

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 90

[PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253; FCC 97-57]

Provision 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

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commission adopts a *Third Report and Order and Fifth Notice of Proposed Rulemaking* regarding the use of the 220-222 MHz Band (220 MHz service) by the Private Land Mobile Radio Service. The *Third Report and Order* portion of this decision is summarized elsewhere in this edition of the **Federal Register**. The *Fifth Notice of Proposed Rulemaking (Fifth NPRM)* seeks comment on various issues related to the partitioning of 220 MHz licenses and whether to permit full partitioning and disaggregation in the 220 MHz service. This action is taken to establish a record from which to consider the specific rules that should govern partitioning and the benefits and drawbacks of full partitioning and disaggregation, and to reach an ultimate decision.

DATES: Comments are due on or before April 15, 1997, and reply comments are due on or before April 30, 1997. Written comments by the public on the proposed and/or modified information collections are due June 2, 1997.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. 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, NW, Washington, DC 20554, or via the Internet to dconway@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Mary Woytek, (202) 418-1310, or Frank Stilwell, (202) 418-0660, Wireless Telecommunications Bureau. For additional information concerning the information collections contained in this *Fifth NPRM*, contact Dorothy Conway at (202) 418-0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Fifth Notice of Proposed Rulemaking* segment of the *Third Report and Order and Fifth Notice of Proposed Rulemaking* in PR Docket No. 89-552, FCC 97-57, adopted February 19, 1997, and released March 12, 1997. The *Third Report and Order* portion of this decision is summarized elsewhere in this edition of the **Federal Register**. The complete text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, DC 20554 and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857-3800, 2100 M Street, NW, Suite 140, Washington, DC 20037.

Paperwork Reduction Act

This *Fifth NPRM* contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collections contained in this *Fifth NPRM*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public comments are due June 2, 1997. 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.

OMB Approval Number: New Collection (which adds respondents to three existing collections 3060-0105, FCC 430; 3060-0319, FCC 490; 3060-0623, FCC 600).

Title: 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.

Form No.: FCC Forms 430, 490, and 600.

Type of Review: New collection.

Respondents: 220 MHz applicants and potential applicants and licensees.

Number of Respondents; Estimated Time Per Response and Total Annual Burden: If the proposed changes in the *Fifth NPRM* are adopted the respondents and burden for the FCC Form's 430, 490 and 600 as follows:

The FCC 430 has 1,900 respondents, to be increased to 23,050; the estimated

time for completion is 2 hours per respondent. The total annual burden for the FCC 430 would increase to 46,100 hours. The Form 490 has 5,000 respondents, to be increased to 28,500; the estimated time for completion is 3 hours per respondent. The total annual burden for the FCC 490 would increase to 85,500. The FCC 600 has 194,769 respondents, which may be increased by the *Third Report and Order* to 197,777, and further increased to 244,777 by the *Fifth NPRM*. The estimated time for completion is 4 hours per respondent. The total annual burden is 779,076. This figure will be increased to 791,108 by an information collection adopted in the *Third Report and Order* portion of this decision and to 979,108 hours if the changes proposed in the *Fifth NPRM* are adopted.

Needs and Uses: The information will be used by Commission personnel to determine if the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. Additionally, the information will be used by Commission personnel to determine who is using spectrum and thus maintain the integrity of the spectrum.

Synopsis of the Fifth Notice of Proposed Rulemaking

1. The Commission has concluded in the *Third Report and Order* that it will permit any holder of a Phase II Economic Area (EA), nationwide, or Regional 220 MHz license to partition portions of its authorization.¹ In this *Fifth NPRM*, the Commission considers the issue of full partitioning for Phase I nationwide 220 MHz licensees and the establishment of disaggregation rules for the 220 MHz service. As we indicated in the recent *Partitioning Report and Order* (which expanded the Commission's rules to permit geographic partitioning and disaggregation for all broadband PCS licensees), the Commission believes that partitioning and disaggregation are an effective means of providing broadband PCS licensees with the flexibility they need to tailor their service offerings to meet market demands.² The *Partitioning Report and Order* further concluded that partitioning and disaggregation may be used to overcome entry barriers through the creation of smaller licenses that require less capital, thereby facilitating greater participation by small businesses, rural telephone companies, and minority- and female-owned

¹ The Commission refers to such licenses as "Covered Phase II licenses."

² *Report and Order and Further Notice of Proposed Rule Making* in GN Docket No. 96-113, 62 FR 653 (January 6, 1997).

businesses.³ The Commission seeks comment on whether these benefits similarly justify the extension of partitioning rules to Phase I nationwide licensees and the establishment of disaggregation rules for the 220 MHz service.

2. The Commission seeks comment as to how various requirements imposed on covered Phase II licensees may be modified if such licensees partition their authorization. The Commission also invites comment as to whether partitioning of 220 MHz Phase I nationwide licenses should be permitted in a manner similar to the rules for partitioning that have been adopted for broadband PCS licensees. The Commission tentatively concludes that it should not adopt partitioning for those Phase II licensees that are not covered Phase II licensees and non-nationwide Phase I licensees because such licenses are awarded on a site-specific rather than for a geographic area basis. In addition, the Commission seeks comment as to whether all Phase I and Phase II 220 MHz licensees should be permitted to disaggregate their licensed spectrum. Since the 220 MHz service includes non-commercial uses by Public Safety and EMRS entities, the Commission seeks comment as to whether additional rules for partitioning and disaggregation should be adopted to address the use of the 220 MHz service for possible commercial and non-commercial services.

3. The full text of this *Fifth NPRM* solicits comment on specific aspects of partitioning and disaggregation, which will need to be addressed if the Commission decides to adopt partitioning for Phase I nationwide licensees and disaggregation for all 220 MHz licensees. For example, Phase I nationwide licensees are not currently permitted to assign or transfer a license before the licensee has constructed at least 40 percent of the proposed system. The Commission therefore seeks comment as to whether a Phase I nationwide licensee should be permitted to partition or disaggregate prior to constructing at least 40 percent of its proposed system. The Commission also seeks comment as to whether there are technical or regulatory constraints unique to the 220 MHz service that would render partitioning or disaggregation impractical or administratively burdensome.

4. Covered Phase II 220 MHz service areas are based on nationwide, Economic Areas or Regional Areas. In addition, there are Phase I nationwide licenses in the 220 MHz service. The

Commission tentatively concludes that a flexible approach to partitioned areas, similar to the one adopted for broadband PCS, is appropriate for the 220 MHz service. The Commission therefore proposes to permit partitioning of Phase I nationwide and covered Phase II 220 MHz licenses based on any license area defined by the parties. Comment is invited on this proposal, and in particular on whether this proposal is consistent with the Commission's 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 the partitioned license area.

5. The Commission next seeks comment as to whether, if disaggregation in the 220 MHz service is permitted, minimum disaggregation standards are necessary. The Commission seeks to determine whether, given the unique characteristics of the 220 MHz service, technological and administrative considerations warrant the adoption of such standards. The Commission seeks comment as to whether to adopt standards which would be flexible enough to encourage disaggregation while providing a standard which is consistent with its technical rules and by which it would be able to track disaggregated spectrum and review disaggregation proposals in an expeditious fashion.

6. The Commission further seeks comment regarding whether combined partitioning and disaggregation should be permitted for the 220 MHz service. The Commission tentatively concludes that it 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.

7. The Commission seeks comment as to whether it should adopt rules for covered Phase II licensees to establish dual construction options and attendant requirements for 220 MHz service partitioners and partitionees, similar to those adopted for broadband PCS. Under the first option, the partitionee certifies that it will satisfy the same construction requirements as the original licensee. The partitionee then must meet the prescribed service requirements in its partitioned area while the partitioner is responsible for meeting those requirements in the area it has retained. Under the second option, the original licensee certifies that it has already met or will meet its 5-year construction requirement and that it will meet the 10-year requirement

for the entire market involved. Because the original licensee retains the responsibility for meeting the construction requirements for the entire market, the partitionee is permitted to comply with a less rigorous construction requirement—the partitionee must only meet a substantial service requirement for its partitioned license area at the end of the 10-year license term. The Commission particularly seeks comment as to the appropriateness of the lesser construction requirement for the second option.

8. The Commission invites comment as to whether to adopt rules for covered Phase II licensees similar to the disaggregation rules adopted for broadband PCS. Under this certification approach, the disaggregating parties would be required to submit a certification, signed by both the disaggregator and disaggregatee, stating whether one or both of the parties will retain responsibility for meeting the 5- and 10-year construction requirements for the 220 MHz market involved. If one party takes responsibility for meeting the construction requirements, then that party would be subject to license forfeiture for failing to meet the construction requirements, but such a failure would not affect the status of the other party's license. If both parties agree to share the responsibility for meeting the construction requirements, then both parties' licenses would be subject to forfeiture if either party fails to meet the construction requirements.

9. The Commission proposes rules for licensees other than covered Phase II licensees that differ from the approach taken in the *Partitioning Report and Order*. Phase I non-nationwide licensees and Phase II licensees authorized on Public Safety or EMRS channels are not authorized to operate within a particular geographic area, but instead are authorized to construct a single land mobile base station for base and mobile operations. Phase I non-nationwide licensees must construct their systems, having all specified base stations constructed with all channels, and place their systems in operation within eight months of the initial license grant.

10. The Commission proposes that Phase I non-nationwide licensees be permitted to disaggregate their licensed spectrum only after they have met the applicable construction deadline. The Commission also proposes that Phase II licensees operating on Public Safety or EMRS channels should be permitted to disaggregate their licensed spectrum only after they have met the applicable construction deadline. Since the construction deadline would therefore

³ *Id.*

be met before any disaggregation is allowed, no construction requirement would be imposed on a disaggregatee. Comment is solicited on these proposals.

11. The Commission next tentatively concludes that a disaggregatee obtaining spectrum from a Phase I nationwide licensee should be required to meet the same two-, four-, six-, and 10-year construction requirements as the original licensee. The disaggregatee would be required to meet the same two-, four-, six-, and 10-year requirements as the original licensee for the spectrum it obtains. The Commission seeks comment on this tentative conclusion.

12. Because the construction requirements for Phase I nationwide licensees differ so markedly from those pertaining to Phase II nationwide licensees or licensees in other services such as broadband PCS or GWCS, it does not appear, as a practical matter, to be possible to have similar construction options for Phase I nationwide partitionees. Given the difficulties created by these construction requirements, the Commission seeks comment on whether partitioning of Phase I nationwide licenses should be permitted. If such partitioning is allowed, the Commission seeks comment on what construction requirements could be imposed on the original licensee and any partitionees. In light of the unique construction requirements imposed on Phase I nationwide licensees, the Commission also seeks comment on what type of construction requirements should be imposed on Phase I licensees and their partitionees and disaggregatees if a Phase I nationwide license is both partitioned and disaggregated.

13. Regarding the license term, the Commission seeks comment as to whether its 220 MHz rules should provide that parties obtaining partitioned 220 MHz licenses or disaggregated spectrum hold their license for the remainder of the original licensee's five- or 10-year license term. In addition, the Commission seeks comment as to whether 220 MHz partitionees and disaggregatees should be afforded the same renewal expectancy as other 220 MHz licensees. The Commission tentatively concludes 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.

14. The Commission's competitive bidding rules for the covered Phase II 220 MHz service include provisions for installment payments and bidding

credits for small businesses and very small businesses. The Commission has also adopted rules to prevent unjust enrichment by such entities that seek to transfer licenses obtained through use of one of these special benefits. The Commission tentatively concludes that the Phase II 220 MHz service partitionees and disaggregatees that would qualify as small businesses or very small businesses should be permitted to pay their pro rata share of the remaining government obligation through installment payments. The Commission seeks comment on this tentative conclusion. The Commission also invites comment as to the exact mechanisms for apportioning the remaining government obligation between the parties and whether there are any unique circumstances that would make devising such a scheme for the Phase II 220 MHz service more difficult than for broadband PCS. Since Phase II 220 MHz service areas are allotted on a geographic basis, in a manner similar to broadband PCS, the Commission proposes using population as the objective measure to calculate the relative value of the partitioned area and amount of spectrum disaggregated as the objective measure for disaggregation, and seeks comment on this proposal.

15. The Commission invites comment on whether to apply unjust enrichment rules to small or very small business Phase II 220 MHz licensees that partition or disaggregate to non-small businesses. Commenters should 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. The Commission asks that commenters also address how it 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. Commenters should also 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. The Commission proposes 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 seeks comment on this proposal.

16. Section 90.709(d) of the Commission's rules currently forbids partial assignment of Phase I 220 MHz licenses. However, since there are existing partial assignment rules for

commercial mobile radio stations in part 90, the Commission proposes utilizing partial assignment procedures, similar to those adopted for broadband PCS, to review 220 MHz partitioning and disaggregation transactions. Partial assignment applications would be placed on public notice and subject to petitions to deny. The parties would be required to submit an FCC Form 490, an FCC Form 600 and, if necessary, an FCC Form 430, together as one package under cover of the FCC Form 490. The Commission invites comment on whether any additional procedures are necessary for reviewing these applications. We also seek comment on how licensing issues should be addressed for non-commercial mobile radio stations in the 220 MHz service with respect to partial assignments.

Administrative Matters

17. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before April 15, 1997, and reply comments on or before April 30, 1997. To file formally in this proceeding, you must file an original plus 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, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, NW., Washington, DC 20554.

18. 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 rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

Initial Regulatory Flexibility Act Statement

19. 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 proposals suggested in this document. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Fifth Notice of Proposed Rulemaking*, but they must have a separate and distinct heading

designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Fifth Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Public Law 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

List of Subjects in 47 CFR Part 90

Business and industry, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

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