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

APR 15 1997

Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Part 90 of the)	PR Docket No. 89-552
Commission's Rules to Provide)	RM-8506
for the Use of the 220-222 MHz Band)	
by the Private Land Mobile)	
Radio Service)	
)	
Implementation of Sections 3(n) and 332)	GN Docket No. 93-252
of the Communications Act)	
)	
Regulatory Treatment of Mobile Services)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act -- Competitive Bidding)	

To: The Commission

**COMMENTS OF THE
AMERICAN MOBILE TELECOMMUNICATIONS ASSOCIATION, INC.**

Respectfully submitted,

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SUMMARY

AMTA supports the adoption of partitioning and disaggregation rules in the 220 MHz service thereby providing licensees in this service with the comparable flexibility offered to licensees in other services. Although AMTA is aware that the "unique" characteristics of the 220 MHz service may affect a licensee's decision to implement the options that partitioning and disaggregation afford, AMTA believes that individual operations should determine the optimal configuration of the spectrum and the type of service provided. Accordingly, AMTA supports permitting partitioning of Phase I nationwide licensees after forty percent of the nationwide system has been built, allowing the parties to define the partitioned service area, and disaggregation for all Phase I and Phase II licenses. AMTA opposes, however, adopting minimum or maximum disaggregation standards. Additionally AMTA agrees with the Commission's tentative conclusion to permit combined partitioning and disaggregation.

AMTA appreciates the Commission's concern regarding the appropriate construction standards to be applied to partitioned and disaggregated licenses. With respect to partitioning, AMTA supports applying the dual construction options afforded broadband PCS partitioned licenses to covered Phase II licensees. The Association recognizes however, that these option may not be applied to Phase I partitioned licenses and recommends that if a Phase I nationwide license is partitioned, the construction requirements be converted from a site specific standard to a population standard similar to that adopted by the Commission for Phase II licenses in its *Order*. With respect to disaggregation, AMTA supports the Commission's proposed construction requirements.

AMTA also supports the Commission's proposals to apply to Phase II licensees the competitive bidding and unjust enrichment provisions adopted for partitioned or disaggregated broadband PCS licenses.

The American Mobile Telecommunications Association, Inc. ("AMTA" or "Association"), in accordance with Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, respectfully submits its Comments in the above-entitled proceeding.^{1/} The Association generally supports the Commission's proposal regarding partitioning and disaggregation for the 220 MHz service, and takes this opportunity to discuss more fully certain aspects of the Commission's proposals.

I. INTRODUCTION

1. AMTA is a nationwide, non-profit trade association dedicated to the interests of the specialized wireless communications industry.^{2/} The Association's members include trunked and conventional 800 MHz and 900 MHz Specialized Mobile Radio ("SMR") Service operators, licensees of wide-area SMR systems, and commercial licensees in the 220 MHz band. These members provide commercial wireless services throughout the country.

2. AMTA's 220 MHz Council ("Council") was formed in February, 1993. It includes representative of the vast majority of incumbent licensees, 220 MHz network organizers and narrowband 220 MHz equipment suppliers. The Council is actively involved in all aspects of the emerging 220 MHz marketplace, with particular emphasis on the evolving regulatory arena. Thus, AMTA and the Council have a direct, significant interest in the outcome of this proceeding.

^{1/} Third Report and Order; Fifth Notice of Proposed Rulemaking, PR Docket No. 89-552, 12 FCC Rcd ____ (1997) (hereafter "*Order*" and "*Notice*" respectively).

^{2/} These entities had been classified as private carriers prior to the 1993 amendments to the Communications Act. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002 (b), 107 Stat. 312, 392 ("Budget Act").

II. BACKGROUND

3. As discussed in the *Notice*, the Commission has proposed or adopted rules permitting the partitioning and disaggregation of licenses in at least eight radio services.^{3/} Most notably, in December of 1996, the Commission adopted rules allowing partitioning and disaggregation in the broadband PCS service.^{4/} In the *Partitioning Report and Order* the Commission found that allowing for such procedures would be beneficial to the development of the broadband PCS market. The Commission stated

[w]e believe these rules will provide broadband PCS licensees with desirable flexibility to determine the amount of spectrum they will occupy and the geographic area they will serve. We believe that such flexibility will (1) facilitate the efficient use of spectrum by providing licensees with the flexibility to make offerings directly responsive to market demands for particular types of service; (2) increase competition by allowing market entry by new entrants; and (3) expedite the provision of service to areas that otherwise may not receive broadband PCS service in the near term.^{5/}

4. In the instant *Order*, the Commission determined to permit partitioning by a holder of an EA, Regional or nationwide Phase II licensee.^{6/} In the *Notice* the Commission seeks comments both on specific rules for implementing its decision regarding partitioning for Phase II licensees and on whether to permit partitioning by Phase I nationwide licensees. Additionally, having declined to authorize disaggregation by Phase II licensees in its *Order*, the Commission seeks comment on the merits of allowing disaggregation by all 220 MHz licensees.

^{3/} Notice at ¶ 320.

^{4/} *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148, 11 FCC Rcd ___ (released Dec. 20, 1996) ("*Partitioning Report and Order*").

^{5/} *Partitioning Report and Order* at ¶ 1.

^{6/} *Order* at ¶ 308.

III. DISCUSSION

5. At the outset, AMTA agrees that the benefits of partitioning and disaggregation described by the Commission in its *Partitioning Order* -- efficiency of spectrum use, increased competition, and expeditious service offerings -- are goals to be achieved in the 220 MHz service as well. Accordingly, as discussed more fully below, AMTA supports the adoption of partitioning and disaggregation procedures in the 220 MHz service that will provide operations in the band with comparable flexibility as has been granted their wireless competitors. AMTA recognizes that the "unique" characteristics of the 220 MHz service may affect a licensee's decision to implement the options that partitioning and disaggregation afford, however, AMTA firmly believes that individual operators, and the developing marketplace, should determine the optimal configuration of the spectrum and the type of service provided. Because there is no adverse effect to providing flexibility for these licensees can which elect to take advantage of the opportunities, policies of equity and regulatory parity supports the adoption of 220 MHz partitioning and disaggregation rules consistent with those available to other radio services.

A. Partitioning

1. Phase I Nationwide Licensees

6. Having authorized partitioning by Covered Phase II licensees^{7/}, the Commission questions whether partitioning should be permitted by Phase I nationwide licensees, and, if so, whether the rules and procedures should be similar to those adopted for broadband PCS.^{8/} If

^{7/} The term "covered Phase II" licensees encompasses Phase II EA, Regional or nationwide 220 MHz licensees, but does not include Phase II licensees using Public Safety or EMRS channels. *Notice* at ¶ 320.

^{8/} *Notice* at ¶ 322.

partitioning were to be permitted by Phase I nationwide licensees, the Commission further questions how to reconcile those provisions with the current rules governing Phase I nationwide construction and transfers. Pursuant to FCC Rule Section 90.709 a nationwide licensee is prohibited from transferring its license unless 40 percent of the proposed system is constructed.^{9/} Accordingly, the Commission seeks comment on whether a Phase I nationwide licensee should be permitted to partition (or disaggregate) prior to constructing at least 40 percent of its system.^{10/}

7. AMTA recommends that Phase I nationwide licensees be permitted to partition or disaggregate their authorizations and recommends that the current rule requiring 40 percent of a nationwide system to be built prior to transfer also be applied to a nationwide licensee seeking to partition (or disaggregate) its license. Licensees that have demonstrated that level of commitment to implementing geographically extensive 220 MHz networks should be permitted to make a business determination regarding the ultimate scope of their operation.^{11/}

2. Phase I Non-nationwide and Non-covered Phase II Licensees

8. AMTA agrees with the Commission's tentative conclusion that partitioning not be adopted for Phase I and non-covered Phase II licensees. Since their license are site-specific

^{9/} 47 C.F.R. ¶ 90.709.

^{10/} Notice at ¶ 323.

^{11/} The Commission's related concern regarding the applicable construction requirements for a partitioned Phase I nationwide license is addressed below in Section D(1)(b).

and not based on a geographic area the concept of partitioning is not applicable, and disaggregation can be accomplished *via* partial assignment.^{12/}

3. Available License Area

9. AMTA agrees with the Commission's determination in the *Partitioning Order* that "allowing the parties to define the partitioned PCS service area would allow licensees to design flexible and efficient partitioning agreements which would permit marketplace forces to determine the most suitable service area."^{13/} Accordingly, the Association supports the Commission's proposal to allow the parties to determine the size and scope of the partitioned area.^{14/} The parties are in a better position to know the size of the area that will best work for their business needs.

B. Disaggregation

10. As stated above, the Commission declined to adopt disaggregation rules in its *Order*, opting instead to seek comment on whether disaggregation would be appropriate for all Phase I and II licensees.^{15/} AMTA supports the adoption of such provisions. Disaggregation would encourage efficiency by providing licensees with a way to divest themselves of spectrum that may be more efficiently and profitably used by another entity or, conversely, to acquire additional increments of spectrum that their technology and customers may require.

^{12/} Notice at ¶ 322.

^{13/} Notice at ¶ 324.

^{14/} Notice at ¶ 325.

^{15/} Notice at ¶ 322.

11. Should the Commission adopt 220 MHz disaggregation rules, it should not impose arbitrary minimum or maximum disaggregation standards. In declining to adopt rules restricting the amount of PCS broadband spectrum that could be disaggregated, the Commission correctly determined that

"[p]roviding the flexibility to allow parties to decide the exact amount of spectrum to be disaggregated is preferable because it will encourage more efficient use of spectrum and will permit the deployment of a broader mix of service offerings, leading to a more competitive wireless marketplace."^{16/}

Although the current 220 MHz technology may dictate the amount of spectrum required for certain service offerings, the rules adopted should not be designed solely for today's capabilities. Maintaining the same level of disaggregation flexibility as is provided to licensees in other wireless services will better accommodate future technological change.

C. Combined Partitioning and Disaggregation

12. AMTA fully supports the Commission's tentative conclusion to permit combined partitioning and disaggregation.^{17/} As discussed in numerous proceedings involving other wireless services, combined partitioning and disaggregation create maximum opportunities for licensees to enter or increase their presence in a market, or expand or enhance their service offerings as they see fit.

^{16/} *Partitioning Order* at ¶ 49.

^{17/} *Notice* at ¶ 327.

D. Construction Requirements

1. Partitioning

a. Covered Phase II Licensees

13. In the *Partitioning Order*, the Commission adopted alternative construction provisions for partitioning in the broadband PCS service, thereby offering licensees two options for satisfying the FCC's construction obligations.^{18/} Under the first option, the partitionee certifies that, with respect to the area it obtained, it will satisfy the same construction requirements as the original licensee. The partitioned therefore is responsible only for meeting the construction requirements for the area it retained. Under the second option, the partitioned certifies that it has met or will meet its five year construction requirements and that it will meet the ten year construction requirements for the entire licensed area. With this option, the partitionee need only meet the substantial service requirement for its area at the end of the ten-year license term. In the *Notice*, the Commission seeks comment on whether the same construction options afforded broadband PCS licensees should be provided to Phase II licensees.^{19/}

14. AMTA believes that the parties involved should have the flexibility to determine their respective responsibilities for satisfying the Commission's construction rules. As long as their collective obligations provide for the requisite system coverage, and are susceptible of enforcement, the public interest as well as the FCC's will have been served. Therefore, the

^{18/} *Partitioning Order* at ¶¶ 42-43.

^{19/} *Notice* at ¶ 333.

Association supports providing covered Phase II licensees with the same options regarding this aspect of partitioning as has been afforded broadband PCS licensees.

b. Phase I Nationwide Licensees

15. The Commission queries whether partitioning is feasible for Phase I licenses in light of their current construction requirements. Pursuant to FCC Rule Section 90.725(a)(2), a nationwide licensee is required to construct and place into operation "at least 40 percent of the geographic areas designated in the application within four years of initial license grant including base stations in at least 28 urban areas. . ."^{20/} As the Commission explains in the *Notice*, application of the alternative broadband PCS construction options to Phase I licenses may not be feasible. A partitionee may not be able to satisfy the first option because there may not be 28 urban areas in the area it obtains in order to be able to certify that it will satisfy the same construction requirements as the original licensee. Additionally, the original licensee may not be able to satisfy the second option if it does not retain 28 urban areas in its partitioned area in order to be able to certify that it has met or will meet all of the construction requirements.^{21/}

16. AMTA agrees that applying the alternative construction options adopted in the *Partitioning Order* to Phase I licenses is not workable. AMTA therefore proposes the following alternative construction standard:

- At the time of partitioning, after a Phase I nationwide licensee has built out 40 percent of its system on a market-by-market basis, AMTA proposes that the construction requirements convert from a site-specific basis to a population basis,

^{20/} 47 C.F.R. § 90.725(a)(2).

^{21/} Notice at ¶¶ 339-340.

similar to the standard the Commission adopted in its *Order* for Phase II nationwide licensees.

17. In the *Order*, the Commission held that in order to satisfy construction requirements, Phase II nationwide licensees must "construct base stations that provide coverage to a composite area of at least 750,000 square kilometers or serve at least 37.5 percent of the United States population within five years of initial license grant, and to provide coverage to at least 1,500,000 square kilometers or at least 75 percent of the population within 10 years of grant."^{22/}

- AMTA recognizes that the geographic criteria of the Commission's construction requirements for Phase II licenses may not be feasible for Phase I nationwide licenses. Accordingly, AMTA suggests that for both the partitioned and partitionee only the population criteria be applied thus requiring 37.5 percent of the population within their licensed service area to be covered within five years and 75 percent of the population by the end of the license term.

18. AMTA submits that its proposal not only provides a workable approach for measuring construction after a Phase I nationwide license has been partitioned, but, is also in keeping with the current shift towards geographic rather than site-specific licensing. AMTA emphasizes that adopting this approach will not relieve Phase I licensees from their construction obligations, and would only be applied after the licensee's 40 percent market-by-market benchmark has been met. At that point, the licensee has demonstrated its commitment to its network. Under AMTA's proposal, the licensee will still remain responsible for further

^{22/} *Order* at ¶ 158.

construction of its system. Moreover, a Phase I nationwide licensee that does not partition its license will continue to be governed by the existing rules.

2. Disaggregation

a. Covered Phase II Licensees

19. The Commission seeks comment on whether to adopt similar construction requirements for disaggregated licenses as those established for broadband PCS.^{23/} In that service, original five- and ten- year construction requirements for the spectrum block remain in effect. The parties are permitted to determine who will be responsible for meeting the requirements, and may designate that only one party will be responsible for meeting the five- and ten- year benchmarks, or they may opt to share the responsibility. In order to obtain Commission approval of the disaggregation plan, the parties are required to certify to whether one or both parties will be responsible for meeting the construction requirement.

20. As with the partitioning proposal, AMTA supports allowing the parties to negotiate and determine for themselves who will be responsible for satisfying the Commission's construction requirements. AMTA sees no reason for rules substantially different from those implemented for other presumptively CMRS Services.

b. Phase I Nationwide

21. With disaggregation alone, none of the problems arise that may occur if a Phase I nationwide license is partitioned, especially those relating to urban area construction requirements. AMTA agrees with the Commission's tentatively conclusion to require that the original licensee and the disaggregatee of a Phase I nationwide system meet the same two-, four-

^{23/} Notice at ¶ 335.

, six-, and 10-year construction requirements set forth in FCC Rule Section 90.725 for the spectrum that each maintains.^{24/} Should a Phase I nationwide license be both partitioned and disaggregated, AMTA advocates converting construction requirements to the population percentage standard outlined in paragraph 16 above.

c. Phase I Non-nationwide Licensees

22. The Commission proposes to permit disaggregation by Phase I non-nationwide licenses only after they meet their construction deadline. The proposal is consistent with the FCC's decision that it will permit primary fixed or paging operations only after a licensee satisfies its construction and placed in operation requirements.^{25/} While AMTA normally would argue that the Commission allow individual licensees in the marketplace to assess the operational mix of service offerings on their systems, it accepts the initial proposal, since Phase I non-nationwide licenses have already passed their construction deadlines.

E. License Term

23. AMTA supports having the expiration date of the partitioned or disaggregated license be coterminous with the original licensee's five- or ten- year license term. Additionally, AMTA supports affording a partitionee or disaggregatee the same renewal expectancy as the original licensee. Accordingly, a partitionee or disaggregatee would be granted a preference in any comparative renewal proceeding if it could demonstrate that it has provided "substantial

^{24/} Notice at ¶ 328.

^{25/} Notice at ¶ 337.

service during its past license term and has substantially complied with the Commission's rules, policies, and the Communications Act.^{26/}

F. Competitive Bidding Issues

24. Should the Commission adopt partitioning and disaggregation of Phase II licenses, certain competitive bidding issues will need to be addressed. Accordingly, the Commission seeks comment on the appropriate manner in which to divide payment obligations between the parties, and how its unjust enrichment rules should apply.

25. The Commission tentatively concludes that it will allow qualified small or very small business partitionees or disaggregates to pay their pro rata share of the payment obligation through installment payments.^{27/} In determining how to calculate the parties' respective share of the total payment obligation, the Commission proposes to use "population as the objective measure to calculate the relative value of the partitioned area and amount of spectrum disaggregated as the objective measure for disaggregation," similar to broadband PCS.^{28/}

26. AMTA agrees that in the event that a small or very small business-qualified Phase II licensee seeks to partition or disaggregate some of its capacity to a similarly qualified entity, the new entity should be allowed to pay its *pro rata* portion of any outstanding obligation to the Federal Treasury associated with the license being partitioned or disaggregated. AMTA further supports the Commission's proposal to use the mechanisms established for broadband PCS to calculate the relative value.

^{26/} Notice at ¶ 341.

^{27/} Notice at ¶ 343.

^{28/} Notice at ¶ 343.

27. The *Notice* further seeks comment on whether the Commission's unjust enrichment rules should be applied to the 220 MHz service, and, if so, how unjust enrichment payments should be calculated in circumstances where a very small business partitions or disaggregates to small business qualifying for a lower bidding credit or, where a small or very small business partitions or disaggregates to a non-small business.^{29/} Again, the Commission proposes to use the calculation methods established for broadband PCS.

28. In the *Partitioning Order*, the Commission sets forth the manner in which it will calculate unjust enrichment obligations as they relate to both bidding credits and installment payments.^{30/} With respect to bidding credits, in cases where a small or very small business partitions to a non-small business, the Commission "will require that the licensee reimburse the government for the amount of the bidding credit calculated on a proportional basis based upon the ratio of population of the partitioned area to the overall population of the licensed area." If a qualified entity partitions to an entity eligible for a lower bidding credit, the Commission "will require that the licensee reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the partitionee is eligible calculated on a proportional basis based upon the ration of population of the partitioned area."^{31/}

29. The same method is used to calculate unjust enrichment obligations with respect to installment payments. A non-small partitionee or disaggregatee will be required to pay the

^{29/} *Notice* at ¶ 344.

^{30/} *Partitioning Order* at ¶¶ 34-35.

^{31/} *Partitioning Order* at ¶ 34.

principal and interest based upon the ratio of the population of the partitioned area to the overall population of the licensed area. Likewise, a partitionee or disaggregatee qualifying for less favorable installment payment plan is required to pay the difference between the installment payment plan it qualifies for and that of the original licensee based upon a ration of population of the partitioned area to the overall population of the licensed area.^{32/}

30. AMTA recognizes that the Commission has spent a great deal of time reviewing the application of its unjust enrichment provisions as they relate to partitioning and disaggregation in the broadband PCS context, and believes that the Commission has adopted a rational and workable method of calculating such obligations. Accordingly, AMTA supports the Commission's tentative conclusion of using the methods adopted for broadband PCS for calculating the amount of the unjust enrichment obligations in the 220 MHz service.

G. Licensing Issues

31. Since the current rules do not allow partial assignments of non-nationwide Phase I licenses, the Commission proposes to apply existing partial assignment rules for their commercial mobile radio stations governed by Part 90. AMTA agrees with the licensing procedures described by the Commission in its *Notice* and does not believe additional procedures are necessary.

IV. CONCLUSION

32. For the reasons described above, AMTA supports the adoption of partitioning and disaggregation provisions in the 220 MHz service as set forth in the Commission's *Notice*, as modified herein.

^{32/} *Partitioning Order* at ¶ 35.

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, McGowan, Nace & Gutierrez, hereby certify that I have, on this 15th day of April, 1997, caused to be mailed a copy of the foregoing Comments to the following:

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