

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

In the Matter of
Partitioning, Disaggregation, and
Leasing of Spectrum
WT Docket No. 19-38

FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairwoman Rosenworcel and Commissioner Starks issuing separate statements

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I. INTRODUCTION

1. With this Further Notice of Proposed Rulemaking, we take key steps towards closing the digital divide and we make further progress on the goals set forth by Congress in the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act

(MOBILE NOW Act)<sup>1</sup> regarding the diversity of spectrum access and the provision of service to rural areas. In particular, we propose an enhanced competition incentive program focused on increasing spectrum access for small carriers and Tribal Nations and on increasing the availability of advanced telecommunications services in rural areas with the goals of promoting greater competition in and expanded access to such services. To achieve these vital Commission goals, we propose to modify our existing partitioning, disaggregation, and leasing rules by providing specific incentives for stakeholders to participate in the program by engaging in qualifying transactions that make spectrum available to these entities and in these areas. Separate from the incentive program, we seek comment on potential alternatives to population-based performance requirements for a variety of stakeholders. Further, we propose to provide for reaggregation of partitioned and disaggregated licenses up to the original license size.

2. The *Further Notice* builds upon the record developed through the Commission's 2019 *Notice of Proposed Rulemaking*,<sup>2</sup> which initiated this proceeding to examine spectrum access and availability of rural service, as Congress directed in the MOBILE NOW Act.<sup>3</sup> We believe that the proposals in this *Further Notice*, taken together, will create new opportunities for small carriers and Tribal Nations to get access to spectrum, and will result in greater competition and expanded wireless deployment in rural areas, bringing more advanced wireless service including 5G to underserved communities.

## II. BACKGROUND

### A. Existing Partitioning, Disaggregation, and Spectrum Leasing Rules

3. *Partitioning and Disaggregation.* The Commission first adopted rules permitting geographic partitioning, which is the assignment of a geographic portion of a geographic area licensee's license area,<sup>4</sup> and spectrum disaggregation, which is the assignment of portions of blocks of a geographic area licensee's spectrum,<sup>5</sup> for Broadband PCS licenses in 1996.<sup>6</sup> The Commission has since adopted partitioning and disaggregation rules on a service-by-service basis to provide licensees the "flexibility to determine the amount of spectrum they will occupy and the geographic area they will serve."<sup>7</sup> The

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<sup>1</sup> Consolidated Appropriations Act, Pub. L. No. 115-141, Division P (RAY BAUM'S Act of 2018), Title VI (MOBILE NOW Act), § 601 et seq. (2018).

<sup>2</sup> *Partitioning, Disaggregation, and Leasing of Spectrum*, Notice of Proposed Rulemaking, WT Docket No. 19-38, 34 FCC Rcd 1758 (2019) (*Notice*).

<sup>3</sup> MOBILE NOW Act § 601 et seq.

<sup>4</sup> See 47 CFR § 1.950(a)(2).

<sup>5</sup> See *id.* § 1.950(a)(3). An example of spectrum disaggregation is where Party A holds 30 megahertz of spectrum in an Economic Area (EA) and assigns half of it to Party B, resulting in Party A holding 15 megahertz over the entire EA and Party B holding 15 megahertz over the entire EA. We note that parties can also disaggregate and partition in combination, such as where Party A holds 30 megahertz of spectrum in an EA and assigns 5 megahertz in County X to Party B, resulting in Party A holding 25 megahertz in County X and 30 megahertz elsewhere in the EA, and Party B holding 5 megahertz only in County X.

<sup>6</sup> See *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees*, WT Docket No. 96-148, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, para. 1 (1996).

<sup>7</sup> *Id.* See, e.g., *Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands*, WT Docket No. 12-70, Report and Order and Order of Proposed Modification, 27 FCC Rcd 16102, 16194-96, paras. 244-53 (2012) (AWS-4); *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Docket No. 06-150, 22 FCC Rcd 15289, 15381, 15355-58, paras. 178-88 (2007) (Lower 700 MHz); *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, 19127-54, paras. 138-227 (1997) (800 MHz and 900 MHz SMR).

Commission has received over 1,000 assignment applications involving partitioning and disaggregation of more than 4,000 licenses over the last 10 years.

4. The Commission's partitioning and disaggregation rules apply to all "Covered Geographic Licenses," which consist of specified "Wireless Radio Services" (WRS) for which the Commission has auctioned exclusive spectrum rights in defined geographic areas.<sup>8</sup> The license term for a partitioned license area or disaggregated spectrum license is the remainder of the original licensee's license term.<sup>9</sup> Parties to a geographic partitioning, a spectrum disaggregation, or a combination of both have two options to satisfy service-specific performance requirements (i.e., construction and operation requirements).<sup>10</sup> First, each party may certify that it will individually satisfy any service-specific performance requirements and, upon failure to do so, must individually face any service-specific performance penalties.<sup>11</sup> Alternatively, both parties may agree to share responsibility for compliance with performance requirements, and both parties are subject to any service-specific penalties.<sup>12</sup>

5. *Spectrum Leasing.* In 2003, the Commission adopted the first comprehensive set of rules to allow licensees in the WRS to enter into a variety of spectrum leasing arrangements.<sup>13</sup> In so doing, the Commission recognized the public interest benefits of permitting "additional spectrum users to gain ready access to spectrum," thus enabling the "provision of new and diverse services and applications to help meet the ever-changing needs of the public."<sup>14</sup> The Commission has received more than 8,000 spectrum lease applications and notifications pertaining to approximately 26,000 licenses over the last 10 years.

6. The Commission's spectrum leasing rules apply to all "included services," as set forth in section 1.9005 of the Commission's rules and which include WRS where commercial or private licensees hold exclusive use rights.<sup>15</sup> A "spectrum leasing arrangement" is an arrangement between a licensed entity and a third-party entity in which the licensee (spectrum lessor) leases certain of its spectrum usage rights in the licensed spectrum to the third-party entity, the spectrum lessee.<sup>16</sup> The arrangement may involve the leasing of any amount of licensed spectrum, in any geographic area or site encompassed by the license, for any period of time during the term of the license authorization. Commission rules provide for two different types of spectrum leasing arrangements: (1) spectrum manager leasing arrangements, in which the licensee/lessor retains *de facto* control of the licensed spectrum leased to the spectrum lessee;<sup>17</sup> and (2) *de facto* transfer leasing arrangements, in which the lessee is primarily responsible for ensuring that its operations comply with the Communications Act and Commission policies and rules.<sup>18</sup>

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<sup>8</sup> 47 CFR § 1.907 (Definitions).

<sup>9</sup> *Id.* § 1.950(e).

<sup>10</sup> *Id.* § 1.950(g).

<sup>11</sup> *Id.*

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

<sup>13</sup> *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003).

<sup>14</sup> *Id.* at 20619, para. 32.

<sup>15</sup> 47 CFR § 1.9005.

<sup>16</sup> *Id.* § 1.9003.

<sup>17</sup> *Id.* §§ 1.9010, 1.9020. A licensee/lessor is deemed to have *de facto* control over the leased spectrum if it satisfies two conditions: (i) the licensee/lessor retains responsibility for lessee compliance with Commission policy and rules; and (ii) the licensee/lessor retains responsibility for interactions with the Commission, including all filings required under the license authorization and applicable service rules directly related to the leased spectrum. *Id.* § 1.9010(b).

<sup>18</sup> *Id.* § 1.9030(b).

7. Spectrum manager leasing arrangements generally do not require prior Commission approval; rather, such arrangements are subject to certain notification requirements whereby the licensee/lessor must submit notice to the Commission in advance of commencing operations.<sup>19</sup> While the licensee/lessor remains responsible for compliance with any construction and performance requirements applicable to the leased spectrum, the licensee/lessor may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of compliance with any such requirements.<sup>20</sup>

8. *De facto* transfer spectrum leasing arrangements can be either long-term (more than one year)<sup>21</sup> or short-term (one year or less).<sup>22</sup> In general, *de facto* transfer spectrum leasing arrangements are subject to the Commission's general approval procedures, under which the Commission must grant the application prior to the parties putting the proposed spectrum leasing arrangement into effect.<sup>23</sup>

## B. Statutory Requirement

9. Section 616 of the MOBILE NOW Act required that, within a year of its enactment, the Commission initiate a rulemaking proceeding to assess whether to establish a program, or modify an existing program, under which a licensee that receives a license for exclusive use of spectrum in a specific geographic area under section 301 of the Communications Act of 1934 may partition or disaggregate the license by sale or long-term lease in order to, *inter alia*, make unused spectrum available to an unaffiliated covered small carrier or an unaffiliated carrier to serve a rural area. Congress also provided the Commission the flexibility to proceed if it found that such a program would promote the availability of advanced telecommunications services in rural areas or spectrum availability for covered small carriers.<sup>24</sup>

10. Section 616 required the Commission to consider four questions in conducting an assessment of whether to establish a new program or modify an existing program to achieve the stated goals. First, would “reduced performance requirements with respect to the spectrum obtained through the program . . . facilitate deployment of advanced telecommunications services in areas covered by the program”?<sup>25</sup> Second, “what conditions may be needed on transfers of spectrum under the program to

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<sup>19</sup> *Id.* § 1.9020(e) (requiring 21 days advance notice for spectrum manager leasing arrangements greater than one year in length, or 10 days advance notice for arrangements of one year or less in length). The Commission reviews the notifications to ensure that all necessary technical and other information is correctly submitted, but the subject spectrum leasing arrangement may be implemented without waiting for such review, unless the parties to the spectrum manager leasing arrangement have requested on the form that the arrangement become effective upon Commission acceptance of the notification. Spectrum manager leasing applications require no prior public notice before the Commission may accept them.

<sup>20</sup> 47 CFR § 1.9020(d)(5). We note that a licensee/lessor that enters into a long-term *de facto* transfer spectrum leasing arrangement may attribute to itself the buildout or performance activities of its spectrum lessee(s) for purposes of compliance with any such requirements; a licensee/lessor may not do so under a short-term *de facto* transfer spectrum leasing arrangement. *See* 47 CFR §§ 1.9030(d)(5), 1.9035(d)(3). *See also Promoting Efficient Use of Spectrum*, WT Docket No. 00-230, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20676, para. 177 (2003) (“[S]hort-term leasing arrangements are expressly designed to be temporary in nature, and therefore cannot be counted to establish that the licensee is meeting the purposes and policies underlying our buildout rules, including the goal of ensuring establishment of service in rural areas.”).

<sup>21</sup> *Id.* § 1.9030(a).

<sup>22</sup> *Id.* § 1.9035(a).

<sup>23</sup> *Id.* §§ 1.9030(a), 1.9035(a). Both long-term and short-term *de facto* transfer spectrum leasing applications are subject to overnight processing under the Commission's immediate approval procedures if the filing meets certain conditions. *Id.* §§ 1.9030(e)(2) (immediate approval procedures), 1.9035(e) (certain conditions still must be met in order for a short-term *de facto* transfer lease to qualify for immediate processing).

<sup>24</sup> MOBILE NOW Act, § 616(b)(1). Congress also defined “covered small carrier” and “rural area.” *See* MOBILE NOW Act, § 616(a)(1), (a)(2), 47 U.S.C. § 1506(a)(1), (a)(2). *See also infra*, paras. 17, 25.

allow covered small carriers that obtain spectrum under the program to build out the spectrum obtained under the program in a reasonable period of time”<sup>26</sup> Third, “what incentives may be appropriate to encourage licensees to lease or sell spectrum, including (i) extending the term of a license . . . or (ii) modifying performance requirements of the license relating to the leased or sold spectrum”<sup>27</sup> And fourth, what is “the administrative feasibility” of those incentives and of “other incentives considered by the Commission that further the goals of [section 616]”<sup>28</sup> Section 616 provided, however, that the Commission “may offer a licensee incentives or reduced performance requirements under this section only if the Commission finds that doing so would likely result in increased availability of advanced telecommunications services in a rural area.”<sup>29</sup> Additionally, section 616 directs that, “[i]f a party fails to meet any build out requirements set by the Commission for any spectrum sold or leased under this section, the right to the spectrum shall be forfeited to the Commission unless the Commission finds that there is good cause for the failure of the party.”<sup>30</sup>

### C. Notice of Proposed Rulemaking

11. On March 15, 2019, the Commission released the *Notice*<sup>31</sup> pursuant to the MOBILE NOW Act,<sup>32</sup> which initiated this proceeding to assess whether potential changes to the Commission’s partitioning, disaggregation, and leasing rules might provide spectrum access to covered small carriers or promote the availability of advanced telecommunications services in rural areas. The *Notice* sought comment on the specific questions and considerations posed in the MOBILE NOW Act, but also sought comment on whether the Commission should consider applying any rule revisions to an expanded class of licensees beyond those Congress required it to consider.<sup>33</sup>

12. The Commission received 15 comments and 10 reply comments in response to the *Notice*. Commenters generally supported rule revisions that would increase spectrum access for a variety of entities and increase the availability of advanced telecommunications in rural areas.<sup>34</sup> As discussed below, many commenters also suggested that the Commission go beyond the MOBILE NOW Act statutory framework if necessary to serve the public interest and to achieve the stated goals.<sup>35</sup>

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<sup>25</sup> MOBILE NOW Act, § 616(b)(2)(A).

<sup>26</sup> *Id.* § 616(b)(2)(B).

<sup>27</sup> *Id.* § 616(b)(2)(C).

<sup>28</sup> *Id.* § 616(b)(2)(D).

<sup>29</sup> *Id.* § 616(b)(4).

<sup>30</sup> *Id.* § 616(b)(3).

<sup>31</sup> *See Notice*, 34 FCC Rcd 1758 (2019).

<sup>32</sup> *See supra* note 1.

<sup>33</sup> *Notice*, 34 FCC Rcd at 1764-65, para. 20.

<sup>34</sup> *See generally* American Petroleum Institute (API) Comments at 1; NTCA-The Rural Broadband Association (NTCA) Comments at 2; CTIA – The Wireless Association (CTIA) Comments at 10-13; Competitive Carriers Association (CCA) Comments at 2; Dynamic Spectrum Alliance (DSA) Comments at 3; Federated Wireless, Inc. (Federated) Comments at 2-3; Midcontinent Communications (Midco) Comments at 1; National Rural Electric Cooperative Association (NRECA) Comments at 1; Open Technology Institute at New America and Public Knowledge Comments at 2; Wireless Internet Service Providers Association (WISPA) Comments at 1; NTCA Reply at 1-2; Sprint Corporation (Sprint) Reply at 2-4; WISPA Reply at 2-3; FTC Management Group, Inc. Horry Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc. and West Central Wireless (Rural Carriers) Reply at 1-2; AT&T Services, Inc. (AT&T) Reply at 1; Midco Reply at 1; CTIA Reply at 1; and Federated Reply at 1.

<sup>35</sup> WISPA Comments at 5; Midco Reply at 3-4.

### III. DISCUSSION

13. This *Further Notice* builds upon the efforts initiated in the *Notice* by proposing incentives that are guided by the MOBILE NOW Act framework but expand upon this approach to advance important Commission goals. As discussed in more detail below, we propose an enhanced competition incentive program (ECIP) focused on increasing spectrum access for small carriers and Tribal Nations and promoting the availability of advanced telecommunications services in rural areas by creating incentives for competition-enhancing transactions.<sup>36</sup> We propose a range of incentives to promote partitioning, disaggregation, and leasing, including extending license terms by five years, extending construction periods by one year, and creating alternate rural-focused construction requirements. Under this two-pronged proposal, parties to qualifying transactions would establish program eligibility by: (1) providing spectrum to small carriers or Tribal Nations; or (2) committing to serve a certain minimum amount of rural area. We also propose measures necessary to ensure program goals are met and that the program is not abused.

14. The ECIP that we propose here would establish specific incentives based on the record in the *Notice*, and would build upon Congress' goals in the MOBILE NOW Act. The ECIP also would further certain long-standing Commission goals by facilitating transactions that promote increased spectrum access for stakeholders that will use this valuable resource efficiently and create meaningful service to rural communities. To develop a more workable solution for a variety of stakeholders, we seek comment on additional proposals on related issues that are consistent with the MOBILE NOW Act, but are based on our pre-existing authority under Title III of the Communications Act of 1934, as amended, pursuant to which the Commission adopted the original partitioning and disaggregation rules.<sup>37</sup> After review of the record on the *Notice* and as discussed below, we find it in the public interest to explore benefits for Tribal Nations choosing to participate in the ECIP; benefits for an expanded group of stakeholders participating in ECIP through rural-focused transactions; alternative performance requirements for all WRS licenses independent of the specific ECIP benefits; and a spectrum license reaggregation process. The proposals discussed below are intended to facilitate increased spectrum access, rural service, and innovative and next-generation wireless use cases, bringing increased competition to underserved areas, while also easing the administrative burden placed on both licensees and Commission staff.

#### A. Enhanced Competition Incentive Program

15. To be eligible for ECIP benefits through a qualifying transaction, we propose that any covered geographic licensee<sup>38</sup> may offer spectrum to an unaffiliated eligible entity through a partition

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<sup>36</sup> See Letter from Louis Peraertz, Vice President of Policy, WISPA, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 19-38, at 1-2 (filed Nov. 10, 2021) (WISPA *Ex Parte*) (providing its support for the ECIP proposal, as it will “greatly help connect more Americans in rural and exurban areas to much needed fixed wireless broadband services and promote other policy goals such as broader deployment of Internet of Things applications”).

<sup>37</sup> See, e.g., 47 U.S.C. § 303(g) (authorizing the Commission to “generally encourage the larger and more effective use of radio in the public interest”); 47 U.S.C. § 303(r) (authorizing the Commission to [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party”); see also 47 U.S.C. § 151 (stating the purpose of the Commission to “regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”); 47 U.S.C. § 309(j)(3)(A), (B), and (D) (directing the Commission to further the rapid deployment of new technologies for the benefit of the public including those residing in rural areas, to promote economic opportunity and competition, and to ensure the efficient use of spectrum).

and/or disaggregation, and any WRS licensee eligible to lease in an included service<sup>39</sup> may offer spectrum to an unaffiliated eligible entity through a long-term leasing arrangement. As detailed below, we propose two types of ECIP qualifying transactions: those that focus on small carriers and Tribal Nations gaining spectrum access, and those that involve any interested party that commits to operating in, or providing service to, rural areas. We recognize that stakeholders may be eligible for one or both paths. However, to achieve the goals of the program, maintain administrative feasibility as set forth in the MOBILE NOW Act, and reduce the potential for program abuse, we propose that each transaction be filed under either, but not both, prongs. This approach would result in consistent application of program benefits and safeguards to ensure program integrity.

### 1. Small Carrier or Tribal Nation Transactions

16. One of the goals of the MOBILE NOW Act was to encourage Commission examination of a program(s) that would promote spectrum availability for small carriers. Through qualifying transactions under this ECIP prong, we would promote small carriers' access to unused spectrum in any market licensed to a covered geographic licensee.<sup>40</sup> We also find it appropriate to propose a narrow expansion beyond the MOBILE NOW Act statutory framework to increase spectrum access for Tribal Nations.

17. *Eligible Entities.* As indicated in the *Notice*, section 616 of the MOBILE NOW Act defined "Covered small carrier" as a carrier that "(A) has not more than 1,500 employees (as determined under section 121.106 of title 13, Code of Federal Regulations, or any successor thereto); and (B) offers services using the facilities of the carrier."<sup>41</sup> Further, section 616 applies the definition of "carrier" as set forth in section 3 of the Communications Act of 1934, meaning "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy."<sup>42</sup> Consistent with Congressional intent, we propose to adopt these statutory definitions for use

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<sup>38</sup> Covered geographic licenses consist of specified WRS for which the Commission has auctioned exclusive spectrum rights in defined geographic areas. *See id.* § 1.907. Covered geographic licenses consist of the following services: 1.4 GHz Service (part 27, subpart I, of this chapter); 1.6 GHz Service (part 27, subpart J); 24 GHz Service and Digital Electronic Message Services (part 101, subpart G, of this chapter); 218-219 MHz Service (part 95, subpart F, of this chapter); 220-222 MHz Service, excluding public safety licenses (part 90, subpart T, of this chapter); 600 MHz Service (part 27, subpart N); 700 MHz Commercial Services (part 27, subparts F and H); 700 MHz Guard Band Service (part 27, subpart G); 800 MHz Specialized Mobile Radio Service (part 90, subpart S); 900 MHz Specialized Mobile Radio Service (part 90, subpart S); 900 MHz Broadband Service (part 27, subpart P); 3.45 GHz Service (part 27, subpart Q); 3.7 GHz Service (part 27, subpart O); Advanced Wireless Services (part 27, subparts K and L); Air-Ground Radiotelephone Service (Commercial Aviation) (part 22, subpart G, of this chapter); Broadband Personal Communications Service (part 24, subpart E, of this chapter); Broadband Radio Service (part 27, subpart M); Cellular Radiotelephone Service (part 22, subpart H); Citizens Broadband Radio Service (part 96, subpart C, of this chapter); Dedicated Short Range Communications Service, excluding public safety licenses (part 90, subpart M); Educational Broadband Service (part 27, subpart M); H Block Service (part 27, subpart K); Local Multipoint Distribution Service (part 101, subpart L); Multichannel Video Distribution and Data Service (part 101, subpart P); Multilateration Location and Monitoring Service (part 90, subpart M); Multiple Address Systems (EAs) (part 101, subpart O); Narrowband Personal Communications Service (part 24, subpart D); Paging and Radiotelephone Service (part 22, subpart E; part 90, subpart P); VHF Public Coast Stations, including Automated Maritime Telecommunications Systems (part 80, subpart J, of this chapter); Upper Microwave Flexible Use Service (part 30 of this chapter); and Wireless Communications Service (part 27, subpart D). *Id.* We seek comment on whether we should include in ECIP all services for which partitioning and disaggregation is available or a subset of services.

<sup>39</sup> 47 CFR § 1.9005.

<sup>40</sup> 47 CFR § 1.907.

<sup>41</sup> *Notice*, 34 FCC Rcd at 1762-63, para. 13; MOBILE NOW Act § 616(a)(1).

<sup>42</sup> 47 U.S.C. § 153(11); *see* MOBILE NOW Act § 616(a)(1).

in the ECIP and to designate covered small carriers as an eligible beneficiary under this prong. We seek comment on whether these are the appropriate definitions for use in the program. In addition, section 616 restricts the partitioning or disaggregation to “unaffiliated” small carriers. Other than looking to the Commission’s designated entity rules,<sup>43</sup> we seek comment on how to determine whether a small carrier is affiliated.

18. We note that most commenters supported an expansion of the covered small carrier definition in the *Notice*,<sup>44</sup> and we seek comment on alternative definitions. While we propose below to adopt more expansive eligibility requirements for rural-focused ECIP transactions, for transactions specifically focused on spectrum access not limited to rural areas,<sup>45</sup> we propose a limited expansion of the group of eligible beneficiaries beyond covered small carriers to include Tribal Nations. This would further facilitate Tribal spectrum access in both rural and non-rural areas as needed. We propose, in the public interest, to include these Tribal Nations and seek comment on this approach. We propose that Tribal Nations eligible under this prong would include any federally-recognized American Indian Tribes and Alaska Native Villages, as well as consortia of federally recognized Tribes and/or Native Villages, or other entities controlled and majority-owned by such Tribes or consortia.<sup>46</sup> We seek comment on whether this is the appropriate definition of Tribal Nations. As of January 2021, there are 574 federally-recognized Indian Tribes,<sup>47</sup> but we note that there are no federally recognized Tribal Nations in Hawaii. We therefore seek comment on how we should facilitate transactions involving entities seeking to serve native Hawaiian Homelands.<sup>48</sup>

19. *Minimum Spectrum and Geography.* We propose that a qualifying transaction under this prong must include a minimum of 50% of the licensed spectrum for each license(s) that is part of the transaction in a geographic area.<sup>49</sup> This approach is intended to provide stakeholders flexibility in structuring transactions, while: (1) ensuring sufficient spectrum is available for the provision of advanced telecommunications services; and (2) preventing transactions involving *de minimis* spectrum amounts that are entered into solely to obtain ECIP benefits. We seek comment on whether the proposed 50% spectrum threshold makes enough spectrum available to small carriers or Tribal Nations. Should we consider a lower or higher threshold percentage? For licenses that authorize paired frequency bands, should an equal or minimum percentage of the spectrum be from each band? Are there any alternative approaches for ensuring sufficient spectrum is made available to small carriers or Tribal Nations, while requiring a sufficient percentage to preclude abuse of the program?

20. We also propose that a qualifying transaction must include a minimum of 25% of the

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<sup>43</sup> See 47 CFR § 1.2110.

<sup>44</sup> WISPA Comments at 4; Midco Comments at 3-5; NRECA Comments at 7-8; Select Spectrum Comments at 2; CCA Comments at 2, 6; Rural Carriers Reply at 2.

<sup>45</sup> As discussed below, we address commenters’ eligibility concerns by proposing to substantially expand the scope of entities eligible for ECIP benefits beyond covered small carriers, provided the entity operates in, or provides service to, a rural area and meets specific program criteria. See *infra*, para. 24.

<sup>46</sup> See *Transforming the 2.5 GHz Band*, WT Docket No. 18-120, Report and Order, 34 FCC Rcd 5446, 5463, para. 47 (2019).

<sup>47</sup> Bureau of Indian Affairs, Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021).

<sup>48</sup> In the 2.5 GHz context, the Wireless Telecommunications Bureau’s Broadband Division granted a waiver of the definition of eligible entities to permit the Department of Hawaiian Homelands to apply for licenses in the Rural Tribal Window. *Department of Hawaiian Homelands Request for Waiver to File as an Eligible Entity in the 2.5 GHz Rural Tribal Priority Window*, WT Docket No. 20-21, Memorandum Opinion and Order, 35 FCC Rcd 2820 (WTB 2020).

<sup>49</sup> For example, for a 30 megahertz license, the transaction must include a minimum of 15 megahertz.



licensed market area for each license(s) that is part of the transaction, regardless of market size or market type. We seek comment on whether the 25% geographic threshold is the appropriate amount to balance incentives for program participation against concerns of sufficient land area for small carriers or Tribal Nations, and concerns related to preventing program gaming. Are there considerations that would warrant an increase or decrease in the minimum geography required for a qualifying transaction under this prong? For example, should the geographic thresholds be different based upon the varying size of the overall licensed market area (e.g., counties, CMAs, PEAs, BEAs, MTAs, REAGs)? Should parties be able to count multiple transactions involving partitions of the same license in aggregate to meet the minimum geographic threshold? We seek comment on the costs and benefits of our proposed approach and any suggested alternatives. We also recognize there may be situations where licenses have been previously disaggregated and/or partitioned and a resulting license(s) consists of a small amount of spectrum or small geographic area. Although we propose in this *Further Notice* to prevent licenses that have previously benefited from ECIP from receiving benefits again for the same license(s), we seek comment on whether, from the outset, we should restrict the ECIP to only licenses of a certain minimum spectrum size and geography area. We seek to avoid inclusion in the ECIP of transactions that might potentially evade the purpose of the respective 50% and 25% thresholds.

21. We note that the MOBILE NOW Act directed the Commission to examine potential changes to our partitioning, disaggregation, and leasing framework to offer incentives to meet specific goals. Such a focus would appear to exclude full license assignments, even those to small carriers and/or to rural licensees. We recognize that implementing the ECIP solely for transactions involving partition, disaggregation, or leasing, as Congress directed us to consider, may create a disincentive for stakeholders to engage in otherwise mutually beneficial transactions for full license assignments. Rather, these parties may instead negotiate transactions for smaller areas and/or less spectrum, solely to acquire ECIP benefits even where a full license assignment might be more appropriate given stakeholder needs. We therefore seek comment on whether we should permit full license assignments within the ECIP and, if so, how we should implement these types of transactions. We note that many of the ECIP benefits discussed below are applicable to both parties to a transaction involving partition, disaggregation, or lease of a license, but would only be available to the assignee in a full license assignment scenario, where the assignor is not licensed for that spectrum after consummation of the assignment. If we determine that the public interest would be served by including in the ECIP those transactions involving full license assignments, what safeguards should we put in place to ensure that these full license assignments achieve the intended benefits of the program?

## 2. Rural-Focused Transactions

22. We also propose a rural-focused transaction approach that is intended to facilitate coverage to rural areas by tying ECIP benefits to construction and operation obligations, as further detailed below, furthering the Commission's goal of promoting the availability of advanced telecommunications services in rural areas.

23. *Eligible Entities.* In the *Notice*, the Commission sought comment on whether it should consider rule revisions to an expanded class of licensees beyond those Congress required the Commission to consider.<sup>50</sup> The record reflects considerable support for expanding the scope of eligible entities.<sup>51</sup> We agree with commenters that restricting program availability, and therefore program benefits and build-out incentives, to only small carriers, as defined in section 616 of the MOBILE NOW Act, would exclude numerous important spectrum users and provide fewer options for larger carrier licensees that seek to disaggregate, partition, or lease their unused spectrum.

24. Accordingly, we propose to include, by relying on our general Title III powers, any

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<sup>50</sup> *Notice*, 34 FCC Rcd at 1764-65, para. 20.

<sup>51</sup> API Comments at 1; CCA Comments at 6; Midco Comments at 1-2; NRECA Comments at 7-8; Select Spectrum Comments at 2; WISPA Comments at 4-7; WISPA Reply at 1-3; Midco Reply at 1-4; WISPA *Ex Parte* at 1.

unaffiliated interested party that commits to serve a minimum amount of rural area under the proposed ECIP rural-focused transactions prong, if they meet the proposed requirements. This would expand upon the focus of the MOBILE NOW Act and include a substantial variety of stakeholders seeking to engage in transactions that we anticipate could result in increased spectrum usage and competition in rural areas, such as large or small carriers, common carriers, non-common carriers, Tribal Nations, critical infrastructure, and other entities (large or small) operating private wireless systems in rural areas. This expanded scope could incentivize transactions that accommodate a wide variety of spectrum users in rural areas facing challenges in accessing spectrum and result in more efficient and intensive spectrum use in rural areas. We seek comment on this flexible approach, including whether there is any reason we should restrict the types of licensees eligible for the ECIP benefits under this rural-focused prong of the program. Similar to our approach in small carrier and Tribal Nation transactions, we also seek comment on whether we should permit full license assignments within the rural-focused prong of the ECIP and, if so, how we should implement these types of transactions. We seek comment on the appropriate definition of affiliated in the context of rural-focused transactions.

25. For purposes of the rural-focused transaction approach and consistent with Congressional intent, we propose to adopt the MOBILE NOW Act definition of “rural area,” which is “any area except (1) a city, town, or incorporated area that has a population of more than 20,000 inhabitants; or (2) an urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.”<sup>52</sup> We seek comment on this approach and any alternatives that might be more appropriate to achieve ECIP goals.

26. *Minimum Spectrum.* Consistent with our proposed approach to transactions involving covered small carriers and Tribal Nations described above, we also propose in the rural context that a qualifying transaction must designate a minimum of 50% of the licensed spectrum, for each license(s) included in the transaction. We seek comment on whether the 50% spectrum threshold makes enough spectrum available for the actual provision of rural-focused service. Would a lower or higher threshold percentage be more appropriate, particularly considering the increased scope of eligible entities seeking to deploy the spectrum? Are there alternative ways to ensure that there is sufficient spectrum to meet stakeholder needs? Further, is there a need to also specify a minimum threshold in terms of megahertz (in case the license has previously been disaggregated)? For licenses that authorize paired frequency bands, should an equal or minimum percentage of the spectrum be from each band?

27. *Minimum Qualifying Geography.* We propose that a qualifying transaction under this rural-focused prong must include a minimum amount of “Qualifying Geography” sufficient to cover at least 300 contiguous square miles of rural area, for market sizes of Partial Economic Areas (PEA) or smaller. We seek to incentivize transactions that will result in rural operation/service where most needed.<sup>53</sup> We recognize that these underserved rural areas in many cases may not directly align with the Commission’s licensed market areas, and may be near the edge, or even overlap, a market boundary. We therefore propose for this prong a required minimum square mileage of rural area, rather than a percentage of an assignor’s market, which could unnecessarily mandate a substantially larger area than intended. The square mileage approach to establish Qualifying Geography provides flexibility for stakeholders to enter a transaction tailored to individual needs, which might involve rural area from more than one license. We propose 300 square miles as the most appropriate figure to ensure that stakeholders include sufficient area in a transaction to warrant the substantial benefits afforded through the ECIP. Where a single transaction involving multiple licenses is needed to obtain the specific rural area sought, we propose to provide ECIP benefits to each license that contains some portion of the 300 square mile area. We seek comment on this approach, including the costs and benefits, and on any suggested alternatives. We understand that rural area could include unpopulated areas, which may otherwise be

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<sup>52</sup> MOBILE NOW Act § 616(a)(2).

<sup>53</sup> See *infra* paras. 32 and 43, which detail specific construction and operational requirements for spectrum obtained through ECIP rural-focused transactions.

used for recreation, travel, commercial or business purposes. Should we limit eligibility to areas that have a census defined population? Does our proposed approach provide sufficient flexibility to structure transactions to meet stakeholder needs in rural areas? Conversely, would such a flexible approach result in gaming, for example, the inclusion of license(s) in a transaction solely to receive ECIP benefits that offer a *de minimis* amount of land as a percentage of the 300 square miles of Qualifying Geography? To discourage this potential outcome, should we require a minimum percentage of land within each license involved in a single transaction to meet the Qualifying Geography requirement? Alternatively, should parties be able to count multiple transactions with different parties involving partitions of the same license in aggregate to meet the Qualifying Geography threshold?

28. We also find it appropriate, given the Commission's current market sizes and goal of incentivizing meaningful service and operation in rural areas, to propose a minimum geography of 300 square miles of rural area for PEA markets and smaller markets. However, given the wide range in size of available markets subject to geographic area licensing, we seek comment on whether it would be appropriate to scale the amount of Qualifying Geography on a proportional basis in two ways. First, we recognize that there are variations in market sizes even for PEAs and smaller markets. For example, in approximately 3% of PEA markets (located in large Western states, including some in Alaska), 300 square miles represents less than 1% of the market land area. We seek comment on whether we should proportionally scale the minimum required Qualifying Geography upwards in these PEA markets to account for their larger size. Second, we seek comment on whether we should proportionally scale the minimum required Qualifying Geography upwards for all markets larger than PEAs. We note that the next largest market area size in relation to PEAs are Basic Economic Areas (BEA), where the average land area is almost twice the size of the average PEA. For Regional Economic Area Grouping (REAG) market areas, which can be comprised of several states, the market size on average is approximately 45 times larger than the average PEA. Would scaling in the large PEA context and/or for markets larger than PEAs prevent windfall benefits for transactions yielding nominal spectrum access and minimal rural buildout relative to the geographic size of the license receiving ECIP benefits? We seek comment on what the costs and benefits are with respect to any such proportional scaling and any suggested alternatives.

29. In addition, we seek comment on whether we should consider coverage on Tribal lands as an alternative to coverage of rural areas. We understand many Tribal lands are located in rural areas and to that extent might already qualify for ECIP benefits under this rural prong, but note that such lands may not be located in all instances in a contiguous 300 square mile area, or might be at least partially located in suburban or urban areas. Should we deem non-contiguous blocks of Tribal land that collectively reach the Qualifying Geography threshold sufficient to warrant ECIP benefits? In addition, we seek comment on the appropriate definition of Tribal lands for purposes of the ECIP.

## **B. Enhanced Competition Incentive Program Benefits**

30. To properly incentivize licensees to make spectrum available to small carriers or Tribal Nations, and to engage in other rural-focused transactions, we propose three specific benefits for ECIP participation. Specifically, we propose to: extend license terms for all parties to a qualifying transaction by five years; extend construction deadlines (both interim and final) by one year for all parties to a qualifying partition/disaggregation transaction and for lessors in a qualifying spectrum lease arrangement; and establish an alternate rural-focused construction requirement for certain transactions. We seek comment on these proposals, any alternative approaches, and associated issues, including whether there are appropriate incentives to encourage licensee participation in the program earlier in the term of the license.

### **1. License Term Extensions**

31. The *Notice* sought comment on the appropriate incentives to achieve the MOBILE NOW Act's goal of encouraging licensees to partition, disaggregate or lease spectrum, including the incentive of

license term extensions.<sup>54</sup> Most commenters addressing the issue of incentives generally supported an extended license term benefit,<sup>55</sup> with one commentator cautioning against conferring outsized benefits.<sup>56</sup> We find it appropriate to propose a five-year license term extension for all parties involved in a qualifying partition/disaggregation transaction, and for all lessors entering into a qualifying spectrum leasing transaction, given that the lessor retains the renewal obligations. We believe this proposal will reduce regulatory burdens with less frequent renewal obligations and will properly incentivize secondary market transactions, particularly spectrum leases that are subject to the lessor's license term. We also propose recommended controls to avoid waste, fraud, and abuse as detailed below.

## 2. Construction Extensions

32. The *Notice* also sought comment on whether modifications to the Commission's performance requirements, including a one-year extension in certain circumstances, would be likely to increase service to rural areas.<sup>57</sup> Commenters expressed significant support for the temporal benefit of additional time to construct facilities, with some arguing that the difficulty and expense associated with building rural areas justifies the benefit.<sup>58</sup> In addition, one commenter acknowledges the potential timing constraints for meeting construction requirements when spectrum is received in the middle of a license term.<sup>59</sup> After review of the record, we propose that all parties to a qualifying transaction receive a one-year construction extension for both the interim and final construction benchmarks where applicable. We believe this approach strikes the right balance between incentivizing small carrier, Tribal Nation, and rural-focused transactions, while ensuring that assignees have adequate time to meet their construction milestones. We propose that this benefit would apply to both parties in a qualifying transaction involving partition or disaggregation. We also propose that this benefit would apply to the lessor in a qualifying spectrum lease arrangement, given that the lessor retains the obligations to comply with buildout and renewal requirements. We seek comment on these proposals and any associated costs and benefits. We recognize that the *Notice* sought comment on whether the Commission should limit any construction extension benefits to transactions filed no later than six months prior to the construction deadline.<sup>60</sup> After review of the record, and in the interest of promoting even late-term transactions that will ensure increased spectrum access and actual spectrum usage in rural areas, we propose not to establish a timeframe prior to a construction deadline within which an ECIP qualifying transaction must be filed. We seek comment on whether this flexible approach will incentivize parties to enter qualifying transactions, or whether an ECIP transaction filing cut-off date prior to relevant construction deadlines is necessary to prevent unintended results.

## 3. Alternate Construction Benchmark for Rural-Focused Transactions

33. In response to the *Notice*, nearly all commenters supported modified performance requirements, noting that existing licenses that include significant portions of rural area are typically for large market areas, often leaving rural and remote areas underserved.<sup>61</sup> Many commenters stated that modification of performance requirements would appropriately reflect the realities of deploying spectrum in rural, underserved, and unserved areas, and would incentivize the efficient allocation of spectrum.<sup>62</sup>

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<sup>54</sup> *Notice*, FCC Rcd at 1765, para. 25.

<sup>55</sup> CCA Comments at 3; CTIA Comments at 11.

<sup>56</sup> WISPA Comments at 7, but subsequently offering support for the ECIP benefits, WISPA *Ex Parte* at 1-2.

<sup>57</sup> *Notice*, 34 FCC Rcd at 1763-64, paras. 17-18.

<sup>58</sup> CCA Comments at 3; CTIA Comments at 11; WISPA Comments at 7; Google Comments at 16.

<sup>59</sup> CTIA Comments at 11.

<sup>60</sup> *Notice*, 34 FCC Rcd at 1763-64, paras. 17-18.

<sup>61</sup> API Comments at 2; WISPA Comments at 8; Open Technology Institute at New America and Public Knowledge Comments at 8, 14-15; Google Comments at 17.

34. To facilitate rural-focused transactions that achieve rural buildout, we propose to substitute an assignee's existing performance requirement with an alternative construction benchmark for those licenses acquired in an ECIP transaction qualifying under the rural-focused transaction approach described above. Specifically, the alternate construction benchmark would require 100% coverage of the Qualifying Geography (coverage to at least 300 contiguous square miles of rural area, for market sizes of PEA or smaller) that was the basis for the qualifying transaction, as well as the provision of service to the public, or operation addressing private internal business needs over that area. We clarify that our proposal for an alternate benchmark does not modify the timeframe for meeting the benchmark, which would remain the current deadline of the partitioned/disaggregated license, plus the one-year extension proposed in the above construction extension benefit section. As previously discussed, the proposed minimum geography seeks to ensure a reasonable investment in construction of facilities in rural areas to warrant the substantial ECIP benefits, while furthering the Commission's long-held goal of providing licensees with flexibility to determine the amount of spectrum licensees will occupy and the geographic area they will serve, and permitting stakeholders to build networks suited to the particular community needs. We seek comment on this approach, including the proposed benchmark, and the associated costs and benefits. Does this approach adequately ensure that an assignor does not enter into partitioning transactions solely for the purpose of reducing the area or population required to be covered under its service-specific performance requirements? In cases where the assignee ultimately fails to construct, should we require the assignor in a partition to meet its obligations consistent with the entire license area, by including in the relevant denominator the population/land of the partitioned-off area? Finally, we also seek comment on whether we should consider an alternative approach specifically tailored to the needs of Tribal Nations. What should the appropriate benchmarks include and what additional factors should be considered to facilitate the provision of service to Tribal Nations?

35. For assignees involved in partitioning and/or disaggregation where the interim performance requirement has not been met, we propose that this alternative construction benchmark would replace the existing interim performance requirement, and remove the final performance requirement, contained in the service rules for the particular license acquired in the ECIP transaction. Where the assignor has previously met the interim construction deadline, this alternative construction benchmark would replace the final construction obligation for the assignee. We propose that the assignor remain bound by the existing substantive coverage requirements for its license(s) (extended by one-year) involved in a qualifying ECIP transaction. We note, however, that this approach provides an additional incentive to the assignor that arguably will meet its performance requirements more easily following a partitioning/disaggregation transaction that reduces the geographic area/population it must cover. We seek comment on this approach, as well as the associated costs and benefits.

36. While our alternate construction benchmark proposal under ECIP focuses on parties individually satisfying performance requirements, the Commission's rules currently permit parties in a partition or disaggregation transaction to share responsibility for any service-specific requirements, and therefore share the penalties associated with failure to meet those performance requirements.<sup>63</sup> We seek comment on whether the construct of a shared buildout requirement runs counter to the ECIP framework proposed herein and, if so, whether, we should afford this particular ECIP benefit solely to those parties that opt to separately meet their construction obligations. Do the ECIP benefits, as well as waste, fraud, and abuse protections, negate the need for the protections that shared responsibility provides? In the context of rural-focused transactions, does a shared responsibility unfairly burden one party over the other?

37. We do not propose an alternate construction benchmark for spectrum lease arrangements.

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<sup>62</sup> NRECA Comments at 6; WISPA Reply at 5; R Street Comments at 3; API Comments at 2; WISPA Comments at 8.

<sup>63</sup> 47 CFR § 1.905(g).

For spectrum lease arrangements that qualify under ECIP, consistent with existing rules, we propose that a lessor would be able to attribute the construction and operation of its lessee's Qualifying Geography to its underlying performance obligations on its license. We believe that retaining this current pass-through benefit is sufficient (given the additional ECIP benefits conferred) to incentivize lessors to lease unused spectrum, particularly in uncovered rural areas. However, consistent with our approach to an assignor in the partition and/or disaggregation context, the lessor is nonetheless bound by the existing performance requirements set forth in the applicable service-specific rules. We seek comment on these tentative conclusions.

### **C. Enhanced Competition Incentive Program Waste, Fraud, and Abuse Protections**

38. Given the substantial benefits being proposed for ECIP participants, and to ensure that stakeholders enter into transactions that will further our goals of increased spectrum access, rural service, and competition, we propose certain measures to protect against waste, fraud, and abuse of the program. We note that applicant character qualifications are part of our review of whether a transaction can be approved in the public interest, and we seek comment on the specific measures proposed below. We invite commenters to suggest alternative or additional measures that would ensure that the benefits we propose for ECIP participants are targeted and appropriate. For example, most of the measures we propose focus on assignees or lessees participating in ECIP transactions, but we welcome suggestions on whether additional restrictions should be imposed on ECIP participant assignors and lessors.

39. As stated above, we recognize that parties to an ECIP transaction are likely in many instances to meet the eligibility requirements for both the small carrier/Tribal Nation transaction prong and the rural-focused transaction prong (e.g., a covered small carrier might be interested in obtaining spectrum access to serve an area consisting of at least 300 rural square miles). Nonetheless, we recognize that open-ended program flexibility might have significant drawbacks. We therefore propose distinct paths to ECIP participation to meet the program's policy goals, to make program administration more feasible, and to afford targeted benefits while reducing instances of program abuse. We clarify our proposal that for each ECIP transaction, applicants must elect either prong 1 or prong 2, not both, and they may not, subsequent to application grant, modify the selected path. As a specific example, under our ECIP proposal, an assignee in a rural-focused transaction proposing to provide service to a partitioned area of at least 300 rural square miles under prong 2 is required to provide service or operate over that entire area by the extended construction deadline. Although that assignee may also be a covered small carrier by definition under prong 1, to ensure provision of the rural service to the Qualifying Geography for which ECIP benefits were granted, we do not propose to permit that assignee to later elect to provide service, in the alternative, to a percentage of population within its licensed area that might include more urban populations, as it might have had it elected to file its ECIP transaction under prong 1. We seek comment on this approach and potential costs and benefits.

40. *Holding Period.* First, we propose to impose a five-year holding period on licenses assigned through partitioning and/or disaggregation as part of ECIP transactions. Specifically, assignees of licenses obtained through ECIP transactions may further assign or lease, in whole or in part, those licenses to other entities only after the expiration of a five-year period commencing from the date of license issuance, and provided the assignee has met both the construction requirement and the three-year operational requirement proposed below (which also satisfies its interim performance benchmark). We seek comment on whether an alternative length of time is more appropriate for this holding period, considering the ECIP benefits conferred.

41. We also propose to apply a parallel "holding period" safeguard in the leasing context. Specifically, for spectrum leases subject to receiving ECIP benefits, we propose to require a mandatory five-year minimum lease term. We believe that this approach fosters transaction parity by not improperly

incentivizing leases over other potential transactions.<sup>64</sup> We seek comment on this proposal and the costs and benefits associated with this approach. In particular, we seek comment on how we should address leases terminated after less than five years. We recognize that the realities of the market often result in early termination of such agreements, but also that the benefits we propose for ECIP transactions could pose a significant risk of program abuse through leasing. Under what circumstances, if any, should such an early termination result in the lessor losing the benefits already applied to its license? Should such benefits be prorated based on how prematurely the lease was terminated? For example, if a lease is terminated after only two years, we could reduce by three years the lessor's license term, but maintain the performance requirement extension. What are the advantages and disadvantages of such an approach? Are there alternative methods of preventing sham leasing? On a related note, we seek comment on whether we should prohibit subleases or otherwise limit subleases to prevent program abuses.

42. To facilitate routine transfers, we propose to allow a *pro forma* transfer exception (such as pursuant to corporate reorganizations). We seek comment on whether we should allow further exceptions to the holding period restriction. For example, are there additional types of transactions, other than *pro forma* transfers, which should be permitted? Should we allow assignees or lessees under the ECIP to assign their licenses or leases to other ECIP-eligible parties that agree to be bound by the ECIP requirements? Are there any additional requirements or protections we should impose on such transactions? Commenters should discuss the costs and benefits of our proposed approach and any alternatives.

43. *Operational Requirement.* To ensure that spectrum is efficiently used in underserved rural areas, we propose an operational requirement on certain ECIP transactions. Specifically, we propose that the assignee or lessee of any transaction that qualifies as an ECIP rural-focused transaction would be required, for a minimum of three consecutive years, to either (1) provide and continue to provide service to the public; or (2) operate and continue to operate to address the licensee's private, internal communications needs. We propose that the level of service during this three-year operational period must not fall below that used (or intended to be used) to meet its construction requirement (for assignees) and ECIP eligibility (for lessees). This approach provides a uniform measure of operational status and verifiable service for a sustained period. We seek comment on this proposal, including the associated costs and benefits.

44. For assignees acquiring an ECIP license through partition and/or disaggregation, we propose that this operational period begin the earlier of the date of actual construction<sup>65</sup> or the date of the interim construction deadline for that license, as modified by the ECIP.<sup>66</sup> We propose that ECIP lessees must operate or provide service for three consecutive years during any period within the five-year minimum lease term. We seek comment on this proposal and any alternative structures for operational requirements, including the associated costs and benefits. Specifically, we seek comment on the interplay of this requirement with our concerns discussed above regarding early termination of leases. We also note that there is no current Commission requirement for lessees to independently certify construction of leased spectrum, as the lessor is responsible for meeting performance requirements and may include in its showing, at its option, any construction by its lessee. Considering the construction and operational requirements proposed in the ECIP, should we also impose a construction notification requirement on

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<sup>64</sup> Parties remain free to enter into long-term lease arrangements for terms of less than five years, as our existing rules permit long-term lease arrangements of one year or more, but such agreements will not be eligible to receive the corresponding ECIP benefits.

<sup>65</sup> Actual construction refers to filings with the Commission on FCC Form 601 Schedule K, which provides construction buildout documentation including the date of actual construction.

<sup>66</sup> We note that all licenses included in ECIP qualifying transactions remain subject to the Commission's rules regarding discontinuance of service or operations. See 47 CFR § 1.953.

lessees that would allow us to verify that lessees have complied with ECIP construction and operational requirements, thereby increasing program accountability?

45. *Automatic Termination.* We also propose, consistent with the MOBILE NOW Act, automatic termination for any licenses assigned as part of an ECIP transaction where the licensee fails to meet the program requirements or construction requirements. Further, we propose that any licensee which was subject to such termination, or any lessee which fails to meet the program requirements, or affiliate of such an entity, would not be eligible to participate in the ECIP in the future. We seek comment on the appropriate definition of affiliate. We seek comment on our proposal, including the costs and benefits. We also seek comment on what measures could be implemented to prevent instances of program abuse, particularly with respect to lessors and assignors participating in the program. How should we address instances where we believe the assignor or lessor is potentially abusing the ECIP to obtain the program's benefits through assignments or leases to entities it knows or should know cannot satisfy the program's obligations?

46. For example, should we extend program ineligibility and/or automatic license termination penalties to the assignor or lessor and its affiliates in situations where its assignee(s) or lessee(s) does not meet program requirements, including construction and operation obligations for which both parties to an ECIP transaction received benefits? Should we condition assignor/lessor program benefits on assignee/lessee performance of construction and continuity of service obligations, particularly in the rural-focused transactions context, to ensure that benefits do not accrue without provision of service or operation in these potentially underserved areas? For example, one approach is to not apply the five-year license term extension to an assignor's license where its assignee/lessee fails to timely construct or operate in the identified Qualifying Geography. We seek comment on the costs and benefits of such an approach. We also seek comment on whether, in the rural-focused transactions context to ensure service or operation, we should condition the assignor/lessor's one-year construction extension on an assignee/lessee's timely compliance with its construction deadline(s). We note that an assignor/lessor and assignee/lessee may have the same extended interim or final construction deadline under the ECIP, and therefore the Commission may not be aware of an assignee/lessee's failure to timely construct until after the expiration of the assignor/lessor's construction deadline, which the assignor/lessor may have relied upon in the construction of its license. How should we address this situation to strike the appropriate balance between properly incentivizing transactions and attempting to eliminate instances of program abuse?

47. *Limitations on Additional Benefits for Subsequent Transactions.* To prevent the benefits of the ECIP from undermining our renewal and construction policies through compounding extensions, we propose that once a license is the subject of a qualifying transaction and has received the benefits associated with the ECIP, that license, and any license created from it, will be ineligible to receive additional ECIP benefits. We propose to apply this restriction to the original license, as well as to licenses issued pursuant to a partition or disaggregation. In other words, if the license at issue in a given transaction has previously been involved in an ECIP transaction, it is not eligible for any more ECIP benefits. We believe this will prevent abuse resulting from leveraging the same spectrum or geography to gain repeated license term or construction extensions. We seek comment, in the alternative, on whether a licensee should instead be eligible for ECIP benefits once per license term.

48. We recognize that this proposal does not provide incentives for licensees to enter into subsequent assignments or leases of their unused spectrum rights, and that there may be situations where such subsequent transactions can provide public interest benefits without undermining our proposed program policies. For example, Licensee A may wish to partition an area to Licensee B (receiving benefits under the ECIP) and also partition another area to Licensee C; are there circumstances in which Licensee C should receive ECIP benefits beyond those already afforded to the license to be partitioned? We seek comment on whether we should permit these types of subsequent transactions, what benefits are appropriate, and how we might ensure that our renewal and construction policies are not frustrated through multiple transactions.



49. *Restrictions on Leasing and Subleasing of Spectrum Rights Obtained Through the ECIP.* Finally, we seek comment on how to approach leasing and subleasing of spectrum rights obtained through ECIP transactions. We recognize that subsequent leases by ECIP assignees and lessees could be used to circumvent our eligibility rules and holding period protections. For example, an assignee of an ECIP transaction could lease its spectrum rights to a third party, including the assignor in the ECIP transaction, extending the license term and construction deadlines, but not resulting in the public interest benefits intended by the ECIP. However, leasing is also an important tool in facilitating spectrum being put to use. How should we prevent this kind of abuse while still permitting leasing where it is in the public interest? Should we only permit leases (and subleases) of such rights to other ECIP-eligible entities? What are the costs and benefits of this approach or alternatives?

50. *Report.* The ECIP seeks to promote competition and increased spectrum access for small carriers and Tribal Nations and to increase the availability of advanced telecommunications services in rural areas. These are critical Commission goals, and we have proposed substantial incentives to encourage participation by our licensees. Because of the importance of these goals and the nature of these incentives, we propose to direct the Wireless Telecommunications Bureau (Bureau) to conduct a review of the ECIP, with an opportunity for interested stakeholders to provide input, so that we may assess the program's effectiveness. We propose that, after an appropriate period of time not to exceed five years from the effective date of the final order adopting the program, the Bureau would submit a public report on the ECIP to the Commission. We propose that the report would include data about ECIP participation by eligible stakeholders, including the number of secondary market transactions, as well as the geographic areas and spectrum made available, under each prong of the program. We further propose that the report would include recommendations about rule or policy changes to increase the effectiveness of the program. In addition, we propose that the report would be publicly available, and that the Bureau could also prepare a non-public version with commercially sensitive information, if included. We seek comment on our proposals. We also seek comment on any other information that stakeholders advocate for inclusion in this report.

#### **D. Alternative to Population-Based Construction Requirements**

51. The *Notice* sought comment on a range of issues related to facilitating increased spectrum access and increased availability of telecommunications service in rural areas.<sup>67</sup> As discussed above, commenters generally were supportive of Commission action to incentivize transactions to meet these key goals, including the MOBILE NOW Act's focus on possible benefits of modified construction requirements.<sup>68</sup> In addition, commenters expressed additional concerns that our current performance rules across virtually all WRS are based on providing coverage and offering service to a percentage of the population in the licensed geographic area, which typically results in more urban-focused service and a lack of service to rural areas.<sup>69</sup> Commenters urge the Commission to provide an alternative to population-based performance benchmarks that will better meet the business needs of a variety of stakeholders, including those providing service to rural subscribers, or that operate telecommunications systems in conjunction with businesses located in less populated rural areas.<sup>70</sup> As WISPA explains,

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<sup>67</sup> *Notice*, 34 FCC Red at 1763-64, paras. 14-19.

<sup>68</sup> See e.g., WISPA Reply at 5; WISPA Comments at 8; NRECA Comments at 6; DSA Comments at 4; NTCA Comments at 2-4; API Comments at 2; R Street Comments at 3.

<sup>69</sup> GeoLink Comments at 2 ("However, all too often, large companies purchase spectrum licenses as an asset or for use only in desired communities or locations within a license area (leaving the rest of the area unserved). This results in spectrum resources that could be benefitting consumers now (especially in rural areas) being left unused"); API Comments at 1 ("[R]ural and remote areas remain underserved even while urban areas receive service. Consequently, API members support simple partitioning, disaggregation, or leasing rules that provide incentives for reasonable spectrum options, especially in rural areas").

<sup>70</sup> WISPA Comments at 8; NRECA Comments at 6-7; CCA Comments at 3, WISPA *Ex Parte* at 2.

“standards based on population coverage encourage licensees to satisfy the requirement for a large-footprint license by covering only the most populated areas,” often to the exclusion of less populated areas like rural America.<sup>71</sup> This approach to build-out requirements can incentivize licensees to focus their deployment efforts on densely populated areas to quickly satisfy their construction requirements, which can leave rural Americans underserved or unserved entirely and can result in a “surplus of unused spectrum, usually in less densely populated areas.”<sup>72</sup> Further, commenters argue that having pre-approved construction requirements offers a greater level of certainty for licensees, which would reduce concerns about the risks involved in leasing and/or partitioning arrangements in particular.<sup>73</sup>

52. We recognize that providing alternatives to construction requirements to a wide range of stakeholders can incentivize acquisition of licenses by entities that will deploy innovative spectrum use models and reach underserved areas. We believe that such an alternative option also can serve the public interest by providing all licensees more certainty as to regulatory requirements when planning to deploy networks, even for licensees acquiring spectrum directly from the Commission. We therefore seek comment on providing all WRS flexible use licensees an alternative construction requirement to population-based construction requirements, including for licenses acquired through a transaction (qualifying for ECIP benefits or not) or licenses newly issued to an auction winner. We seek to develop a robust record on the most beneficial alternatives to achieve more efficient use of spectrum, particularly in underserved rural areas.

53. As noted, the Commission has adopted population-based performance requirements in most flexible use radio services. In so doing, the Commission largely departed from providing the “substantial service” option that was available to many licensees in certain services.<sup>74</sup> This option allowed licensees to provide an alternate demonstration as to how its spectrum was used in the public interest where population benchmarks either could not be met or were an inaccurate measure of actual spectrum usage. We therefore seek comment on whether to provide a “substantial service” type alternative as has previously been used in many different services.<sup>75</sup> We recognize that use of the subjective term “substantial” provides flexibility to licensees, but it can also create uncertainty over how to meet the standard and how to enforce the standard. We therefore seek comment on the appropriate definition of substantial service or an appropriate variation of this concept more tailored to individual licensee needs.

54. We seek detailed comment on how we can best accommodate particular use cases that are less suited to meeting population coverage requirements, for example, critical infrastructure, Internet of Things applications, and other private internal uses (e.g., oil and gas, agricultural, industrial, railroads). How should we tailor performance requirements to these types of spectrum uses that do not directly serve the public through ubiquitous mobile service to subscribers in a manner that nonetheless facilitates enforcement of buildout obligations in the public interest? Should we establish specific safe harbors to provide more certainty to stakeholders, as some commenters in this record suggest?<sup>76</sup> What is an appropriate safe harbor for these types of use cases? Should we only apply (or modify) a safe harbor in rural areas, recognizing that the Commission adopted a rural safe harbor for certain radio services in

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<sup>71</sup> WISPA Comments at 3.

<sup>72</sup> DSA Comments at 5.

<sup>73</sup> API Comments at 2.

<sup>74</sup> As an example, the following WRS do not provide a substantial service option in lieu of either meeting performance requirements based on population-based metrics or a number of fixed links per a population figure for fixed operations: 3.7 GHz, Upper Microwave Flexible Use Service, and 70, 80, & 90 GHz.

<sup>75</sup> 220 MHz Phase II licenses - 47 CFR § 90.767, 769; 800 MHz Geographic licenses - 47 CFR § 90.685(b); 900 MHz Geographic licenses - 47 CFR § 90.665(c).

<sup>76</sup> See NRECA Comments at 6 (recommending the Commission formally codify its rural safe harbors for substantial service into its rules and make certain clarifications to those safe harbors).

2004?<sup>77</sup> Would establishing band-specific alternative metrics or safe harbors aid in incentivizing partitioning, disaggregation, or leasing with a range of diverse use cases and in particular, rural providers? How should we accommodate licensees seeking either to provide services or to meet internal connectivity needs through fixed, rather than mobile, operations? Commenters addressing these issues should provide specific examples and also address the costs and benefits of any recommended approach.

55. If the Commission determined that the public interest would not be served by adopting the substantial service concept on a more widespread basis, we also seek comment on whether there are more suitable alternative metrics for flexible use licenses in lieu of population coverage. What are the appropriate alternative performance benchmarks for these types of spectrum use cases, whether fixed or mobile or both? Should we apply a specific geographic area coverage benchmark to these market areas? How could performance requirements be tailored to meet stakeholder business needs, while ensuring that business decisions do not result in spectrum lying fallow in potentially large areas of a market?

### **E. Reaggregation of Spectrum Licenses**

56. Under our current rules, while licensees may partition and disaggregate their licenses through spectrum transactions, there is no provision for reaggregating spectrum, even when the partitioned or disaggregated portions of an original market area are acquired by a single entity. In the *Notice*, the Commission sought comment on whether to permit flexible use licensees to reaggregate licenses that have been partitioned and/or disaggregated up to a maximum of the original market/channel block size, provided certain regulatory requirements have been fulfilled.<sup>78</sup> The Commission asked whether such an approach would increase the incentives of parties to lease or sell spectrum, thereby furthering the Congressional and Commission policy goals of increased spectrum access for small carriers and increased rural service.<sup>79</sup> Many commenters acknowledge the public interest benefits of permitting partitioning/disaggregation, but also note that business circumstances may subsequently necessitate license reaggregation, which they argue should therefore be permitted by rule with a clear licensing path for doing so.<sup>80</sup> For example, R Street suggests that “[a]llowing reaggregation is essential to well-functioning markets,” and that “[p]ermitting free reaggregation alongside disaggregation would not only allow more flexibility in the use of spectrum over time, it would also incentivize initial licensees to participate in the secondary market in the first place.”<sup>81</sup> CTIA and Google also support this flexible approach.<sup>82</sup> Google agrees that the reaggregation cap should be the original size of the market area,<sup>83</sup> while RS Access suggests that “the Commission’s rules should not restrict aggregation to instances where the licensee is merely reaggregating previously disaggregated or partitioned spectrum . . . the rules should permit the aggregation of licenses that were not previously disaggregated or partitioned, provided a licensee has satisfied the substantial service requirements for each of the licenses.”<sup>84</sup>

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<sup>77</sup> See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services; 2000 Biennial Regulatory Review Spectrum Aggregation Limits for CMRS*, Report and Order, 19 FCC Rcd 19078, 19123, para.79 (2004).

<sup>78</sup> *Notice*, 34 FCC Rcd at 1766, para 28.

<sup>79</sup> *Id.*

<sup>80</sup> R Street Comments at 4; Google, LLC (Google) Comments at 17; CCA Comments at 3; CTIA Comments at 13; AT&T Reply at 2; Rural Carriers Reply at 2; Sprint Reply at 1.

<sup>81</sup> R Street Comments at 4.

<sup>82</sup> CTIA Comments at 20 (“Allowing reaggregation creates greater incentives for licensees to engage in secondary market transactions”); Google Comments at 16 (suggesting “reaggregation . . . could enhance the fluidity of spectrum holdings and thus make secondary transactions more attractive for all parties”).

<sup>83</sup> Google Comments at 17.

<sup>84</sup> RS Access Reply at 5.

57. Some commenters, however, oppose a reaggregation process on the grounds that it would create the “potential for abuse by large carriers” because it would “encourage...licensees to use partitioning to avoid their buildout obligations by partitioning non-desirable or hard-to-serve spectrum” followed by a later reaggregation and consequent spectrum warehousing.<sup>85</sup> Similarly, GeoLink and WISPA argue that allowing reaggregation would undermine the goal of increasing spectrum access by small and rural carriers.<sup>86</sup>

58. The *Notice* sought comment on the costs and benefits of permitting reaggregation, as well as whether measures were necessary to prevent abuse, particularly evasion of any performance requirements associated with partitioned or disaggregated licenses subject to a request for reaggregation.<sup>87</sup> Stakeholders largely agree that there were substantial administrative benefits associated with permitting reaggregation, including those related to construction requirements, renewal showings, continuous service requirements, and the need to maintain up-to-date information in the Commission’s Universal Licensing System.<sup>88</sup> Commenters also discuss the added costs associated with maintaining multiple licenses that were formerly a single license and the extent to which this could discourage disaggregation in the first place.<sup>89</sup> R Street does not favor construction requirements, but comments that “[i]f the Commission is committed to keeping construction requirements, it could avoid this difficulty by allowing reaggregation only after the original construction requirements for the aggregate license area have been met.”<sup>90</sup> Google suggests that, “[t]o the extent that possible manipulation of disaggregation and reaggregation to evade regulatory construction deadlines is a concern, the Commission could condition reaggregation on building out the entire reaggregated service area.”<sup>91</sup>

59. After review of the record, we propose to permit license reaggregation with appropriate safeguards. Our goal is to further the public interest by providing a path to removing unnecessary regulatory barriers to facilitate secondary market transactions and easing administrative burdens for stakeholders and the Commission. Permitting reaggregation can make our licensing information easier to use through a more flexible, yet accountable, data policy for geographic spectrum licenses.<sup>92</sup> The

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<sup>85</sup> Rural Wireless Association, Inc. (RWA) Comments at 5.

<sup>86</sup> GeoLink Comments at 4 (“[a]llowing large carriers to lease off undesired spectrum within their license area and then reaggregate pieces later when they become desirable does little to promote this goal [of increasing spectrum access by small and rural carriers]”); WISPA Reply at 7 (“Once established, smaller license areas that are ‘right-sized’ to meet the needs of rural consumers should not be permitted to be simply reabsorbed by large carriers into wide-area licenses. Such ‘pass-throughs’ would undermine the purposes intended by the MOBILE NOW Act, leading to reduced service to small and rural communities . . .”).

<sup>87</sup> *Notice*, 34 FCC Rcd at 1766-67, paras. 28-29. The Commission noted that one disadvantage to reaggregation without safeguards is that “carriers may attempt to use it to avoid construction requirements.” *Id.*

<sup>88</sup> Google Comments at 17; CTIA Comments at 13-14; CCA Comments at 3 (allowing a provider to consolidate multiple licenses will maximize buildout and efficiency).

<sup>89</sup> CTIA Comments at 13-14; Google Comments at 17.

<sup>90</sup> R Street Comments at 4.

<sup>91</sup> Google Comments at 17.

<sup>92</sup> We note that our proposed approach would build upon and codify an informal process for reaggregation accomplished in certain instances through *pro forma* assignment processes. *See e.g.*, CTIA Comments at 16 (citing Nextel Communications of the Mid-Atlantic, Inc., Description of *Pro Forma* Assignment and Public Interest Statement, ULS File No. 0008063765, at 1 (filed Jan. 16, 2018) (explaining that the purpose of the assignment is to allow a wholly-owned subsidiary of Sprint Corporation “to reconsolidate the small partitioned spectrum area licensed under WPQT200 with the underlying license—WPLM552—from which it originally came”); *see also* Nextel WIP License Corp., ULS File No. 0000493992 (filed June 18, 2001); Nextel WIP License Corp., ULS File No. 0000493991 (filed June 18, 2001); Nextel WIP License Corp., ULS File No. 0000493987 (filed June 18, 2001);

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reaggregation proposal described below, however, is not intended as an overall reexamination of the Commission's adopted approaches on key licensing issues related to WRS licenses, including performance requirements, renewal and associated continuing service obligations, and permanent discontinuance of operations.

60. Accordingly, we propose to permit licensees to seek reaggregation of partitioned and/or disaggregated portions of licenses up to the original geographic size and spectrum band(s) for the type of license.<sup>93</sup> We believe that this approach is the appropriate scope for reaggregation requests and that expanding this proposal to permit consolidation of market licenses not previously partitioned or disaggregated, as one commenter suggests,<sup>94</sup> would unnecessarily undermine the established WRS licensing framework and complicate our attempt to ease administrative burdens. As a safeguard against potential abuses, we propose to require that, prior to seeking license reaggregation, the entity requesting reaggregation must ensure that each license to be reaggregated has: (1) met all performance requirements (both interim and final benchmarks); (2) been renewed at least once after meeting any relevant continuing service or operational requirements, if applicable; and (3) not violated the Commission's permanent discontinuance rules. We seek comment on our proposed approach to preventing potential abuses of our essential licensing requirements, including whether we should consider further safeguards such as requiring any additional certifications from applicants seeking license reaggregation.

61. To implement our proposed reaggregation approach, we propose that a licensee holding multiple active licenses in the same radio service and for the same channel block may seek reaggregation by: filing FCC Form 601, identifying the licenses to be reaggregated, and certifying that the performance requirements, renewal requirement, and lack of permanent discontinuance conditions have been met. Under this proposal, the licenses must be active and held under the same FCC registration number (FRN). To simplify the administrative process associated with this effort, we propose to treat this as a separate filing from any transactions that may be necessary to transfer the licenses under the same FRN and to prohibit combining a proposed reaggregation with any other transaction in the same FCC 601 application. We recognize that the subdivided licenses within a partitioned/disaggregated market may, over the course of license term(s), be the subject of additional license conditions, rights (such as granted waivers), and other parameters that make them dissimilar. We seek comment on this approach and on how best to reflect those unique parameters on the reaggregated license. For example, if one of the licenses (but not the others) authorizes operation at higher power levels through a granted waiver, should the waiver rights and conditions be transferred to the reaggregated license (but only for the geographic area and spectrum associated with the license subject to waiver)? Alternatively, to simplify the process, should we prevent reaggregation in cases where the licenses do not have identical rights and conditions? We seek comment on how we should address these types of circumstances, as well as the costs and benefits of any suggested alternatives.

#### **F. Other Considerations**

62. *Open Radio Access Networks.* Over the last several years, the Commission has worked closely with federal partners, equipment manufacturers, carriers, and other parties on the important issue of securing the United States' communications networks, in particular in the area of supply chain risk management.<sup>95</sup> In March, 2021, the Commission issued a *Notice of Inquiry* into one potential method of

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Nextel WIP License Corp., ULS File No. 0000493981 (filed June 18, 2001); Nextel WIP License Corp., ULS File No. 0000493896 (filed June 18, 2001).

<sup>93</sup> Our proposal is limited to covered geographic licenses eligible for partitioning and disaggregation. See 47 CFR § 1.907 (defining covered geographic licenses). See also 47 CFR § 1.950 (permitting partitioning/disaggregation of covered geographic licenses).

<sup>94</sup> See RS Access Reply at 5.

<sup>95</sup> *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Third Report and Order, 35 FCC Rcd 1293 (2021); *Wireline Competition Bureau Seeks Comment on Secure and*

(continued...)

promoting secure communications networks: Open Radio Access Networks (Open RAN).<sup>96</sup> Open RAN has the potential to allow carriers to promote the security of their networks while driving innovation, in particular in next-generation technologies like 5G, lowering costs, increasing vendor diversity, and enabling more flexible network architecture.<sup>97</sup> Comments received in response to that *Notice of Inquiry*, as well as discussions enabled by the Commission's Open RAN Solutions Showcase, held on July 14-15, 2021,<sup>98</sup> show that these technologies have great promise.

63. To that end, we seek comment on whether and how we should factor the use of Open RAN technologies into the ECIP. For example, should we tie ECIP benefits to the use of Open RAN in network deployment? If so, what level of use should we require, and how would parties demonstrate their use in their application? Should this requirement apply to assignors and lessors, and assignees and lessees, or only to some parties? Alternatively, how could we further incentivize ECIP participants to explore Open RAN deployments? Should we retain our proposed ECIP eligibility requirements, and provide additional benefits to parties which use Open RAN in their networks? If so, what should those additional benefits be? Should we make these benefits available to both assignors/lessors and assignees/lessees, if both sides of the transaction demonstrate their use of these technologies?

64. *Use or Share Spectrum Access Models.* Many commenters proposed adoption of varying spectrum rights models with the "use or share" model emerging prominently in the record.<sup>99</sup> This spectrum rights model typically involves enabling temporary or opportunistic shared access to unused portions of a licensed band in which a licensee has not begun operations.

65. The Open Technology Institute at New America and Public Knowledge's joint comment references various implementations of the use or share model, in particular noting how this model is employed at 3.5 GHz (via Spectrum Access Systems) and 600 MHz (via white spaces databases).<sup>100</sup> We seek comment on "use or share" models generally, and in particular on whether there are voluntary mechanisms or incentives that we could put into place to promote sharing, whether as part of the ECIP or more widely. We seek comment on whether such an approach could increase spectrum access and/or promote competition, and how these mechanisms could be implemented. We also seek comment on incentives to promote sharing by licensees with opportunistic users on a secondary basis. We recognize that dynamic sharing has been managed effectively through spectrum access systems and databases in

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*Trusted Communications Networks Reimbursement Program Application Filings and Process*, Public Notice, DA 21-607 (May 24, 2021); *Public Safety and Homeland Security Bureau Announces Publication of the List of Equipment and Services Covered by Section 2 of the Secure Networks Act*, Public Notice, 36 FCC Rcd 5534 (2021); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Second Report and Order, 35 FCC Rcd 14284 (2020); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Report and Order, 34 FCC Rcd 11423 (2019); *Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs*, Notice of Proposed Rulemaking, 33 FCC Rcd 4058 (2018).

<sup>96</sup> *Promoting the Deployment of 5G Open Radio Access Networks*, GN Docket No. 21-63, Notice of Inquiry, 36 FCC Rcd 5947, 5948 (2021).

<sup>97</sup> *Id.*

<sup>98</sup> *FCC Announces New Dates for Open RAN Solutions Showcase*, Public Notice, DA 21-687, 2021 WL 21-687 (WTB June 11, 2021); FCC, *Open RAN Solutions Showcase – Day 1*, <https://www.fcc.gov/news-events/events/2021/07/open-ran-solutions-showcase-day-1> (last visited Oct. 18, 2021); FCC, *Open RAN Solutions Showcase – Day 2*, <https://www.fcc.gov/news-events/events/2021/07/open-ran-solutions-showcase-day-2> (last visited Oct. 18, 2021).

<sup>99</sup> DSA Comments at 4; Google Comments at 17-19; Open Technology Institute at New America and Public Knowledge Comments at 8-16; WISPA Comments at 3, 7-8 (supporting adoption of both a "use it or share it" model and a "keep what you use" model).

<sup>100</sup> Open Technology Institute at New America and Public Knowledge Comments at 3-4.

some bands, and we seek comment on the suitability for these systems to facilitate sharing in other bands. We seek comment also on whether there are particular scenarios in which licensees and sharing proponents might self-coordinate without an access system or database, how that would function, and how we might encourage such arrangements. We seek comment on the costs and benefits of such approaches to sharing.

66. *Digital Equity and Inclusion.* Finally, the Commission, as part of its continuing effort to advance digital equity for all,<sup>101</sup> including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations<sup>102</sup> and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

#### IV. PROCEDURAL MATTERS

67. *Paperwork Reduction Act Analysis.* This *Further Notice of Proposed Rulemaking* may contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995.<sup>103</sup> If the Commission adopts any new or modified information collection requirements, they 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, pursuant to the Small Business Paperwork Relief Act of 2002,<sup>104</sup> we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”<sup>105</sup>

68. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA),<sup>106</sup> requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>107</sup> Accordingly, the Commission has

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<sup>101</sup> Section 1 of the Communications Act of 1934, as amended, provides that the FCC “regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex.” 47 U.S.C. § 151.

<sup>102</sup> The term “equity” is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. See Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021).

<sup>103</sup> Pub. L. No. 104-13.

<sup>104</sup> Pub. L. No. 107-198.

<sup>105</sup> 44 U.S.C. § 3506(c)(4).

<sup>106</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>107</sup> 5 U.S.C. § 605(b). The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. § 601(6); see 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such

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prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning potential rule and policy changes contained in this *Further Notice of Proposed Rulemaking*. The IRFA is contained in Appendix B.

69. *Ex Parte Presentations*. The proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. 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.

70. In light of the Commission’s trust relationship with Tribal Nations and our commitment to engage in government-to-government consultation with them, we find the public interest requires a limited modification of the *ex parte* rules in this proceeding.<sup>108</sup> Tribal Nations, like other interested parties, should file comments, reply comments, and *ex parte* presentations in the record to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process consistent with the requirements of the Administrative Procedure Act.<sup>109</sup> However, at the option of the Tribal Nation, *ex parte* presentations made during consultations by elected and appointed leaders and duly appointed representatives of federally recognized Indian Tribes and Alaska Native Villages to Commission decision makers shall be exempt from the rules requiring disclosure in permit-but-disclose proceedings<sup>110</sup> and exempt from the prohibitions during the Sunshine Agenda period.<sup>111</sup> To be clear, while the Commission recognizes consultation is critically important, we emphasize that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

71. *Comment Period and Filing Procedures*. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 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*

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definition(s) in the Federal Register.” 5 U.S.C. § 601(3). In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. 15 U.S.C. § 632. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. See 5 U.S.C. §§ 601-612.

<sup>108</sup> 47 CFR § 1.1200(a).

<sup>109</sup> 5 U.S.C. §§ 551 *et seq.*

<sup>110</sup> See generally 47 CFR § 1.1206.

<sup>111</sup> 47 CFR § 1.1203.



*Rulemaking Proceedings*, 63 FR 24121 (1998). Commenters should refer to WT Docket No. 19-38 when filing in response to this *Further Notice of Proposed Rulemaking*.

- Electronic filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper filers: Parties who choose to file by paper must file an original and one copy of each filing.
- All Filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L St NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, 35 FCC Rcd 2788 (2020), <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.
  - During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.
  - After COVID-19 restrictions are lifted, the Commission has established that hand-carried documents are to be filed at the Commission's office located at 9050 Junction Drive, Annapolis Junction, MD 20701. This will be the only location where hand-carried paper filings for the Commission will be accepted.<sup>112</sup>

72. *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 and Governmental Affairs Bureau at (202) 418-0530 (voice).

73. *Additional Information.* For additional information on this proceeding, contact Katherine Nevitt of the Wireless Telecommunications Bureau, Mobility Division, at (202) 418-0638 or [Katherine.Nevitt@fcc.gov](mailto:Katherine.Nevitt@fcc.gov).

## V. ORDERING CLAUSES

74. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 303, and 310(d) of the Communications Act of 1934, as amended, and section 616 of the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act, 47 U.S.C. §§ 151, 154(i), 303, 310(d), 1506, that this *Further Notice of Proposed Rulemaking* is HEREBY ADOPTED.

75. IT IS FURTHER ORDERED that, pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments on the *Further Notice of Proposed Rulemaking* on or before 60 days after publication in the Federal Register, and reply comments on or before 90 days after publication in the Federal Register.

76. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed*

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<sup>112</sup> See *Amendment of the Commission's Rules of Practice and Procedure*, Order, 35 FCC Rcd 5450 (OMD 2020).

*Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**  
**Proposed Rules**

The Federal Communications Commission proposes to amend 47 CFR part 1 as follows:

**PART 1 – PRACTICE AND PROCEDURE**

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

AUTHORITY: 47 U.S.C. ch. 2, 5, 9, 13; 28 U.S.C. 2461, unless otherwise noted.

2. Amend § 1.950 by:

- a. Revising the heading of paragraph (c); and
- b. Adding paragraph (i).

The additions and revisions read as follows:

§ 1.950 Geographic Partitioning and Spectrum Disaggregation.

\* \* \* \* \*

(c) Filing requirements for partitioning and disaggregation.

\* \* \* \* \*

(i) Reaggregation of licenses.

(1) A licensee of multiple licenses which were disaggregated or partitioned, pursuant to § 1.950, from the same Wireless Radio Service License may apply to reaggregate those licenses into one new license.

(i) Parties may not reaggregate licenses unless all licenses to be aggregated were once part of the same Wireless Radio Service license.

(ii) All performance requirements for the licenses to be combined through reaggregation must have been completed and certified as required prior to the filing of the application.

(iii) Each of the licenses to be combined through reaggregation must have been renewed at least once since the completion and certification of all performance requirements.

(iv) None of the licenses being combined may have violated the Commission's permanent discontinuance rules, as applicable to that license.

(2) A licensee does not need to reaggregate all licenses which were once part of the original Wireless Radio Service license in order to qualify for reaggregation.

(3) Licensees seeking approval for reaggregation of licenses must apply by filing FCC Form 601. Each request which involves geographic area aggregation must include an attachment defining the boundaries of the licenses being aggregated by geographic coordinates to the nearest second of latitude and longitude, based upon the 1983 North American Datum (NAD83). The licenses must all be active in the Commission's licensing system, and held by the same licensee under the same FCC Registration Number.

3. Add a new § 1.961 to read as follows:

§ 1.961 Enhanced Competition Incentive Program.

(a) Definitions.

(1) *Covered Small Carrier*. A covered small carrier is a carrier (as defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153)) that has not more than 1500 employees (as determined under section 121.106 of title 13, Code of Federal regulations, or any successor thereto) and offers services using the facilities of the carrier.

(2) *Enhanced Competition Incentive Program.* The Enhanced Competition Incentive Program allows licensees to assign or lease some of their spectrum rights pursuant to a given Wireless Radio Service license as part of a qualifying transaction, as defined in paragraph (b) of this rule, and in return receive certain benefits, as defined in paragraph (c) of this rule.

(3) *Qualifying transaction.* A qualifying transaction under the Enhanced Competition Incentive Program, as defined in paragraph (b) of this rule.

(4) *Rural area.* A rural area is any area other than

(i) a city, town, or incorporated area that has a population of more than 20,000 inhabitants; or

(ii) an urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.

(5) *Tribal Entity.* A Tribal entity is any federally-recognized American Indian Tribe or Alaska Native Village, as well as consortia of federally recognized Tribes and/or Native Villages, or other entities controlled and majority-owned by such Tribes or consortia.

(b) Eligibility.

(1) In order to qualify for benefits under the Enhanced Competition Incentive Program, a qualifying transaction must partition or disaggregate (pursuant to § 1.950) or lease (pursuant to Subpart X of this part) a minimum of 50% of the frequencies authorized by a Wireless Radio Service license to an unaffiliated entity.

(2) That transaction must also involve either:

(i) An assignee or lessee which is a covered small carrier or Tribal Nation which receives rights to a minimum of 25% of the Wireless Radio Service license area; or

(ii) Any assignee or lessee that proposes to cover at least 300 contiguous square miles of rural area for license areas consisting of a Partial Economic Area or smaller, as defined in § 27.6(a). The transaction may not involve a party which has been previously found to have failed to comply with the requirements of the Enhanced Competition Incentive Program, whether as an assignee or a lessee.

(3) The transaction may not involve any license which has previously been included in a qualifying transaction and received benefits under the Enhanced Competition Incentive Program.

(c) *Incentives.* Parties to a qualifying transaction will be eligible to receive the following benefits.

(1) *License Term Extension.* The license term for all licenses involved in a qualifying transaction will be extended by five (5) years. If other Commission action, whether by Order or by rule, would otherwise have modified the license term for the party's license, this increase would be in addition to that modification.

(2) *Construction Extension.* The period in which each party is required to demonstrate compliance with the relevant interim and/or final performance requirements of the license will be extended by one (1) year. This will apply to all relevant performance deadlines applicable to this license but will have no impact on any license not covered by the qualifying transaction.

(3) *Alternative Construction Requirements.* The assignee of a disaggregated or partitioned license in a qualifying transaction under clause (b)(2)(ii) of this section which involves the assignment of, and commitment to cover and serve, a qualifying geography of rural area will substitute the construction requirements which apply to this license with actual coverage over the entirety of the qualifying geography that was the basis for the qualifying transaction, as well as the provision of service to the public, or operation addressing private internal business needs over

that area. The assignor of such license remains subject to its original construction requirements, as modified above.

(d) *Filing Requirements.* Parties seeking to participate in the Enhanced Competition Incentive Program must file for a partition or disaggregation pursuant to § 1.950 or a spectrum lease pursuant to subpart X of our rules. As part of the application, the parties should state whether the transaction qualifies under clause (b)(2)(i) or (b)(2)(ii) of this section, show their satisfaction with all relevant eligibility requirements, and request participation in the program.

(e) Protections against waste, fraud, and abuse.

(1) *Operating requirements.* Licenses assigned through the Enhanced Competition Incentive Program pursuant to subparagraph (b)(2) of this rule must provide service for a period of at least three (3) years, commencing no later than the next construction deadline for the license (as modified by this program). Lessees of Enhanced Competition Incentive Program transactions must provide service for a period of at least three (3) years during any period within the five (5) years of that lease. The service for licensees and lessees must not fall below the level of service used (or which will be used) to meet its construction requirement or by which it qualifies for participation in the program.

(2) Holding period.

(i) Licenses assigned through the Enhanced Competition Incentive Program must be held for a period of at least five (5) years following grant of the assignment application. Leases made through the Enhanced Competition Incentive Program must be for a minimum of five years and remain in effect for the entire term of the lease and may not be assigned to another party.

(ii) Licenses assigned through the Enhanced Competition Incentive Program may not be assigned, even after five (5) years following the grant of the assignment application, unless the underlying construction and operating requirements imposed, either through the Enhanced Competition Incentive Program or by other rule, have been satisfied.

(iii) These assignment restrictions do not apply to *pro forma* transfers pursuant to § 1.948(c)(1).

(5) *Automatic termination.* If the licensee of a license assigned pursuant to the Enhanced Competition Incentive Program fails to meet performance requirements, including requirements imposed by this paragraph and those imposed by other Commission rules, that license shall be automatically terminated without further notice to the licensee.

**APPENDIX B****Initial Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (Further Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. As part of the Commission's continuing efforts to close the digital divide and to increase spectrum access by small and rural carriers, in the Further Notice the Commission explores how proposed changes to our partitioning, disaggregation, and leasing rules might better serve those goals. Specifically, we propose an enhanced competition incentive program (ECIP), focused on increasing spectrum access for small carriers and Tribal Nations and promoting the availability of advanced telecommunications services in rural areas by creating incentives for competition enhancing transactions. The Further Notice builds upon the record developed through the Commission's 2019 Notice of Proposed Rulemaking,<sup>4</sup> which initiated this proceeding to examine spectrum access and availability of rural service, as Congress required in the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act),<sup>5</sup> and which also includes provisions requiring that the Commission take various actions concerning licensing, infrastructure, and deployment of wireless broadband services.

3. In the Further Notice, we propose to modify our existing partitioning, disaggregation, and leasing rules by providing specific incentives for stakeholders to participate in the ECIP by engaging in qualifying transactions, including extended license terms, extended construction deadlines, and alternative construction requirements in rural areas. The qualifying transaction proposal requires parties to transactions to establish program eligibility by (1) providing spectrum to small carriers or Tribal Nations, or (2) committing to serve a certain minimum amount of rural area. Additionally, we go beyond the MOBILE NOW Act approach to seek comment on providing all Wireless Radio Service flexible use licensees an alternative construction requirement to population-based construction requirements and to propose the establishment of a formal reaggregation process for licenses that have been partitioned or disaggregated to ease regulatory burdens. We also propose the necessary measures to ensure the goals of the ECIP are met and to avoid waste, fraud, or abuse of the program.

**B. Legal Basis**

4. The proposed action is authorized pursuant to sections 1, 4(i), 303, and 310(d) of the Communications Act of 1934, as amended, and Pub. L. No. 115-141, Div. P, Title VI, § 616, 132 Stat.

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

<sup>4</sup> *Partitioning, Disaggregation, and Leasing of Spectrum*, Notice of Proposed Rulemaking, 34 FCC Rcd 1758 (2019).

<sup>5</sup> Consolidated Appropriations Act, Pub. L. No. 115-141, Division P (RAY BAUM'S Act of 2018), Title VI (MOBILE NOW Act), § 601 et seq. (2018).

348, 47 U.S.C. §§ 151, 154(i), 303, 310(d), and Pub. L. No. 115-141, Div. P, Title VI, § 616, 132 Stat. 348.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>6</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>7</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>8</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>9</sup>

6. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.<sup>10</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>11</sup> These types of small businesses represent 99.9 percent of all businesses in the United States, which translates to 30.7 million businesses.<sup>12</sup>

7. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>13</sup> Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.<sup>14</sup>

8. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special

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<sup>6</sup> 5 U.S.C. § 603(b)(3).

<sup>7</sup> *See id.* § 601(6).

<sup>8</sup> *See id.* § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>9</sup> 15 U.S.C. § 632.

<sup>10</sup> *See* 5 U.S.C. § 601(3)-(6).

<sup>11</sup> *See* SBA, Office of Advocacy, “What’s New With Small Business?”, <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/23172859/Whats-New-With-Small-Business-2019.pdf> (Sept 2019).

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

<sup>13</sup> 5 U.S.C. § 601(4).

<sup>14</sup> *See* Exempt Organizations Business Master File Extract (EO BMF), “CSV Files by Region,” <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-EO-BMF>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

districts, with a population of less than fifty thousand.”<sup>15</sup> U.S. Census Bureau data from the 2017 Census of Governments<sup>16</sup> indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>17</sup> Of this number there were 36,931 general purpose governments (county,<sup>18</sup> municipal and town or township<sup>19</sup>) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts<sup>20</sup> with enrollment populations of less than 50,000.<sup>21</sup> Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”<sup>22</sup>

9. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>23</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>24</sup> For this industry, U.S. Census data for 2012 show that there were

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<sup>15</sup> 5 U.S.C. § 601(5).

<sup>16</sup> See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

<sup>17</sup> See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also Table 2. CG1700ORG02 Table Notes\_Local Governments by Type and State\_2017.

<sup>18</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

<sup>19</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

<sup>20</sup> See U.S. Census Bureau, 2017 Census of Governments - Organization, Table 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes Special Purpose Local Governments by State Census Years 1942 to 2017.

<sup>21</sup> While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

<sup>22</sup> This total is derived from the sum of the number of general-purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations Tables 5, 6, and 10.

<sup>23</sup> U.S. Census Bureau, 2017 NAICS Definition, “517312 Wireless Telecommunications Carriers (except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

<sup>24</sup> 13 CFR § 121.201, NAICS code 517210.



967 firms that operated for the entire year.<sup>25</sup> Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1,000 employees or more.<sup>26</sup> Thus, under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

10. The Commission has determined from data available in its Universal Licensing System (ULS) that there are approximately 6,204 unique licensees corresponding to more than 90,000 licenses in the Wireless Radio Services that could be affected by the Further Notice, as of October 21, 2021.<sup>27</sup> The Commission does not know how many licensees in these bands are small entities, as the Commission does not collect that information for these types of entities.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

11. The proposed actions in the Further Notice may impose reporting, recordkeeping and other compliance requirements on small entities as well as other licensees. For example, there are potential changes to performance requirements that could alter existing, or create additional, recordkeeping and compliance obligations for small entities as well as other licensees.

12. In addition, if adopted, the ECIP we propose to facilitate transactions focused on increasing spectrum access for small carriers and Tribal Nations and increasing the availability of advanced telecommunications services in rural areas, requires parties to establish program eligibility by participation in a qualifying transaction providing spectrum access to small carriers or Tribal Nations, or committing to operate in or provide service to rural areas. For both types of qualifying transactions, we propose eligibility and minimum spectrum and geography requirements. In addition, the Further Notice proposes that, for each ECIP transaction, an applicant must elect either prong 1 or prong 2, but not both, and they may not, subsequent to application grant, modify the selected path. We seek information on the costs and benefits of these proposals as well as on alternatives to these proposals with cost and benefit information for any alternative proposals.

13. To incentivize participation in the ECIP, the Commission proposes three benefits to participants – a five-year extended license term for all parties to a qualifying transaction; a one-year extension on construction deadlines (both interim and final) for all parties to a qualifying partition/disaggregation transaction and for lessors in a qualifying spectrum lease arrangement; and establishing an alternate construction benchmark for rural-focused transactions under prong 2 of the ECIP where an assignee in a rural-focused qualifying transaction provides coverage over the qualifying geography in lieu of existing performance requirements. While we establish an alternate construction benchmark for rural areas, we inquire and seek comment on whether we should consider an alternative approach specifically tailored to the needs of Tribal Nations, on the appropriate benchmarks to include, and on any additional factors we should consider to facilitate the provision of service to Tribal Nations. We also seek comment on our proposed requirement to hold the assignor responsible, post assignment, for the existing coverage requirements for its license(s) involved in a qualifying transaction, as well as whether a shared buildout requirement runs counter to the framework established through the ECIP.

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<sup>25</sup> U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210. [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012\\_EC1251SSSZ5&hidePreview=false&vintage=2012](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012_EC1251SSSZ5&hidePreview=false&vintage=2012).

<sup>26</sup> *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

<sup>27</sup> See <http://wireless.fcc.gov/uls>. For the purposes of this IRFA and consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

14. The Further Notice proposes requirements to protect against waste, fraud, and abuse of the ECIP. These proposed protections include a five-year holding period on licenses assigned through partitioning and/or disaggregation through the program, an operational requirement that the assignee or lessee of any rural-focused ECIP transaction must, for a minimum of three consecutive years, either (1) provide and continue to provide service to the public; or (2) operate and continue to operate to address the licensee's private, internal communications needs. We also propose automatic termination for any licenses assigned as part of an ECIP transaction where the licensee fails to meet the program or construction requirements, and a limit on additional benefits for subsequent transactions involving the same license(s), and we seek comment on conditioning assignor/lessor program benefits (e.g., five-year license term extension, one year construction extension) on assignee/lessee performance of construction and continuity of services obligations, particularly in the rural-focused transactions context. The Further Notice also seeks comment on whether to require the assignor in a partition, in cases where the assignee ultimately fails to construct, to meet its obligations consistent with the entire license area, by including in the relevant denominator the population/land of the partitioned-off area, and also seeks comment on compliance requirements for leasing and subleasing in the program to prevent circumvention of our protections.

15. The Further Notice also proposes to direct the Wireless Telecommunications Bureau to conduct a review of the ECIP, with an opportunity for interested stakeholders to provide input, so that we may assess the program's effectiveness. The Bureau would provide a report to the Commission no later than five years from the effective date of the final order adopting the program, which includes data about ECIP participation by eligible stakeholders, including the number of secondary market transactions, as well as the geographic areas and spectrum made available, under each prong of the program. The Further Notice also seeks comment on any other information that stakeholders advocate for inclusion in the report.

16. Additionally, the Further Notice seeks comment on establishing an alternative to population-based construction requirements for all Wireless Radio Service flexible use licenses. We inquire whether we should provide a "substantial service" type of alternative, and if so, what the appropriate definition of substantial service or an appropriate variation of this concept would be. We also inquire about the best way to accommodate particular use cases, like critical infrastructure and Internet of Things applications, that are less suited to meeting population coverage requirements, whether we should establish safe harbors to provide more certainty and what appropriate safe harbors would be for these types of use cases, and whether there are more appropriate alternative metrics than substantial service and population coverage.

17. We propose to establish a formal process for the reaggregation of flexible use licenses that have been partitioned and/or disaggregated up to a maximum of the original market/channel block size, provided regulatory requirements have been fulfilled. To satisfy the regulatory requirements that we propose, each license to be reaggregated must have: (1) met all performance requirements (both interim and final benchmarks); (2) been renewed at least once after meeting any relevant continuing service or operational requirements, if applicable; and (3) not violated the Commission's permanent discontinuance rules. We seek comment on these requirements and our proposal for procedural requirements to seek reaggregation. The Further Notice also seeks comment on whether and how to factor the use of Open RAN technologies into the ECIP, on incentives to promote greater spectrum sharing, including sharing by licensees with opportunistic users on a secondary basis, and on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility.

18. In assessing the cost of compliance for small entities, at this time the Commission is not in a position to determine whether, if adopted, the potential rule changes that could result from proposals and questions raised in the Further Notice will require small entities to hire attorneys, engineers, consultants, or other professionals, and cannot quantify the cost of compliance with the potential rule changes that may be adopted in this proceeding. The Commission has sought comment from parties in the proceeding, including seeking cost and benefit analyses and alternative proposals. We therefore expect the comments we receive on our proposals to include information addressing costs, service

impacts, and other matters of concern, which should help the Commission identify and evaluate relevant matters, including compliance costs and other burdens on small entities that may result from the matters explored in the Further Notice.

**E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

19. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof for such small entities.”<sup>28</sup>

20. The proposals in the Further Notice are intended to facilitate increased spectrum access, rural service, and innovative and next-generation wireless use cases, while also easing some of the administrative and regulatory burdens placed on small entities and other licensees. The Commission has made proposals and inquired about alternatives to facilitate changes that would promote the availability of advanced telecommunications services in rural areas or spectrum availability for covered small carriers which includes proposing to adopt the statutory definition of small carriers from section 616 of the MOBILE NOW Act<sup>29</sup> expanded to include Tribal nations for use in the ECIP and designate covered small carriers as eligible beneficiaries.

21. As discussed above in section B, the Commission has also proposed other incentives to benefit small and other licensees as part of the ECIP. These proposals include a five-year license term extension for all parties involved in a qualifying partition/disaggregation transaction, and for all lessors entering into a qualifying spectrum leasing transaction. The reduction in the frequency of license renewal obligations will reduce regulatory burdens on small carriers and other licensees. Another proposed benefit allowing additional time to meet performance obligations under certain circumstances – such as a one-year extension may help licensees counteract the difficulty and expense associated with buildout in rural areas.

22. The Further Notice seeks comment on alternatives to population-based construction metrics for all Wireless Radio Service flexible use licensees that have business models less suited to meeting the typically-required population coverage. In addition, the Commission has proposed a formal reaggregation process which will permit license reaggregation with the appropriate safeguards to avoid any potential abuse and adverse impact on the ECIP’s objective to increase spectrum access by small carriers and rural service availability. With sufficient safeguards, we believe that allowing reaggregation can make our licensing information easier to use through a more flexible, yet accountable, data policy for geographic spectrum licenses. We also believe there may be substantial administrative benefits associated with permitting reaggregation, including those related to construction requirements, renewal showings, continuous service requirements, and the need to maintain up-to-date information in our ULS. Reaggregation may result in the removal of unnecessary regulatory barriers thereby facilitating secondary market transactions and easing administrative burdens for stakeholders and the Commission which is consistent with our public interest objectives. The Commission raises for comment questions on how best to implement these proposals in the Further Notice to eliminate impediments to transfers of spectrum to covered small carriers to allow them to build out in a reasonable period of time. Additionally, to ensure the ECIP goals of increased access for small carriers and increased rural area buildout, the Further Notice also includes the compliance obligations to prevent waste, fraud, and abuse discussed above in section C.

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<sup>28</sup> See 5 U.S.C. § 603(c)(1)-(4).

<sup>29</sup> MOBILE NOW Act § 616(a)(1).

23. Throughout the Further Notice, the Commission requests cost and benefit information on its proposals and on questions and issues it raises and seeks comment on. As a result, small entities are provided the opportunity to submit comments on a wide range of issues on the ECIP and increasing spectrum access by small carriers and Tribal Nations, and increasing service in rural areas. The Commission also seeks alternative proposals from stakeholders on matters discussed in the Further Notice. Having data on the costs, benefits, and economic impact of the proposals will allow the Commission to better evaluate options and alternatives to minimize any significant economic impact on small entities from any rules that may be adopted. Accordingly, the Commission expects to consider more fully the economic impact on small entities following its review of comments filed in response to the Further Notice, including costs and benefits analyses, and this IFRA. The Commission's evaluation of the comments filed in this proceeding will shape the final alternatives it considers, the final conclusions it reaches, and any additional actions it ultimately takes to minimize any significant economic impact that may occur on small entities as a result of the final rules it promulgates in this proceeding.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules**

24. None.

**STATEMENT OF  
CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *Partitioning, Disaggregation, and Leasing of Spectrum*, WT Docket No. 19-38

A few years back, Senator Klobuchar and Senator Fischer introduced bipartisan legislation to increase opportunities for spectrum access and extend the reach of wireless broadband in rural communities. They proposed to do this by providing incentives for large wireless carriers to make their unused spectrum available to smaller rural carriers, who were ready and willing to put it to use to bring new wireless service to some of the nation's hardest to reach areas. This was a good idea, and it was incorporated into the MOBILE NOW Act.

Today we are working to put this idea into practice. We are doing that by proposing a new program to help grow wireless competition and create new opportunities for smaller carriers and Tribal Nations to succeed in their wireless ambitions. We're calling it the Enhanced Competition Incentive Program, or ECIP. Here's how it works. We know today that some wireless providers have access to airwaves that others might be better positioned to deploy. But our rules don't always make it easy to get spectrum resources to those who want to build in the places that need it most. This new program will help fix that by building better incentives. Specifically, an existing wireless provider that uses its license to create new spectrum opportunities for small carriers, Tribal Nations, or others serving rural areas will see gain and not just loss for doing so because we'll reward them with longer license terms, more flexible construction requirements, and some more options for complying with our rules. But that's not all. We also seek comment on related policies that would facilitate a range of new opportunities in these areas for everything from the internet of things to precision agriculture.

My thanks to the dedicated staff who worked on this effort to promote competition and deployment. That includes Lloyd Coward, Peter Daronco, Diane Dupert, Garnet Hanly, Susannah Larson, Georgios Leris, Paul Malmud, Jon Markman, Charles Mathias, Justin McCuen, Susan Mort, Roger Noel, Katherine Patsas Nevitt, Jessica Quinley, Linda Ray, Blaise Scinto, Nadja Sodos Wallace, Dorothy Stifflemire, Cecilia Sulhoff, Joel Taubenblatt, and Jeffrey Tignor from the Wireless Telecommunications Bureau; David Horowitz, Doug Klein, and Bill Richardson from the Office of General Counsel; Patrick Brogan, Patrick DeGraba, Judith Dempsey, Rachel Kazan, Kate Matraves, Mark Montano, Michelle Schaefer, Don Stockdale, Emily Talaga, and Aleks Yankelovich from the Office of Economics and Analytics; Shannon Lipp, Neal McNeil, and Josh Zeldis from the Enforcement Bureau; Carolyn Conyers, Matthew Duchesne, Barbara Esbin, Derik Goatson, and Sayuri Rajapakse from the Consumer and Governmental Affairs Bureau; and Chana Wilkerson from the Office of Communications Business Opportunities.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: Partitioning, Disaggregation, and Leasing of Spectrum, WT Docket No. 19-38

The Duck Valley Indian Reservation is home to the Shoshone Paiute Tribal Nation. It is in an isolated portion of northern Nevada, about 90 miles from the nearest interstate. The reservation is served by a single cell tower, and residents have described needing to drive out of town simply to update their phones. They aren't the only tribal community with a lack of quality wireless service. A 2019 survey by the American Indian Policy Institute found that, even though most tribal respondents relied on their smartphones to access the Internet, more than a third had issues connecting. According to a recent study from the Federal Reserve Bank of Minneapolis, mobile wireless download speeds are 45 percent slower in tribal areas nationwide than in non-tribal areas.

This item proposes an Enhanced Competition Incentive Program (ECIP) that would encourage wireless licensees to engage in secondary market transactions with Tribes and small rural carriers to expand and improve wireless service in their communities. It's past time for this type of action. More than 10 years ago, the Commission released a Notice of Proposed Rulemaking acknowledging the lack of high-quality wireless service on Tribal lands, and the complaints from Tribal communities about underutilized spectrum in their areas. That NPRM proposed measures to encourage secondary market transactions between wireless licensees and Tribes, but the Commission never finalized any rules. Three years ago, the General Accountability Office (GAO) published a report recounting complaints from Tribal entities about their unsuccessful attempts to enter into secondary market transactions with wireless licensees. Those tribes and an industry association told GAO that these transactions often failed to happen simply because the potential financial benefits were outweighed by the potential costs.

Here's one example. Earlier this year, I met with the Red Cliff Tribal Nation, which is located in Northern Wisconsin on the shores of Lake Superior. The Red Cliff tribe has had difficulties in obtaining wireless service even though it sits within the service area of a licensee on the other side of the lake. The licensee has focused its buildout on more populated and prosperous areas and asserts that it would be too costly to extend service to the Red Cliff community. But the Red Cliff tribe says that it has the resources and expertise to build out service on its own – it just needs access to the spectrum. I'm looking forward to hearing from stakeholders about whether the incentives we propose in this item could help address situations like this so we can expand or improve service to communities like the Red Cliff tribe.

Unfortunately, these same incentives could also attract bad actors seeking to exploit the program through sham leases and other abuses. Throughout my career at the Commission and the Justice Department, I've focused on preventing the waste, fraud, and abuse of federal programs. That's why I'm pleased that the item seeks comment how we could prevent and punish such misconduct.

But a program's success isn't measured solely by how well it avoids abuse. Far too often, federal agencies adopt policies without making any subsequent effort to review whether those policies are achieving their objectives. I therefore appreciate that my colleagues have agreed with my suggestion to seek comment on whether we should do a public report on the ECIP's effectiveness five years after the program begins. If ultimately adopted, the ECIP will be a new approach towards encouraging the expansion of high-quality wireless service to all communities. This follow-up report will allow the Commission and the public to assess the program's progress towards that goal.

Thank you to the staff of the Wireless Telecommunications Bureau for their hard work on this item.