given that the Bureau has already taken a position regarding the outcome of this proceeding, I doubt that its review of the comments that it receives will be uninfluenced by its prior negotiations. At bottom, the problem lies in the two incompatible roles that the Bureau has been assigned. It has been asked to referee negotiations to which it is also, in essence, a party. In these circumstances, it is simply not plausible that the Commission can maintain the strict neutrality that is required of an agency engaged in rulemaking. It has plainly reached a view as to how these proceedings should be resolved, and its review of the comments that it now proposes to gather will be indelibly tainted by its involvement in the CALLS negotiations.

To the extent that this agency thought it necessary to narrow the differences between the various parties with interests in this docket in advance of a formal rulemaking proceeding, it could legally have done so by following the framework set forth in the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq*. Section 563 of this statute provides for the establishment of a committee that, with the assistance of the relevant agency, will negotiate to reach a consensus on a given issue. An agency that undertakes a negotiated rulemaking must publish in the Federal Register a notice that, among other things, (1) announces the establishment of the committee; (2) describes the issues and scope of the rule to be developed; and (3) proposes a list of persons that will participate on the committee. 5 U.S.C.§ 564(a). In addition, the agency must give persons with interests that will be affected by the new rule an opportunity to apply to participate in the negotiated rulemaking process. *Id.* § 564(b). If the committee reaches a consensus, the statute requires it to transmit to the agency that established the committee a report on a proposed rule. *Id.* § 566(f). Significantly, although the agency may nominate a federal employee to facilitate the committee's negotiations, "[a] person designated to represent the agency in substantive issues *may not* serve as facilitator or otherwise chair the committee." *Id.* § 566(c) (emphasis added).

None of those procedures was followed here. The public generally was not notified that the CALLS negotiations were taking place, nor were a number of parties

that wished to be included in these negotiations permitted at the table. The scope of the negotiations was not made public, and the public was unaware that two unrelated proceedings became part of the negotiations. There is no public record describing whatever consensus was finally reached. And, inconsistent with the policy set forth in 5 U.S.C. § 566(c), the Bureau participated in these negotiations both substantively *and* as a facilitator. Had the Commission adhered to the statutory requirements set forth in the Negotiated Rulemaking Act, I believe it could have accomplished its goal of reforming the current access charge regime in a way that preserved its neutrality, allowed representatives of *all* interested parties to participate, and kept the public informed about the process taking place.[41]

To be clear, I do not accuse any employee of this agency of acting in bad faith, nor do I call into question the propriety of public participation in the Commission's decisionmaking process by making *ex parte* presentations. In addition, I believe that the current structure of access charges is unsustainable, and I share the Commission's desire quickly to eliminate the inefficiencies of that regime. Nevertheless, I cannot escape the conclusion that the process by which this Notice has been promulgated falls short of certain fundamental principles that govern the behavior of administrative agencies.

[41] Even under the Negotiated Rulemaking Act, however, the Bureau could not have promised that this Commission would abide by the negotiated rulemaking committee's consensus. *See USA Group Loan Servs. Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).