

MYTHS & MISPERCEPTIONS EDUCATIONAL ADVISORY SERIES: Topic #3

Government Approval Requirements for Sales/Acquisitions of Telecommunications Companies & Customer Bases

THE MYTH:	<i>Government approval is not required for the sale or acquisition of a telecommunications carrier or its assets (e.g., customer base).</i>
THE REALITY:	<i>Government approval and/or notification is required for transactions involving a telecommunications carrier and certain assets, including customers, at both the state and federal levels.</i>

Despite a general awareness that the telecommunications industry is heavily regulated, we have recently witnessed a widespread lack of understanding of both state and federal regulations governing mergers, acquisitions and other transactions among regulated service providers. These burdensome regulations, coupled with a potentially lengthy and time-consuming regulatory approval process oftentimes throw sand in the gears of the otherwise fast-paced, highly-competitive telecommunications marketplace. Failing to take into account the regulatory approval requirements, processes, and timelines when contemplating a transaction involving regulated assets can result in many unexpected and unintended adverse consequences. Such outcomes may not only impact current business plans and growth initiatives, but future ones as well.

The purpose of this Educational Advisory is to dispel the Myth and Misperception that businesses are not required to obtain regulatory approval for the sale and/or acquisition of either a telecommunications carrier or its customer base, and to highlight the potentially onerous regulatory requirements that carriers may face in seeking government approval for their transactions.

Federal Approval

On the federal level, telecommunications carriers holding Section 214 international and/or domestic authorizations must either obtain approval from, or notify the Federal Communications Commission (“FCC,” or the “Commission”) of the transaction. Whether a carrier must obtain approval for the transaction, or merely provide notification of its occurrence, depends entirely on the nature of the interests assigned or transferred.

1. *Types of Transactions Subject to FCC Approval*

The Commission recognizes two broad forms of transactions:

- *Transfers of Control* – The FCC defines a transfer of control as a transaction resulting in a change of an ownership share from *less* than 50 percent to *more* than 50 percent – or vice

versa.¹ If these criteria are not met, the Commission evaluates those transactions on a case-by-case basis to determine whether or not the transaction is considered a transfer of control for purposes of the FCC's review and approval.

- *Assignment of License* – The FCC defines an assignment of license as a transaction resulting in the assignment of an FCC authorization (*e.g.*, Section 214 authorization) from one entity to another so that the authorization is held by a different entity than the one to which it was originally granted.² Additionally, the sale of all or part of a carrier's customer base is considered to be an assignment of license as well.

On the whole, transfers of control are subject to more rigorous FCC approval requirements than assignments of license. However, the degree of regulatory oversight applied by the Commission to a transaction can vary even within these two broad transaction forms.

2. *Substantial vs. Non-Substantial Transactions*

Both transaction forms recognized by the FCC are classified as either "substantial" or "non-substantial" transactions. In short, "substantial" assignments of license and transfers of control must receive Commission approval *prior* to the consummation of the proposed transaction via application. This is because there is a *change* in the ultimate control of the company or authorization. However, the specific application processes and approval requirements depend on the type of transaction, and whether the telecommunications carrier is considered a domestic or international carrier under the FCC's rules.

In contrast, however, the FCC considers a transaction to be "non-substantial," or *pro forma*, when there is *no change* in the ultimate control of a telecommunications company, its customer base, or authorization to operate. Such transactions are subject to limited notification requirements with the Commission.³ As with substantial transactions, the specific application processes and approval requirements depend on the type of transaction, and whether the carrier is deemed to be either a domestic or international carrier by the FCC.

3. *Unauthorized Transfers of Control*

At the moment, the Commission is very aggressive in enforcing its transaction rules. Generally, if a Section 214 telecommunications carrier applies for FCC authorization *after* a substantial transaction has been consummated, the FCC's International Bureau will refer the matter to the FCC's Enforcement Bureau for investigation. The International Bureau will also typically delay approval of the transaction until the Enforcement Bureau has completed its investigation. The Enforcement Bureau has the discretion as to whether to investigate the matter, and to issue a Notice of Apparent Liability (*i.e.*, proposed monetary forfeiture against the carrier for failure to obtain *prior* Commission approval for the transaction) – typically at least \$8,000.00 for *each* violation of the FCC's rules.⁴

¹ See 47 C.F.R. § 63.24(c) (defining a transfer of control as "a transaction in which the FCC license or authorization remains held by the same entity, but there is a change in the entity or entities that control the authorization holder").

² See 47 C.F.R. § 63.24(b).

³ 47 C.F.R. §§ 63.04(d), 63.24(d).

⁴ See, *e.g.*, *AccessLine Communications Corp.*, File No. EB-13-IH-0280, Consent Decree, DA 13-1556 (rel. Jul. 17, 2013) (consent decree in total amount of \$16,000.00 for two violations of the Commission's transaction rules).

4. *Team Telecom*

Substantial transactions involving telecommunications companies with ten (10) percent or greater foreign ownership are subject to even greater regulatory scrutiny at the federal level. The FCC refers such transaction applications to “Team Telecom” for further review prior to authorization. “Team Telecom” is comprised of representatives from the U.S. Department of Homeland Security, U.S. Department of Justice (including the Federal Bureau of Investigation), U.S. Department of Commerce, U.S. Department of Defense, U.S. Department of State, U.S. Department of Treasury, and the Office of the U.S. Trade Representative. The committee is responsible for reviewing transactions involving telecommunications carriers for possible national security issues.

Based on its review, Team Telecom may either have no issue with the transaction referred to them by the FCC, or may request that the Commission condition its approval of the transaction with assurances made by the carrier either by letter or formal security agreement. It is important to remember that the foreign ownership of the company means that the carrier *cannot* provide telecommunications service within the United States without a Section 214 authorization. Otherwise, the company will be fined.

State Approval

Unlike at the federal level, state approval and notification requirements for transactions involving telecommunications companies vary greatly from state to state. Some states require a full application for consent to the transaction to be submitted to the state regulatory authority, while other states merely require a simple notification. Furthermore, some states require notification of the transaction *prior* to its occurrence, others after consummation. On the whole, most state regulatory agencies require either approval or notification for a transaction involving telecommunications companies, and unauthorized transactions can lead to fines or revocation of operating authorizations for the entities involved.

Summation

As this Educational Advisory illustrates, the notion that regulatory approval is not required for the completion of a transaction involving a telecommunications carrier and/or its customer base a Myth & Misperception held by many industry members. In reality, there is a complex web of transactional approval and notification requirements that carriers must comply with at both the federal and state levels.

Thus, businesses contemplating the sale and/or acquisition of a regulated telecommunications asset should not hesitate to consult with legal counsel regarding the regulatory approval and/or notification requirements in a specific jurisdiction.

Contact Us for Assistance

Carefully structuring a transaction involving telecommunications service providers can be a complex endeavor. However, failure to appreciate the myriad issues associated with such transactions can be disruptive and economically catastrophic for a business – the least of which being a lack of regulatory approval for the transaction.

Attorneys in The *CommLaw* Group's [Corporate, Contracts and Commercial Transactions Group](#) can help you unpack and understand the myriad issues, and how they may impact your business. Moreover, our Attorneys can assist in the development of practical and pragmatic strategies that will enable, and not inhibit, your company's ability to take full advantage of marketplace opportunities while mitigating exposure to regulatory enforcement agencies.

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