

expand wireless service, problems remained.<sup>412</sup> For example, even with waivers and grants of extended implementation authority developed in the hybrid licensing model, the SMR licensing process remained cumbersome because of the requirement that SMR sites and frequencies be licensed individually.<sup>413</sup> The Commission noted specifically that “site-by-site licensing deprives licensees of flexibility to move transmitter sites throughout a defined service area without seeking [the Commission’s] prior approval.”<sup>414</sup> In order to provide wireless licensees with needed flexibility, therefore, the Commission adopted a system of geographic-area licensing with minimum coverage requirements based on population or geography.<sup>415</sup> At the same time, the Commission transitioned from the “keep what you use” licensing policy to a “complete forfeiture” approach, which made licenses subject to automatic cancellation for failure to meet interim coverage requirements at specified benchmarks.<sup>416</sup> Failure to meet applicable performance benchmarks would result in complete loss of the license, even in areas where construction had already been completed.<sup>417</sup>

142. The Commission first applied geographic area licensing and a “complete forfeiture” performance standard when it established the narrowband and broadband PCS services. In order to permit the widest possible range of mobile communications, the Commission put in place technical standards that would permit significant flexibility in both the design and implementation of PCS systems as well as geographic- and population-based construction benchmarks that would ensure that licensees built out their systems or face forfeiture of their licenses.<sup>418</sup> The Commission concluded that these and other changes to its licensing approach would encourage diversity of technologies and speed deployment of service.<sup>419</sup> In addition, in 2000, the Commission adopted “substantial service” as an alternative

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<sup>412</sup> *SMR Report and Order*, 11 FCC Rcd at 1474 ¶ 4.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> See, e.g., Amendment of the Commission’s Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, ET Docket No. 92-100, *Memorandum Opinion and Order*, 9 FCC Rcd 1309, 1314 (1994) (*Narrowband PCS MO&O*).

<sup>416</sup> See, e.g., 47 C.F.R. § 90.685(d).

<sup>417</sup> See, e.g., *id.*

<sup>418</sup> The Commission’s rules require that 30 MHz broadband PCS licensees must provide service sufficient to cover one-third of the market’s population within five years of license grant and two-thirds of the population of the market within ten years. 47 C.F.R. § 24.203(a). Ten and 15 MHz broadband PCS licensees must provide service sufficient to cover one-third of the population or provide substantial service within 5 years of license grant. 47 C.F.R. § 24.203(b). Narrowband PCS providers may elect geographic-based, population-based or substantial service benchmarks in order to satisfy their construction obligations. See 47 C.F.R. § 24.103.

<sup>419</sup> See Amendment of the Commission’s Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7753-54 ¶¶ 132-134. The Commission concluded that, in addition to flexible technical and coverage rules, both large and small market sizes would promote the swift implementation and deployment of PCS service as well as increase competition and promote diversity in the provision of such services. See Amendment of the Commission’s Rules to Establish New Narrowband Personal Communications Services, GEN Docket No. 90-314, ET Docket No. 92-100, *First Report and Order*, 8 FCC Rcd 7162, 7167 ¶ 27 (1993) (*Narrowband PCS Report and Order*).

construction requirement for PCS licensees.<sup>420</sup> As noted, under the “complete forfeiture” approach, failure to meet these benchmarks results in automatic cancellation or non-renewal of the entire PCS license, including the rights to operate from any facilities already constructed under the authorization.<sup>421</sup>

143. The Commission also applied geographic area licensing to existing services, such as SMR. The Commission sought to institute policies that would afford wide-area SMR system licensees opportunities to bid on new licenses that offered the same flexibility as cellular and PCS licenses in terms of facility location, design, construction, and modification.<sup>422</sup> Therefore, the Commission designated the upper 200 channels of 800 MHz SMR spectrum for geographic-area licensing based on EAs, and overlaid geographic markets over existing site-based systems.<sup>423</sup> The Commission granted licensees the authority to construct base stations at any available site and on any available channel within their spectrum blocks so long as previously existing site-based facilities are provided appropriate interference protection.<sup>424</sup> Using the “complete forfeiture” approach, the Commission also instituted minimum coverage and channel use requirements at three- and five-year benchmarks.<sup>425</sup> Two years later, in 1997, the Commission adopted geographic-area licensing with EA service areas for the lower 230 800 MHz channels as well, stating that “geographic area licensing remains the most efficient and logical licensing approach for the majority of licensees in the band.”<sup>426</sup> The Commission adopted construction requirements similar to the upper channels, but eliminated the channel usage requirement and also adopted an alternative plan whereby licensees in the lower 230 channels can satisfy coverage obligations by providing substantial service within five years of license.<sup>427</sup>

144. In recent years, the Commission has continued to embrace geographic area licensing<sup>428</sup>

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<sup>420</sup> Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, *Second Report and Order* and *Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10469 ¶ 24 (2000).

<sup>421</sup> 47 C.F.R. § 24.203.

<sup>422</sup> *SMR Report and Order*, 11 FCC Rcd at 1496-97 ¶ 49.

<sup>423</sup> *Id.* at 1483-85 ¶¶ 23-25. Geographic area licenses were overlaid onto existing site-based facilities. Geographic area licensees are required to provide protection to any site-based licensee within their markets.

<sup>424</sup> *Id.* at 1498 ¶ 52.

<sup>425</sup> The Commission adopted 10-year license terms and five-year construction periods for EA licenses, which require licensees to (1) demonstrate coverage of one-third of the population within their EA and demonstrate use of 50 percent of the channels within their spectrum block within three years of the initial license grants; and (2) demonstrate coverage of two-thirds of the EA population by the end of the five-year construction period. *See* 47 C.F.R. §§ 90.685(b), (c).

<sup>426</sup> Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd 19079, 19088-89 ¶¶ 12, 15 (1997) (*SMR Second Report and Order*).

<sup>427</sup> *Id.* at 19094-95 ¶ 34.

<sup>428</sup> *See e.g.* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), GN Docket No. 01-74, *Report and Order*, 17 FCC Rcd 1022 (2002) (Lower 700 MHz).

and moved towards the adoption of more flexible construction requirements, such as substantial service. This shift has occurred in order to provide flexibility for licensees seeking to provide a variety of services with their spectrum, not all of which require pervasive geographic coverage, as well as to accommodate licenses encompassing very large service areas as opposed to smaller site-based licenses. In keeping with its goal of flexibility for licensees, the Commission has also adopted substantial service as the sole standard, or as an alternate standard, for many services.<sup>429</sup> For example, LMDS, 39 GHz and 24 GHz microwave services all have the sole construction requirement of providing substantial service by the end of the initial license term.<sup>430</sup> As discussed earlier in Section III.D.1, the Commission's increasing movement towards substantial service as an alternative means of meeting construction requirements has been met with mixed reactions. While some commenters see extending substantial service to all wireless services as a way to promote regulatory parity,<sup>431</sup> others, such as OPASTCO/RTG, believe the vagueness of the substantial service standard will likely inhibit deployment of wireless services to rural areas.<sup>432</sup> Based on this difference of opinion between commenters, we seek further comment in the paragraphs below as to the appropriate performance standards to apply.

145. We note that regardless of the type of requirement, our current performance requirements apply only during the initial term. As noted, once a licensee renews its license, no additional performance requirements are imposed in subsequent terms other than the standard necessary in order to achieve a renewal expectancy.<sup>433</sup> In the case of renewals, if an incumbent files an appropriate and timely application and neither the public nor the Commission objects, the license will typically be renewed for another term. However, if another party objects or files a competing application, a licensee must demonstrate that it is entitled to a renewal expectancy.<sup>434</sup> A renewal applicant involved in a comparative renewal proceeding will acquire a renewal expectancy if the applicant provides sufficient evidence that the applicant has provided substantial service during its license term, and that the applicant has substantially complied with the Communications Act, as well as with all applicable Commission rules and policies.<sup>435</sup> As a general matter, if a renewal applicant satisfies these requirements, the applicant will

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<sup>429</sup> "Substantial service" generally means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal. See e.g. 47 C.F.R. §§ 22.503(k)(3), 27.14, 90.685(b), 95.381, 101.527(a), 101.1011(a).

<sup>430</sup> 47 C.F.R. §§ 101.17, 101.527, 101.1011.

<sup>431</sup> See CTIA Comments at 5, Sprint Reply Comments at 23.

<sup>432</sup> OPASTCO/RTG Comments at 4-5.

<sup>433</sup> See 47 C.F.R. § 1.949.

<sup>434</sup> See e.g. 47 C.F.R. §§ 22.935(a), 22.940(a)(2). At a minimum, this showing must include (a) a description of the licensee's current service in terms of geographic coverage and population served as well as the system's ability to accommodate roamers; (b) an explanation of the licensee's record of expansion, including a timetable for any planned construction of new cell sites; (c) a description of the licensee's investment in its cellular system; and (d) copies of any Commission orders finding the licensee to have violated the Communications Act or any Commission rule or policy. See Section 22.940(a)(2)(i)-(iv).

<sup>435</sup> See e.g. 47 C.F.R. §§ 22.940(a)(1)(i) and (ii), 24.16, 27.14(b). If there are additional requirements applicable to the specific service, the incumbent must comply with those requirements prior to, or in connection with, its application for renewal. Section 1.949(a).

be granted a renewal expectancy and other competing applications will be dismissed.

### C. Discussion

#### 1. Existing Market-Based Models.

146. The Commission's rules and policies provide interested parties with several market-based vehicles for obtaining access to licensed spectrum through the secondary market. First, an interested party may obtain a license through the assignment and transfer of control process, pursuant to Commission review and approval under Section 310(d) of the Communications Act.<sup>436</sup> Furthermore, by utilizing the partitioning and disaggregation process,<sup>437</sup> parties need not buy a license "as is" – instead, parties may obtain licenses for a particular subset of frequencies and carve out certain geographic areas that satisfy their unique needs, while the original licensee retains the remaining frequencies and geographic areas. Second, parties may utilize the spectrum leasing process – further enabled under the Commission's secondary markets proceeding – to engage in short- and long-term leases.<sup>438</sup> Based upon the record developed in response to the *Rural NPRM*, we are hopeful that these measures will provide effective means of providing access to spectrum through the secondary market. As discussed below, however, it appears that there are ways in which these mechanisms nevertheless may not satisfy the needs of some parties; in the following paragraph, we identify some of the key concerns with these mechanisms, as reflected in the record, and seek additional comment on the efficacy of these procedures in providing access to spectrum in rural areas.

147. As an initial matter, we observe that the record reflects some disagreement with respect to the effectiveness of our partitioning and disaggregation policies in providing access to spectrum in rural areas. On the one hand, the record provides information on partitioning and disaggregation transactions that suggest these policies are working. AT&T Wireless, for example, states that "the Commission's partitioning and disaggregation policies have helped foster rural wireless deployment by enabling wireless carriers to concentrate their efforts where they can be most efficient."<sup>439</sup> AT&T Wireless indicates that it has "entered into more than a dozen agreements that involved the sale of more than 100 separate market areas or portions of market areas," and that many of these transactions "involved small and rural carriers" such as Highland Cellular, Inc., RCC Minnesota, Inc., and Union Telephone Company.<sup>440</sup> According to AT&T Wireless, "the vast majority of markets transferred were rural and suburban counties, rural service areas, and sparsely populated areas in more than twenty states."<sup>441</sup> On the other hand, the record also shows that some rural carriers may not be receiving the

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<sup>436</sup> See 47 U.S.C. § 310(d).

<sup>437</sup> For a list of wireless services for which partitioning and disaggregation is permitted, and for the service-specific rule sections governing partitioning and disaggregation, see *supra* note 20.

<sup>438</sup> See *Secondary Markets Report and Order* and *Secondary Markets Further Notice*.

<sup>439</sup> AT&T Wireless Comments at 5. See also Nextel Partners Comments at 20 (indicating that, "[w]ith regard to the 800 MHz SMR service, Nextel Partners has benefited from the applicable EA license partitioning rules, pursuant to which Nextel Partners has obtained partitioned EA licenses").

<sup>440</sup> AT&T Wireless Comments at 4.

<sup>441</sup> *Id.*

benefits of partitioning and disaggregation. In their joint comments, OPASTCO and RTG (OPASTCO/RTG) indicate that their “members have been repeatedly rebuffed in their attempts to entice license holders for various services to partition their license areas or disaggregate their spectrum.”<sup>442</sup> According to OPASTCO/RTG, the problems with partitioning and disaggregation are multi-fold: (1) the Commission’s rules do not provide licensees with an incentive “to ‘carve out’ portions of their license areas for rural carriers”; (2) “the administrative costs of entering into and managing the partitioning/disaggregation process outweigh the realized financial gains”; (3) and licensees wish “to retain the entire geographic area when they go to sell the system as a whole in the future,” because “[l]icensees perceive that unpartitioned licenses will have a higher resale value.”<sup>443</sup> Blooston echoes these concerns, stating that “large national and regional carriers that control licenses for most of the spectrum are not willing or able to devote the time and resources necessary to negotiate and implement arrangements on the scale desired by rural telephone companies.”<sup>444</sup>

148. In order to identify the specific nature and extent to which our partitioning and disaggregation rules are working, we seek additional comment on specific partitioning and disaggregation transactions, as well as the negotiations process. We seek to develop a more comprehensive understanding of the ways in which this process may be insufficient to promote access to spectrum. For example, although Blooston indicates that large carriers may be reluctant to engage in smaller-scale transactions, such as those that involve less than one million “pops,”<sup>445</sup> AT&T Wireless expressly states that “[i]t has never placed” a threshold of one million pops on such deals and notes that it is “about to close a few spectrum transactions in which the total number of potential customers is very small.”<sup>446</sup> AT&T Wireless further states that it has three pending sales involving “approximately 56,000 POPs spread across six counties[,] 292,000 POPs across 13 counties[,] and 250,000 POPs across 15 counties,” and that a wholly owned subsidiary of AT&T Wireless recently partitioned an “undefined area” in Jefferson Parrish, Louisiana, with a population of just 1533.<sup>447</sup> Given the conflicting record regarding the ability of carriers to engage in smaller-scale partitioning and disaggregation transactions, we believe that additional information, particularly specific transaction data such as that provided by AT&T Wireless, will facilitate our greater understanding of the benefits and shortfalls of our partitioning and disaggregation policies in fostering access to spectrum in rural areas. We also seek comment on how these policies may work in coordination with potential re-licensing mechanisms such as “keep what you use,” as discussed in greater detail below in section IV.C.2. We note that certain commenters proposed various incentives for licensees to engage in partitioning and disaggregation, including the provision of bidding credits for auction winners that commit to partitioning portions of their licenses to rural

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<sup>442</sup> OPASTCO/RTG Comments at 10-11.

<sup>443</sup> *Id.*

<sup>444</sup> Blooston Comments at 11. *See also* UTStarcom Comments at 8-9 (indicating that large carriers “will not relinquish spectrum easily – or even reasonably,” and that such carriers “either flatly refuse to partition or lease portions of their spectrum, demand exorbitant compensation, or require other unreasonable terms, none of which serve the public good”).

<sup>445</sup> Blooston Comments at 11.

<sup>446</sup> AT&T Wireless Reply Comments at 7.

<sup>447</sup> *Id.* at 7-8.

carriers,<sup>448</sup> monetary credits towards a future spectrum auction in exchange for the return of unused spectrum,<sup>449</sup> and credits towards licensees' construction obligations.<sup>450</sup> We ask for comment on these proposals and also seek comment on additional incentives that are likely to encourage partitioning and disaggregation in rural areas.

149. In addition to the partitioning and disaggregation process, the Commission's rules also facilitate access to spectrum on the secondary market through spectrum leasing. Because our rules further enabling spectrum leasing went into effect on January 24, 2004, we are not yet in a position to evaluate the effectiveness of spectrum leasing in providing access to spectrum in rural areas. Nevertheless, we are encouraged by the record that interested parties will take advantage of our spectrum leasing rules to obtain access to previously "unused" spectrum and provide innovative and new service offerings to the public. Indeed, based upon preliminary information regarding proposed spectrum leasing transactions, we are optimistic that our spectrum leasing rules are affording many new opportunities for access to spectrum, including spectrum in rural areas. During the period from February 2004 through July 2004, the Commission received 64 spectrum leasing filings. Of these filings, 37 are *de facto* transfer leases and 27 are spectrum manager leases. Most filings involve broadband PCS, 39 GHz (point-to-point microwave), paging, and SMR spectrum. In addition, these filings include spectrum in counties that constitute "rural areas," based upon our default definition for "rural area." Given this preliminary data, we have some basis to believe that existing, market-based incentives are encouraging parties to engage in spectrum leasing arrangements.

150. While the record in response to the *Rural NPRM* indicates that many commenters are optimistic that our spectrum leasing will promote the deployment of wireless services to rural areas and therefore urge the Commission to "wait and see" how secondary markets develop prior to taking any regulatory action to encourage spectrum access,<sup>451</sup> others indicate concern that this market-based mechanism will be an insufficient means of providing spectrum access. For example, OPASTCO/RTG suggest that the spectrum leasing rules will suffer from the same problems as partitioning and disaggregation: "the decision to enter into a spectrum lease with a rural company remains exclusively with the licensee," and if the licensee "determine[s] that the cost of negotiating and executing a spectrum lease with a rural carrier will not yield an acceptable return during the term of such a lease, as most licensees have determined in the partitioning and disaggregation realm, it is unlikely that a lease will ever materialize."<sup>452</sup> OPASTCO/RTG further state that "as is the case with partitioning and disaggregation, the current spectrum leasing rules provide little incentive for large licensees to effectuate leases with rural companies because construction of wireless systems in rural areas is usually unnecessary to help

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<sup>448</sup> See Blooston Comments at 12-14. See also AT&T Wireless Comments at 10 (recommending the provision of "reverse discounts" to carriers that partition portions of their licensed areas to rural carriers). But see Nextel Partners Reply Comments at 8-9 (indicating that it is unfair to favor one class of carrier over another, such as providing financial incentives only for certain lease agreements with a rural telephone company or its subsidiary).

<sup>449</sup> AT&T Wireless Comments at 10.

<sup>450</sup> See Blooston Comments at 14 (suggesting that the Commission reduce the build-out requirements for licensees that partition a portion of their license to a rural carrier). See also AT&T Wireless Reply Comments at 12 (stating that these credits "would make such transactions more attractive to large carriers").

<sup>451</sup> See *supra* Section III.B.2. ¶¶ 37-41.

<sup>452</sup> OPASTCO/RTG Reply Comments at 5.

larger licensees meet their 'substantial service' build-out requirements."<sup>453</sup> Blooston also notes that, while "spectrum leases may prove to be a valuable tool in facilitating access to unused rural spectrum," there will be "a number of situations" where "carriers will need the certainty and permanence of licensee status that can only be provided by a true partitioning arrangement before a rural telco board of directors or other financing source will approve the expenditure of substantial resources on the construction and operation of a telecommunications system."<sup>454</sup> Accordingly, we seek additional comment on how spectrum leasing is addressing concerns about access to spectrum, particularly from those who have entered into, or are contemplating, such transactions. In particular, we seek comment regarding situations where parties' need for spectrum have been accommodated by spectrum leasing as well as situations where those needs may not have been satisfied by the availability of such leasing.

## 2. "Keep What You Use" Re-licensing Measures

151. Based upon the record developed in this proceeding, as well as available data on partitioning and disaggregation transactions and preliminary information on spectrum leasing agreements, we believe that our current policies and regulations are working to promote access to "unused" spectrum. Nevertheless, the record also suggests that, for a variety of reasons, there may be instances where these market-based policies may not be adequate to promote access to spectrum in rural areas.<sup>455</sup> As we have already indicated, the rapid provision of broadband and other wireless services to rural areas is of critical importance in accomplishing our statutory and public policy objectives. Accordingly, if we determine that our current policies are insufficient to increase access to spectrum, we may take additional measures to ensure that unused spectrum moves into the hands of those who stand ready and willing to deploy wireless voice and data services to rural Americans.

152. Based upon the record received in response to the *Rural NPRM*, commenters indicate

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<sup>453</sup> *Id.* See also Blooston Comments at 10-11 (stating that although "the spectrum leasing policies and rules adopted in the *Secondary Markets Order* represent important first steps to facilitate broader access to unused spectrum resources," "the existing regulatory scheme for wireless services does not give licensees an adequate incentive to participate in the secondary market, and may not go far enough to ensure the optimally efficient use of spectrum in rural areas").

<sup>454</sup> Blooston Comments at 11.

<sup>455</sup> According to the *Eighth Competition Report*, 270 million people, or 95 percent of the total U.S. population, have three or more different operators (cellular, PCS, and/or SMR) offering mobile telephone service in the counties in which they live. *Eighth Competition Report*, 18 FCC Rcd at 14823 ¶ 84. In contrast, these same counties make up only 52 percent of the total land area of the United States, reflecting the nation's uneven population distribution. *Id.* In other words, there are two or fewer mobile telephony providers (typically cellular carriers) offering service in 48 percent of the country's total land area. The *Eighth Competition Report* notes that, while the newer broadband PCS and digital SMR carriers have "less complete networks," the original cellular licensees have extensive networks providing nearly complete coverage of the continental United States. *Id.* at 14823 ¶ 83. By some estimates, cellular service is available in zip codes in which roughly 99 percent of the U.S. population lives. *Id.* at 14823 n. 286. Given the successful deployment of cellular systems, we continue to examine *infra* whether the potential use of a "keep what you use" approach similar to that found in our cellular unserved licensing rules will help speed the rural deployment of other services, such as PCS and digital SMR networks, which historically have been subject to a "complete forfeiture" approach. In evaluating these different approaches, however, we also recognize that, while cellular service has had over 20 years to mature, the geographic area and "complete forfeiture" model of licensing has had little more than half that time to develop, and it is too early to tell if the geographic market-based licensing approach will lead to similar deployment.

that extending the “keep what you use” to additional wireless services may provide a variety of benefits. As NTCA explains, adopting a “keep what you use” approach “frees up spectrum for other potential users.”<sup>456</sup> Likewise, Blooston states that “a modified version of the cellular ‘fill in’ rule” will “give rural interests an opportunity to serve portions of a larger license that remain unserved after a reasonable period of time has passed.”<sup>457</sup> For those services that otherwise would be subject to a “complete forfeiture” approach,<sup>458</sup> a “keep what you use” approach might also have the benefit of allowing future licensees in those services to keep certain portions of their licenses rather than forfeiting the entire license for failure to satisfy certain benchmarks.<sup>459</sup>

153. We also recognize, however, that adopting a “keep what you use” approach may yield certain unintended and potentially detrimental consequences, as asserted by a number of commenters.<sup>460</sup> As an initial matter, commenters suggest that adopting a “keep what you use” approach may not actually result in additional rural deployment, because, if it is economically beneficial for a carrier to deploy services in a particular area, they have sufficient incentive to do so without regulatory intervention. As Nextel Partners explains, “wireless carriers have every incentive to expand their rural service as soon as economically feasible,” as well as “to obtain any available value from ‘unused’ portions of spectrum, assuming that secondary market transactions are cost-efficient and not subject to undue regulation.”<sup>461</sup> Similarly, AT&T Wireless states that carriers will deploy services where “[t]here is no reason to believe that, if the Commission were to adopt rules forcing larger carriers to relinquish spectrum or sell it at low prices to other entities if they do not build quickly enough, the new licensees would be any more able to serve the area rapidly if the economics do not support the costs of building out and providing service there.”<sup>462</sup> Second, commenters caution that adopting a “keep what you use” approach may upset the valuation of spectrum licenses and chill investment in wireless services.<sup>463</sup> Third, such an approach might result in uneconomic construction, in an attempt to “save” licensed area. According to Sprint, requiring licensees to “use it or lose it” may force carriers “to make the Hobson’s choice of making

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<sup>456</sup> NTCA Comments at 9.

<sup>457</sup> Blooston Comments at 15.

<sup>458</sup> See *supra* Sections III.B.2 and *infra* IV.C.4 for discussions of the “complete forfeiture” approach to enforcement of our construction regulations.

<sup>459</sup> See RCA *Ex Parte* Comments, Attachment at 2.

<sup>460</sup> We note that this discussion is intended to be representative (but not exhaustive) of the types of concerns raised by commenters in this proceeding.

<sup>461</sup> Nextel Partners Reply Comments at 10.

<sup>462</sup> AT&T Wireless Reply Comments at 6. See also Sprint Reply Comments at 12-13 (stating that arguments by rural cellular incumbents that PCS licensees are “[d]riven solely by profit” and “that large PCS licensees in particular ‘lack the motivation to serve rural communities’” is “at best disingenuous,” because all carriers “are driven by profit”) (quoting NTCA Comments at 4, 7).

<sup>463</sup> See Nextel Communications Reply Comments at 8-9 (stating that “[t]he Commission should consider carefully whether what it is trying to achieve is realistic and be sure that any new policies do not unwittingly erode the necessary investor confidence so critical to continued licensed service deployment in rural markets” and that “[t]he ‘use it or lose it’ model of taking back spectrum does not convince licensees or investors that the licensee has a reasonable period of time and opportunity to ‘protect’ unserved areas from encroachment by third parties”).

uneconomic investments or forfeiting their licenses in rural areas (even though entry may be justified in the future).<sup>464</sup> Nextel Partners urges the Commission to refrain from adopting any rules “that might result in the forfeiture of spectrum by a licensee that has *already met* initially established Commission construction benchmarks,” indicating that this policy shift “would not only be patently unfair, but might well have the untoward effect of compelling wireless carriers to revise their business plans radically to build out portions of their territories in a manner that is uneconomic and out of step with marketplace demand.”<sup>465</sup> Fourth, adopting the “keep what you use” approach may result in numerous administrative and legal costs, including the costs of initially assessing whether the spectrum is being “used,” reclaiming the subject spectrum and resolving “any controversy or litigation that may arise as a result,” engaging in the re-licensing process, and “waiting to see whether the new licensees actually provide the desired wireless service to the indicated rural territory.”<sup>466</sup> Finally, carriers express concern that adopting a “keep what you use” approach may “strip[ ] a licensee of legitimate business opportunities, such as the ability to lease excess spectrum in the secondary market.”<sup>467</sup>

154. Given the potential benefits and drawbacks of the “keep what you use” approach, we intend to continue to examine carefully the potential use of this mechanism to increase access to spectrum in this proceeding as well as in future service-specific proceedings. In the *Rural NPRM*, the Commission limited its inquiry regarding spectrum re-licensing and adoption of the “keep what you use” approach to future spectrum allocations only.<sup>468</sup> In this *Further Notice*, however, we extend our inquiry to include all licensed terrestrial wireless services that are within the scope of this proceeding, as well as future spectrum allocations. Accordingly, we seek comment on the benefits, if any, of extending the “keep what you use” approach. We ask whether the potential benefits of the “keep what you use” approach, in terms of increasing access to spectrum in rural areas, are likely to outweigh the potential costs. In this regard, commenters are asked to discuss the likelihood that such an approach will in fact cause uneconomic construction. We note that, to the extent that any construction requirement will cause a licensee to deploy facilities in a manner in which it may not otherwise have in the absence of such a rule, any build-out obligation could to some extent be said to cause uneconomic investment or construction. Accordingly, we seek comment on whether a “keep what you use” approach will cause undue disruption or whether it should more appropriately be viewed as one of many factors to be considered by a licensee in determining whether or not to deploy facilities in a given area.

155. We also seek comment on the impact of such a re-licensing approach on secondary markets. Because licensees may wish to recoup some financial benefit from their unused spectrum, rather than simply allowing it to revert to the Commission, a “keep what you use” approach would seem to encourage licensees to engage in more partitioning, disaggregation, and spectrum licensing arrangements. For these reasons, adoption of a “keep what you use” approach might well complement

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<sup>464</sup> Sprint Reply Comments at 12.

<sup>465</sup> Nextel Partners Reply Comments at 4-5.

<sup>466</sup> *Id.* at 7-8.

<sup>467</sup> Blooston Comments at 10. We note that although Blooston discusses the potential drawbacks to “keep what you use” in the context of its applicability to smaller licensed areas, we believe that these drawbacks may apply to larger areas as well. We further note that, in the event we adopt a “keep what you use” re-licensing approach, we are unlikely to introduce regulatory disparity and differentiate between large and small licensed areas.

<sup>468</sup> See *Rural NPRM*, 18 FCC Rcd at 20816 ¶ 25.

our existing market-based policies. On the other hand, we note that certain commenters, such as Nextel Partners and AT&T Wireless, caution that a “keep what you use” approach to spectrum re-licensing “could eliminate long range benefits from the Commission’s positive steps taken to foster development of a secondary market in spectrum.”<sup>469</sup> We seek clarification on the potential impact of a “keep what you use” approach on our secondary market policies.

156. We acknowledge that any “keep what you use” approach would necessitate certain important administrative determinations, such as identifying what constitutes “use” for particular services and requiring licensees to demonstrate sufficient “use.” However, we do not intend to set out a comprehensive definition of spectrum “use” in this proceeding. Should we adopt a “keep what you use” approach, we will examine the definition of “use” and other administrative issues in future service-specific proceedings.<sup>470</sup>

### 3. Renewal Term Substantial Service Requirements.

157. We also seek comment on whether we should strengthen the application of substantial service performance requirements after initial license terms as a means of encouraging access to spectrum and provision of service in rural areas. The *Report and Order* provided most geographic area licensees with the option of satisfying a substantial service standard if they did not already have such an option.<sup>471</sup> As discussed in Section III.D.1, the unique characteristics and considerations inherent in constructing within rural areas may make it impractical for licensees with population-based build-out requirements to construct in such areas. We believe that enabling licensees to fulfill their construction obligations by providing substantial service affords them the flexibility to deploy facilities in sparsely populated areas that otherwise may not be served. Indeed, the record in this proceeding supports our belief that the substantial service requirement enhances licensee ability to bring service to rural areas. A number of commenters agree that the use of substantial service standards for all geographic area wireless licensees should be extended,<sup>472</sup> with one commenter arguing that our population- or geographic-based build-out requirements are no longer necessary because of changes in the market, and contending that firms already in the market are more likely to acquire spectrum in order to provide niche services, rather

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<sup>469</sup> See Nextel Partners Comments at 18, AT&T Wireless Reply Comments at 6.

<sup>470</sup> We note that we have competing concerns associated with adopting a definition of “use” for flexible allocations. At present, many licensees have the flexibility to offer a range of services using their spectrum. Given the broad range of innovative services that are likely, imposing strict usage definitions that would apply over the license term may be neither practical nor desirable as a means of promoting rapid deployment of new services, including broadband applications. Without knowing the specific type of service or services to be provided, it is difficult to devise specific usage definitions. Further, given the undeveloped nature of equipment and the technical requirements to prevent interference, we are concerned that strict usage definitions might have the effect of discouraging the development of spectrally efficient equipment and applications. In any event, given these factors, we believe that determining an appropriate definition of “use” is better left to service-specific proceedings.

<sup>471</sup> See *supra* at ¶¶ 75-78.

<sup>472</sup> See Blooston Comments at 16, CTIA Comments at 5, Cingular Comments at 4 n. 11, NRTC Comments at 3-5, Southern LINC Comments at 7, RCA Comments at 8, WCA Comments at 7, Blooston Reply Comments at 7, Southern LINC Reply Comments at 4-6, Sprint Reply Comments at 21-24, WCA Reply Comments at 2, 5, Western Wireless Reply Comments at 9.

than to duplicate the existing services provided by others.<sup>473</sup>

158. We therefore seek comment on the viability of more rigorous substantial service construction requirements for licenses beyond their initial license terms. Given our interest in ensuring that spectrum is available to those who actively seek to deploy facilities, we ask if such a measure would promote access to spectrum and expanded service in sparsely populated areas. We also ask how best to structure any new substantial service requirements for use in renewal license terms that will expand coverage in rural areas. For example, should we require the provision of additional coverage beyond that which is sufficient to satisfy the existing substantial service standard during the initial license term? In other words, is it reasonable to expect a carrier to expand its coverage over time and therefore impose an increasing substantial service requirement? If so, we ask commenters to explain how best to formulate such standards to provide both existing and prospective licensees with flexibility to develop or revise their long-term business plans and build-out strategies but also with sufficient clarity for them to understand what needs to be accomplished and by what date. In addition, we ask commenters to describe any safe harbor provisions that would facilitate compliance or explain why the adoption of a safe harbor for that particular standard would not be appropriate. In addition, given our desire to encourage the deployment of service in rural areas, should we require licensees to demonstrate that some percentage of the rural population of its licensed areas is being covered in order to satisfy its substantial service showing whether or not a competing application is filed against a renewal application? Recognizing the reservations of some to the imposition of performance requirements during renewal license terms,<sup>474</sup> we also seek comment on any disadvantages that might accrue if we were to strengthen substantial service performance after initial terms.

#### 4. Other Alternatives

159. We ask commenters to identify any other methods we might adopt to make unused spectrum available to those better positioned to deploy service in the event our market-based policies fail to do so. For example, as stated earlier, although we believe it is premature at this time to adopt the use of easements, we will continue to consider the potential impact of easements on the incentives of all parties to ensure the highest and best use of the band. Comments in this proceeding provided mixed views on such use. One commenter generally supports such easements provided they permit, but do not

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<sup>473</sup> See Sprint Reply Comments at 23-24 (contending that that continued use of population- or geographic-based build-out requirements could undermine the public interest).

<sup>474</sup> See *supra* at ¶ 83. Further, T-Mobile opposes any new performance or other build-out requirements for incumbent licensees. According to T-Mobile, such requirements would fundamentally undermine the integrity of the auction process, but would also work to alter existing build-out plans to the disadvantage of rural consumers by forcing carriers to deploy resources in economically unsound ways. See T-Mobile Reply Comments at 4. Cingular adds that the imposition of additional build-out or other performance obligations would wreak havoc on business plans and could drive a number of smaller carriers out of the market. It argues that the Commission would be setting dangerous precedent that build-out obligations are fluid, which would in turn inhibit capital formation in CMRS markets. See Cingular Comments at 8. We also recognize some commenters oppose or are skeptical of any further application of substantial service requirements. They claim there is no evidence such requirements facilitate the deployment of wireless services in rural and unserved areas, and they conclude that entities will continue to make build-out decisions based on whether it is economic for them to construct regardless of the availability of a substantial service option. See OPASTCO/RTG Comments at 4-5, Dobson Comments at 14, 16, Nextel Partners Comments at 17.

require, licensees to allow the operation of unlicensed devices on their networks.<sup>475</sup> However, others submit that such easements or underlays for the provision of unlicensed services should not be permitted because they believe that unlicensed overlays will interfere with the Commission's secondary market policies,<sup>476</sup> would create uncertainty regarding a licensee's spectrum rights,<sup>477</sup> as well as raise interference concerns.<sup>478</sup> We, nevertheless, remain interested in the role that easements or other authorized secondary uses could play in providing incentives for the development by third parties of new devices and services that will increase access to spectrum, such as software-defined radios and other frequency-agile devices in frequency bands that are otherwise currently restricted to exclusive license holders.<sup>479</sup> Such ability to take advantage of unused portions of licensed spectrum could lead to the development of more equipment at lower costs, a key barrier to entry in rural areas. Nonetheless, we also seek to afford license holders as much reliability in their spectrum usage rights as practicable. In light of the objections of some to the possible use of easements,<sup>480</sup> we ask commenters to clarify their objections and, where possible, provide examples of potential adverse consequences. Should we choose to use such easements, we ask, first, how they could be structured to increase spectrum access and service coverage while also addressing the concerns raised in the comments. Second, after what time period should we allow entities to employ such easements, *e.g.*, immediately after renewal if a certain standard was not met during the initial term, or at some other point?

160. Finally, because we recognize that different wireless services may benefit from different approaches to spectrum access, we ask commenters to identify the specific services to which their proposed approaches should apply and whether there are any services that should be excluded. For example, how should the re-licensing methodologies available for mobile wireless services be different than those for fixed services? Should different approaches be applied to different geographic markets, *i.e.* is it appropriate to apply the same re-licensing method for a nationwide license as well as a MTA-based license?

## V. PROCEDURAL MATTERS

### A. Final Regulatory Flexibility Analysis

161. The Final Regulatory Flexibility Analysis for this *Report and Order*, as required by Section 604 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, is set forth in Appendix B.

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<sup>475</sup> See Nextel Communications Reply Comments at 5.

<sup>476</sup> See Cingular Comments at 8.

<sup>477</sup> See AT&T Reply Comments at 12, Western Wireless Reply Comments at 12.

<sup>478</sup> See AT&T Comments at 8, Cingular Comments at 8-9, n. 30, CTIA Comments at 8, Dobson Comments at 15, Nextel Communications Reply Comments at 5.

<sup>479</sup> For instance, to increase access to spectrum, we continue to examine the possible benefits of modifying our Part 15 rules on a band-by-band basis for currently assigned spectrum to increase access to spectrum. As one example, in our Cognitive Radio proceeding, we are exploring, *inter alia*, possible changes to our rules that would allow certain unlicensed operations in bands in those areas where spectrum occupancy is low, such as in rural areas. See *Cognitive Radio NRPM* at ¶ 36.

<sup>480</sup> See, *e.g.*, *supra* ¶ 40.

**B. Final Paperwork Reduction Act of 1995 Analysis.**

162. This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” Written comments by the public on the proposed information collections are due sixty days after the date of publication in the Federal Register. Written comments must be submitted by the OMB on the proposed information collections on or before sixty days after the 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 Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, D.C. 20554, or via the Internet to [Judith-B.Herman@fcc.gov](mailto:Judith-B.Herman@fcc.gov), and to Kristy LaLonde, OMB Desk Officer, Room 10234, New Executive Office Building, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to [Kristy\\_LaLonde@omb.eop](mailto:Kristy_LaLonde@omb.eop).

163. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.” In this present document, we have assessed the effects of the policy changes contained in this *Report and Order* in terms of the information collection burdens they might impose on small business concerns. We find the following:

164. Cellular cross-interest rule. The *Report and Order* eliminates the remaining components of the cellular cross-interest rule that currently apply only in RSAs and transitions to case-by-case review for cellular transactions. The Commission believes that modification of the rule is necessary to better encourage more transactions and levels of financing that are in the public interest while still maintaining much of the protection afforded by the cellular cross-interest rule. The *Report and Order* agreed with commenters that the approach limiting cross-interests in RSAs, as well as the proposal to eliminate the rule only in counties with more than three competitors, may interfere with investment in rural areas by discouraging certain financing in the RSA portions of a regional market but not in the MSA portions. The Commission believes that elimination of the cellular cross-interest rule will provide greater flexibility to all carriers, including small entities. In order to maintain scrutiny over those cross interests that pose a particular risk to competition in the near term, we impose a reporting requirement in cases in which a licensee with a controlling or otherwise attributable interest in one cellular licensee within an RSA obtains a non-controlling interest of more than 10 percent in the other cellular licensee in an overlapping CGSA. The licensee must notify the Commission within 30 days of the date of consummation of the transaction by filing updated ownership information (using an FCC Form 602) reflecting the specific level of investment. This notification requirement will sunset at the earlier of: (1) five years after the release of this item, or (2) at the cellular licensee’s specific renewal deadline. Although this rule change does impose an information collection on all cellular licensees, including those that can be characterized as small business concerns, the Commission believes that the reporting requirement is necessary in order to review any transactions that may pose a risk to competition.

165. The Commission will send a copy of this *Report & Order* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

### C. Initial Regulatory Flexibility Analysis

166. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals in the Further Notice of Proposed Rulemaking. The IRFA is set forth in Appendix C. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the Notice of Proposed Rulemaking, and they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act. *See* 5 U.S.C. § 603(a).

### D. Initial Paperwork Reduction Act of 1995 Analysis

167. This Further Notice of Proposed Rulemaking does not contain either a proposed or a modified information collection. Accordingly, we need not seek comment on the impact of this Further Notice on information collections, pursuant to the Paperwork Reduction Act of 1995.

### E. Ex Parte Rules – Permit-But-Disclose Proceeding

168. This is a permit-but-disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules.<sup>481</sup>

### F. Comment Dates

169. Pursuant to sections 1.415 and 1.419 of the Commission's rules,<sup>482</sup> interested parties may file comments on or before **[30 days from date of publication in the *Federal Register*]** and reply comments on or before **[60 days from date of publication in the *Federal Register*]**. Comments and reply comments should be filed in WT Docket Nos. 02-381, 01-14, 03-202. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.<sup>483</sup>

170. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. 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, U.S. 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](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. 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

<sup>481</sup> 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

<sup>482</sup> 47 C.F.R. §§ 1.415, 1.419.

<sup>483</sup> *See* Electronic Filing of Documents in Rulemaking Proceedings, *Order*, 13 FCC Rcd 11322, 11326 (1998).

appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

171. Parties that choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Best Copy and Printing, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location will be 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. One copy of all comments should also be sent to the Commission's contractor, Natek, Inc., 445 12th Street, S.W., Suite CY-B402, Washington, D.C. 20554. In addition, parties who choose to file by paper should provide a courtesy copy of each filing to Allen A. Barna, Mobility Division, Wireless Telecommunications Bureau, 445 12<sup>th</sup> Street, SW, Portals I, Room 6324, Washington, DC 20554 or by email to [allen.barna@fcc.gov](mailto:allen.barna@fcc.gov).

172. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to Natek, Inc., 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

173. Copies of all filings will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Room CY-A257, at Portals II, 445 12<sup>th</sup> St., S.W., Washington, D.C. 20554, and will be placed on the Commission's Internet site. Copies of comments and reply comments will be available through the Commission's contractor, Natek, Inc., 445 12<sup>th</sup> St., S.W., Room CY-B402, Washington, D.C. 20554, [www.bcpiweb.com](http://www.bcpiweb.com), 1-800-378-3160.

<b>If you are sending this type of document or using this delivery method...</b>	<b>It should be addressed for delivery to...</b>
Hand-delivered or messenger-delivered paper filings for the Commission's Secretary	236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002 (8:00 to 7:00 p.m.)
Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail and Priority Mail)	9300 East Hampton Drive, Capitol Heights, MD 20743 (8:00 a.m. to 5:30 p.m.)
United States Postal Service first-class mail, Express Mail, and Priority Mail	445 12 <sup>th</sup> Street, SW Washington, DC 20554

174. Parties who choose to file by paper should also submit their comments on diskette. These diskettes, plus one paper copy, should be submitted to: Milton Price, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible format using Word 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 numbers, WT Docket Nos. 02-381, 01-14, 03-202, 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, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554 (see alternative addresses above for delivery by hand or messenger).

175. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, 445 12th Street S.W., CY-B402, Washington, D.C. 20554 (see alternative addresses above for delivery by hand or messenger).

176. Alternative formats (computer diskette, large print, audio cassette and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426, TTY (202) 418-2555, or via e-mail to Brian.Millin@fcc.gov. This *Report and Order and Further Notice of Proposed Rulemaking* can also be downloaded in Microsoft Word and ASCII formats at <http://www.fcc.gov/wtb>.

## VI. ORDERING CLAUSES

177. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157, 161, 303(r), and 309(j), this REPORT AND ORDER is hereby ADOPTED.

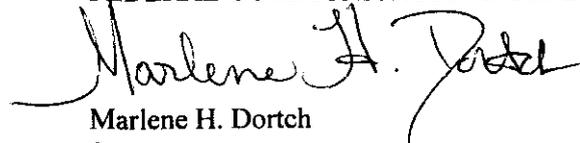
178. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 4(i), 11, 303(r), 309(j) and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 157, 161, 303(r), and 309(j), this FURTHER NOTICE OF PROPOSED RULEMAKING is ADOPTED.

179. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Cingular Wireless LLC, in WT Docket No. 01-14 on February 13, 2002, and the Petition for Reconsideration filed by Dobson Communications Corp./ Western Wireless Corp./Rural Cellular Corp. in WT Docket No. 01-14 on February 13, 2002 ARE GRANTED, to the extent described above.

180. IT IS FURTHER ORDERED that the rule sections set forth in Appendix A are adopted, effective sixty days from the date of publication in the *Federal Register*.

181. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the REPORT AND ORDER and FURTHER NOTICE OF PROPOSED RULE MAKING, including the Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

**APPENDIX A**  
**RULE CHANGES**

**Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:**

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Section 1.919 is amended by redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), and by adding paragraph (c) to read as follows:

**§ 1.919 Ownership Information.**

(a) \* \* \*

(b) \* \* \*

(c) Reporting of Cellular Cross-Ownership Interests.

(1) A cellular licensee of one channel block in a cellular geographic service area (CGSA) must report current ownership information if the licensee, a party that owns a controlling or otherwise attributable interest in the licensee, or a party that actually controls the licensee, obtains a direct or indirect ownership interest of more than 10 percent in a cellular licensee, a party that owns a controlling or otherwise attributable interest in a cellular licensee, or a party that actually controls a cellular licensee, for the other channel block in an overlapping CGSA, if the overlap is located in whole or in part in a Rural Service Area (RSA), as defined in § 22.909 of this chapter. The ownership information must be filed on a FCC Form 602 within 30 days of the date of consummation of the transaction and reflect the specific levels of investment.

(2) For the purposes of paragraph (c) of this section, the following definitions and other provisions shall apply:

(i) Non-controlling interests. A direct or indirect non-attributable interest in both systems is excluded from the reporting requirement set out in paragraph (c)(1) of this section.

(ii) Ownership attribution. For purposes of paragraph (c) of this section, ownership and other interests in cellular licensees will be attributed to their holders pursuant to the following criteria:

(A) Controlling interest shall be attributable. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(B) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee shall be attributed.

(C) Non-voting stock shall be attributed as an interest in the issuing entity

if in excess of the amounts set forth in paragraph (c)(2)(ii)(B) of this section.

(D) Debt and instruments such as warrants, convertible debentures, options, or other interests (except non-voting stock) with right of conversion to voting interests shall not be attributed unless and until converted.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of a cellular licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a cellular licensee shall be considered to have an attributable interest in the cellular licensee.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest. (For example, if A owns 20 percent of B, and B owns 40 percent of licensee C, then A's interest in licensee C would be 8 percent. If A owns 20 percent of B, and B owns 51 percent of licensee C, then A's interest in licensee C would be 20 percent because B's ownership of C exceeds 50 percent.)

(H) Any person who manages the operations of a cellular licensee pursuant to a management agreement shall be considered to have an attributable interest in such licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

- (1) The nature or types of services offered by such licensee;
- (2) The terms upon which such services are offered; or
- (3) The prices charged for such services.

(I) Any licensee, or its affiliate, who enters into a joint marketing arrangements with a cellular licensee, or its affiliate, shall be considered to have an attributable interest, if such licensee or affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (1) The nature or types of services offered by such licensee;
- (2) The terms upon which such services are offered; or
- (3) The prices charged for such services.

(3) Sunset Provisions. This notification requirement will sunset at the earlier of:

- (A) Five years after [INSERT DATE 60 DAYS AFTER DATE OF

PUBLICATION IN THE FEDERAL REGISTER], or

(B) At the cellular licensee's specific deadline for renewal.

(d) \* \* \*

(e) \* \* \*

(f) \* \* \*

**Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:**

3. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 222, 303, 309 and 332.

4. Section 22.702 is amended to read as follows:

**§ 22.702 Eligibility.**

Existing and proposed communications common carriers are eligible to hold authorizations to operate conventional central office, interoffice and rural stations in the Rural Radiotelephone Service. Subscribers are also eligible to hold authorizations to operate rural subscriber stations in the Rural Radiotelephone Service.

5. Section 22.913 is amended by revising paragraph (a) to read as follows:

**§ 22.913 Effective radiated power limits.**

\* \* \* \* \*

(a) Maximum ERP. In general, the effective radiated power (ERP) of base transmitters and cellular repeaters must not exceed 500 Watts except as described below. The effective radiated power (ERP) of base transmitters and cellular repeaters must not exceed 1000 Watts for those systems operating in areas more than 72 km (45 miles) from international borders that (1) are located in counties with population densities of 100 persons or fewer per square mile, based upon the most recently available population statistics from the Bureau of the Census; or (2) extend coverage into cellular unserved areas, as those areas are defined in Section 22.949 of the Commission's rules. The ERP of mobile transmitters and auxiliary test transmitters must not exceed 7 Watts.

\* \* \* \* \*

6. Section 22.942 is removed.

**Part 24 of Title 47 of the Code of Federal Regulations is amended as follows:**

7. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

8. Section 24.203 is amended by revising paragraph (a) to read as follows:

**§ 24.203 Construction requirements.**

(a) Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed. Licensees may, in the alternative, provide substantial service to their licensed area within the appropriate five- and ten-year benchmarks. Licensees may choose to define population using the 1990 census or the 2000 census. Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.

\* \* \* \* \*

9. Section 24.232 is revised to read as follows:

**§ 24.232 Power and antenna height limits.**

(a) Base stations are limited to 1640 watts peak equivalent isotropically radiated power (EIRP) with an antenna height up to 300 meters HAAT, except as described in paragraph (b) below. *See* Sec. 24.53 for HAAT calculation method. Base station antenna heights may exceed 300 meters with a corresponding reduction in power; *see* Table 1 of this section. In no case may the peak output power of a base station transmitter exceed 100 watts. The service area boundary limit and microwave protection criteria specified in Sec. 24.236 and Sec. 24.237 apply.

Table 1--Reduced Power for Base Station Antenna Heights Over 300 Meters

HAAT in meters	Maximum EIRP watts
≤300	1640
≤500	1070
≤1000	490
≤1500	270
≤2000	160

(b) Base stations that are located in counties with population densities of 100 persons or fewer per square mile, based upon the most recently available population statistics from the Bureau of the Census, are limited to 3280 watts peak equivalent isotropically radiated power (EIRP) with an antenna height up to 300 meters HAAT; *See* Sec. 24.53 for HAAT calculation method. Base station antenna heights may exceed 300 meters with a corresponding reduction in power; *see* Table 2 of this section. In no case may the peak output power of a base station transmitter exceed 200 watts. The service area boundary limit and microwave protection criteria specified in Sec. 24.236 and Sec. 24.237 apply. Operation under this paragraph must be coordinated in advance with all PCS licensees within 120 kilometers (75 miles) of the base station and is limited to base stations located more than 120 kilometers (75 miles) from the Canadian border and more than 75 kilometers (45 miles) from the Mexican border.

Table 2--Reduced Power for Base Station Antenna Heights Over 300 Meters

HAAT in	Maximum
---------	---------

meters	EIRP watts
≤300	3280
≤500	2140
≤1000	980
≤1500	540
≤2000	320

(c) Mobile/portable stations are limited to 2 watts EIRP peak power and the equipment must employ means to limit the power to the minimum necessary for successful communications.

(d) Peak transmit power must be measured over any interval of continuous transmission using instrumentation calibrated in terms of an rms-equivalent voltage. The measurement results shall be properly adjusted for any instrument limitations, such as detector response times, limited resolution bandwidth capability when compared to the emission bandwidth, sensitivity, etc., so as to obtain a true peak measurement for the emission in question over the full bandwidth of the channel.

10. Section 24.237 is amended by revising paragraph (d) as follows:

**§ 24.237 Interference protection**

(a) \* \* \*

(b) \* \* \*

(c) \* \* \*

(d) The licensee must perform an engineering analysis to assure that the proposed facilities will not cause interference to existing OFS stations within the coordination distance specified in Table 3 of a magnitude greater than that specified in the criteria set forth in paragraph (e) and (f) of this section, unless there is prior agreement with the affected OFS licensee. Interference calculations shall be based on the sum of the power received at the terminals of each microwave receiver from all of the applicant's current and proposed PCS operations.

Table 3.--Coordination Distances in Kilometers

EIRP(W)	PCS Base Station Antenna HAAT in Meters												
	5	10	20	50	100	150	200	250	300	500	1000	1500	2000
0.1	90	93	99	110	122	131	139	146	152	173	210	239	263
0.5	96	100	105	116	128	137	145	152	158	179	216	245	269
1	99	103	108	119	131	140	148	155	161	182	219	248	272
2	120	122	126	133	142	148	154	159	164	184	222	250	274
5	154	157	161	168	177	183	189	194	198	213	241	263	282
10	180	183	187	194	203	210	215	220	225	240	268	291	310
20	206	209	213	221	229	236	242	247	251	267	296	318	337
50	241	244	248	255	264	271	277	282	287	302	331	354	374
100	267	270	274	282	291	297	303	308	313	329	358	382	401
200	293	296	300	308	317	324	330	335	340	356	386	409	436
500	328	331	335	343	352	359	365	370	375	391	421	440	
1000	354	357	361	369	378	385	391	397	402	418			

1200	361	364	368	376	385	392	398	404	409	425			
1640	372	375	379	388	397	404	410	416	421	437			
2400	384	387	391	399	408	415	423	427	431				
3280	396	399	403	412	419	427	435	439	446				

\* \* \* \* \*

**Part 27 of Title 47 of the Code of Federal Regulations is amended as follows:**

11. The authority citation for Part 27 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

12. Section 27.50 is amended by revising paragraph (d) to read as follows:

**§ 27.50 Power and antenna height limits.**

(a) \* \* \*

(b) \* \* \*

(c) \* \* \*

(d) The following power and antenna height requirements apply to stations transmitting in the 1710-1755 MHz and 2110-2155 MHz bands:

(1) The power of each fixed or base station transmitting in the 2110-2155 MHz band and located in any county with population density of 100 or fewer persons per square mile, based upon the most recently available population statistics from the Bureau of the Census, is limited to a peak equivalent isotropically radiated power (EIRP) of 3280 watts and a peak transmitter output power of 200 watts. The power of each fixed or base station transmitting in the 2110-2155 MHz band from any other location is limited to a peak EIRP of 1640 watts and a peak transmitter output power of 100 watts. A licensee operating a base or fixed station utilizing a power of more than 1640 watts EIRP must coordinate such operations in advance with all Government and non-Government satellite entities in the 2025-2110 MHz band. Operations above 1640 watts EIRP must also be coordinated in advance with the following licensees within 120 kilometers (75 miles) of the base or fixed station: all Multipoint Distribution Service (MDS) licensees authorized under Part 21 in the 2155-2160 MHz band and all AWS licensees in the 2110-2155 MHz band.

(2) Fixed, mobile, and portable (hand-held) stations operating in the 1710-1755 MHz band are limited to a peak EIRP of 1 watt. Fixed stations operating in this band are limited to a maximum antenna height of 10 meters above ground, and mobile and portable stations must employ a means for limiting power to the minimum necessary for successful communications.

\* \* \* \* \*

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

13. The authority citation for Part 90 continues to read as follows:

AUTHORITY: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

14. Section 90.155 is amended by revising paragraph (d) to read as follows:

**§ 90.155 Time in which station must be placed in operation.**

(a) \* \* \*

(b) \* \* \*

(c) \* \* \*

(d) Multilateration LMS EA-licensees, authorized in accordance with § 90.353 of this part, must construct and place in operation a sufficient number of base stations that utilize multilateration technology (*see* paragraph (e) of this section) to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two-thirds of the population within ten years. Licensees may, in the alternative, provide substantial service to their licensed area within the appropriate five- and ten-year benchmarks. In demonstrating compliance with the construction and coverage requirements, the Commission will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five- and ten-year benchmarks, licensees will be required to file a map and FCC Form 601 showing compliance with the coverage requirements (*see* § 1.946).

\* \* \* \* \*

15. Section 90.685 is amended by revising paragraph (b) to read as follows:

**§ 90.685 Authorization, construction and implementation of EA licenses.**

(a) \* \* \*

(b) EA licensees in the 806-821/851-866 MHz band must, within three years of the grant of their initial license, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its EA-based service area. Further, each EA licensee must provide coverage to at least two-thirds of the population of the EA-based service area within five years of the grant of their initial license. EA-based licensees may, in the alternative, provide substantial service to their markets within five years of the grant of their initial license. Substantial service shall be defined as: "Service which is sound, favorable, and substantially above a level of mediocre service."

\* \* \* \* \*

16. Section 90.767 is amended to read as follows:

**§ 90.767 Construction and implementation of EA and Regional licenses.**

(a) An EA or Regional licensee must construct a sufficient number of base stations (*i.e.*, base stations for land mobile and/or paging operations) to provide coverage to at least one-third of the

population of its EA or REAG within five years of the issuance of its initial license and at least two-thirds of the population of its EA or REAG within ten years of the issuance of its initial license. Licensees may, in the alternative, provide substantial service to their licensed areas at the appropriate five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the Construction requirements of paragraph (a) of this section.

(c) Failure by an EA or Regional licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire EA or Regional license. In such instances, EA or Regional licenses will not be converted to individual, site-by-site authorizations for already constructed stations.

(d) EA and Regional licensees will not be permitted to count the resale of the services of other providers in their EA or REAG, *e.g.*, incumbent, Phase I licensees, to meet the construction requirement of paragraph (a) of this section, as applicable.

(e) EA and Regional licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.

17. Section 90.769 is amended to read as follows:

**§ 90.769 Construction and implementation of Phase II nationwide licenses.**

(a) A nationwide licensee must construct a sufficient number of base stations (*i.e.*, base stations for land mobile and/or paging operations) to provide coverage to a composite area of at least 750,000 square kilometers or 37.5 percent of the United States population within five years of the issuance of its initial license and a composite area of at least 1,500,000 square kilometers or 75 percent of the United States population within ten years of the issuance of its initial license. Licensees may, in the alternative, provide substantial service to their licensed areas at the appropriate five- and ten-year benchmarks.

(b) Licensees must notify the Commission in accordance with § 1.946 of this chapter of compliance with the Construction requirements of paragraph (a) of this section.

(c) Failure by a nationwide licensee to meet the construction requirements of paragraph (a) of this section, as applicable, will result in automatic cancellation of its entire nationwide license. In such instances, nationwide licenses will not be converted to individual, site-by-site authorizations for already constructed stations.

(d) Nationwide licensees will not be required to construct and place in operation, or commence service on, all of their authorized channels at all of their base stations or fixed stations.