

Empirical economic studies, copies of relevant state orders, and proposed rule text will not be counted against these page limits. Specific rule proposals should be filed as an appendix to a party's comments or reply comments. Such appendices may include only proposed text for rules that would implement proposals set forth in the parties' comments and reply comments in this proceeding, and may not include any comments or arguments. Proposed rules should be provided in the format used for rules in the Code of Federal Regulations and should otherwise conform to the Comment Filing Procedures set forth in this order. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments also must clearly identify the specific portion of this FNPRM to which a particular comment or set of comments is responsive. Parties will not be permitted to file more than a total of ten (10) pages of ex parte submissions, excluding cover letters, except in response to direct requests from Commission staff. This would not include written *ex parte* filings made solely to disclose an oral *ex parte* contact. *Ex parte* filings in excess of this limit will not be considered as part of the record in this proceeding.

44. Parties also are asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Wanda M. Harris, Competitive Pricing Division of the Common Carrier Bureau, 1919 M Street, NW., Room 518, Washington, DC., 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

D. Ordering Clause

It is ordered that, pursuant to the authority contained in sections 1, 4(i), 4(j), 201-205, 218, 251, and 332 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 251, and 332, a further notice of proposed rulemaking is hereby adopted.

List of Subjects

47 CFR Part 20

Federal Communications Commission, Local number portability, Radio, Telecommunications.

47 CFR Part 52

Federal Communications Commission, Cost recovery, Local exchange carrier, Local number portability, Long-term database methods, Numbering, Telecommunications.

Federal Communications Commission.
William F. Caton,
Acting Secretary.

[FR Doc. 96-18479 Filed 7-24-96; 8:45 am]

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47 CFR Part 24

[WT Docket No. 96-148; GN Docket No. 96-113; FCC 96-287]

Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; and Implementation of Section 257 of the Communications Act—Elimination of Market Entry Barriers

AGENCY: Federal Communications Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: In this *Notice of Proposed Rulemaking* in WT Docket No. 96-148 and GN Docket No. 96-113, the Commission proposes modifications to the broadband personal communications services (PCS) rules to expand geographic partitioning and spectrum disaggregation provisions. The Commission also solicits comment on certain issues relating to these rules. The Commission's objective in expanding the partitioning and disaggregation rules is to enable a wide variety of applicants, including small businesses, to overcome barriers to entry in the broadband PCS market, to increase competition, and to expedite the provision of broadband PCS to areas that may not otherwise receive wireless services.

DATES: Comments must be filed on or before August 15, 1996. Reply comments are to be filed on or before August 30, 1996.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

FOR FURTHER INFORMATION CONTACT: David Nall or Mika Savir, Commercial Wireless Division, Wireless Telecommunications Bureau, at (202) 418-0620.

SUPPLEMENTARY INFORMATION: This *Notice of Proposed Rulemaking* in WT Docket No. 96-148 and GN Docket No. 96-113, adopted on June 28, 1996, and released on July 15, 1996, is available for inspection and copying during normal business hours in the FCC Reference Center, Room 575, 2000 M Street N.W., Washington D.C. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, N.W., Suite 140, Washington D.C. 20037, (202) 857-3800. Synopsis of *Notice of Proposed Rulemaking*:

I. Background

1. In the *Broadband PCS Memorandum Opinion and Order*, Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, *Memorandum Opinion and Order*, 59 FR 32830 (June 24, 1994) (*Broadband PCS Memorandum Opinion and Order*), the Commission declined to allow general geographic partitioning, noting that licensees might use partitioning as a means of circumventing construction requirements. The Commission observed, however, that a limited partitioning scheme might facilitate participation by certain groups, including rural telephone companies and other designated entities, in the provision of broadband PCS. The Commission stated that it would consider the issue of geographic partitioning in a future proceeding to establish competitive bidding rules for broadband PCS.

2. The Commission established geographic partitioning provisions for rural telephone companies in the *Competitive Bidding Fifth Report and Order*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, 59 FR 37566 (July 22, 1995) (*Competitive Bidding Fifth Report and Order*). The Commission determined that partitioning would satisfy the Congressional mandate to provide an opportunity for rural telephone companies to participate at auction and in the provision of broadband PCS. The Commission decided that rural telephone companies could acquire a partitioned license (1) by forming an auction bidding consortium comprised entirely of rural telephone companies, and partitioning the license(s) won among consortium members; or (2) through private negotiation, either before or after an auction. The Commission required that partitioned areas conform to established

geopolitical boundaries (such as county lines) and that each area include all portions of the rural telephone company's wireline service area within the PCS service area.

3. In the *Competitive Bidding Further Notice of Proposed Rulemaking*,

Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Further Notice of Proposed Rulemaking*, 59 FR 41426 (August 12, 1994) (*Competitive Bidding Further Notice of Proposed Rulemaking*), the Commission requested comment on whether to extend post-auction partitioning of broadband PCS licenses to women- and minority-owned businesses. The Commission observed that allowing these entities to acquire partitioned licenses may, like rural telephone companies, facilitate their ability to participate in the provision of broadband PCS.

4. In the *Broadband PCS*

Memorandum Opinion and Order, the Commission held that broadband PCS licensees may disaggregate licensed broadband PCS spectrum under the current rules after January 1, 2000 if they have met the five-year construction requirement. The Commission reasoned that this limit on spectrum disaggregation for broadband PCS would allow the PCS market to take shape and prevent anti-competitive practices with regard to disaggregation. The Commission indicated, however, that it would initiate a proceeding at a later date to specify rules for allowing spectrum disaggregation.

II. Notice of Proposed Rulemaking

A. Partitioning

1. License Eligibility

The Commission proposes to relax the broadband PCS geographic partitioning rules for the A, B, D, and E spectrum blocks to allow any party to acquire a license for a partitioned geographic service area that meets the eligibility requirements to be a broadband PCS licensee. The Commission tentatively concludes that this would allow spectrum to be used more efficiently, speed service to underserved areas, and increase competition. The Commission invites comment on this proposal. The Commission solicits comment on whether this proposal to liberalize the geographic partitioning rules would hinder a rural telephone company's ability to participate in the provision of broadband PCS.

2. Available License Area, Timing, and Financial Obligations

The Commission proposes that any partitioning of broadband PCS licenses

be along county lines in the same manner that rural telephone companies must partition along county lines under the current rules. The Commission tentatively concludes that this would reduce the administrative burden and minimize interference coordination concerns. Commenters are invited to address the merits of the Commission's proposal.

7. Non-entrepreneur block licensees.

The Commission believes that there may be significant advantages in broadening the partitioning rules to permit A, B, D, and E block broadband PCS licensees to partition a portion of their license area to any qualifying entity at any time after receiving a license. The Commission proposes that all licensees in the A, B, D, and E blocks be permitted to partition their license area along county lines, at any time. Commenters are invited to discuss whether the Commission should impose any limitations on the size of geographic area that a licensee would be allowed to partition in the non-entrepreneurs' blocks.

8. *Licensees with competitive bidding benefits.* The Commission observes that small businesses face certain barriers to entry into the broadband PCS market that changes in the partitioning rules may address. The Commission proposes that an entrepreneurs' block (C and F block) licensee be permitted to partition at any time to other parties that would be eligible for a license in those blocks. The Commission seeks comment on this tentative conclusion.

9. The Commission seeks comment on the treatment of installment plans for winning auction bids owned by partitioning licensees. The Commission seeks comment on whether an entrepreneur block licensee who partitions to another entrepreneur should be required to repay, on an accelerated basis, a portion of the outstanding principle balance owed under an installment payment plan. The Commission seeks comment on whether the partitionee should be required to guarantee payment of a portion of the partitioner's obligation.

10. The Commission tentatively concludes that some form of the unjust enrichment requirements should apply to a partitioning licensee that has received bidding credits or is paying the winning bid through installment payments when the partitionee qualifies as an entrepreneur, but would receive less favorable installment plan payments. The Commission seeks comment on whether such unjust enrichment requirements in this case should be on a proportional basis, and how the payments should be calculated.

11. The Commission proposes to apply the current five-year restriction against complete license transfers to prohibit partitioning and/or disaggregation by an entrepreneur block licensee to a non-entrepreneur during the first five years of the license period. The Commission states that applying this holding period to partitioning and disaggregation will ensure the objective that entrepreneurs and small businesses continue to participate as PCS licensees for substantial periods of time, and through that participation obtain experience and profits that will enable their long-term participation in communications industries. The Commission tentatively concludes that after the five-year holding period, unjust enrichment requirements should apply as a condition for approval of an application for a partitioning transfer of an entrepreneur block license to a non-entrepreneur. The unjust enrichment provisions would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest, and would be applied on a proportional basis. The Commission seeks comment on how such unjust enrichment amounts should be calculated. The Commission seeks comment on whether the price paid by the partitionee should be considered in determining the percentage of the outstanding principle balance to be repaid.

12. The Commission seeks comment on what the respective obligations of the participants in a partitioning transfer should be, and whether each party should be required to guarantee all or a portion of the partitionee's original auctions-related obligation in the event of default or bankruptcy by any of the parties to the partitioning transfer. The Commission seeks comment on whether the partitioner (the original licensee) should have a continuing obligation with respect to the entire initial geographic area. The Commission seeks comment on whether partitioning parties should be able to determine which party has a continuing obligation with respect to the original licensed area.

13. The Commission tentatively concludes that the proposals to permit partitioning in the manner described above would allow broadband PCS spectrum to be used most efficiently, speed service to unserved or underserved areas, and facilitate competition. The Commission tentatively concludes that the proposal to permit partitioning by entrepreneur block licensees to similarly qualified parties would ensure that these entities retain a significant presence in the market. Additionally, this proposal may

help small business licensees compete more effectively in the areas they retain and assist in the elimination of entry barriers to the PCS market. The Commission solicits comment on this analysis of the intended effects of these proposals.

3. License Term

14. The Commission proposes that a partitionee be authorized to hold its license for the remainder of the partitioner's original ten-year license term. The Commission tentatively concludes that this approach is appropriate because a licensee, through partitioning, should not be able to confer greater rights than it was awarded under the terms of its license grant. The Commission solicits comment on this tentative conclusion.

15. The Commission also proposes that a partitionee be afforded the same renewal expectancy as a market area licensee. Specifically, a partitionee would be granted a preference at a comparative renewal proceeding if it can demonstrate that it has provided "substantial" service during its past license term and has substantially complied with applicable Commission rules, policies and the Communications Act of 1934, as amended. The Commission invites comment on this proposal.

4. Construction Requirements

16. In the Broadband PCS Memorandum Opinion and Order, the Commission found that broadband PCS would likely be a highly competitive service and that licensees would have incentives to construct facilities to meet the service demands in their licensed areas. Nevertheless, the Commission imposed minimum construction requirements to expedite service to the public and promote efficient use of the spectrum. Specifically, the Commission required 30 MHz broadband PCS licensees to construct facilities that provide coverage to one-third of the population of their service area within five years of the license grant and two-thirds of the population within ten years. Ten MHz licensees are required to provide coverage to one-fourth of the service area's population within five years or, alternatively, they may submit a showing to the Commission demonstrating that they are providing substantial service.

17. The Commission tentatively concludes that both the partitioner and partitionee should be subject to coverage requirements that ensure that both portions of a partitioned licensing area will receive service. This proposal would facilitate partitioning by offering

a choice between two different build-out options, which could be negotiated between the partitioner and partitionee. Applicants would then select in their assignment and transfer applications the construction option they would be obligated to meet.

18. Under the first option, a partitionee would be obligated to satisfy the same construction requirements as the original licensee within its partitioned area, regardless of when it acquired the partitioned license. The Commission invites comment on this option.

19. As a second option, the Commission proposes more modest build-out requirements for a partitioned area where the original licensee has met its five-year build-out requirements and certifies that it will meet the ten-year coverage requirements for its entire license area. Specifically, the Commission proposes that partitionees must only satisfy the substantial service requirement for renewal expectancy for its partitioned area by the end of the original ten-year license term. For example: an A Block licensee who meets its five-year build-out requirements within three years after receiving its license, may, in its partitioning application, certify that it will meet the ten-year coverage requirement for its original license. In this scenario, the partitionee would only be required to meet the substantial service requirement for its partitioned area at the end of the A Block licensee's original ten-year license term.

20. The Commission tentatively concludes that establishing flexible build-out requirements would encourage partitioning to entities that have a sincere interest in providing broadband PCS and would thereby expedite the provision of service to areas that otherwise may not receive it as quickly. The Commission also observes that this option may facilitate partitioning agreements, especially in the latter portion of a license term, by acknowledging licensees' efforts to bring broadband PCS service to their licensed areas. The Commission solicits comment on these build-out proposals.

B. Disaggregation

1. Timing of Disaggregation

21. Currently, a broadband PCS licensee who has met the five-year construction requirement may assign portions of its licensed PCS spectrum after January 1, 2000. In the *Broadband PCS Memorandum Opinion and Order*, the Commission stated that allowing immediate disaggregation of spectrum before that time may impede

competition in the provision of broadband PCS.

22. The Commission tentatively concludes that the prohibitions on disaggregation may no longer be warranted. The Commission tentatively concludes that the current prohibitions on disaggregation may constitute a barrier to market entry for small businesses and other entrepreneurs which may lack the resources to participate successfully in auctions for 30 MHz and 10 MHz broadband PCS spectrum blocks. The Commission proposes to eliminate such market entry barriers by making changes in the disaggregation rules. The Commission seeks comment on these tentative conclusions.

23. The Commission proposes to allow spectrum disaggregation prior to January 1, 2000, and to eliminate the condition that the licensee must satisfy the five-year build-out requirements before disaggregating. The Commission invites comment on whether to retain the five-year build-out requirement before allowing disaggregation. Commenters should discuss whether the goals of elimination of market entry barriers, efficient spectrum use, expedited access to broadband PCS service, and competition would be better served by eliminating this restriction. Specifically, the Commission proposes to allow non-entrepreneurs to disaggregate to other qualified entities at any time, and to allow entrepreneurs to disaggregate to other qualified entrepreneurs at any time, but entrepreneurs would be restricted from disaggregating spectrum to non-entrepreneurs until after the five-year holding period. Commenters should discuss whether any alternate restrictions on allowing disaggregation may be appropriate.

2. Amount of Spectrum to Disaggregate

24. In the *Broadband PCS Memorandum Opinion and Order*, the Commission established six frequency blocks of spectrum for licensed broadband PCS. Three of the blocks (A, B, and C) each have 30 MHz of spectrum, while the remaining blocks (D, E, and F) have 10 MHz of spectrum each. The Commission determined that this broadband PCS spectrum allocation plan would facilitate the rapid deployment of broadband PCS and enable broadband PCS licensees to compete fully with other commercial mobile radio services. The Commission determined that 30 MHz blocks of spectrum would facilitate competition and the rapid development and implementation of the fullest range of PCS services and ensure that PCS is

more fully competitive with other mobile radio services. The Commission observed that 10 MHz licensees may be able to provide services ranging from specialized applications to services comparable to those now provided by cellular systems, through the use of advanced digital techniques, such as Code Division Multiple Access (CDMA) and Time Division Multiple Access (TDMA), and micro-cellular technology.

25. The Commission seeks comment and proposals for the amount of spectrum that a licensee should be required to retain if disaggregation is allowed on a more expedited basis. The Commission seeks comment generally concerning whether some restriction or limit should be placed on the amount of spectrum a licensee may disaggregate or the timing of such disaggregation.

26. The Commission proposes that licensees disaggregate frequencies in accordance with the pairings specified in our rules. The Commission tentatively concludes that for these purposes, disaggregation for broadband PCS in blocks smaller than a 1 MHz block of paired frequencies will not be permitted. The Commission seeks comment on this tentative conclusion. The Commission requests that commenters suggesting alternative approaches provide technical justifications and other relevant support in responding to this issue.

27. The Commission seeks comment on whether broadband PCS licensees should be required to retain or acquire spectrum above the administrative minimum of 1 MHz. The Commission also seeks comment on the minimum amount of spectrum a disaggregatee could utilize for the provision of broadband type services. The Commission seeks comment generally on the relevance of the distinction between broadband and narrowband for purposes of disaggregation rules.

28. The Commission tentatively concludes that elimination of the current prohibitions on broadband PCS disaggregation would be consistent with the recent elimination of the cellular/PCS cross-ownership rule and the 40 MHz PCS spectrum cap, and the retention of the 45 MHz CMRS spectrum cap, because such actions facilitate market transfers of spectrum among cellular and PCS licensees while maintaining a provision to ensure a diversity of service providers. The Commission requests comment on this tentative conclusion, and generally on the impact of the present 45 MHz spectrum cap on these proposals.

3. Matters Relating to Entrepreneur Block Licensees

29. The Commission proposes to allow all entrepreneur block licensees to disaggregate to similarly qualifying parties at any time without restriction, and to parties not eligible for entrepreneur block licenses after a five-year holding period. The Commission tentatively concludes that if an entrepreneur block licensee is permitted to disaggregate to a non-entrepreneur entity after the five-year holding period, the disaggregating entrepreneur block licensee will be required to repay the unjust enrichment provisions on a proportional basis. These unjust enrichment provisions would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest, and would be applied on a proportional basis. The Commission seeks comment on how such unjust enrichment amounts should be calculated. The Commission seeks comment on whether the price paid by the disaggregating party should be considered in determining the percentage of the outstanding principle balance to be repaid.

30. The Commission seeks comment on what the respective obligations of the participants in a disaggregation transfer should be, and whether each party should be required to guarantee all or a portion of the disaggregatee's original auctions-related obligation in the event of default or bankruptcy by any of the parties to the disaggregation transfer. The Commission seeks comment on whether the disaggregator (the original licensee) should have a continuing obligation with respect to the entire initial license. The Commission seeks comment on whether the parties should have available a choice of options, ranging, for example, from an accelerated payment based on purchase price to a guarantee for a larger payment by one party in the event another party defaults. Parties are also invited to comment on whether the disaggregating parties should be able to determine which party has a continuing obligation with respect to the original licensed area.

31. The Commission tentatively concludes that if an entrepreneur block licensee is permitted to disaggregate to an entrepreneur that would not qualify for the same level of benefits as the disaggregating licensee, the disaggregating entrepreneur block licensee will be required to repay a portion of the unjust enrichment provisions as they apply to a full assignment of a license. The Commission seeks comment on whether

this should be a proportional amount of its bidding credits, unpaid principal, and accrued unpaid interest to the U.S. Treasury, and how the amounts should be calculated. The Commission seeks comment on what provisions, if any, should be adopted to address the situation of an entrepreneur block licensee's disaggregation followed by default in payment of a winning bid at auction.

32. The Commission seeks comment on whether there should be different requirements for entrepreneur block licensees and for non-entrepreneur block licensees regarding the amounts of spectrum which a licensee must retain or may disaggregate.

4. Construction Requirements

33. The Commission's rules currently require 30 MHz broadband PCS licensees to construct facilities that provide coverage to one-third of the population of their service area within five years of the initial license grant and two-thirds of the population within ten years. Ten MHz licensees are required to construct facilities that provide coverage to one-fourth of the service area's population within five years or, alternatively, they may submit a showing to the Commission demonstrating that they are providing substantial service.

34. To address the concerns raised in the *Broadband PCS Memorandum Opinion and Order* about anti-competitive incentives to disaggregate and engage in spectrum warehousing, the Commission proposes two construction build-out options to apply to entities receiving disaggregated spectrum that do not already possess a broadband PCS license in the same geographic service area. Such applicants seeking to receive disaggregated spectrum would select the construction option for which they would be obligated to meet in their assignment and transfer applications. The Commission tentatively concludes that this proposal would prevent licensees from warehousing spectrum and would enable new entrants to provide service.

35. Under the first option, a disaggregatee entering the geographic market would be obligated to satisfy the same construction requirements as the licensee, regardless of when it acquired the disaggregated spectrum. For example, an entity that acquires spectrum from a 30 MHz broadband PCS licensee (an A, B, or C block licensee) would be obligated to provide service to at least one-third of the population in the license area within five years of the underlying license term and two-thirds of the population in the

license area by the end of the ten-year license term. An entity that acquires spectrum from a 10 MHz broadband PCS licensee (a D, E, or F block licensee) would have to provide adequate service to at least one-quarter of the population in the license area or make a showing of substantial service at the five-year benchmark. The Commission tentatively concludes that this approach would prevent spectrum warehousing and ensure expedited access to broadband PCS services. Commenters are invited to discuss the merits of this option.

36. As a second option, the Commission proposes a modified build-out requirement after the disaggregating licensee has met its five-year build-out requirement and certifies that it will meet the ten-year construction requirement by the end of its license term. Specifically, a disaggregatee must only satisfy the five-year build-out requirements for the license area by the end of the original ten-year license term. The Commission tentatively concludes that this build-out option will facilitate the rapid introduction of broadband PCS service and increase spectrum efficiency. The Commission seeks comment on this approach. Commenters are also invited to address whether these build-out requirements should apply where a licensee disaggregates a portion of its spectrum after the initial ten-year license term has expired.

37. The Commission proposes to require, as a pre-condition for approving a proposed disaggregation, certifications from both the disaggregator and the disaggregatee that the time remaining before the ten-year construction benchmarks is sufficient for the disaggregator and disaggregatee to meet the pertinent construction benchmark for their respective licenses. This proposal would ensure against delay in the build-out of PCS, and place all parties on notice that the construction requirements must be considered during the negotiations. In addition, disaggregatees must file maps and other supporting documents showing compliance with the construction requirements within the appropriate five-year and ten-year benchmarks of the date of their initial licenses.

38. The Commission proposes that if a licensee fails to meet the construction requirements, the license of the disaggregator or disaggregatee would revert back to the Commission. In light of the fact that the disaggregator and disaggregatee are each licensees, their prospective construction requirements are independent from each other and failure to satisfy one construction requirement will not affect the renewal of the other.

39. The Commission proposes no new construction requirements for disaggregatees already possessing a broadband PCS license in a geographic service area, on the premise that these licensees are already subject to coverage requirements under their existing licenses. The Commission seeks comment on this proposal. The Commission seeks comment on the construction requirements, if any, that should apply to other CMRS licensees receiving disaggregated broadband PCS spectrum.

5. License Term

40. The Commission proposes a similar license term for disaggregation as for partitioning, *i.e.*, that a disaggregatee would be authorized to hold its license for the disaggregated spectrum for the remainder of the disaggregator's original ten-year license term. The Commission believes this approach is appropriate because a licensee, through disaggregation, should not be able to bestow greater rights than it was awarded under the terms of its license grant. The Commission seeks comment on whether administrative efficiency and convenience for licensees support a limited exception to this general rule. The Commission proposes that a disaggregatee be afforded the same renewal rights as a market area licensee. A disaggregatee would be granted a preference at a comparative renewal proceeding if it can demonstrate that it has provided "substantial" service during its past license term and has substantially complied with applicable Commission rules, policies, and the Communications Act. The Commission invites comment on this proposal.

C. Related Matters

1. Combination of Partitioning and Disaggregation

41. The Commission tentatively concludes that combinations of partitioning and disaggregation should be permitted. The Commission seeks comment on whether the benefits of allowing licensees to combine disaggregation and partitioning at any time outweigh factors supporting restrictions on such a combination. In those situations where the combination of partitioning and disaggregation is allowed under the proposed rules, the Commission proposes to implement the rules proposed for partitioning in the event there is a conflict in the application of the rules. The Commission seeks comment on where such conflicts conceivably could arise and on the overall approach to the

combination of partitioning and disaggregation addressed herein.

2. Licensing

42. The Commission proposes to follow existing partial assignment procedures for broadband PCS licenses in reviewing requests for geographic partitioning, disaggregation, or a combination of both. Thus, the licensee must file an FCC Form 490 that is signed by both the licensee and qualifying entity. The qualifying entity would also file an FCC Form 430 unless a current FCC Form 430 is already on file with the Commission. An FCC Form 600 would be filed by the qualifying entity to receive authorization to operate in the market area which is being partitioned or to modify an existing station of the qualifying entity to include the new or additional market area being partitioned. The Commission seeks comment on these proposed licensing rules.

43. The Commission proposes that any requests for a partitioned license or disaggregated spectrum would contain the FCC Forms 490, 430, and 600 and be filed as one package under cover of the FCC Form 490. Parties are invited to comment on whether any additional procedures should be required. A broadband PCS disaggregatee must file FCC Form 430 qualifying it as a common carrier unless a current FCC Form 430 is already on file with the Commission. An FCC Form 600 should be filed by the disaggregatee to receive authorization to operate in the market area which is covered by the disaggregated spectrum or to modify an existing station of the disaggregatee to include the new or additional spectrum being disaggregated. Parties are invited to comment whether any additional procedures should be required.

3. Technical and Microwave Relocation Rules

44. In the *Broadband PCS Second Report and Order*, Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314, *Second Report and Order*, 58 FR 59174 (November 8, 1993) (*Broadband PCS Second Report and Order*) the Commission adopted minimal technical standards to allow PCS to develop in the most rapid, economically feasible and diverse manner. The Commission tentatively concludes that the current technical rules with respect to service area boundary limits and protections, which provide for coordination and negotiation among licensees, should be maintained and applied to partitioned license areas. The Commission seeks

comment on this tentative conclusion. The Commission seeks comment on whether any modifications to the technical rules are needed to accommodate these partitioning and disaggregation proposals.

45. The Commission tentatively concludes that a new entrant PCS licensee who gains its license through partitioning or disaggregation should be treated as any other subsequent PCS licensee for purposes of the microwave relocation cost-sharing plan, including eligibility for installment plan payments if the transferee would be eligible for an installment plan equivalent to that enjoyed by the transferring licensee, unless the reimbursement obligations to which they would be subject have already been paid by the transferring licensee. The Commission seeks comment on this approach.

4. Clearinghouse for Spectrum.

46. The Commission seeks comment on whether establishing an electronic database to make more readily accessible the information about licensed PCS spectrum would lower market entry barriers, consistent with the mandate of Section 257 of the Telecommunications Act of 1996, or otherwise be in the public interest. The Commission requests comment on how to encourage the creation of private information clearinghouses on available spectrum and what procedures could be utilized to assist small businesses in obtaining available licenses or spectrum from licensees to meet very limited or defined telecommunications needs. The Commission also seeks comment on how to promote information clearinghouses or other market solutions so that the public can be informed about spectrum availability in particular geographic areas or excess or available spectrum that could be disaggregated in minimum amounts.

III. Conclusion

47. The Commission believes that these partitioning and disaggregation proposals are consistent with a pro-competitive deregulatory national policy framework and will promote the rapid creation of a competitive market to deliver broadband PCS to the largest number of consumers. These proposals are designed to meet the Congressional objectives of opening telecommunications markets to competition, providing advanced technologies and services efficiently and quickly, and identifying and eliminating market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services.

IV. Procedural Matters and Ordering Clauses

A. Regulatory Flexibility Act

Summary: As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking*.

Reason for Action: This rulemaking proceeding was initiated to secure comment on proposals to modify our broadband PCS rules to permit partitioning and disaggregation for all Part 24 licensees. The proposals advanced in the *Notice of Proposed Rulemaking* are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services.

Objectives: The Commission proposes changes to its rules for broadband PCS that are intended to facilitate the efficient use of broadband PCS spectrum, increase competition, and expedite the provision of broadband PCS service to areas that may not otherwise receive broadband PCS or other wireless services in the near term. These proposals seek to increase the level of small business participation in the provision of broadband PCS. The Commission proposes to allow broadband PCS licensees in the non-entrepreneurs' blocks to partition any portion of their geographic license area to entities that are eligible to be broadband PCS licensees. The Commission further proposes to allow entrepreneurs' block licensees to partition any portion of their licensed geographic area to entities that qualify as entrepreneurs and are otherwise eligible to be broadband PCS licensees. Additionally, the Commission proposes to eliminate the January 1, 2000 benchmark for disaggregation, and allow disaggregation any time after the broadband PCS licensee meets the five-year build-out requirement. Specifically, the Commission proposes to allow broadband PCS licensees in the non-entrepreneurs' blocks to disaggregate spectrum to entities that are eligible to be broadband PCS licensees. The Commission proposes to allow entrepreneurs' block licensees to disaggregate to another entrepreneur, otherwise qualified to be a broadband PCS licensee. Additionally, the Commission proposes to establish license terms that permit partitionees to hold partitioned licenses and disaggregatees to hold disaggregated spectrum for the remaining duration of the original ten-year license term. The

Commission also proposes to establish construction requirements to ensure expedient access to broadband PCS service in partitioned areas to ensure coverage and increase spectrum efficiency. Finally, the Commission proposes to allow licensees to combine partitioning and disaggregation under limited circumstances.

Legal Basis: The proposed action is authorized under Sections 4(i), 257, 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r) and 309(j), as amended.

Reporting, Recordkeeping, and Other Compliance Requirements: The proposals under consideration in this *Notice of Proposed Rulemaking* include the possibility of imposing reporting and recordkeeping requirements for small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine if the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. We estimate that the average burden on the applicant is three hours for the information necessary to complete these forms. We estimate that 75 percent of the respondents (which may include small businesses) will contract out the burden of responding. We estimate 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. Applicants (including small businesses) filing the package under cover of FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. We estimate that 75 percent of the applicants may file electronically. We estimate that applicants contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact, and Number of Small Entities Involved: The rule changes proposed in this proceeding will affect all small businesses which avail themselves of these rule changes, including small

businesses currently holding broadband PCS licenses who choose to partition and/or disaggregate, and small businesses who may acquire licenses through partitioning and/or disaggregation. The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total broadband PCS entities, existing and potential, would be affected by the proposed rules in the *Notice of Proposed Rulemaking*. In particular, the Commission seeks estimates of how many broadband PCS entities, existing and potential, will be considered small businesses. "Small business" is defined as a firm that has revenues of less than \$40 million in each of the last three calendar years. This definition was used in the PCS C block auction and approved by the Small Business Administration. The Commission seeks comment as to whether this definition is appropriate in this context. Additionally, the Commission requests each commenter to identify whether it is a small business under this definition. If the commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has auctioned broadband PCS licenses in blocks A, B, and C. The Commission does not have sufficient information to determine whether any small businesses within the SBA-approved definition bid successfully for licenses A or B block auctions. There were 89 winning bidders that qualified as small businesses in the C block PCS auctions. Based on this information, the Commission concludes that the number of broadband PCS licensees affected by the rules proposed in this *Notice of Proposed Rulemaking* includes the 89 winning bidders that qualified as small entities in the C block broadband PCS auction.

The Commission estimates that up to 10,370 PCS licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation. This estimate is based on the total number broadband PCS licenses auctioned and subject to auction, 2,074, and the estimate that each license would probably not be partitioned and/or disaggregated to

more than five parties. The Commission notes that the A and B blocks each consist of 51 licenses (a total of 102 licenses) and the C, D, E, and F blocks each consist of 493 licenses (a total of 1,972 licenses). Currently the C and F block licensees and potential licensees (holding a total of 986 licenses) must be small businesses or entrepreneurs with average gross revenues over the past three years of less than \$125 million. Under the proposed rules they will be permitted to partition and/or disaggregate to other qualified entrepreneurs. The A, B, D, and E block licensees and potential licensees (holding a total of 1,088 licenses) will also be permitted under the proposed rules to partition and/or disaggregate to small businesses.

At present, there have been no auctions held for the D, E, and F blocks of broadband PCS spectrum. The Commission anticipates a total of 1,479 licenses will be awarded in the D, E, and F block PCS auctions, which are scheduled to begin on August 26, 1996. Eligibility for the F block licenses is limited to entrepreneurs with average gross revenues of less than \$125 million. However, there is no basis upon which to estimate the number of licenses that will be awarded to small businesses, nor is there a basis for an estimate as to how many small businesses will win D or E block licenses. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees, and that no reliable estimate of the number of D, E, and F block licensees can be made, the Commission assumes, for purposes of this IRFA that all of the licenses will be awarded to small businesses. The Commission believes that it is possible that a significant number of the up to 10,370 PCS licensees or potential licensees who could take the opportunity to partition and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small businesses.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: The proposals advanced in the *Notice of Proposed Rulemaking* 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. The impact on small entities in the proposals in the *Notice of Proposed Rulemaking* is the opportunity to enter the broadband PCS market through the partitioning and disaggregation proposals herein.

The rule changes proposed in the *Notice of Proposed Rulemaking* by the

Commission are consistent with the mandate under the Communications Act of 1934, as amended, to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services, and the mandate under Section 309(j) of the Communications Act of 1934, as amended, to utilize auctions to ensure that small, minority and women-owned businesses and rural telephone companies have an opportunity to participate in the provision of spectrum-based services. The Commission's proposals in this *Notice of Proposed Rulemaking*, if implemented, will facilitate market entry by parties who may lack the financial resources for participation in PCS auctions, including small businesses. These proposals, if implemented, will promote technological advancement and participation by diverse entities, as well as facilitate the efficient use of broadband PCS spectrum. The alternative to the Commission's proposal to allow geographic partitioning would be to maintain the status quo and only permit rural telephone companies to utilize partitioning through forming an auction bidding consortium comprised entirely of rural telephone companies or through private negotiation post-auction. Limiting geographic partitioning to rural telephone companies would not permit other small businesses to obtain partitioned licenses or to partition to other parties, and thus would not promote the participation of small businesses in the provision of PCS. The Commission also noted that the proposed partitioning policy would allow spectrum to be used more efficiently, speed service to underserved areas, and increase competition.

In this *Notice of Proposed Rulemaking*, the Commission observed that initially general partitioning by broadband PCS licensees was not permitted because of the concern that licensees might use partitioning as a means to circumvent construction requirements. The Commission tentatively concludes that both the partitioner and partitionee should be subject to coverage requirements that ensure that both portions of a partitioned licensing area will receive service. The Commission proposes facilitating partitioning by offering a choice between two different build-out options, which could be negotiated between the partitioner and partitionee. The first option proposed by the Commission would require a partitionee to satisfy the same construction

requirements as the original licensee within its partitioned area, regardless of when it acquired the partitioned license. This approach is consistent with the present construction requirements for rural telephone companies. The second option proposed by the Commission would apply where the original licensee has met its five-year build-out requirements and certifies that it will meet the ten-year coverage requirements for its entire license area. Specifically, the Commission proposes that partitionees must only satisfy the substantial service requirement for renewal expectancy for its partitioned area by the end of the original ten-year license term. The Commission tentatively concludes that these proposed flexible build-out requirements, if adopted, will encourage partitioning to entities that have a sincere interest in providing broadband PCS and will thereby expedite the provision of service to areas that otherwise may not receive it as quickly.

The Commission considered the fact that many broadband PCS licensees may meet their five-year build-out construction obligation early, and therefore proposes revisiting the current prohibition on disaggregation. The Commission considered the alternative, requiring PCS licensees to wait until January 1, 2000 before disaggregating, and noted that this would not permit small businesses to disaggregate or obtain disaggregated spectrum and therefore, would not promote an efficient use of spectrum.

The Commission is proposing to allow partitioning and/or disaggregation by entrepreneurs only to other qualified entrepreneurs for five years, to ensure the objective that entrepreneurs and small businesses continue to participate as PCS licensees for substantial periods of time, and through that participation obtain experience and profits that will enable their long term participation in communications industries. The Commission is proposing to apply proportional unjust enrichment provisions for partitioning and disaggregation by entrepreneurs to non-entrepreneurs after the five-year period. The alternative to this proposal, would be to either prohibit partitioning by entrepreneurs or to allow entrepreneurs who have benefited from special bidding provisions to become unjustly enriched by immediately partitioning a portion of their license area to parties that do not qualify for such benefits. The Commission also noted that allowing partitioning and/or disaggregation by entrepreneurs only to other qualified entrepreneurs for five years is consistent with the

Commission's rule allowing license transfers by entrepreneurs only to other entrepreneurs in the first five years of the license period.

The Commission believes that allowing entrepreneurs and small businesses to partition and/or disaggregate their licenses to other qualified entrepreneurs and small businesses, and allowing all non-entrepreneurs to partition and/or disaggregate to any qualified party (including small businesses) will help attain the Congressional objective of ensuring that small businesses have an opportunity to participate in the provision of broadband PCS. These proposals will enable a wide variety of applicants, including small businesses, to overcome entry barriers in the provision and ownership of telecommunications services.

This *Notice of Proposed Rulemaking* solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered.

IRFA Comments: The Commission requests public comment on the foregoing IRFA. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the comment deadlines set forth in the *Notice of Proposed Rulemaking*.

B. Paperwork Reduction Act

This *Notice of Proposed Rulemaking* contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this *Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Public and agency comments are due at the same time as other comments on this *Notice of Proposed Rulemaking*; OMB notification of action is due September 23, 1996. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments by the public on the proposed and/or modified information collections are due August 15, 1996. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before September 23, 1996.

ADDRESSES: In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington D.C. 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, N.W., Washington D.C. 20503 or via the Internet to fain_t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: For additional information concerning the information collections contained in this *Notice of Proposed Rulemaking* contact Dorothy Conway at (202) 418-0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION:

Title: Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees and Implementation of Section 257 of the Communications Act- Elimination of Market Entry Barriers.

Type of Review: New Collection.

Respondents: Number of Respondents: We estimate up to 10,370 PCS licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation.

Estimated Time Per Response: The average burden on the applicant is 3 hours for the information necessary to complete FCC Forms 490, 430 or 600 and be filed as one package under cover of the FCC Form 490. We estimate 75% of respondents will contract out the burden of responding. We estimate that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25% of respondents are estimated to employ in house staff to provide the information. 7,778 applications (contracting out) \times .5 hour = 3,889 hours. 2,592 applications (in house) \times 3 hours = 7,776 hours.

Total burden = 3,889 + 7,776 = 11,665 hours.

Estimated Cost to the Respondent: Total capital and start-up costs: Applicants wishing to file the package under cover of the FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time

would amount to no more than 30 minutes. Seventy-five percent of the respondents are expected to file electronically. $7,778 \text{ applications} \times \$2.30 = \$536,682$. All other respondents would be expected to file manually and would incur the following costs: $2,592 \text{ applications} \times \$1.15 = \$2,981$. Total capital and start-up costs = $\$536,682 + \$2,981 = \$539,663$.

We assume that the respondents contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information. $7,778 \text{ applications} \times \$200 \text{ per hour} \times 3 \text{ hours} = \$4,666,800$. Total Respondent Costs: $\$539,663 + \$4,666,800 = \$5,203,463$.

Cost to the Federal Government: The government review time for this submission is estimated at 15 minutes per response with the review being done by personnel at the GS-6 level. $10,370 \text{ applications} \times \$3.39 = \$35,154$.

C. Ex Parte Rules—Non-Restricted Proceeding

This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules, 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

D. Comment Period

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before August 15, 1996. Reply comments are to be filed on or before August 30, 1996. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington D.C. 20554. A copy of all comments should also be filed with the Commission's copy contractor, ITS, Inc., 2100 M Street, N.W., Suite 140, (202) 857-3800.

E. Authority

The above action is authorized under the Communications Act, §§ 4(i), 303(r), 309(c), 309(j), and 332, 47 U.S.C. §§ 154(i), 303(r), 309(c), 309(j), and 332, as amended.

F. Ordering Clauses:

It is ordered that, pursuant to Sections 4(i), 303(r), 309(c), 309(j), and 332 of the

Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(c), 309(j), and 332, a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

It is further ordered, that comments in WT Docket No. 96-148 will be due August 15, 1996 and reply comments will be due August 30, 1996.

List of Subjects in 47 CFR Part 24

Communications common carriers, Federal Communications Commission, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 96-18847 Filed 7-24-96; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF ENERGY

48 CFR Parts 917, 950, 952 and 970

RIN 1991-AB-09

Acquisition Regulation; Department of Energy Management and Operating Contracts.

AGENCY: Department of Energy.

ACTION: Proposed rule; supplemental notice.

SUMMARY: On June 24, 1996, the Department of Energy (DOE or Department) published a notice of proposed rulemaking (61 FR 32588) (DOE-NOPR) to amend the Department of Energy Acquisition Regulation (DEAR) to incorporate certain contract reform initiatives. Among the contract reform initiatives contained in the DOE-NOPR was a proposal to amend the DEAR to address the treatment of costs which its management and operating contractors incur in proceedings involving *qui tam* actions. On June 20, 1996, the Civilian Agency Acquisition Council and the Defense Acquisition Council published a notice of proposed rulemaking (61 FR 31790) (FAR-NOPR) to amend the Federal Acquisition Regulation (FAR) to address the same issue. This notice solicits comments on whether the Department should adopt the FAR approach, instead of its originally proposed approach, in addressing legal costs incurred in connection with *qui tam* actions in which the Government does not intervene.

DATES: Written comments on the issue presented in this notice and on the DOE-NOPR must be submitted by August 23, 1996.

ADDRESSES: All comments are to be submitted to Connie P. Fournier, Office of Policy (HR-51), Department of Energy, 1000 Independence Avenue, SW., Washington, DC. 20585, (202) 586-8245; (202) 586-0545 (facsimile); connie.fournier@hq.doe.gov (Internet).

The administrative record regarding this rulemaking that is on file for public inspection, to include a copy of the transcript of the public hearing scheduled for August 1st at the Department's Independence Avenue address, and any additional public comments received, is located in the Department's Freedom of Information Reading Room, Room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Connie P. Fournier, Office of Policy (HR-51), Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586-8245.

SUPPLEMENTARY INFORMATION: On June 24, 1996, DOE published a NOPR to amend the Department of Energy Acquisition Regulation (DEAR) to incorporate certain contract reform initiatives. Among the Department-wide contract reform initiatives contained in the DOE-NOPR was a proposal to amend DEAR 970.5204-61, Cost Prohibitions Related to Legal and Other Proceedings, to add a new paragraph (h). The proposal addresses the treatment of management and operating contractor costs incurred in proceedings involving *qui tam* actions under the False Claims Act, 31 U.S.C. 3730, alleging fraud against the Government, which are not covered by the existing provisions of that clause.

On June 20, while the Department was waiting for its own proposal to be published, the Civilian Agency Acquisition Council and the Defense Acquisition Council published a notice of proposed rulemaking that addresses the same issue. The FAR-NOPR approach would amend the cost principle at FAR 31.205-47 by amending paragraph (b), creating a new subparagraph (c)(2), and amending subparagraph (e)(3). Except for the change in existing policy contained in (e)(3), which goes beyond *qui tam* cases, the DOE-NOPR and FAR-NOPR approaches would have the same result. Both approaches would make legal costs connected with *qui tam* actions which result in a judgment against the contractor an unallowable cost, and both approaches authorize the contracting officer to make provisional or conditional reimbursement pending the outcome of a case. The only difference occurs in the event of a