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Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

- Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service ) PR Docket No. 89-552
- Implementation of Sections 3(n) and 332 Of the Communications Act ) GN Docket No. 93-252 ✓
- Regulatory Treatment of Mobile Services )
- Geographic Partitioning and spectrum Disaggregation for the 220-222 MHz Service )

MEMORANDUM OPINION AND ORDER

Adopted: May 22, 2000

Released: May 30, 2000

By the Commission:

TABLE OF CONTENTS

	<u>Paragraph No.</u>
I. INTRODUCTION .....	1
II. BACKGROUND.....	3
III. DISCUSSION .....	6
A. Available License Area .....	6
B. Post-Partitioning Construction Requirements .....	9
IV. CONCLUSION .....	15
V. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY CERTIFICATION.....	16
VI. ORDERING CLAUSES .....	18

## I. INTRODUCTION

1. On August 4, 1998, we adopted rules for geographic partitioning<sup>1</sup> and spectrum disaggregation<sup>2</sup> for the 220-222 MHz service (220 MHz service).<sup>3</sup> On reconsideration, we dismiss Rand McNally & Company's (RMC) petition for reconsideration to remove the references to Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) in the 220 MHz partitioning rules. We also partially grant Intek Global Corp.'s (Intek) petition for reconsideration by clarifying the construction requirements applicable to partitioned and disaggregated 220 MHz licenses.<sup>4</sup>

2. On March 29, 2000, the Commission released a *Memorandum Opinion and Order* (FCC 00-102) disposing of the RMC and Intek Petitions. Although released, the order was not published in the Federal Register. To clarify any inconsistency between the text of the *Fifth Report and Order* and the Commission's rules pertaining to the partitioning and disaggregation construction requirements for 220 MHz service licensees adopted in the *Fifth Report and Order*, on our own motion, we vacate the order released March 29, 2000, and adopt this *Memorandum Opinion and Order*, which supersedes that order.

## II. BACKGROUND

3. On March 12, 1997, we adopted the *Third Report and Order*, which established rules for the operation and licensing of the 220-222 MHz band.<sup>5</sup> These rules were adopted to establish a flexible regulatory framework that would allow for the efficient licensing of the 220 MHz service, eliminate unnecessary regulatory burdens on both Phase I and Phase II licensees,<sup>6</sup> and enhance the competitive potential of the 220 MHz service in the mobile services marketplace.<sup>7</sup> *The Fifth Notice of Proposed Rulemaking (Fifth NPRM)*, released with the *Third Report and Order*, proposed that any holder of a

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<sup>1</sup> Partitioning is the assignment of geographic portions of a licensee's authorized service area along geopolitical or other geographic boundaries.

<sup>2</sup> Disaggregation is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

<sup>3</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Geographic Partitioning and Spectrum Disaggregation for the 220-222 MHz Service, *Fifth Report and Order*, 13 FCC Rcd. 24615 (1998) (*Fifth Report and Order*).

<sup>4</sup> RMC filed a Petition for Reconsideration (RMC Petition) on October 13, 1998. Intek filed a Petition for Reconsideration (Intek Petition) on October 15, 1998.

<sup>5</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 10943 (1997) (*Third Report and Order*).

<sup>6</sup> Licensees granted initial authorizations for operations in the 220-222 MHz band from among applications filed on or before May 24, 1991, are referred to as "Phase I" licensees. Licensees granted initial authorizations for operations in the 220-222 MHz band from among applications filed after May 24, 1991, are referred to as "Phase II" licensees.

<sup>7</sup> *Third Report and Order*, 12 FCC Rcd. at 10948, ¶ 3.

covered Phase II license<sup>8</sup> would be permitted to partition portions of its license.<sup>9</sup> The *Fifth NPRM* also sought comment on whether to permit full geographic partitioning and spectrum disaggregation in the 220 MHz service.<sup>10</sup> In the *Fifth Report and Order*, we adopted full partitioning and disaggregation rules for the 220 MHz service similar to those previously established for other services, e.g., Broadband PCS, Multipoint Distribution Service (MDS), 800 MHz and 900 MHz Specialized Mobile Radio (SMR), 39 GHz fixed point-to-point microwave, the Wireless Communications Service (WCS), Local Multipoint Distribution Service (LMDS) and Maritime Services. Partitioning and disaggregation follow the general partitioning and disaggregation framework adopted for other wireless services.<sup>11</sup> These rules permit all 220 MHz service licensees, with the exception of Public Safety and Emergency Medical Radio Service (EMRS) licensees, to partition and disaggregate their licenses. Partitioning is permitted based on any geographic area defined by the parties, provided that the parties notify the Commission regarding the relevant boundaries and coordinates. Disaggregation is allowed for any amount of 220 MHz spectrum, with no requirement that the disaggregator retain a certain amount of spectrum if the disaggregation is otherwise consistent with the Commission's rules.

4. Specifically, the 220 MHz partitioning and disaggregation rules allow Phase II licensees to partition and disaggregate at any time after receiving their license. Phase II licensees may negotiate with their partial assignees how the construction requirements will be met after partitioning and disaggregating their license. Different options for satisfying the construction requirements are available depending on whether the license is partitioned or disaggregated. The consequences for failure to satisfy the construction requirements also are different depending on whether the license is partitioned or disaggregated.

5. RMC requests that the Commission delete the reference to MTA and BTA designations in the Commission's rules. RMC argues that it holds the copyright for these terms and that it has not authorized their use in the 220 MHz service. Intek requests reconsideration of the Commission's post-partition/disaggregation construction requirements and proposes allowing the partitioner and partitionee to separately satisfy the construction requirements.

### III. DISCUSSION

#### A. Available License Area

6. Background. The 220 MHz partitioning rules allow partitioning based on any area defined by the parties to the partitioning agreement.<sup>12</sup> Parties to the partitioning agreement are given the option to define the partitioned area by: (1) county lines, (2) FCC recognized service areas, or (3) coordinate points at every three degrees. In the *ULS Report and Order*,<sup>13</sup> the Commission amended

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<sup>8</sup> There are two types of Phase II licenses: (1) "covered Phase II licenses" which were granted on an Economic Area (EA), Regional or nationwide basis, and (2) "non-covered Phase II licenses" which were granted on a site-specific basis and were to be used for Public Safety or Emergency Medical Radio Service (EMRS) under 47 C.F.R. § 90.720. See *Third Report and Order*, 12 FCC Rcd. at 11078, n.553.

<sup>9</sup> *Third Report and Order*, 12 FCC Rcd. at 11074, ¶ 308.

<sup>10</sup> *Id.* at 11079, ¶ 321.

<sup>11</sup> See *Fifth Report and Order*, 13 FCC Rcd. 24615 (1998).

<sup>12</sup> *Id.*

<sup>13</sup> See Biennial Regulatory Review --- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate The Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027 (1998) (*ULS Report and Order*).

Section 90.1019(b) of the rules to eliminate any reference to Major Trading Area (MTA) and Basic Trading Area (BTA) as FCC recognized areas for 220 MHz partitioning purposes.

7. Discussion. RMC requests that Section 90.1019 of the Commission's rules be amended to remove the reference to MTAs and BTAs as FCC recognized areas for partitioning purposes. RMC further requests that we clarify that 220 MHz licensees are not permitted to use MTA and BTA designations to define a service area in connection with their partitioning agreements without RMC's consent.<sup>14</sup> RMC asserts that it is the copyright owner of the MTA and BTA designations and that it has entered into licensing agreements for the use of these designations in connection with the licensing of certain services.<sup>15</sup> However, RMC notes that there is no licensing agreement for use of MTA and BTA designations in the 220 MHz service. In the absence of a licensing agreement applicable to 220 MHz, RMC argues that it is improper for the 220 MHz partitioning rules to refer to MTAs or BTAs as FCC recognized areas in this service.

8. We recognize that RMC holds the copyright for the MTA and BTA designations. In those services in which we have used MTAs and BTAs to define initial geographic licensing areas (e.g., PCS, 900 MHz SMR), RMC has entered into service-specific licensing agreements with industry participants in the service to authorize licensee use of the copyrighted terms.<sup>16</sup> In the case of the 220 MHz service, however, Section 90.1019 has been amended to remove the reference to partitioning by MTAs and BTAs.<sup>17</sup> Accordingly, we dismiss RMC's Petition as moot.

#### **B. Post-Partitioning Construction Requirements**

9. Background. The construction requirements imposed on covered Phase II licensees and assignees after a 220 MHz license has been partitioned or disaggregated are based on the construction requirements previously adopted for broadband PCS and other wireless service licensees. The requirements are different depending on whether a license is partitioned or disaggregated. For example, broadband PCS licensees are given two options for satisfying the Commission's construction requirements after partitioning: (a) the original licensee (partitioner) and the partitionee may agree to be individually responsible for satisfying the construction requirements for their respective portions of the partitioned license; or (b) the original licensee may certify that it will be responsible for satisfying the construction requirements for the entire market.<sup>18</sup> If the first option is selected and the partitioner or the partitionee fails to meet the construction requirement for its portion of the partitioned license, its license (but not that of the other party) will be subject to automatic cancellation.<sup>19</sup> If the alternative option is selected, *i.e.*, the partitioner certifies that it will be responsible for meeting all future construction requirements for the original license, and that party fails to meet the requirement, its license will be subject to automatic cancellation, but the non-certifying party's license will not be affected if it

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<sup>14</sup> RMC Petition at 1-2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See 47 C.F.R. § 90.1019(b).

<sup>18</sup> See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. at 21855-57, ¶¶ 37-43 (1996) (*Broadband PCS R&O*).

<sup>19</sup> See 47 C.F.R. §§ 90.767, 90.769, 90.1019(d). See also *Fifth Report and Order*, 13 FCC Rcd. at 24634, ¶ 24.

demonstrates that it is providing “substantial service” for its partitioned area.<sup>20</sup>

10. The construction requirements and consequences for not satisfying the requirements are different for the disaggregation of a license. For instance, broadband PCS licensees have two options for satisfying the construction requirements after disaggregation: (a) either party may certify that it will be responsible for satisfying the construction requirements for the entire market; or (b) the parties may agree to share the responsibility for satisfying the construction requirements for the market.<sup>21</sup> If the first option is selected, i.e., one party certifies that it will be responsible for meeting all future construction requirements for the original license, and that party fails to meet the requirement, its license will be subject to automatic cancellation, but the other party’s license will not be affected.<sup>22</sup> If the second option is selected and either licensee fails to meet the construction requirement for its portion of the disaggregated license, both parties’ licenses will be subject to automatic cancellation.<sup>23</sup>

11. Discussion. In its petition for reconsideration, Intek contends that the 220 MHz construction requirements will deter 220 MHz Phase II licensees from partitioning their licenses to assignees who are small businesses.<sup>24</sup> According to Intek, small businesses are most interested in partitioning their 220 MHz licenses, and they will be reluctant to partition their licenses to other small businesses, who are less likely to meet their construction obligations, as compared to well established companies from whom recourse is available.<sup>25</sup> Intek suggests that the Commission consider two alternatives for satisfying the Commission’s construction requirements. One alternative would permit the partitioner and partitionee to separately satisfy the construction requirements upon a demonstration of the bona fide nature of the partitioning request. The second alternative would permit the partitioner and partitionee to avoid construction requirements if partitioning occurs before a specific date (e.g., within three years of license grant).

12. We believe that the existing 220 MHz partitioning rules sufficiently address the concerns raised by Intek. With respect to Intek’s first proposed alternative, the rules already give the partitioner and partitionee the option of applying separate construction requirements to their respective areas. Moreover, contrary to Intek’s assertion, the rules provide that under this option, failure by one party to meet the construction requirements for its partitioned area does not jeopardize the license of the other party if the latter fulfills the construction requirements for its partitioned area. We recognize, however, that this may not be clear from the text of the *Fifth Report and Order*, which suggested that both partitioner and partitionee could be subject to license forfeiture if one party did not meet its construction obligation.<sup>26</sup> In fact, as noted above, the latter result only applies in the case of disaggregation where the parties choose to share construction obligations.<sup>27</sup> Therefore, to eliminate any inconsistency between the discussion of construction requirements in the *Fifth Report and Order* text and the rules adopted in that order, and to resolve any uncertainty arising therefrom, we clarify that the options afforded to 220 MHz

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<sup>20</sup> See 47 C.F.R. § 90.1019(d)(1)(ii).

<sup>21</sup> *Broadband PCS R&O*, 11 FCC Rcd. at 21863-65, ¶¶ 56-63.

<sup>22</sup> *Id.*

<sup>23</sup> *See id.*

<sup>24</sup> Intek Petition at 3. Intek notes that only 7 of 54 bidders in the Phase II 220 MHz service auctions did not qualify for small or very small business bidding credits.

<sup>25</sup> *Id.*

<sup>26</sup> *Fifth Report and Order*, 13 FCC Rcd. at 24634, ¶ 24.

<sup>27</sup> *See* para. 10, *supra*.

service licensees for satisfying the partitioning and disaggregation construction requirements, and the consequences of not satisfying such requirements, exactly mirror the options and consequences for partitioning and disaggregation imposed on broadband PCS licensees.

13. In light of our clarification that one partitioned 220 MHz licensee's failure to meet construction requirements does not jeopardize the license of the other partitioned licensee, we conclude that there is no need to further consider the first alternative proposed in Intek's reconsideration petition. We also decline to adopt Intek's second alternative, which would permit a licensee and partitionee to avoid post-assignment construction requirements if partitioning occurs before a specific date (e.g., within three years of license grant).<sup>28</sup> We are concerned that the proposal is likely to result in licensees and partitionees enjoying the benefits of partitioning without the burdens. Although this proposal could arguably stimulate partitioning activity, including greater participation by small business partitionees, this benefit is outweighed by the disincentive the proposal creates for licensees and partitionees to actually build out their networks in their respective service areas once partitioning occurs. Without the obligation to satisfy post-assignment construction requirements, the proposal offers no assurance that licensees and partitionees would continue to build out their networks after partitioning to serve those unserved areas within their respective service areas. Consequently, we find that Intek's second alternative does not serve the public interest.

14. We note that although Section 90.1019 of the rules as adopted in the *Fifth Report and Order* specified the consequences of failure to construct by parties to a disaggregation agreement,<sup>29</sup> this language was subsequently inadvertently deleted from the rule.<sup>30</sup> We therefore amend Section 90.1019 herein to restore the deleted language. We also revise the caption of Section 90.1019 to better reflect the scope of the rule.

#### IV. CONCLUSION

15. For the reasons discussed above, we dismiss Rand McNally's Petition, and we grant Intek's Petition in part and deny it in part. As we have previously stated, our goal in taking these actions is to allow for more efficient use of the spectrum, to increase opportunities for a variety of entities to participate in the provision of 220 MHz service, and to expedite the delivery of service to unserved areas.

#### V. SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY CERTIFICATION

16. The Regulatory Flexibility Act of 1980, as amended,<sup>31</sup> requires that a final regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.<sup>32</sup> We certify that the rule change adopted in this *Memorandum Opinion and Order* will not have a significant economic impact on a substantial number of small entities because it does not effect any substantive policy change, but only restores language that was previously inadvertently deleted from the

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<sup>28</sup> Intek Petition at 4-5.

<sup>29</sup> See *Fifth Report and Order*, 13 FCC Rcd. at 24645.

<sup>30</sup> See *ULS Report and Order*, 13 FCC Rcd. at 21027.

<sup>31</sup> The Regulatory Flexibility Act of 1980, 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).

<sup>32</sup> 5 U.S.C. § 605(b).

Commission's rules.

17. The Commission will send a copy of this *Memorandum Opinion and Order*, including a copy of the Supplemental Final Regulatory Flexibility Certification, in a report to Congress pursuant to SBREFA, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the *Memorandum Opinion and Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

## VI. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), and Section 1.108 of the Commission's rules, 47 C.F.R. § 1.108, the *Memorandum Opinion and Order* in this proceeding released on March 29, 2000, FCC 00-102, IS VACATED.

19. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 303(g), 303(r), 332(a)(2), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), 332(a)(2), and 405, the Petition for Reconsideration filed by Rand McNally & Company on October 13, 1998, IS DISMISSED.

20. IT IS FURTHER ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), 332(a)(2), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), 332(a)(2), and 405, the Petition for Reconsideration filed on October 15, 1998, by Intek Global Corporation IS GRANTED to the extent stated herein and otherwise DENIED.

21. IT IS FURTHER ORDERED THAT the rule correction adopted herein SHALL BECOME EFFECTIVE sixty days after date of publication in the Federal Register. This action is taken pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

22. IT IS FURTHER ORDERED THAT the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order*, including the Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

## APPENDIX

## FINAL RULES

Part 90 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 90 – PRIVATE LAND MOBILE RADIO SERVICES**

1. The authority citation for Part 90 continues to read as follows:  
47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).
2. Section 90.1019 is revised to read as follows:

**Sec. 90.1019 Eligibility for partitioned licenses and disaggregated spectrum.**

\* \* \*

(d) *Construction requirements.*

\* \* \*

(2) *Requirements for disaggregation.* Parties seeking authority to disaggregate spectrum must certify in FCC Form 601 which of the parties will be responsible for meeting the five-year and ten-year construction requirements for the particular market as set forth in §§ 90.767 of 90.769 of this part, as applicable. Parties may agree to share responsibility for meeting the construction requirements. If one party accepts responsibility for meeting the construction requirements and later fails to do so, then its license will cancel automatically without further Commission action. If both parties accept responsibility for meeting the construction requirements and later fail to do so, then both their licenses will cancel automatically without further Commission action.