

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

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

FIFTH REPORT AND ORDER

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By the Commission:

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## I. INTRODUCTION

1. By this *220 MHz Fifth Report and Order (Fifth Report and Order)*, we amend Part 90 of our Rules to adopt geographic partitioning and spectrum disaggregation rules for the 220-222 MHz service.<sup>1</sup> Our goal in amending these rules is to allow the 220 MHz service the competitive benefits we believe can be achieved by allowing licensees to partition and disaggregate - more efficient use of spectrum, increased opportunities for a variety of entities, including small, minority-owned and women-owned businesses, to participate in the provision of 220 MHz service, and expedited delivery to unserved areas. Moreover, in an effort to create regulatory symmetry among wireless services, we have followed the general framework for partitioning and disaggregation that we previously adopted for other wireless services.

## II. EXECUTIVE SUMMARY

2. In this *Fifth Report and Order*, we adopt the following partitioning and disaggregation rules for the 220 MHz service:

- 220 MHz licensees, with the exception of Public Safety and Emergency Medical Radio Service (EMRS) licensees, are permitted to partition.<sup>2</sup>
- Partitioning of 220 MHz licenses is permitted based on any geographic area defined by the parties, provided they submit information to the Commission regarding relevant boundaries or coordinates.
- All 220 MHz licensees are permitted to disaggregate, with the exception of Public Safety or EMRS licensees. Disaggregation of 220 MHz spectrum is allowed for any amount of spectrum, with no requirement that the disaggregator retain a certain amount of spectrum as long as the disaggregation is otherwise consistent with our Rules.
- Combined partitioning and disaggregation is permitted.
- Non-nationwide Phase I licensees eligible to partition and disaggregate may do so only after fully constructing their base stations and placing them in operation, or commencing service.

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<sup>1</sup> Partitioning is the assignment of geographic portions of the 220 MHz license along geopolitical or other geographic boundaries. Disaggregation is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

<sup>2</sup> This is in addition to our decision in the *220 MHz Third Report and Order* to allow partitioning of licenses granted on an Economic Area (EA), Regional or nationwide basis. See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 10,943, 11,074, ¶ 308 (1997) (*Third Report and Order*).

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- Nationwide Phase I licensees are permitted to partition and disaggregate only after constructing 40 percent of their proposed systems.
  - Phase II licensees eligible to partition and disaggregate may do so at any time after they receive their license.
  - Phase II licensees eligible to partition and disaggregate may negotiate with their partial assignees to determine how the construction requirements will be met. Under one option, the assignee can certify that it will satisfy the construction requirements for its area or spectrum, while the original licensee is responsible for the area or spectrum it retains. Under a second option, one party can certify that it will meet the construction requirements for all the license area or spectrum.
  - 220 MHz partitionees and disaggregatees will hold their licenses for the remainder of the original licensees' term and may earn a renewal expectancy similar to other 220 MHz licensees.
  - 220 MHz licensees that obtained a small business, or very small business, bidding credit at auction must adhere to the unjust enrichment rules if they partition or disaggregate to a non-small business entity. Unjust enrichment will be calculated on a *pro rata* basis using population to determine the relative value of the partitioned area or the amount of spectrum disaggregated to determine the relative value of the disaggregated spectrum.
  - The Commission's current Part 90 assignment procedures will apply to 220 MHz partitioning and disaggregation.

### III. BACKGROUND

3. On March 12, 1997, we adopted the *220 MHz Third Report and Order (Third Report and Order)* wherein we established service rules to govern future operation and licensing of the 220-222 MHz band (220 MHz service).<sup>3</sup> We stated that our goal in the *Third Report and Order* was to establish a flexible regulatory framework that would allow for the efficient licensing of the 220 MHz service, eliminate unnecessary regulatory burdens on both Phase I and Phase II licensees,<sup>4</sup> and enhance the competitive potential of the 220 MHz service in the mobile services marketplace.<sup>5</sup> As part of that goal,

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<sup>3</sup> *Third Report and Order*, 12 FCC Rcd. 10,943.

<sup>4</sup> See 47 C.F.R. § 90.701(b)(1) (licensees granted initial authorizations for operations in the 220-222 MHz band from among applications filed on or before May 24, 1991, are referred to as "Phase I" licensees) and 47 C.F.R. § 90.701(c)(1) (licensees granted initial authorizations for operations in the 220-222 MHz band from among applications filed after May 24, 1991, are referred to as "Phase II" licensees). Phase II licenses will be granted from applications received pursuant to the framework established in the *Third Report and Order*.

<sup>5</sup> *Third Report and Order*, 12 FCC Rcd. at 10,948-49, ¶ 3.

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we authorized any holder of an Economic Area (EA), Regional, or nationwide Phase II license<sup>6</sup> to partition portions of its authorization.<sup>7</sup>

4. We presently permit geographic partitioning and spectrum disaggregation in several services, e.g., broadband PCS,<sup>8</sup> Multipoint Distribution Service (MDS),<sup>9</sup> 800 MHz and 900 MHz Specialized Mobile Radio (SMR),<sup>10</sup> 39 GHz fixed point-to-point microwave,<sup>11</sup> the Wireless Communications Service (WCS),<sup>12</sup> Local Multipoint Distribution Service (LMDS)<sup>13</sup> and Maritime Services.<sup>14</sup> We are also seeking

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<sup>6</sup> The *Third Report and Order* defines two types of Phase II licenses: (1) "covered Phase II licenses" which were granted on an EA, Regional or nationwide basis, and (2) "non-covered Phase II licenses" which were granted on a site-specific basis and were to be used for Public Safety or EMRS under 47 C.F.R. § 90.720. See *Third Report and Order*, 12 FCC Rcd. at 11,078, n.553.

<sup>7</sup> *Id.* at 11,074, ¶ 308.

<sup>8</sup> Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, WT Docket No. 96-148, Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers, GN Docket No. 96-113, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21,831 (1996) (*Broadband PCS R&O*).

<sup>9</sup> Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd. 9589, 9614-15, ¶¶ 46-47 (1995) (allowing partitioning of MDS licenses).

<sup>10</sup> Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Sections 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 12 FCC Rcd. 19,079, 19,127-53, ¶¶ 138-227 (1997) (*800 MHz SMR Second Report and Order*) (adopting flexible partitioning and disaggregation rules for all 800 MHz and 900 MHz SMR licensees).

<sup>11</sup> Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Bands, ET Docket No. 95-183, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0 - 38.6 GHz and 38.6 - 40.0 GHz, PP Docket No. 93-253, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd. 18,600, 18,634-36, ¶ 70-74 (1997) (adopting partitioning and disaggregation rules for licenses in the 39 GHz band).

<sup>12</sup> Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd. 10,785, 10,834-39, ¶¶ 92-103 (1997) (*WCS Report and Order*) (adopting partitioning and disaggregation rules for WCS licensees).

<sup>13</sup> Rule Making to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Fourth Report and Order*, CC Docket No. 92-297, 13 FCC Rcd. 11, 655 (1998) (*LMDS Fourth Report and Order*) (adopting partitioning and disaggregation rules for LMDS licensees).

<sup>14</sup> Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92-257,

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comment on geographic partitioning and spectrum disaggregation proposals for other services, including paging,<sup>15</sup> cellular service,<sup>16</sup> General Wireless Communications Service (GWCS),<sup>17</sup> and narrowband PCS.<sup>18</sup> When we expanded our rules to permit partitioning and disaggregation for broadband PCS licensees, we stated that they will provide licensees with flexibility to determine the amount of spectrum they will occupy and the geographic area they will serve.<sup>19</sup> We concluded that this flexibility will facilitate the efficient use of spectrum by allowing licensees to offer services directly responsive to consumer demands, increase competition through new wireless service provider entry and expedite service to areas that otherwise would not receive it in the near future.<sup>20</sup>

5. Released along with the *Third Report and Order*, the *Fifth Notice of Proposed Rulemaking (Fifth NPRM)* initiated our consideration of whether to permit partitioning and disaggregation for all licensees in the 220 MHz service, and if so, what specific procedural, administrative and operational rules we should adopt.<sup>21</sup> Specifically, we sought comment as to whether partitioning should be permitted in a manner similar to what we adopted for broadband PCS licenses in the *Broadband PCS R&O*.<sup>22</sup> In the *Fifth NPRM*, we tentatively concluded that non-nationwide Phase I licensees and non-covered Phase II licensees should not be allowed to partition because their licenses were awarded on a site-specific basis rather than for a geographic area.<sup>23</sup> On the other hand, we proposed permitting partitioning for nationwide Phase I licensees and covered Phase II licensees, in which the licensee and partitionee would

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*Third Report and Order and Memorandum Opinion and Order*, FCC 98-151, ¶ 37-43 (Jul. 6, 1998).

<sup>15</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 2732, 2815-18, 2821-26, ¶ 188-194, 203-218 (1997) (adopting partitioning certain paging licensees and proposing partitioning and disaggregation for all paging licensees).

<sup>16</sup> *Broadband PCS R&O*, 11 FCC Rcd. at 21,876, ¶ 95 (seeking comment on whether to permit cellular disaggregation).

<sup>17</sup> *Id.* at 21,876, ¶ 96. *See also* Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Second Report and Order*, 11 FCC Rcd. 624, 665, ¶ 105 (1995) (permitting GWCS licenses to partition to rural telcos).

<sup>18</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12,972, 13,014-18, ¶¶ 87-99 (1997) (proposing partitioning and disaggregation for narrowband PCS licensees).

<sup>19</sup> *See Broadband PCS R&O* at 21,833, ¶ 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Third Report and Order*, 12 FCC Rcd. at 11,078-88, ¶¶ 320-344.

<sup>22</sup> *Id.* at 11,080, ¶ 322.

<sup>23</sup> *Id.*

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define the area to be partitioned.<sup>24</sup> We also sought comment as to whether all Phase I and Phase II licensees should be permitted to disaggregate their licensed spectrum, and if they were, whether there should be minimum or maximum disaggregation standards.<sup>25</sup> We additionally requested comment on whether combined partitioning and disaggregation should be permitted for the 220 MHz service.<sup>26</sup> Furthermore, we recognized the effect partitioning and disaggregation would have on the unique construction rules for the 220 MHz service, and sought comment on how the construction rules would be applied to partitionees and disaggregatees.<sup>27</sup> Finally, we sought comment on the licensing terms and renewal expectancy for partitionees and disaggregatees, changes to the competitive bidding structure for Phase II licensees that wished to partition or disaggregate, and other licensing issues.<sup>28</sup> In response to the *Fifth NPRM*, six comments and two reply comments were received.<sup>29</sup>

#### IV. DISCUSSION

##### A. Licensees Eligible to Partition

6. Background. In the *Third Report and Order*, we permitted covered Phase II 220 MHz licensees to partition portions of their authorization in order to facilitate the provision of services to small markets and rural areas.<sup>30</sup> In our *Fifth NPRM*, we tentatively concluded that we should not adopt partitioning for non-covered Phase II licensees and non-nationwide Phase I licensees because such licenses are awarded on a site-specific basis rather than for a geographic area.<sup>31</sup> We did, however, seek comment as to whether nationwide Phase I licenses should be permitted to partition, or whether there are technical or regulatory constraints unique to the 220 MHz service that would render partitioning nationwide Phase I licenses impractical or administratively burdensome.<sup>32</sup>

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<sup>24</sup> *Id.* at 11,081, ¶ 325.

<sup>25</sup> *Id.* at 11,081, ¶ 326.

<sup>26</sup> *Id.* at 11,081-82, ¶ 327.

<sup>27</sup> *Id.* at 11,082-86, ¶¶ 328-340.

<sup>28</sup> *Id.* at 11,086-88, ¶¶ 341-45.

<sup>29</sup> See Appendix A for a list of the commenters and reply commenters.

<sup>30</sup> See *Third Report and Order*, 12 FCC Rcd. at 11,074, ¶ 308.

<sup>31</sup> *Id.* at 11,080, ¶ 322. Site-specific licensees refer to Phase I non-nationwide and Phase II non-covered licensees because they were granted a license to operate from a specific site, rather than for a particular geographic area. Although we did not expound on it in the *Fifth NPRM*, the transmission area for a site-specific license is generally much smaller and more ambiguous than a predetermined geographic area, such as an EA or Region. Therefore, partitioning a geographic license is generally easier than a site-specific license to track because it is larger and it has an FCC designated service area. See SMR Group Comments at 4.

<sup>32</sup> *Id.* at 11,080, ¶ 323.

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7. Discussion. We find no compelling reason to withhold from site-specific licensees the flexibility gained by having the option to partition their license, and therefore, reverse our tentative conclusion in the *Fifth NPRM* limiting partitioning to geographic-based licensees.<sup>33</sup> In the sole comment against allowing non-nationwide Phase I licensees to partition, AMTA only states that the concept of partitioning is not applicable to site-specific licenses.<sup>34</sup> We are unpersuaded by this brief conclusion. Although it may be easier to partition a license that is based on a geographic area, we recognize that a number of non-nationwide Phase I licensees have acquired several site-specific licenses that create a contiguous, compatible, interconnected system.<sup>35</sup> Moreover, we agree with SMR Group that consolidation of site-specific licenses is more likely to occur since we eliminated the forty-mile restriction.<sup>36</sup> As to the concerns about the feasibility of partitioning a site-specific license, we agree with SMR Group that the marketplace will best determine if partitioning is economically or technologically feasible.<sup>37</sup> In addition, as we have concluded in other wireless services, we believe that limiting the number of licensees that are eligible to partition only serves to unreasonably reduce the number of potential entrants into the marketplace without any corresponding public interest benefit.<sup>38</sup> Therefore, we will, in general, allow non-nationwide Phase I licensees to partition.

8. All of the commenters agreed that nationwide Phase I licensees should be allowed to partition.<sup>39</sup> No commenter expressed, nor do we find, any concern over technical or regulatory constraints unique to the 220 MHz service that would render partitioning nationwide Phase I licenses impractical or administratively burdensome. Thus, because we see no reason to deny non-nationwide Phase I licensees the flexibility partitioning allows, we believe nationwide Phase I licensees should be able to partition as well.<sup>40</sup> We believe that the benefits of partitioning -- specifically, bringing service to

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<sup>33</sup> SMR Group Comments at 5-6; Intek Comments at 2.

<sup>34</sup> AMTA Comments at 5.

<sup>35</sup> SMR Group Comments at 4.

<sup>36</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Fourth Report and Order*, 12 FCC 13,459, ¶ 14 (*Fourth Report and Order*) (removing prohibition against a Phase I licensee from operating more than one 220 MHz station within a 40 mile geographic area).

<sup>37</sup> SMR Group Comments at 4.

<sup>38</sup> See *Broadband PCS R&O* at 21,843, ¶ 14.

<sup>39</sup> AMTA Comments at 4; ComTech Comments at 6; Global Comments at 3; Intek Comments at 2-3; Rush Comments at 2; and SMR Group Comments at 3. However, several of the commenters disagree on when nationwide licensees should be allowed to partition. See our discussion, *supra*, IV.E.

<sup>40</sup> Allowing both Phase I nationwide and non-nationwide licensees to partition is consistent with our goal of regulatory symmetry to treat similar applicants similarly, as reflected in the revisions to Section 332 of the Communications Act. See Communications Act of 1934, as amended, 47 U.S.C. § 332 (Communications Act). See also *Melody Music, Inc. v. FCC*, 345 F.2d 730 (1965); *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (1985); and *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1164 (1990).

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areas that might otherwise be considered low priorities and allowing other businesses to serve niche, underserved or unserved markets in which they may be suited to serve -- outweigh our desire for a nationwide license that is used for a single service.<sup>41</sup> Therefore, we conclude that nationwide Phase I licensees will be allowed to geographically partition their licenses.

9. The one exception to extending partitioning to all 220 MHz licensees is in the context of Public Safety and EMRS licensees.<sup>42</sup> We did not receive any comments regarding our tentative conclusion in the *Fifth NPRM* to not adopt partitioning for non-covered Phase II licensees because such licenses are awarded on a site-specific basis.<sup>43</sup> However, we maintain our tentative conclusion not to adopt partitioning for Public Safety and EMRS licensees not on the fact that their licenses are site-specific, but because we believe that partitioning is unnecessary in the Public Safety and EMRS context. In place of partitioning, these licensees have the options of sharing frequencies and short-spacing their base stations.<sup>44</sup> In addition, because applications for Public Safety and EMRS 220 MHz licenses are not subject to competitive bidding,<sup>45</sup> we believe it would be inappropriate to allow them to partition their licensed geographic area for monetary compensation. Therefore, we conclude that no Public Safety or EMRS entity licensed under Phase I or Phase II of the 220 MHz service is eligible for partitioning their licensed geographic area.

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<sup>41</sup> When setting aside frequencies for a nationwide license, we foresaw a need for nationwide land mobile services. See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, PR Docket No. 89-552, *Report and Order*, 6 FCC Rcd. 2356, 2361, ¶ 34 (1991). Although partitioning does not necessarily preclude ubiquitous availability of a given service, we recognize that geographic partitioning may result in different services being offered in different areas (*i.e.*, paging being used in one region and two-way radio in another).

<sup>42</sup> The *Fifth NPRM* specifically addressed Public Safety and EMRS entities licensed under Phase II. See *Third Report and Order*, 12 FCC Rcd. at 11,080, ¶ 322. However, for regulatory symmetry among Phase I and II, we extend our findings for all 220 MHz licensees that are Public Safety and EMRS entities and are authorized to operate on Channels 161 through 170 or Channels 181 through 185. See 47 C.F.R. § 90.719(c)-(d).

<sup>43</sup> See *Third Report and Order*, 11 FCC Rcd. at 11,080, ¶ 322.

<sup>44</sup> Section 90.179 of the Commission's Rules allows non-commercial licensees to share spectrum in exchange for an agreed share of its costs. See 47 C.F.R. §90.179. Short-spacing refers to the situation in which a licensee operates closer to another licensee upon its consent than is generally allowed in the Commission's Rules. In general, all non-nationwide Phase I licensees and the Public Safety and EMRS licensees granted exclusive authority to operate on Channels 166-170 are required to have their base stations 120 kilometers apart. See 47 C.F.R. §§ 90.723(i) and 90.711(a). However, shorter separations will be considered on a case-by-case basis upon the submission of a technical analysis indicating adequate interference protection. See 47 C.F.R. § 90.723(i). Public Safety licensees authorized on the shared, non-exclusive Channels 161-165 must resolve any instances of interference in accordance with the provisions of 47 C.F.R. § 90.173. See 47 C.F.R. 90.711(b).

<sup>45</sup> See Communications Act, § 309(j)(2), 47 U.S.C. § 309(j)(2) (1997). In the *220 MHz Third Report and Order*, we deferred consideration of whether Public Safety 220 MHz licensees could resell excess capacity on their systems. *Id.* at 10,974, ¶ 62 and n. 115.

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10. In addition, we will not limit the maximum size of geographic area that a 220 MHz licensee may partition. This is consistent with our partitioning policies in other wireless services.<sup>46</sup> Moreover, as with other wireless services, all proposed partitioning agreements, like disaggregation agreements, will be subject to Commission review and approval under the public interest standard of section 310 of the Communications Act.<sup>47</sup>

## B. Available License Area

11. Background. In the *Fifth NPRM*, we proposed to allow the parties to the partitioning agreement to define the partitioned area because we had concluded in broadband PCS that this flexible approach would permit the marketplace forces to determine the most suitable service areas.<sup>48</sup> We sought comment as to whether this proposal is consistent with our licensing of the 220 MHz service, and whether there are any technical or other issues unique to the 220 MHz service that might impede the adoption of a flexible approach to defining partitioned license areas.<sup>49</sup>

12. Discussion. We agree with the commenters that 220 MHz licensees should have broad flexibility in defining license areas to allow the marketplace to create the most efficient and suitable service areas.<sup>50</sup> Therefore, we will permit partitioning based on any area defined by the parties to the partitioning agreement. Our assessment in the *Broadband PCS R&O* is also valid in the 220 MHz service -- areas defined by county lines or other geopolitical boundaries may not reflect market realities and may instead inhibit partitioning.<sup>51</sup> We agree with AMTA's contention that the parties to the partitioning agreement are in the best position to know what service area will work best for their business needs,<sup>52</sup> which, in turn, will allow the marketplace to shape optimal service areas.<sup>53</sup> We believe that any other approach would inevitably lead to inefficient use of the spectrum by forcing a partitionee to take on more area than they are willing or capable of serving. This flexible approach may complicate the maintenance of our licensee database, but we believe that the benefits to the public outweigh any additional administrative burden.<sup>54</sup> Otherwise, as we concluded in broadband PCS, numerous parties would be

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<sup>46</sup> See *Broadband PCS R&O*, 11 FCC at 21,848, ¶ 27.

<sup>47</sup> See § 310 of the Communications Act. See also *Broadband PCS R&O*, 11 FCC Rcd. at 21,859, ¶ 46.

<sup>48</sup> See *Third Report and Order*, 12 FCC at 11,081, ¶ 324-25 (citing *Broadband PCS R&O*, 11 FCC at 21,847-48, ¶¶ 23-24).

<sup>49</sup> *Id.*

<sup>50</sup> AMTA Comments at 5; ComTech Comments at 3; Global Comments at 5; Rush Comments at 2; and SMR Group Comments at 6-7.

<sup>51</sup> See ComTech Comments at 3 (citing *Broadband PCS R&O*, 11 FCC at 21,847, ¶ 23).

<sup>52</sup> AMTA Comments at 5.

<sup>53</sup> Global Comments at 5.

<sup>54</sup> Rush Comments at 2.

required to seek a waiver of the geopolitical line, which would unnecessarily burden the Commission and the parties without any corresponding public benefit.<sup>55</sup> Moreover, as ComTech adds, any propagation characteristics of 220 MHz systems that are different from the propagation characteristics of PCS systems will be taken into account in the negotiations between the licensee and the partitionee.<sup>56</sup>

13. Consistent with other wireless services, we will require partitioning applicants to submit, as separate attachments to the partial assignment application, a description of the partitioned service area and a calculation of the population of the partitioned service area and licensed market.<sup>57</sup> The partitioned service area must be defined by coordinate points at every three degrees along the partitioned service area agreed to by both parties, unless either (1) an FCC-recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service or Economic Area) or (2) county lines are followed.<sup>58</sup> These geographical coordinates must be specified in degrees, minutes and seconds to the nearest second latitude and longitude, and must be based upon the 1983 North American Datum (NAD83).<sup>59</sup> This coordinate data should be supplied as an attachment to the partial assignment application, but maps need not be supplied.<sup>60</sup>

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<sup>55</sup> *Broadband PCS R&O*, 11 FCC Rcd at 21,847, ¶ 23.

<sup>56</sup> ComTech Comments at 3.

<sup>57</sup> *Broadband PCS R&O*, 11 FCC Rcd. at 21,847-48, ¶ 24.

<sup>58</sup> In cases where an FCC recognized service area or county lines are being utilized, applicants need only list the specific area(s) (through use of FCC designations) or counties that make up the newly partitioned area. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

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**C. Disaggregation**

14. Background. In the *Fifth NPRM*, we sought comment as to whether all Phase I and Phase II 220 MHz licensees should be permitted to disaggregate their licensed spectrum.<sup>61</sup> We also sought comment as to whether, if we permit disaggregation in the 220 MHz service, technological or administrative concerns necessitate minimum disaggregation standards, given the unique characteristics of the 220 MHz service.<sup>62</sup> We requested proposals for such standards that would allow us to better track disaggregated spectrum and review disaggregation proposals in an expeditious fashion.<sup>63</sup>

15. Discussion. In general, we agree with the several comments which support allowing 220 MHz licensees to disaggregate their licensed spectrum.<sup>64</sup> Disaggregation will allow licensees to divest themselves of spectrum that may be more efficiently and profitably used by another entity or to acquire additional amounts of spectrum to satisfy their consumer demands.<sup>65</sup> Although we do not agree with Rush that disaggregation is *necessary* because of our decision not to require Phase II licensees to construct all their channels,<sup>66</sup> we nonetheless believe that the benefits of disaggregation outweigh any administrative burdens caused from tracking the spectrum. The one limitation we add is to prohibit Public Safety and EMRS licensees from disaggregating. As in the context of partitioning,<sup>67</sup> spectrum held by Public Safety and EMRS entities is more easily shared than disaggregated, and we do not find it appropriate for these licensees to disaggregate spectrum for monetary compensation.<sup>68</sup> Therefore, we will allow all 220 MHz licensees that are not Public Safety or EMRS entities to disaggregate their spectrum.

16. We also conclude that there should be no minimum limit imposed on spectrum disaggregation in the 220 MHz service. We are persuaded by SMR Group that our goal of increased flexibility for licensees will best be served by allowing the market to determine what amount of spectrum is technically and economically feasible to disaggregate.<sup>69</sup> We also agree with Rush that adopting a minimum standard would continue unnecessary and inefficient aggregation of spectrum, which would frustrate our goal of achieving maximum use of the spectrum.<sup>70</sup> If a party wishes to purchase a small

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<sup>61</sup> See *Third Report and Order*, 12 FCC Rcd. at 11,080, ¶ 323.

<sup>62</sup> *Id.* at 11,081, ¶ 326.

<sup>63</sup> *Id.*

<sup>64</sup> AMTA Comments at 5; Global Comments at 3; Intek Comments at 2; Rush Comments at 2-3; and SMR Group Comments at 3.

<sup>65</sup> AMTA Comments at 5.

<sup>66</sup> Rush Comments at 3 (citing to *Third Report and Order*, 12 FCC Rcd. at 11,017, ¶ 158).

<sup>67</sup> See *supra*, para. 9.

<sup>68</sup> See *supra*, note 36.

<sup>69</sup> SMR Group Comments at 8.

<sup>70</sup> Rush Comments at 2.

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amount of spectrum for its technological and customer needs, we should not force the disaggregatee to take more than they need or are willing to use. We recognize the potential administrative burdens imposed on the Commission in tracking spectrum smaller than a 5 kHz channel pair.<sup>71</sup> However, although current technology may dictate the amount of spectrum required for certain service offerings, our rules should be designed to accommodate future technology.<sup>72</sup> Moreover, we understand that small amounts of the spectrum may not be viable by themselves, but when combined with amounts obtained by other licensees, they may become practical.<sup>73</sup> Again, we believe that the marketplace will determine if it is economically and technologically feasible to disaggregate an amount of spectrum smaller than a single 5 kHz channel pair. Because we believe the market and available technology, rather than regulation, will best determine how much spectrum should be disaggregated, we decline to adopt a minimum disaggregation standard.

17. No comments were filed regarding possible maximum limits on disaggregated spectrum. However, consistent with other wireless services,<sup>74</sup> we decline to limit the amount of spectrum that a 220 MHz licensee can disaggregate. We have found nothing in the present record, or any prior proceedings, that indicates that a maximum limitation for disaggregation is necessary, so long as the disaggregation is otherwise consistent with our rules.<sup>75</sup> Moreover, our conclusion regarding a minimum standard, that market forces and available technology, rather than regulation, should determine how much spectrum is disaggregated, holds true for maximum disaggregation as well.

#### **D. Combined Partitioning and Disaggregation**

18. Background. In the *Fifth NPRM*, we sought comment regarding whether combined partitioning and disaggregation should be permitted for the 220 MHz service.<sup>76</sup> We tentatively concluded that we should permit such combinations in order to provide parties the flexibility they need to respond to market forces and demands for service relevant to their particular locations and service offerings.<sup>77</sup>

19. Discussion. We affirm our tentative conclusion and agree with the commenters that allowing licensees to both partition their area and disaggregate their spectrum in any combination will give them greater flexibility.<sup>78</sup> As AMTA explains, this flexibility will help licensees respond to market forces and

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<sup>71</sup> ComTech Comments at 3-4; Global Comments at 11.

<sup>72</sup> AMTA Comments at 6.

<sup>73</sup> SMR Group Comments at 8.

<sup>74</sup> *See Broadband PCS R&O*, 11 FCC at 21,860, ¶ 50.

<sup>75</sup> For example, the disaggregatee must comply with the CMRS spectrum cap. *See* 47 C.F.R. § 20.6 (no CMRS licensee can have an attributable interest in a total of more than 45 MHz of licensed CMRS spectrum with significant overlap in any geographic area).

<sup>76</sup> *See Third Report and Order*, 12 FCC Rcd. at 11,081-82, ¶ 327.

<sup>77</sup> *Id.*

<sup>78</sup> ComTech Comments at 5; SMR Group Comments at 9; Rush Comments at 3.

demands in service relevant to their particular locations and service offerings, as well as allow licensees to enter or increase their presence in a market.<sup>79</sup> Combined partitioning and disaggregation supports our goal of spectrum efficiency by reducing the amount of spectrum that goes unused.<sup>80</sup> Therefore, we permit 220 MHz licensees to combine partitioning and disaggregation to the extent they can do so individually. As in other wireless services, we further conclude that in the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules will prevail.<sup>81</sup>

#### E. When Licensees May Partition and Disaggregate

20. Background. In the *Fifth NPRM*, we proposed that both non-nationwide Phase I licensees and non-covered Phase II licensees should be permitted to disaggregate<sup>82</sup> their licensed spectrum only after they have met the applicable construction deadline.<sup>83</sup> We noted that since the construction deadline would be met before any disaggregation is allowed, no construction requirement would be imposed on the disaggregatee.<sup>84</sup> For nationwide Phase I licensees, we sought comment as to whether a Phase I nationwide licensee should be permitted to partition and disaggregate prior to constructing at least 40 percent of its proposed system.<sup>85</sup>

21. Discussion. For clarification, we separately address each type of 220 MHz license which is eligible for partitioning and disaggregation.<sup>86</sup>

A. Non-Nationwide Phase I Licensees. We conclude that a non-nationwide Phase I licensee that is eligible to partition or disaggregate may do so only after it has fully constructed its base

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<sup>79</sup> AMTA Comments at 6.

<sup>80</sup> See *Third Report and Order*, 11 FCC Rcd at 10, 948-49, ¶ 3. See also Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, and Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 220-222 MHz, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd. 188, 193, ¶ 2 (1995).

<sup>81</sup> See *Broadband PCS R&O*, 11 FCC at 21,866, ¶ 66.

<sup>82</sup> We note that because we had tentatively concluded in the *Fifth NPRM* not to allow Phase I non-nationwide or non-covered Phase II licensees to partition, we did not seek comment on when these licensees should be permitted to partition.

<sup>83</sup> See *Third Report and Order*, 12 FCC Rcd. at 11,085, ¶ 337.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 11,080, ¶ 323.

<sup>86</sup> As we have determined earlier, see *supra* para. 9 and 15, non-covered Phase II licensees are not permitted to partition and/or disaggregate their licensed spectrum.

station and placed it into operation.<sup>87</sup> Because non-nationwide Phase I licensees were initially required to fully construct their base stations and place them into operation within eight months of the initial authorization, we recognize that the construction deadline for most of these licensees has already passed.<sup>88</sup> However, for those non-nationwide Phase I licensees that have not yet been required to construct,<sup>89</sup> we require construction and operation as a precondition to partitioning and disaggregating. We believe that this prerequisite is consistent with the rule adopted in the *220 MHz Report and Order* prohibiting transfer or assignment of non-nationwide licensees prior to full construction and operation.<sup>90</sup> This rule will reduce potential speculation by persons with no real interest in constructing systems,<sup>91</sup> and we believe it will also deter those who would use partitioning or disaggregation to speculate. We find that non-nationwide Phase I licensees should have no expectation to transfer or assign any part of their license prior to fully constructing and placing their base station in operation. Moreover, since construction will be complete before any partitioning or disaggregation is allowed, no construction requirement will be imposed on a partitionee or disaggregatee.

B. Nationwide Phase I Licensees. Consistent with the restriction on the transfer or assignment of nationwide Phase I licenses in section 90.709(a)(3),<sup>92</sup> we will require a nationwide Phase I licensee to meet the four-year construction benchmark before it may partition or disaggregate. Section 90.709(a)(3) was created to reduce any potential speculation or trafficking in licenses by persons who

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<sup>87</sup> As stated earlier, *see supra*, para. 9 and 15, non-nationwide Phase I licensees that are Public Safety and EMRS entities are not eligible to partition or disaggregate.

<sup>88</sup> AMTA Comments at 11; ComTech Comments at 5. *See also* 47 C.F.R. § 90.725(f) which originally required non-nationwide Phase I licensees to construct within eight months of the initial license grant date. This construction deadline was extended several times until non-nationwide Phase I licensees must have constructed by March 11, 1996, or if they elected to relocate under the minor modification procedure, by August 15, 1996. *See* 47 C.F.R. § 90.757(a).

<sup>89</sup> Phase I non-nationwide licensees with base stations authorized at a location north of Line A (near the Canadian border) are required to construct their base stations, and place them in operation, within twelve months of the initial grant date, or within twelve months of the date of the release between of the terms of an agreement between the United States and Canadian governments on the sharing of 220-222 MHz spectrum between the two countries, whichever is later. *See* 47 C.F.R. § 90.757(b). As of the release date of this *Fifth Report and Order*, no agreement has been reached, so the construction period for those Phase I non-nationwide licensees above Line A has not begun to toll. Moreover, some potential licensees have not yet been required to construct because grant of their license is in question.

<sup>90</sup> *See Report and Order* at 2367, ¶ 83. *See also* 47 C.F.R. § 90.709(a)(2) (the Commission will not consent to any application to assign or transfer a Phase I non-nationwide system prior to the completion of construction of facilities). As stated in the *Fifth NPRM*, we also required full construction and operation before non-nationwide Phase I licensees are permitted to begin primary fixed or paging operations. *Third Report and Order*, 12 FCC Rcd. at 11,085, ¶ 337.

<sup>91</sup> *Id.*

<sup>92</sup> 47 C.F.R. § 90.709(a)(3).

have no real interest in constructing systems.<sup>93</sup> We are persuaded by AMTA that keeping the current rule prohibiting any type of transfer prior to the four-year construction benchmark (*i.e.*, forty percent build-out of the nationwide system), will clearly demonstrate the licensees' commitment to promptly implementing "geographically extensive 220 MHz networks."<sup>94</sup> Moreover, because we are not adopting any limits to the size or amount of partitioned area or disaggregated spectrum, we wish to prevent a licensee from using partitioning or disaggregation to circumvent the transfer and assignment limitations.<sup>95</sup>

22. We disagree that the benefits of partitioning and disaggregation outweigh the concern with build-out of a nationwide system.<sup>96</sup> Nationwide Phase I licenses were the only nationwide wireless licenses to be distributed by lottery, a process which required minimal upfront costs.<sup>97</sup> Our intent when we allocated the 220-222 MHz band to develop narrowband technology was to strictly apply the construction benchmarks and enforce strict assignment and transfer rules to deter speculators and insure prompt development and introduction of the narrowband technology by licensees with genuine communications interests.<sup>98</sup> We see no reason to abandon this goal. We find that a nationwide Phase I licensee can still enjoy the flexibility that partitioning and disaggregation offers after it has met its four-year benchmark when it would also be permitted to fully assign or transfer its license. We are unpersuaded by ComTech and Global's suggestion that combining the construction of the licensee and any assignees to meet the benchmark, would be the same as requiring the licensee to meet the four-year benchmark.<sup>99</sup> The four-year benchmark was a significant hurdle for nationwide licensees in the 220 MHz service.<sup>100</sup> While we recognize that permitting partitioning before the four-year benchmark may speed service to the public in some cases, as ComTech claims,<sup>101</sup> we find it more significant that the four-year benchmark will deter licensees who would use partitioning and disaggregation to circumvent our original intent for 220 MHz nationwide licensees.

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<sup>93</sup> See *Report and Order* at 2367 (¶ 83).

<sup>94</sup> AMTA Comments at 4.

<sup>95</sup> See 47 C.F.R. § 90.709 (limitations on assignment or transfer of authorizations).

<sup>96</sup> ComTech Comments at 7.

<sup>97</sup> See *Report and Order*, 6 FCC Rcd. at 2364, ¶ 54.

<sup>98</sup> *Id.* at 2367, ¶ 83.

<sup>99</sup> ComTech Reply Comments at 5. Global Comments at 7-8.

<sup>100</sup> For example, we would not allow a nationwide licensee to transfer or assign its licensee before meeting the benchmark. See 47 C.F.R. § 90.709(a)(3). Also, applicants for a nationwide licensee had to demonstrate it had sufficient financial resources to construct 40 percent of its system and operate the proposed system for the first four years of the license term. See 47 C.F.R. § 90.713(a)(5). Moreover, once a nationwide licensee met the four-year benchmark, it could only lose authorization for unconstructed base stations if it failed to meet the six or ten-year benchmarks. See 47 C.F.R. § 90.725(c).

<sup>101</sup> ComTech Reply Comments at 5.

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C. Covered Phase II Licensees. We conclude that a covered Phase II licensee that wishes to partition or disaggregate may do so once it receives its license. None of the commenters propose, nor do we see any reason to require, any construction prerequisites before a covered Phase II licensee may partition or disaggregate. As ComTech points out, we are requiring Phase I licensees to meet a construction prerequisite, while Phase II licensees will be able to partition or disaggregate once it has obtained its license.<sup>102</sup> However, we believe the different application and licensing processes between Phase I and Phase II warrant such disparity. We disagree with ComTech's statement that a licensee's incentives are not relevant and are not justification for different treatment.<sup>103</sup> Phase I licenses were distributed on a random selection basis, where the only up-front cost to the applicant was the application fee.<sup>104</sup> In contrast, covered Phase II applicants will have to bid for the licenses,<sup>105</sup> and will have the financial incentive to develop their 220 MHz systems in order to recover the costs of the auction.<sup>106</sup> We believe that the financial incentive Phase II licensees have to build-out their system mitigates the concern we have for Phase I licenses that partitioning and disaggregation might be used as a means to delay construction. Therefore, we see no reason to delay the benefits of partitioning and disaggregation to Phase II licensees.

#### F. Post-Assignment Construction Requirements

23. Background. In the *Fifth NPRM*, we recognized the difficulties that partitioning and disaggregation create on previously established construction requirements.<sup>107</sup> We sought comment on what the construction requirements should look like post-assignment for the various types of 220 MHz licensees (Phase I or Phase II, nationwide or non-nationwide, covered or non-covered) and their assignees.<sup>108</sup> In the *Broadband PCS R&O*, we allowed licensees two options for satisfying the construction requirements.<sup>109</sup> A licensee and assignee could agree that they individually will be responsible for meeting the construction requirements in their respective portions of the partitioned or

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<sup>102</sup> ComTech Reply Comments at 5 n.4.

<sup>103</sup> *Id.*

<sup>104</sup> *See Report and Order*, 6 FCC Rcd. at 2364-65, ¶¶ 59-63.

<sup>105</sup> *See Third Report and Order*, 12 FCC Rcd. at 11,001-02, ¶ 124. *See also* 47 C.F.R. § 90.711(c) (all covered Phase II applicants must follow competitive bidding procedures established in Part 90, Subpart W).

<sup>106</sup> *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Second Report*, 12 FCC Rcd. 11266, 11,326 ("The Commission has made extensive use of its auction authority as the most efficient means of assigning this newly-allocated spectrum to providers who will deploy services for use by the public as quickly as possible . . .").

<sup>107</sup> *See Third Report and Order*, 12 FCC Rcd. at 11,080, ¶ 322.

<sup>108</sup> In the context of this *Fifth Report and Order*, we refer to assignees to mean both partitionees and disaggregatees.

<sup>109</sup> *See Broadband PCS R&O*, 11 FCC Rcd. at 21,857, ¶¶ 42-43.

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disaggregated license.<sup>110</sup> Otherwise, the licensee could certify that it has already, or will, meet the construction requirements for the entire market.<sup>111</sup> Under this second option, the assignee need only meet a "substantial service" requirement for its partitioned area or disaggregated spectrum at the end of the license term.<sup>112</sup> In the *Fifth NPRM*, we sought comment on whether these options would work in the 220 MHz service and, if so, how they would be applied to the various types of 220 MHz licensees.<sup>113</sup>

24. Discussion. The goal of post-assignment construction requirements is to ensure that the spectrum is used to the same degree that would have been required had the partitioning or disaggregation transaction not taken place.<sup>114</sup> In other wireless services, we have allowed licensees and their assignees the flexibility to determine how the construction requirements will be met.<sup>115</sup> As before, to avoid confusion, we address each type of 220 MHz license that would have post-assignment construction requirements separately.

A. Nationwide Phase I Licensees.<sup>116</sup> After a nationwide Phase I licensee reaches its four-year construction benchmark, it must construct base stations and place them in operation in at least 70 percent of the geographic areas designated in its original application within six years of its initial license grant. Moreover, it must complete construction and place into operation the base stations in all geographic areas designated in its application within ten years of its initial license grant. We agree with ComTech that both of these benchmarks can be met on a system-wide basis, in which the construction of the original licensee and any assignees would count towards the construction requirements.<sup>117</sup> We further agree with ComTech that if the combined construction fails to meet the construction requirements, both the original licensee and the assignee would be subject to cancellation according to section 90.725(c).<sup>118</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Substantial service is defined as service that is sound, favorable, and substantially above a level of mediocre service that might just minimally warrant renewal. *See* 47 C.F.R. § 90.743(a)(1).

<sup>113</sup> *See Third Report and Order*, 12 FCC Rcd. at 11,083, ¶ 333.

<sup>114</sup> *See Broadband PCS R&O*, 11 FCC at 21,864, ¶ 61.

<sup>115</sup> *Id.* at 21, 857, ¶ 42-43.

<sup>116</sup> As we noted earlier, because we require full construction before Phase I non-nationwide licensees may partition or disaggregate, the assignees will not have to meet any construction requirements.

<sup>117</sup> ComTech Comments at 7.

<sup>118</sup> *Id.* *See* 47 C.F.R. § 90.725(c) (licensees not meeting the six and ten year benchmarks will lose authorization for the facilities not constructed, but will retain exclusivity for constructed facilities). Because we do not adopt ComTech's proposal to allow partitioning and disaggregation for Phase I nationwide licensees before they meet the four-year construction benchmark, we need not address how partitionees or disaggregatees are affected by section 90.725(b). 47 C.F.R. § 90.725(b) (licensees not meeting the two and four year benchmarks will lose their entire authorization, but will be permitted a six month period to convert the system to available non-nationwide channels).

The flexibility afforded by this decision gives the original licensees the option to either retain sufficient geographic coverage to ensure that they meet the coverage requirements themselves or contractually ensure that they, together with the assignees, meet those requirements.<sup>119</sup> We are not persuaded by AMTA's proposal to switch the construction requirements to population based criteria after the four-year benchmark has been met.<sup>120</sup> Nationwide Phase I licenses were granted contingent on specific business plans that are premised on market-by-market coverage requirements.<sup>121</sup> We agree with ComTech that the public interest would not be served by requiring these licensees to abandon their construction plans in order to partition.<sup>122</sup> We are also persuaded by ComTech that having one set of construction rules for those that partition or disaggregate, and another for those that do not, would be unnecessarily confusing and inconsistent.<sup>123</sup> Therefore, we will retain the construction requirements as they currently are, but will count the construction of the original nationwide Phase I licensee and any assignees toward meeting the construction benchmarks.

B. Covered Phase II Licensees. Consistent with other wireless services, we will allow the parties to the assignment agreement involving a covered Phase II license to negotiate and choose who will be responsible for satisfying the Commission's construction requirements.<sup>124</sup> We agree with AMTA that the parties involved should have the flexibility to determine their respective responsibilities for satisfying the Commission's construction requirements.<sup>125</sup> As long as the parties' collective obligations provide the requisite system coverage, we believe that the public interest in having the system built-out will be met.<sup>126</sup> Specifically, if the assignee certifies that it will satisfy the same construction requirements as the original licensee, then the assignee must meet the prescribed service requirements in its partitioned area (or for its disaggregated spectrum) while the original licensee would be responsible for meeting those requirements in the area (or for the spectrum) it has retained. Alternatively, if one party (generally the original licensee) certifies that it will meet all future construction requirements, the other party need only demonstrate that it is providing "substantial service" for its remaining license.<sup>127</sup> Moreover, consistent with other wireless services, in the event that both parties agree to share the responsibility for meeting the construction requirement and either party fails to do so, both parties' licenses will be subject to forfeiture.<sup>128</sup> If one party agrees to take responsibility for meeting the construction requirement and later

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<sup>119</sup> *Id.* at 8.

<sup>120</sup> AMTA Comments at 8-10.

<sup>121</sup> ComTech Reply Comments at 4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See Broadband PCS R&O*, 11 FCC Rcd. at 21, 857, ¶¶ 42-43.

<sup>125</sup> AMTA Comments at 7.

<sup>126</sup> *Id.*

<sup>127</sup> The substantial service requirement we adopt herein is the same as that in 47 C.F.R. § 90.743(a)(1).

<sup>128</sup> *See Broadband PCS R&O*, 11 FCC Rcd. at 21,865, ¶ 63.

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fails to do so, that party's license will be subject to forfeiture, but the other party's license will not be affected.<sup>129</sup>

### G. License Term and Renewal Expectancy for Assignees

25. Background. In the *Fifth NPRM*, we sought comment as to whether our 220 MHz rules should provide that partitionees or disaggregatees hold their license for the remainder of the original licensee's license term.<sup>130</sup> We tentatively concluded that limiting the license term of the partitionee or disaggregatee is necessary to ensure that there is maximum incentive for parties to pursue available spectrum as quickly as practicable.<sup>131</sup> In addition, we sought comment as to whether 220 MHz partitionees and disaggregatees should be afforded the same renewal expectancy as other 220 MHz licenses.<sup>132</sup>

26. Discussion. Consistent with the suggestion of all the commenters who addressed the issue, and with other wireless services,<sup>133</sup> we adopt our tentative conclusion that partitionees and disaggregatees hold their license for the remainder of the original licensee term.<sup>134</sup> We are persuaded by Global that this approach would ensure prompt action by licensees to pursue spectrum use, while at the same time, protect against licensees who might use partitioning or disaggregation to circumvent the original license term.<sup>135</sup> It is our belief that any other approach would unnecessarily delay implementing service to the public.<sup>136</sup>

27. In addition, consistent with all of the commenters<sup>137</sup> and with other wireless services,<sup>138</sup> we will grant the partitionees and disaggregatees a renewal expectancy if they demonstrate at the end of their license term that they have provided substantial service and complied with our rules and policies, as well

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<sup>129</sup> *Id.*

<sup>130</sup> *See Third Report and Order*, 12 FCC Rcd. at 11,087, ¶ 342.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* *See also* 47 C.F.R. § 90.743 (licensees seeking renewal must file an application that demonstrates that they have provided "substantial service" and have substantially complied with applicable Commission rules, policies and the Communications Act).

<sup>133</sup> *See Broadband PCS R&O*, 11 FCC at 21,870, ¶ 77.

<sup>134</sup> AMTA Comments at 11; ComTech Comments at 9; Global Comments at 12; Rush Comments at 5; and SMR Group Comments at 10.

<sup>135</sup> Global Comments at 12.

<sup>136</sup> *Id.*

<sup>137</sup> AMTA Comments at 11-12; ComTech Comments at 9; Global Comments at 12; Rush Comments at 5; and SMR Group Comments at 10-11.

<sup>138</sup> *See Broadband PCS R&O*, 11 FCC at 21,870, ¶ 76.

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as the Communications Act of 1934, as amended.<sup>139</sup> We agree with Rush that if the partitionees or disaggregatees that had constructed and began operation were not given a renewal expectancy, it would be difficult to convince an entity to accept a license for a partitioned area or disaggregated spectrum.<sup>140</sup> We are also persuaded with Global's point that without such a renewal expectancy, potential partitionees and disaggregatees would find it more difficult to attract the capital necessary to acquire the assignment.<sup>141</sup> Therefore, partitionees and disaggregatees will be eligible for the same renewal expectancy as other 220 MHz licensees.

## H. Competitive Bidding Issues

28. **Background.** In the *Third Report and Order*, we established incentives, including the use of installment payments and bidding credits, for small businesses to participate in the Phase II 220 MHz auction.<sup>142</sup> In the *Fifth NPRM*, we sought comment on whether to apply our unjust enrichment rules<sup>143</sup> to small or very small business Phase II 220 MHz licensees<sup>144</sup> that partition or disaggregate to non-small businesses.<sup>145</sup> We asked that commenters address how to calculate unjust enrichment payments for designated entity Phase II 220 MHz service licensees paying through installment payments and those that were awarded bidding credits that partition or disaggregate to non-small businesses.<sup>146</sup> We asked that commenters also address how we should calculate unjust enrichment payments in situations where a very small business partitions or disaggregates to a small business that qualifies for a lower bidding credit, and

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<sup>139</sup> See 47 C.F.R. § 90.743 (describes what licensees must demonstrate to gain a renewal expectancy).

<sup>140</sup> Rush Comments at 5.

<sup>141</sup> Global Comments at 12.

<sup>142</sup> See *Third Report and Order*, 12 FCC Rcd. 11,064, ¶ 283.

<sup>143</sup> Unjust enrichment requirements are those mechanisms designed to prevent a small business licensee from benefitting from special bidding provisions and becoming unjustly enriched by immediately selling its license to a party that does not qualify for such benefits. See 47 C.F.R. § 90.1017 (b) (describes procedures to avoid unjust enrichment from bidding credits).

<sup>144</sup> Small businesses are defined as entities that, together with affiliates and controlling principals, have average gross revenues that are not more than \$15 million for the three preceding years. Very small businesses are defined as entities that, together with affiliates and controlling principals, have average gross revenues that are not more than \$3 million for the three preceding years. See 47 C.F.R. § 90.1021(b). See also *Third Report and Order* at 11,068-70, ¶¶ 291-295.

<sup>145</sup> *Id.* at 11,088, ¶ 344.

<sup>146</sup> *Id.* An applicant that qualifies as a small businesses would receive at 10 percent bidding credit; an applicant that qualifies as a very small businesses would receive a 25 percent bidding credit. *Third Report and Order*, 12 FCC Rcd at 11,071-72 (¶ 298). See also 47 C.F.R. § 90.1017(a). In addition, a licensee that qualifies as a small business or a very small business would be entitled to pay their winning bid amount in quarterly installments over the term of the license. *Third Report and Order*, 12 FCC Rcd. at 11,072, ¶ 301. See also 47 C.F.R. § 90.1017(d).

that commenters address whether the unjust enrichment payments should be calculated on a proportional basis, using population of the partitioned area and amount of spectrum disaggregated as the objective measures.<sup>147</sup> We proposed using methods similar to those adopted for broadband PCS for calculating the amount of the unjust enrichment payments that must be paid in such circumstances, and we sought comment on this proposal.<sup>148</sup>

29. Discussion. In our recent *Memorandum Opinion and Order*, we eliminated the use of installment payments for auctioned spectrum in the 220 MHz service.<sup>149</sup> Therefore, we need not address how partitioning and disaggregation will affect installment payments.

30. However, when we eliminated the installment payments, we also increased the small business bidding credits in order to facilitate the participation of small businesses by overcoming the barriers they face in mobilizing the necessary financial resources to participate in auctions.<sup>150</sup> To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we adopted unjust enrichment provisions similar to those adopted for narrowband PCS and the 900 MHz SMR service.<sup>151</sup>

31. Since the release of the *Fifth NPRM*, the Commission has adopted a provision in Part 1 of the Commission's Rules for all auctionable services to determine unjust enrichment for the 220 MHz service in the context of partitioning and disaggregation.<sup>152</sup> Thus, we will follow the uniform procedures set forth in Part 1 of our Rules and calculate unjust enrichment based on population for partitioned areas, and on the amount of spectrum for disaggregated spectrum.<sup>153</sup> Consistent with our rules for other services, we

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<sup>147</sup> See *Third Report and Order*, 12 FCC Rcd. at 11,088, ¶ 344.

<sup>148</sup> *Id.*

<sup>149</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration*, FCC 98-93, ¶ 159 (released May 21, 1998) (*Memorandum Opinion and Order*).

<sup>150</sup> See *Memorandum Opinion and Order* at ¶ 145.

<sup>151</sup> See 47 C.F.R. § 90.1017(b). See also *Third Report and Order*, 11 FCC Rcd. at 11076, ¶ 315.

<sup>152</sup> See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz transferred from Federal Government Use, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374, 405-409, ¶¶ 49-57 (1997). See also 47 C.F.R. § 1.2111(d), (e). The approach in Part 1 of the Commission's Rules is the same as set forth in the *Fifth NPRM*. We also followed this approach to unjust enrichment in the context of partitioning and disaggregation in other services. See *Broadband PCS R&O*, 11 FCC Rcd. at 21,852, ¶¶ 34-35; *800 MHz SMR Second Report and Order*, 12 FCC Rcd. at 19,148, ¶ 210; *WCS Report and Order*, 12 FCC Rcd. at 10,838, ¶ 101, *LMDS Fourth Report and Order*, 13 FCC Rcd. at (11,655), ¶ 25; *Maritime Third Report and Order*, at ¶ 43.

<sup>153</sup> See 47 C.F.R. § 1.2111(e)(3). As provided in our Rules, the unjust enrichment penalty shall be reduced over time. See 47 C.F.R. § 90.1017(b)(3). Also, we note that population will be calculated based upon the latest

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will use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these *pro rata* calculations when a combined partitioning and disaggregation is proposed.<sup>154</sup> We believe that such unjust enrichment requirements strike the proper balance between promoting economic opportunities for small businesses while preventing abuse of our bidding credits by partitioning or disaggregation.

## I. Licensing

32. Background. The 220 MHz service rules currently forbid partial assignment of Phase I licenses.<sup>155</sup> However, based on the existing partial assignment rules for commercial mobile radio stations in Part 90, we proposed utilizing partial assignment procedures, similar to those adopted for broadband PCS, to review 220 MHz partitioning and disaggregation transactions.<sup>156</sup> We tentatively held that partial assignment applications would be placed on public notice and subject to petitions to deny, and that the parties would be required to submit an FCC Form 490 (Application for Assignment of Authorization or Consent to Transfer of Control of Licensee), an FCC Form 600 (Application for Mobile Radio Service Authorization) and, if necessary, an FCC Form 430 (Licensee Qualification Report), together as one package under cover of the FCC Form 490.<sup>157</sup> We invited comment on whether any additional procedures are necessary for reviewing these applications.<sup>158</sup> We also sought comment on how licensing issues should be addressed for non-commercial mobile radio stations in the 220 MHz service with respect to partial assignments.<sup>159</sup>

33. Discussion. Because we consider partitioning and disaggregation transactions to be essentially partial assignments of a license, we will eliminate the rule that forbids partial assignment of Phase I licenses and adopt the partial assignment procedures for commercial mobile radio stations, as outlined in section 90.153 of the Commission's Rules, to review all 220 MHz partitioning and disaggregation transactions, both commercial and non-commercial.<sup>160</sup> As with most assignments and transfers, Commission review and approval is necessary to ensure compliance with our rules.<sup>161</sup> This

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available census data.

<sup>154</sup> See, e.g., *Broadband PCS R&O*, 11 FCC Rcd. at 21,866, ¶ 66; *LMDS Fourth Report and Order*, 13 FCC Rcd. at (11,655), ¶ 25.

<sup>155</sup> See 47 C.F.R. § 90.709(d).

<sup>156</sup> See *Third Report and Order*, 12 FCC Rcd. at 11,088, ¶ 345.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See 47 C.F.R. § 90.153.

<sup>161</sup> We note that we recently determined that we would forbear from applying our procedures for reviewing *pro forma* transfers of control and assignments of licenses involving wireless telecommunications carriers. We decided to allow these carriers to simply notify the Commission after the *pro forma* transaction has been

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process includes placing all partial assignment applications on public notice and making them subject to public comment. We disagree with Rush's suggestion to eliminate the public notice requirement.<sup>162</sup> We believe that the public notice process does not create delays and extra workload that exceeds the benefits derived, and believe the public notice process is even more important in the context of partitioning and disaggregation because of the potential interference conflicts such transactions can create. As we concluded with broadband PCS, these procedures are easy to administer and provide an appropriate method for reviewing partitioning and disaggregation proposals.<sup>163</sup> As to the particular forms required for a partitioning and/or disaggregation assignment, we will require the original licensee and the partial assignee to file the appropriate FCC forms under the Universal Licensing System.<sup>164</sup>

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consummated. *See* Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd. 6293 (1998). However, partitioning and disaggregation transactions are not pro forma in nature and, therefore, the rationale we followed in that proceeding would not apply here.

<sup>162</sup> Rush Comments at 6. Rush points to the tens of thousands of private mobile radio service licenses which are issued annually with no public notice and with no apparent problems. *Id.*

<sup>163</sup> *See Broadband PCS R&O*, 11 FCC Rcd. at 21,867, ¶ 70.

<sup>164</sup> Currently, FCC Form 603 has been approved to collect such information.

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**V. CONCLUSION**

34. We conclude that the rules we have adopted in this *Fifth Report and Order* will provide 220 MHz licensees with the competitive benefits we believe can be achieved by allowing licensees to partition and disaggregate. In particular, we believe these options will produce more efficient use of the 220 MHz spectrum, bring service to areas that might otherwise remain unserved or underserved in the near future and allow more entities to enter the 220 MHz marketplace, thereby increasing competition and services to consumers. In general, we have followed the framework established in other wireless services, making changes only when required by the unique technical and regulatory aspects of the 220 MHz service. Moreover, by allowing 220 MHz licensees to partition and disaggregate, we will give them greater flexibility to structure their business arrangements so that they are better able to respond to market demands for service and be more competitive with other wireless services.

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**VI. PROCEDURAL MATTERS****A. Regulatory Flexibility Act**

35. The Final Regulatory Flexibility Act pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

**B. Paperwork Reduction Act**

36. This Report and Order contains no new or modified information collection requirements. The information collections referenced in the item are contained in information collections previously approved by the Office of Management and Budget under the Paperwork Reduction Act.

**C. Ordering Clauses**

37. Accordingly, IT IS ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), section 90.709 of the Commission's Rules, 47 C.F.R. § 90.709, IS AMENDED as set forth in Appendix B.

38. IT IS FURTHER ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), section 90.725 of the Commission's Rules, 47 C.F.R. § 90.725, IS AMENDED as set forth in Appendix B.

39. IT IS FURTHER ORDERED THAT, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), section 90.1019 of the Commission's Rules, 47 C.F.R. § 90.1019, IS AMENDED as set forth in Appendix B.

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

41. IT IS FURTHER ORDERED THAT the Director, Office of Public Affairs, SHALL SEND a copy of this *Fifth Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 601(a).

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**D. Further Information**

42. For further information concerning this proceeding, contact Scott A. Mackoul, Federal Communications Commission, Wireless Telecommunications Bureau, Commercial Wireless Division, Policy and Rules Branch, at (202) 418-7240.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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APPENDIX A

LIST OF COMMENTERS

Comments

American Mobile Telecommunications Association, Inc. (AMTA)

ComTech Communications, Inc. (ComTech)

Global Cellular Communications, Inc. (Global)

Intek Diversified Corp. (Intek)

Rush Network Corp. (Rush)

SMR Advisory Group, L.C. (SMR Group)

Reply Comments

ComTech Communications, Inc. (ComTech)

Intek Diversified Corp. (Intek)

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**APPENDIX B**
**FINAL RULES**

Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 90.709 is revised as follows:

**Sec. 90.709 Special limitations on amendment of applications and on assignment or transfer of authorizations licensed under this subpart.**

\* \* \* \*

(d) A licensee may partially assign any authorization in accordance with § 90.1019.

\* \* \* \*

2. Section 90.725 is revised as follows:

**Sec. 90.725 Construction requirements for Phase I licensees.**

(a) Licensees granted commercial nationwide authorizations will be required to construct base stations and placed those base stations in operation as follows:

\* \* \* \*

3. The Table of Contents for Subpart W of Part 90 is revised as follows:

**Subpart W -- Competitive Bidding Procedures for the 220 MHz Service**

\* \* \* \*

90.1019 Partitioning and disaggregation.

\* \* \* \*

4. Section 90.1019 is revised as follows:

**Sec. 90.1019 Partitioning and disaggregation.**

(a) *Definitions.*

*Disaggregation.* The assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

*Partitioning.* The assignment of geographic portions of a licensee's authorized service area along geopolitical or other geographic boundaries.

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(b) *Eligibility.*

(1) Phase I non-nationwide licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum after constructing their systems and placing their in operation or commencing service in accordance with the provisions in § 90.725(f).

(2) Phase I nationwide licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum after constructing at least 40 percent of the geographic areas designated in their applications in accordance with the provisions in § 90.725(a).

(3) Phase II licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(4) Phase I and Phase II licensees authorized to operate on Channels 161 through 170 or Channels 181 through 185 are not eligible to partition their geographic service area or disaggregate their licensed spectrum.

(5) Parties seeking approval for partitioning and disaggregation shall request authorization for partial assignment of a license pursuant to § 90.709, as amended.

(c) *Technical Standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as an attachment, a description of the partitioned service area. The partitioned service area shall be defined by coordinate points at every 3 degrees along the partitioned service area agreed to by both parties, unless either an FCC-recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service or Economic Area) or county lines are followed. The geographical coordinates must be specified in degrees, minutes and seconds to the nearest second latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC-recognized service area or county lines are utilized, applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area. In such partitioning cases where an unjust enrichment payment is owed the Commission, the request for authorization for partial assignment of a license must include, as an attachment, a calculation of the population of the partitioned service area and licensed geographic service area.

(2) *Disaggregation.* Spectrum may be disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation. In the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules take precedence.

(d) *License Term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term.

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(e) *Construction Requirements.*

(1) *Requirements for Partitioning.* Phase II EA, Regional or nationwide licensees seeking authority to partition must meet one of the following construction requirements:

(A) The partitionee may certify that it will satisfy the applicable construction requirements set forth in Secs. 90.767 or 90.769, as applicable, for the partitioned license area; or

(B) The original licensee may certify that it has or will meet its five-year construction requirement and will meet the ten-year construction requirement, as set forth in Secs. 90.767 or 90.769, as applicable, for the entire license area. In that case, the partitionee must only satisfy the requirements for "substantial service," as set forth in Sec. 90.743(a)(1), for the partitioned license area by the end of the original ten-year license term of the licensee.

(C) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above construction options they select.

(D) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate five-year and ten-year construction benchmarks set forth in Sec. 90.767 or 90.769, as applicable.

(E) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(2) *Requirements for Disaggregation.* Parties seeking authority to disaggregate spectrum from a Phase II EA, Regional or nationwide license, must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the five-year and ten-year construction requirements for the particular market as set forth in Sec. 90.767 or 90.769, as applicable. Parties may agree to share responsibility for meeting the construction requirements. If one party accepts responsibility for meeting the construction requirements and later fails to do so, then its license will cancel automatically without further Commission action. If both parties accept responsibility for meeting the construction requirements and later fail to do so, then both their licenses will cancel automatically without further Commission action.

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**APPENDIX C****FINAL REGULATORY FLEXIBILITY ANALYSIS***Fifth Report and Order*

As required by section 603 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Third Report & Order; Fifth Notice of Proposed Rulemaking (Fifth NPRM)* in PR Docket No. 89-552, RM-8506. The Commission sought written public comment on the proposals in the *Fifth NPRM*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Fifth Report and Order (Fifth R&O)* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.<sup>165</sup>

**A. Need for and Purpose of this Action:**

In the *Fifth R&O*, the Commission modifies the 220-222 MHz band service (220 MHz) rules to permit partitioning and disaggregation for all 220 MHz licensees. With more open partitioning and disaggregation, additional entities, including small businesses, may participate in the provision of the 220 MHz service without needing to acquire wholesale an existing license (with all of the rights currently associated with the existing license). Acquiring "less" than the current license will presumably be a more flexible and less expensive alternative for entities desiring to enter these services.

**B. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis:**

None of the commenters submitted comments that were specifically in response to the IRFA.

**C. Description and Number of Small Entities Involved**

The rules adopted in the *Fifth R&O* will affect all small businesses which avail themselves of these rule changes, including small businesses that will obtain 220 MHz licenses through auction and subsequently decide to partition or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation.

**D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:**

The rules adopted in the *Fifth R&O* will impose reporting and recordkeeping requirements on small businesses seeking licenses through partitioning and disaggregation. The information requirements will be used to determine whether the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be given in a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Form 430 which is currently in use and has already received Office of Management and Budget clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents (which may include small businesses) will

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<sup>165</sup> Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) *codified at* 5 U.S.C. § 601 *et seq.*)

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contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information.

#### **E. Steps Taken to Minimize Burdens on Small Entities:**

The rules adopted in the *Fifth R&O* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services and are consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services.

Allowing non-restricted partitioning and disaggregation will facilitate market entry by parties who may lack the financial resources for participation in auctions, including small businesses. Some small businesses may have been unable to obtain 220 MHz licenses through auction due to high bidding. By allowing open partitioning and disaggregation, small businesses will be able to obtain licenses for smaller service areas and smaller amounts of spectrum at presumably reduced costs, thereby providing a method for small businesses to enter the 220 MHz service marketplace.

Allowing geographic partitioning of 220 MHz licenses by areas defined by the parties will provide an opportunity for small businesses to obtain partitioned 220 MHz license areas designed to serve smaller, niche markets. This will permit small businesses to enter the 220 MHz service marketplace by reducing the overall cost of acquiring a partitioned 220 MHz license.

Allowing disaggregation of spectrum in any amount will also promote participation by small businesses who may seek to acquire a smaller amount of 220 MHz spectrum tailored to meet the needs of their proposed service.

#### **F. Significant Alternatives Considered and Rejected:**

The Commission considered and rejected the following alternative proposals concerning 220 MHz partitioning and disaggregation.

The Commission tentatively concluded in the *Fifth NPRM* to not adopt partitioning for non-nationwide Phase I licensees and non-covered Phase II licensees because their licenses were awarded on a site-specific basis rather than for a geographic area. However, the Commission rejected this proposal because it found no compelling reason to withhold from site-specific licensees the flexibility gained by having the option to partition their license. The Commission noted that a number of non-nationwide Phase I licensees have acquired several site-specific licenses and that such consolidation is more likely since the prohibition of a Phase I licensee operating more than one 220 MHz station within a 40-mile geographic area has been eliminated. Both of these developments have created contiguous, compatible and interconnected 220 MHz systems from non-nationwide Phase I licenses. Therefore, the Commission concluded that non-nationwide Phase I licensees should be allowed the same opportunity to partition their systems and will allow that the marketplace to determine if partitioning is economically or technically feasible for those systems. The Commission did, however, maintain that non-covered Phase II licensees, as well as those Phase I licensees that are Public Safety or EMRS entities, do not need partitioning or

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disaggregation, but rather should continue to share their licensed spectrum in accordance with section 90.179 of the Commission's rules.

The Commission declined to create a minimum standard for the amount of spectrum that a 220 MHz licensee can disaggregate. In place of regulation, the Commission found that the marketplace will best determine the amount of disaggregated spectrum that is economically or technically feasible and that any minimum standard would not allow for future technology.

The Commission rejected the proposal of Rush Network Corp. (Rush) that all construction requirements be eliminated and, in their place, allow the market to dictate when construction will occur. Recognizing that the most of the 220 MHz licensees have the incentive to construction, the Commission, nonetheless, reaffirmed that construction requirements play a vital role in encouraging rapid deployment of the 220 MHz system and avoid inefficient use of the spectrum.

Along the same lines, the Commission declined permitting nationwide Phase I licensees to partition or disaggregate before meeting the four-year construction benchmark. Current rules prohibit the transfer or assignment of nationwide Phase I licenses prior to the build out of 40 percent of their system to reduce any potential speculation or trafficking in licenses by persons who have no real interest in constructing systems. The Commission concluded that this rationale should also apply to partial assignments, especially for Phase I licensees which received their licenses by lottery and thus lack the financial incentive to recoup their upfront costs.

The Commission also rejected the proposal by American Mobile Telephone Association (AMTA) to convert the six- and ten-year construction requirements for nationwide Phase I licensees to population-based criteria. The Commission found that AMTA's approach would be unnecessarily confusing and inconsistent because those nationwide Phase I licensees that decided to partition or disaggregate would have one set of requirements, while those that did not would have different requirements. Moreover, the Commission found no public benefit to switching the construction requirement criteria after the licenses had already been granted.

Finally, the Commission rejected the recommendation by Rush to eliminate the public notice requirements in licensing partial assignments. The Commission believed that any delay or extra work created by putting the partial assignment applications on public notice would be outweighed by the benefits of public notice, especially because of the potential interference conflicts that partitioning and disaggregation may create.

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**G. Report to Congress**

The Commission shall include a copy of this Final Regulatory Flexibility Analysis, along with this *Fifth R&O*, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.