

ARNOLD & PORTER LLP

Approaching Transactions: A Practitioner's Perspective

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Substantial or *pro forma*?

- The same rules apply to *pro forma* assignments and transfers of control.
- Submarine Cable Landing Licenses: Forbearance for *pro forma* transactions only applies to those licenses granted on or after March 15, 2002.
- Overnight processing may be available for *pro forma* transactions involving private radio licenses that require advance consent, but don't guarantee it!
 - If the transaction involves non-wireless licenses, it will be offlined from IAP.
 - Alert List
 - There also may be conditional authority. See 47 C.F.R. § 90.159(c); Fact Sheet at 2000 WL 1340584, 2000 FCC LEXIS 4926 and 2000 FCC LEXIS 5653.

Find the licenses

- If an entity is being transferred, does it have any subsidiaries with licenses?
- Are non-wholly owned entities controlled?
- FRN searches, name searches to find the license nobody knows about
- Domestic Section 214s
 - Provision of *interstate* telecommunications services
 - CMRS carriers do not have (or need to have) domestic Section 214 authority
- Derivative international Section 214s

Determine the structure and map out the filings.

- Generally, this will be determined by tax or business considerations.
- Lots of permutations; for example:
 - Assignment or transfer of control
 - Two-step transaction: *pro forma* assignment to Newco and transfer of control of Newco
 - Leases pending approval of full transaction

Dealing with uncertainty

- Alternate transferees
 - At the intermediate holding company level: Less can be more; see if you can avoid providing immaterial details.
 - Does it really matter which wholly owned subsidiary will acquire the entity being transferred?
 - If not, by remaining silent, you give the tax folks leeway to make the pending transaction more tax efficient without requiring amendment of the application.
 - If the uncertainty involves material details, you may be able to seek approval for alternate scenarios.
- Alternate assignees?

A Picture Is Worth 1,000 Words

- If the transaction structure is complex, include one or more diagrams.

When do you talk to the staff before filing?

- If you are doing something unusual procedurally or this is a “major” transaction, talk to the staff first.
 - Get buy-in or feedback on your proposed procedures.
 - Will they open a docket and want you to submit some or all of your applications in it?
 - Will you need a protective order because your application will contain confidential information?

How detailed should your public interest showing be?

- Be complete in providing material information about the transaction.
- Otherwise, the staff may require amendment before issuing a PN.
 - This doesn't mean you should throw in the kitchen sink.
 - You have the burdens of production and persuasion, but
 - There's a sliding scale depending on the potential for public interest harms.
 - The staff will issue an information request if it needs more details to test your claims.

Other tips

- Transactions with private radio service licenses don't have to be on accepted for filing PNs and may be granted as quickly as the allocation of staff resources permits. But try not to push it for transactions that must close by year end!
- Short-term *de facto* transfer leases are deemed not to have any competitive impact, so they won't be offlined from overnight processing due to geographic overlap.

Other tips continued

- Especially for large carrier transactions involving spectrum that may be used for mobile services, use charts broken down to the county level identifying the spectrum aggregation of the transferee/assignee and its competitors' holdings.
- Forms 602
 - A wholly owned subsidiary may rely on its parent's Form 602.
 - Explain such reliance in an application exhibit.
 - The FAQ on Forms 602 may be found in DA 99-1001.

Other tips continued

- If your transaction will be referred to Team Telecom, be proactive and request a meeting to introduce the transaction and discuss issues and possible resolutions.
- When assigning a derivative international Section 214 authorization, be careful to specify that the assignor is retaining the underlying authorization.

Other tips continued

- If your client wants to rationalize its international Section 214 authorizations post-transaction, remember that only a wholly owned subsidiary may rely upon its parent's authorization.
- When you're all done, don't forget notifications of consummation and ASR registrant changes.