



# PUBLIC NOTICE

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## WIRELESS TELECOMMUNICATIONS BUREAU SEEKS COMMENT ON PROCESS FOR RELICENSING 700 MHz SPECTRUM IN UNSERVED AREAS

WT Docket No. 06-150

**Comments Due: [20 days after publication in the Federal Register]**

**Reply Comments Due: [30 days after publication in the Federal Register]**

1. In the 2007 700 MHz *Second Report and Order*,<sup>1</sup> the Commission adopted rules for relicensing of 700 MHz Lower A, B, and E Block, and Upper C Block spectrum that is returned to the Commission's inventory as a result of licensees' failure to meet applicable construction requirements. The Commission set forth the overall rules and policies for the relicensing process and delegated authority to the Wireless Telecommunications Bureau (Bureau) to implement those rules and policies.<sup>2</sup> To the extent the 700 MHz *Second Report and Order* and other Commission rules set forth elements of the relicensing process, we cite to those rules, and, by this Public Notice, otherwise seek comment on the Bureau's proposed approach to the remaining elements of the process, including the respective costs and benefits of the various proposals.

### I. BACKGROUND

2. In the 700 MHz *Second Report and Order*, the Commission set forth rules governing wireless licenses in the 700 MHz Band that, among other things, established interim and end-of-term construction benchmarks and status reporting requirements.<sup>3</sup> These rules required Lower 700 MHz A, B, and E Block licensees to provide reliable service sufficient to cover 35 percent of the geographic area of their licenses within four years and 70 percent of this area within ten years (the license term);<sup>4</sup> they required Upper 700 MHz C Block licensees to provide reliable service sufficient to cover 40 percent of the population of their license area within four years and 75 percent of the population within ten years

<sup>1</sup> *Service Rules for 698-746, 747-762, and 777-792 MHz Bands et al.*, Second Report and Order, 22 FCC Rcd 15289 (2007) (700 MHz *Second Report and Order*).

<sup>2</sup> *Id.* at 15481, para. 557. See also *Service Rules for 698-746, 747-762, and 777-792 MHz Bands et al.*, Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 2671, 2678 (2013) (stating that in the 700 MHz *Second Report and Order*, the Commission delegated to the Bureau "the authority to establish further specifications for filings and to determine coverage areas" to implement the relicensing process) (700 MHz *Second R&O Order on Reconsideration*).

<sup>3</sup> See generally 700 MHz *Second Report and Order*.

<sup>4</sup> 47 CFR § 27.14(g).

(the license term).<sup>5</sup> In 2013, the Commission released the *Interoperability Report and Order*, which extended the interim construction deadline for Lower 700 MHz A and B Block licensees and removed the interim construction deadline for certain A Block licensees adjacent to Channel 51 operations.<sup>6</sup> The Commission also extended the interim and end-of-term deadlines for E Block licensees and permitted a showing of population coverage, rather than geographic coverage.<sup>7</sup>

3. For licensees that fail to meet the applicable interim benchmark, the rules specify that the license term will be accelerated by two years.<sup>8</sup> Accounting for the extensions provided in the *Interoperability Report and Order*, the earliest accelerated end-of-term deadline is June 13, 2017; this accelerated deadline applies to Upper C Block licensees that failed to meet the interim construction deadline by June 13, 2013, and to Lower A and B Block licensees that failed to meet the interim construction deadline by December 13, 2016.<sup>9</sup> The Commission's rules require that licensees subject to the accelerated end-of-term deadline must file construction notifications, including coverage maps and supporting documentation, demonstrating that the licensee has met the end-of-term coverage requirement.<sup>10</sup> Under the "keep-what-you-serve" (KWYS) rules, if a licensee fails to meet its end-of-term construction deadline, its authorization to operate will terminate automatically without Commission action for those geographic areas of its license authorization in which the licensee is not providing service on the date of the end-of-term deadline, and those areas will become available for reassignment by the Commission.<sup>11</sup> The Commission delegated to the Bureau the authority to establish by public notice the process by which licenses will become available for relicensing under these rules.<sup>12</sup>

## **II. IDENTIFYING FAILURE AND THE RESULTING UNSERVED AREAS AVAILABLE FOR RELICENSING**

4. As set forth in the Commission's rules, licensees must demonstrate compliance with the interim and end-of-term construction benchmarks by filing a construction notification with the Commission no later than 15 days after the relevant deadline demonstrating that they have met the construction requirements or, if they have not met the construction requirements, they must file a description and certification of the areas for which they are providing service.<sup>13</sup> In the *700 MHz Second Report and Order*, the Commission delegated to the Bureau the responsibility for establishing the specifications for filing maps and other documents (e.g., file format and appropriate data) needed to

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<sup>5</sup> *Id.* § 27.14(h).

<sup>6</sup> *See Promoting Interoperability in the 700 MHz Commercial Spectrum*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122, 15151-52, para. 65 (2013) (*Interoperability Report and Order*).

<sup>7</sup> *Id.* at 15147-49, paras. 56-59.

<sup>8</sup> 47 CFR § 27.14(g)(1), (h)(1). However, for Lower E Block licensees that fail to meet the interim benchmark, the license term will be accelerated by only one year. *See Interoperability Report and Order*, 28 FCC Rcd at 15148, para. 58.

<sup>9</sup> The accelerated end-of-term deadline for Lower E Block licensees that fail to meet the interim deadline is March 7, 2020. Lower E Block licensees are subject to the requirements and process described herein, as well as any future guidance provided by the Bureau prior to that deadline.

<sup>10</sup> As discussed above, the coverage requirements vary by spectrum block.

<sup>11</sup> 47 CFR § 27.14(g)(2), (h)(2), (i)(2). Licensees may also be subject to enforcement action, including forfeitures. *Id.*

<sup>12</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15353, para. 171; 47 CFR § 27.14(j)(1).

<sup>13</sup> *See* 47 CFR § 1.946(d) ("The notification must be filed within 15 days of the expiration of the applicable construction or coverage period."). *See also 700 MHz Second Report and Order*, 22 FCC Rcd at 15352, para. 166.

determine a licensee's service area.<sup>14</sup> The Bureau has already provided the specific construction notification filing requirements in a series of public notices, with which licensees must continue to comply when filing interim and end-of-term construction notifications.<sup>15</sup> The Bureau, if necessary, will provide any further filing instructions by public notice to implement the finalized KWYS process.

5. Pursuant to our rules, at the end-of-term construction deadline, licensees must file construction notifications demonstrating that they have met their end-of-term construction benchmarks.<sup>16</sup> Pursuant to the *700 MHz Second Report and Order*, the Bureau places construction notifications on public notice and reviews each notification and any related comments prior to making a determination regarding the notification.<sup>17</sup> Interested parties are permitted to file comments, which must be filed no later than 30 days after the public notice release date. After examining the construction notifications and public comments, the Bureau will determine whether each licensee has made a sufficient showing to satisfy the end-of-term construction benchmark and retain its entire license.<sup>18</sup> As with interim construction notifications, the Bureau may return the filing and ask the licensee to amend the notification with additional or different information as it deems necessary.<sup>19</sup> Pursuant to the rules and procedures set forth in the *700 MHz Second Report and Order*, if a licensee files a request for extension of time or a waiver of the construction deadline and the Bureau denies the request, the Bureau will instruct the licensee to file a construction notification either demonstrating compliance with the construction benchmark as of the end-of-term construction deadline, or admitting failure. Licensees that fail to meet the end-of-term construction benchmark – whether they admit failure or are deemed by the Bureau to have failed following review of the construction notification – are subject to the KWYS rules and will be required to make the additional KWYS required filings described below.<sup>20</sup> We seek comment on the process described below for doing so.

#### **A. Required Filing for KWYS.**

6. Pursuant to the *700 MHz Second Report and Order*, licensees that fail to meet the construction requirement and are subject to the KWYS rules will be required to file an electronic coverage map in order to demonstrate the geographic portion of the licensed area the licensee will retain, and the geographic area that will be returned to the Commission for reassignment.<sup>21</sup> Licensees admitting failure must include the additional required filing for KWYS with their construction notification at the

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<sup>14</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15352, para. 166.

<sup>15</sup> See *Wireless Telecommunications Bureau Establishes Electronic Map Format for Covered 700 MHz Band Licensee Construction Notifications*, Public Notice, 30 FCC Rcd 11407 (WTB 2015); *700 MHz Construction and Reporting Requirements and Related Deadlines*, Public Notice, 31 FCC Rcd 5297 (WTB 2016) (clarifying and updating certain filing requirements).

<sup>16</sup> *Id.* See also 47 CFR § 1.946(d).

<sup>17</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15353, para. 169. Specifically, the Bureau places 700 MHz construction notifications on its weekly Market-Based Applications Accepted for Filing Public Notice.

<sup>18</sup> *Id.* (“After examining the notification and public comments, Commission staff will make a final determination as to what areas within EAs and CMAs are, and are not, deemed ‘served.’”).

<sup>19</sup> The Bureau might, for instance, request the licensee use a different propagation model for determining coverage that is consistent with previous specifications. Alternatively, if a licensee files a notification admitting failure, but does not include the further documentation necessary for application of the KWYS process, the Bureau will return the filing and ask the licensee to amend with the requirements described herein.

<sup>20</sup> 47 CFR § 27.14(g)(2), (h)(2), (i)(2).

<sup>21</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15352, para. 166. See also 47 CFR § 27.14(g)(2), (h)(2), (i)(2).

end-of-term construction deadline. If a licensee claims to have met the construction benchmark, but the Bureau deems the licensee to have failed after review of the construction notification, the licensee will be asked to amend its initial construction notification filing to include the additional required filing for KWYS.

7. In order to implement the KWYS rules, we propose and seek comment on a process whereby licensees would demonstrate the “served” area of the license by filing a shapefile showing a smooth enclosed 40 dB $\mu$ V/m field strength contour (Smooth Contour)<sup>22</sup> of existing facilities as of the end-of-term deadline. The portion of the license market covered by the Smooth Contour would be deemed “served” for the purposes of the KWYS rule and become the reduced licensed area that the licensee “keeps.” Recognizing the need for functional license boundaries once a licensee’s authorization is reduced, we propose a smooth enclosed contour as the most practical format for demonstrating coverage area.<sup>23</sup> Under the Commission’s technical rules, licensees in the 700 MHz band may not exceed 40 dB $\mu$ V/m field strength at the license boundary.<sup>24</sup> In light of this field strength limit as well as our observations of existing services in the 700 MHz band, and in the interest of administrative clarity and expediency, we anticipate the 40 dB $\mu$ V/m field strength contour would be the most suitable means of determining licensees’ service area. However, we recognize that some licensees might provide service at significantly lower field strength such that the 40 dB $\mu$ V/m Smooth Contour would result in a reduced licensed area that is substantially smaller than the licensee’s actual service area. Therefore, to provide an alternative, we propose that, if the 40 dB $\mu$ V/m Smooth Contour would result in a reduced licensed area that is at least 25 percent smaller than the licensee’s actual service area, the licensee could demonstrate the service area using a lower dB $\mu$ V/m field strength smooth contour (Alternative Smooth Contour). Under this proposed approach, in order to be acceptable for filing, a submission using an Alternative Smooth Contour would be required to demonstrate that: (1) the licensee is operating a viable service at the lower field strength; and (2) the service area using the lower dB $\mu$ V/m field strength Alternative Smooth Contour is at least 25 percent larger than it would be using the 40 dB $\mu$ V/m field strength Smooth Contour. The Bureau would update the license in the Commission’s Universal Licensing System (ULS) using either the Smooth Contour or Alternative Smooth Contour shapefile to reflect the reduced license boundary.<sup>25</sup> The remaining portion of the original license market would be deemed unserved area and would return to the Commission’s inventory for relicensing.<sup>26</sup>

8. We seek comment on this proposed methodology for determining licensees’ service area. Would the Smooth Contour and Alternative Smooth Contour approach adequately encompass the services and technologies offered in the 700 MHz band? What, if any, alternatives to this approach might achieve the Commission’s goals of accurately reflecting licensees’ service areas and making spectrum available for relicensing in an efficient manner? While the proposed filing method would apply to all 700 MHz licensees, we seek comment on whether small entities might be particularly impacted by the proposed

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<sup>22</sup> A smooth contour is a closed, non-overlapping polygon. Here, the smooth contour would be a closed, non-overlapping polygon reflecting the signal area at 40 dB $\mu$ V/m field strength.

<sup>23</sup> See *700 MHz Second Report and Order*, 22 FCC Rcd at 15352, para. 167 (indicating that licensees’ coverage maps “must clearly and accurately display the boundaries of the area or areas within each EA or CMA not being served”).

<sup>24</sup> 47 CFR § 27.55(a)(2).

<sup>25</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15353, para. 170 (“We will update our [ULS] records to reflect those geographic areas for which the licensee retains authority to operate, as well as those geographic areas that will be made available for reassignment.”).

<sup>26</sup> Geographic area to be made available for relicensing must include a contiguous area of at least 50 square miles, and areas smaller than a contiguous area of at least 50 square miles will not be deemed unserved for the purposes of relicensing, and will therefore be retained by the licensee. 47 CFR § 27.14(g)(3), (h)(3), (i)(3).

requirements. Should the filing requirements vary depending on whether a licensee is small or large?

#### **B. Identifying Unserved Areas.**

9. Pursuant to the *700 MHz Second Report and Order*, information about the available unserved areas will be publicly available. Under our proposed approach, the Bureau would use the Smooth Contour or Alternative Smooth Contour shapefiles submitted by failing licensees to determine the unserved areas of each market. The Bureau would compile these unserved portions together as areas that would be available for relicensing and would provide instructions on how to access that information by public notice. The public notice announcing the unserved areas available for relicensing would also provide further instructions and specific dates for the commencement of the relicensing process. In setting these dates, the Bureau intends to provide potential applicants with at least 60 days prior to the commencement of relicensing to enable them to make necessary inquiries about available area, e.g. site leases, existing infrastructure, neighboring operations, and network and backhaul needs.<sup>27</sup>

### **III. PHASED RELICENSING PROCESS**

10. This section describes the two-phase process established by the *700 MHz Second Report and Order* for applying to serve unserved areas available for relicensing. We seek comment on the proposed approach for implementing the overall process, as described below.

#### **A. Applications.**

11. Pursuant to Section 27.14 of the Commission's rules, relicensing of unserved areas will occur through a two-phase application process. Applications for available unserved areas will be filed via ULS, and applicants will submit a shapefile covering the area they wish to license. Subject to the restrictions of Phase 1 and other relicensing rules, described below, applicants may apply for any area, shape, or number of available areas they choose.<sup>28</sup> Applicants will file an application for either a new license or to modify an existing license.<sup>29</sup> As with other processes for the licensing of spectrum, at the application stage, applicants will not be required to, and should not, file any technical specifications of the services they intend to provide. If an applicant submits any technical specifications or other information not required in the application, the Bureau will not review it, and the Bureau's acceptance of an application that includes such information is not an acceptance of those technical specifications.<sup>30</sup> Consistent with the Commission's Part 1 rules and the process outlined below, all applications for available unserved areas found acceptable for filing (including the shapefile) will be placed on public notice, and the applications will be available for public review and comment.<sup>31</sup> We observe that the shapefile contains the primary substantive information for which opportunity for review is provided and on which comment is sought – i.e., details about the scope of the license request (such as the geographic boundaries of the requested service area) sufficient to ascertain whether the license application is or will be mutually exclusive with another application as already filed or to be filed within the upcoming Phase I filing window. We therefore do not anticipate a likely scenario in which confidential treatment of a

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<sup>27</sup> These inquiries are particularly important, given the requirements of licensees described *infra* Section IV.

<sup>28</sup> For instance, while only unserved area that is at least 50 sq. miles will be returned to the Commission for relicensing, 47 CFR § 27.14(g)(3), (h)(3), (i)(3), there is no minimum size requirement for applications to license available unserved area.

<sup>29</sup> In ULS, purpose codes NE (New) and MD (Modification). Modifications may be used where an applicant is an existing 700 MHz licensee of area adjacent to available unserved area and wishes to expand the existing license area to cover a portion of that adjacent unserved area in the same frequency band.

<sup>30</sup> Such filings with technical specifications of the service provided are more appropriate and will be reviewed when the licensee files its notification of construction, discussed *infra* Section IV.

<sup>31</sup> 47 CFR § 1.933. *See also id.* § 27.14(j)(2).

shapefile would be warranted.

12. In order to implement the relicensing process, we propose to provide applicants with access to a publicly available map displaying the areas available for relicensing, from which they could determine the areas they are interested in licensing. In the interest of administrative clarity and functionality, we propose limiting a single application to include one shapefile of a contiguous shape, or, if non-contiguous, requiring that the shapes be within a single market boundary.<sup>32</sup> If an applicant files for non-contiguous shapes in a single application, grant of the application would result in a single license and a single buildout requirement would be applied to all shapes as a whole. Consequently, failure to meet the buildout requirement with respect to one non-contiguous shape would result in application of the penalty for failure to all shapes as a whole.<sup>33</sup> We seek comment on this proposed treatment of applications for available unserved areas. What, if any, further restrictions or methods might be necessary to ensure efficient processing and review of applications filed during the relicensing process?

### **B. Phase 1 of Relicensing.**

13. As set forth in the Commission's rules, relicensing will begin with a 30-day Phase 1 filing window.<sup>34</sup> Pursuant to Section 27.14, the original licensee of available unserved areas, whose authorization to serve that area terminated due to failure to meet the end-of-term construction benchmark, is barred during Phase 1 from applying to relicense that area.<sup>35</sup> This Phase 1 bar is specific to each unserved area, and therefore an applicant that is barred from one unserved area during Phase 1 is not barred from applying for other available areas for which it was not the original licensee.

14. In order to implement the Phase 1 bar, we propose to apply the bar to any applicant that has any interest or ownership in, or any control of, the original licensee and to any applicant in which the original licensee has any interest, ownership, or control. We seek comment on requiring applicants to certify in the application that: (1) the applicant is not the original licensee of the unserved area; (2) the applicant does not have any interest in or own or control any part of the original licensee of the unserved area; and (3) the original licensee of the unserved area does not have any interest in or own or control any part of the applicant.<sup>36</sup> In establishing the Phase 1 bar, the Commission sought to promote access to spectrum and ensure that spectrum is licensed to those parties that are most likely to use it.<sup>37</sup> In light of these goals and the limited timeframe during which the bar applies, is the proposed method of ownership attribution appropriate? We seek comment on this approach and potential alternatives for applying the bar, including application of the Commission's *pro forma* standard for determining ownership, which

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<sup>32</sup> For example, a non-contiguous shapefile for A-Block area must be contained within one Economic Area (EA); a non-contiguous shapefile for B-Block area must be contained within one Cellular Market Area (CMA).

<sup>33</sup> See *infra* Section IV for discussion of the construction requirement for relicensed area and the penalty for failure to satisfy the requirement.

<sup>34</sup> 47 CFR § 27.14(j)(1).

<sup>35</sup> *Id.*

<sup>36</sup> Because of the permanent bar that applies to licensees who fail to meet the buildout requirement for relicensed spectrum, discussed *infra* Section IV, applicants would be required to file the certification during all Phases of relicensing.

<sup>37</sup> See *700 MHz Second Report and Order*, 22 FCC Rcd at 15551, Appx. C, para. 35 (“This rule ensures that spectrum covering areas that are not adequately built out is returned to the Commission and others are given an opportunity to acquire licenses for this spectrum.”). See also *700 MHz Second R&O Order on Reconsideration*, 28 FCC Rcd at 2678, para. 17 (“This measure helps ensure that the original licensee will make all reasonable efforts to meet its performance benchmarks and that we license spectrum to those parties that are most likely to use it.”).

looks to both *de jure* and *de facto* control of the licensee.<sup>38</sup> Rather than administering a bright-line test for ownership through the proposed certification requirement, would the *pro forma* standard be a more appropriate means of determining whether a particular applicant is barred? We seek comment on the respective impact of each approach, specifically with respect to small entities. Should either of the possible approaches vary depending on whether the wireless provider is small or large?

15. Pursuant to the Commission's Part 1 rules, at the end of the 30-day Phase 1 filing window, the Bureau will issue a public notice listing applications found acceptable for filing during Phase 1.<sup>39</sup> The public notice will identify which acceptable applications, if any, are mutually exclusive with each other. All applications received during the Phase 1 filing window for a particular available unserved area are treated as contemporaneous for the purposes of mutual exclusivity.<sup>40</sup> Pursuant to Section 27.14(j)(1), applications will be deemed mutually exclusive if they propose areas overlapping with other applications.<sup>41</sup> Consistent with the *700 MHz Second Report and Order*, no further mutually exclusive applications may be filed after the 30-day filing window has ended, but licensees and third parties may file petitions to deny any pending applications within 30 days of the release of the public notice listing Phase 1 applications found acceptable for filing.<sup>42</sup>

16. Pursuant to the Commission's rules, mutually exclusive applications are subject to auction.<sup>43</sup> The Commission delegated authority to the Bureau to, in its discretion, designate a limited settlement period for the applicants to resolve the mutual exclusivity prior to auction.<sup>44</sup> Subject to the Greenmail Rule,<sup>45</sup> applicants may resolve mutual exclusivity by withdrawing or filing a minor

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<sup>38</sup> See, e.g., 47 CFR §§ 1.929(k)(1) (applications for *pro forma* assignment or transfer of control deemed a minor application), 1.933(d)(2) (no public notice required prior to grant of *pro forma* assignments and transfers), 1.948(c)(1) (prior Commission approval not required for *pro forma* assignment of authorization or transfer of control). For discussion of factors that may be relevant to a finding of *de jure* and *de facto* control, see *Federal Communications Bar Association's Petition for Forbearance from Section 310(D) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers et al.*, FCC 98-18, Memorandum Opinion and Order, 13 FCC Rcd 6293, paras. 7-9 (1998).

<sup>39</sup> 47 CFR § 1.933.

<sup>40</sup> *Id.* § 90.165(b)(4).

<sup>41</sup> *Id.* § 27.14(j)(1).

<sup>42</sup> See *700 MHz Second Report and Order*, 22 FCC Rcd at 15353, para. 172. The Commission stated that following the Phase 1 filing window, "the original licensee and third parties can file license applications for remaining unserved areas where licenses have not been issued or there are no pending applications." *Id.* (emphasis added). In light of our Part 90 rules concerning filing windows, see, e.g., 47 CFR § 90.165, we view this instruction as prohibiting any further applications that are mutually exclusive of Phase 1 applications after the filing window has closed.

<sup>43</sup> 47 CFR §§ 27.14(j)(1), 90.165(c)(4)(ii).

<sup>44</sup> *Id.* § 27.14(j)(1).

<sup>45</sup> *Id.* (during the limited settlement period "applicants may enter into a settlement to resolve their mutual exclusivity subject to the provisions of § 1.935"). Settlement agreements require Commission approval and applicants are required to make certain filings and certifications. See *id.* § 1.935. For examples of how this rule has been applied to applications for unserved area in the Cellular Radiotelephone Service band, see, e.g., *Wireless Telecommunications Bureau Approves Settlement Agreement Between Keystone Wireless, Inc. and Verizon Wireless (VAW) LLC*, Public Notice, 23 FCC Rcd 7931 (WTB 2008); *Wireless Telecommunications Bureau Approves Settlement Agreement Between WWC License L.L.C. and WWC Holding Co., Inc., and N.E. Colorado Cellular Inc.*, Public Notice, 17 FCC Rcd 26148 (WTB 2002); *Settlement Agreement Between ACS Wireless Sub, Inc. and Copper Valley Wireless, Inc. Approved*, Public Notice, 17 FCC Rcd 10571 (WTB 2002).

amendment to one or both of the mutually exclusive applications. Under our Part 1 rules, amendments to an application are considered either major amendments or minor amendments, depending on the circumstance.<sup>46</sup> If one or both of the applicants agrees to reduce or “pull back” the area covered by the application in order to avoid mutual exclusivity, the change is deemed a minor amendment.<sup>47</sup> Minor amendments do not materially alter the original applications and do not require a new public notice period. Such treatment, however, is not available when the modification of the application constitutes a major amendment. If the applicants’ agreement would require that either application be modified to include any area that was not part of the area specified in the application as originally filed,<sup>48</sup> such a change would be deemed a major amendment,<sup>49</sup> and the application so modified would be dismissed as impermissible provided the modification occurred after the close of the 30-day Phase 1 filing window.<sup>50</sup> At that point, the dismissed applicant could file a new application for a license covering the modified service area, but such application, because it would be filed during Phase 2, would be subject to potential Phase 2 competing filings.<sup>51</sup>

17. In order to implement these policies concerning mutually exclusive applications, we propose that applicants would be permitted to resolve their mutually exclusive applications or attempt to reach a settlement during the public notice period that follows the Phase 1 filing window. Similar to the Commission’s approach in other licensing and competitive bidding contexts, we propose that the definition of mutually exclusive applications would include “daisy chains” of mutual exclusivity, which occur when two or more applications contain proposed areas that do not directly overlap, but are linked together into a chain by the overlapping proposal(s) of other(s).<sup>52</sup>

### **C. Phase 2 of Relicensing.**

18. As set forth in the rules establishing the relicensing process, interested applicants, including those that were barred during Phase 1, may file applications for available unserved areas that were not licensed during Phase 1 or for which there are no pending applications.<sup>53</sup> The Bureau will place Phase 2 applications deemed acceptable for filing on public notice for 30 days, during which licensees and third parties may file applications for unserved areas that are mutually exclusive of the pending application as well as petitions to deny the application.<sup>54</sup> Pursuant to Section 27.14(j)(2), an application for unserved area is deemed mutually exclusive if it overlaps a pending application and is filed during the pending application’s 30-day public notice period. As with Phase 1 and consistent with the Commission’s rules, Phase 2 applicants may withdraw or amend their applications in order to avoid

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<sup>46</sup> *Id.* § 1.929.

<sup>47</sup> *Id.* § 1.929(k).

<sup>48</sup> Such a modification could reflect an expansion of the originally requested area, or it could be the result of a substitution that maintains or reduces the net square mileage covered by the original request, but which describes an area that includes at least some geographic portion that was not requested in the application as originally filed.

<sup>49</sup> 47 CFR § 1.929(a)(1).

<sup>50</sup> Major amendments to Phase 1 applications are not permitted after the close of the 30-day Phase 1 filing window, and an application so amended will be dismissed. *Id.* §§ 1.934(f), 27.14(j)(1).

<sup>51</sup> *Id.* § 1.933(c).

<sup>52</sup> *See, e.g., Auction No. 81 Final Settlement Window Announced*, Public Notice, 18 FCC Rcd 25141, 25142 (MB 2003); *Supplemental Closed Broadcast Auction; Auction No. 28, Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for March 21, 2000; Minimum Opening Bids and Other Procedural Issues*, DA 99-2958, Public Notice (MB/WTB, Dec. 23, 1999).

<sup>53</sup> 47 CFR § 27.14(j)(2).

<sup>54</sup> *Id.*

mutual exclusivity, and the Greenmail Rule is not waived during any settlement period provided by the Bureau.<sup>55</sup> During Phase 2, both major and minor amendments are permitted. However, consistent with the Commission’s Part 1 rules, a major amendment to a pending application will require a new public notice period during which the applicant would be subject to further mutually exclusive applications.<sup>56</sup>

19. In order to implement the Phase 2 process, we propose and seek comment on a process whereby the Bureau would update the publicly available relicensing map following Phase 1 to reflect pending applications, licenses that were issued, and area that remains available for relicensing. As with Phase 1, we propose that the definition of mutual exclusivity for Phase 2 applications would include applications that, though not mutually exclusive of the first-filed application, are mutually exclusive of another application that overlaps the first-filed application – i.e., a “daisy chain” as described above. We expect parties interested in serving a particular unserved area to file applications as early as possible once the area becomes available for relicensing. Therefore, consistent with the Commission’s approach to “daisy chain” applications in other contexts to promote expediency and efficiency, and to avoid potentially indefinite filing of “daisy chain” mutually exclusive applications, we propose that the public notice for the first-filed application would determine the applicable filing period for all subsequent mutually exclusive or “daisy chain” applications.<sup>57</sup> The Bureau would dismiss any further mutually exclusive applications filed after the pending application’s public notice period.<sup>58</sup> Following a Phase 2 application’s 30-day public notice, we propose and seek comment on a process whereby, if the Bureau determines there are existing applications that are mutually exclusive of the initial application, it would notify the parties of the conflicting applications and provide 60 days to resolve the mutual exclusivity. Any mutually exclusive applications that are not resolved by the end of the 60-day period would be subject to auction.<sup>59</sup> We seek comment on this proposed approach to mutual exclusivity during Phase 2.

#### **IV. RELICENSED AREA**

##### **A. Construction Requirement.**

20. As set forth in Section 27.14(j)(3), licensees of 700 MHz licenses acquired through the relicensing process will have one year from the date the new license is issued to complete construction, provide signal coverage, and offer service over 100 percent of the geographic area of the new license area.<sup>60</sup> Pursuant to the Commission’s rules, if the licensee fails to meet this construction requirement, its license will automatically terminate without Commission action and it will not be eligible to apply to provide service to this area at any future date.<sup>61</sup>

21. Unlike the KWYS rules, which provide that an unserved area less than 50 square miles will be deemed “served” for the purposes of determining a failing licensee’s service area, the rules setting forth the construction requirements for relicensed area do not contain any provision for treating such smaller unserved portions of a licensee’s service area as “served.” Rather, Section 27.14(j)(3) states, without exception, that the failure of a licensee of relicensed area to complete its construction and provide signal coverage and offer service over 100 percent of the geographic area of the new license area will

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<sup>55</sup> See *id.* §§ 1.929, 1.935, 27.14(j)(2).

<sup>56</sup> *Id.* § 1.933(c).

<sup>57</sup> See *id.* § 90.165(b)(3).

<sup>58</sup> *Id.* § 90.165(b).

<sup>59</sup> 47 CFR §§ 90.165(c)(4)(ii), 27.14(j)(2).

<sup>60</sup> *Id.* § 27.14(j)(3).

<sup>61</sup> *Id.*

result in the automatic termination of the license.<sup>62</sup> Therefore, any portion of the relicensed area that remains unserved at the one-year construction deadline – even if less than 50 square miles – will result in failure of the requirement and application of the penalty described in the previous paragraph. The government lands exclusion provided in Section 27.14(g)(1) of the Commission’s rules also does not apply to relicensed area; if a licensee applies for a relicensed area that includes government lands, they will be required to provide service to those lands in order to satisfy the construction requirement. Operations in relicensed area remain subject to the field strength limit of 40 dB $\mu$ V/m at the license boundary.<sup>63</sup> In order to meet the 100 percent coverage requirement and provide service to the entire relicensed area, licensees providing services at a field strength higher than 40 dB $\mu$ V/m will need to coordinate with neighboring licensees to avoid interference issues. We seek comment on the below approach to implementing this construction requirement.

22. In establishing the construction requirement for licenses acquired through the relicensing process and the penalty for failure, the Commission sought to facilitate rapid deployment of service on relicensed spectrum and to prevent potential gaming of the relicensing process.<sup>64</sup> Therefore, in order to implement the Commission’s goals, we propose to treat any modification, cancellation, or assignment of a license as failure to provide signal coverage and offer service to the entire relicensed area, such that the penalty for failure would apply. Specifically, under our proposal, licensees would not be permitted to modify the licensed area prior to meeting the one-year construction benchmark in order to reduce the area they must cover. Cancellation of the license prior to meeting the one-year construction benchmark would also constitute failure, and the former licensee would not be eligible to apply to serve any portion of this area at any future date. Finally, licensees would be permitted to file applications to assign licenses acquired through relicensing (including requests to partition and disaggregate) only after they have demonstrated that they have met the construction benchmark.<sup>65</sup> We seek comment on this approach to the construction requirement. What, if any, further restrictions might be necessary to promote the Commission’s goals in establishing the requirements? Should any of these proposed restrictions vary depending on whether the licensee is a small entity?

#### **B. Construction Showing.**

23. Pursuant to our rules, at the one-year construction deadline, licensees must provide signal coverage and offer service over 100 percent of the licensed area. Licensees must demonstrate that they comply with the construction benchmark by filing a construction notification with the Commission no later than 15 days after the relevant deadline.<sup>66</sup>

24. In order to implement this requirement, we propose that, at the one-year construction deadline, licensees would be required to demonstrate that they provide signal coverage and offer service over 100 percent of the geographic area by filing either a Smooth Contour or an Alternative Smooth Contour, consistent with the proposed required filings for KWYS. As discussed above, we anticipate that use of either a Smooth Contour or Alternative Smooth Contour will provide an efficient and practical format for demonstrating coverage area.<sup>67</sup> We seek comment on what, if any, alternative filings might be

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* § 27.55(a)(2).

<sup>64</sup> See *700 MHz Second Report and Order*, 22 FCC Rcd at 15551, Appx. C, paras. 35-36; *700 MHz Second R&O Order on Reconsideration*, 28 FCC Rcd at 2678, para. 17 & n.48.

<sup>65</sup> While the Bureau believes this procedure for assignment will best promote administrative efficiency, we would consider waivers on a case by case basis for larger assignment transactions.

<sup>66</sup> 47 CFR § 1.946(d).

<sup>67</sup> See *supra* discussion in *Required Filing for KWYS*.

appropriate methods for licensees to demonstrate that they satisfy the construction requirement.

25. Given the proposed requirements and penalties for failing to meet the construction requirement, it is particularly important that potential participants in the relicensing process only apply for portions of available unserved areas if they, through due diligence, have determined they can provide signal coverage and offer service over 100 percent of the area within one year from the date of license issuance. Under our proposed approach, it would be particularly important that potential licensees conduct due diligence prior to applying for available unserved areas during the relicensing process and ensure the shapefile used in their application is an accurate reflection of the Smooth Contour or Alternative Smooth Contour they would be required to file at the one-year construction deadline. Additionally, the Bureau recommends that potential licensees review the technical narratives and specifications of construction notifications that the Bureau has previously accepted for the 700 MHz band.<sup>68</sup>

## V. PROCEDURAL MATTERS

### A. *Ex Parte* Rules

26. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>69</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

### B. Filing Requirements

27. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.

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<sup>68</sup> See Appendix A for instructions on how to view previously accepted construction notifications.

<sup>69</sup> 47 CFR §§ 1.1200 *et seq.*

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- 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, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

28. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

29. Copies of materials which are available, or made available, for public inspection may be obtained by visiting the FCC's Reference Information Center, Portals II, 445 12<sup>th</sup> Street, SW, Room CY-A257, Washington, DC 20554. Or, visit the Commission's website at [www.fcc.gov](http://www.fcc.gov). Documents can be downloaded from the website by using the following databases:

- Electronic Comment Filing System ([ECFS](#))
- Electronic Document Management System ([EDOCS](#))

### C. Regulatory Flexibility Analysis

30. As required by the Regulatory Flexibility Act of 1980 (RFA),<sup>70</sup> the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) in connection with the *700 MHz Further Notice*<sup>71</sup> and a Final Regulatory Flexibility Analysis (FRFA) in connection with the *700 MHz Second Report and Order*.<sup>72</sup> While no commenter directly responded to the IRFA, the FRFA addressed concerns about the impact on small business of the KWYS rules.<sup>73</sup> The IRFA and FRFA set forth the need for and objectives of the Commission's rules for the KWYS rules; the legal basis for those rules, a description and estimate of the number of small entities to which the rules apply; a description of projected reporting, recordkeeping, and other compliance requirements for small entities; steps taken to minimize the significant economic impact on small entities and significant alternatives considered; and a statement that there are no federal rules that may duplicate, overlap, or conflict with the rules. The proposals in this Public Notice do not change any of those descriptions.

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<sup>70</sup> See 5 U.S.C. § 603.

<sup>71</sup> *Service Rules for 698-746, 747-762, and 777-792 MHz Bands et al.*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064, 8212 (2007) (*700 MHz Further Notice*).

<sup>72</sup> *700 MHz Second Report and Order*, 22 FCC Rcd at 15542.

<sup>73</sup> *Id.* at 15550-51, paras. 33-36.

31. This Public Notice does, however, detail proposed procedures for implementing those rules. Therefore, we seek comment on how the proposals in this Public Notice could affect either the IRFA or the FRFA. Such comments must be filed in accordance with the same filing deadlines for responses to this Public Notice and have a separate and distinct heading designating them as responses to the IRFA and FRFA.

**D. Paperwork Reduction Act**

32. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

**E. Further Information**

33. Questions regarding this Public Notice may be directed to Anna Gentry, Attorney Advisor, Wireless Telecommunications Bureau, Mobility Division, at (202) 418-7769 or [anna.gentry@fcc.gov](mailto:anna.gentry@fcc.gov).

**VI. AUTHORITY**

34. Action taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131, 0.331.

By the Chief, Mobility Division, Wireless Telecommunications Bureau.

**-FCC-**

## APPENDIX A

To access the 700 MHz construction notifications that were granted in ULS the following steps can be taken:

1. Access the ULS page by going to <http://wireless.fcc.gov/uls/index.htm?job=home>
2. Under the **Search Tab** select applications.
3. Under the **Application Search** select advanced application search.
4. Under **Application Detail** fill in the following four areas:
  - a. Under **Radio Service Code** you can select one or multiple codes depending on the spectrum band you wish to check. The codes for 700 MHz are:
    - i. WU – Upper Band Block C
    - ii. WX – Guard Band
    - iii. WY – Lower Band Blocks A, B, E
    - iv. WZ – Lower Band Blocks C, D
  - b. Under **Status** select Q – Accepted
  - c. Under **Purpose** select NT – Required Notification of Coverage/Construction
  - d. Under **Authorization Type** select Regular.
5. Select Search and the results will display.