

ALERT

FCC Seeks Comment on Spectrum Partitioning, Disaggregation, and Leasing Policies

March 18, 2019

On March 15, 2019, the Federal Communications Commission (FCC or Commission) released a Notice of Proposed Rulemaking (NPRM) seeking comment on whether certain changes to its spectrum partitioning, disaggregation, and leasing rules may increase the availability of advanced telecommunications services in rural areas and facilitate access to spectrum by covered small carriers. As required by the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (MOBILE NOW Act),^[1] the NPRM requests feedback on three main issues: (1) reduced performance requirements in rural areas, (2) potential conditions on transfers of spectrum to certain small carriers, and (3) incentives to encourage spectrum lease or sale. The item offers an important opportunity for stakeholders to weigh in on the efficacy of the Commission's existing secondary market rules and policies.

Comments will be due 60 days from publication in the Federal Register.

A. Background

The FCC's spectrum partitioning, disaggregation, and leasing rules are designed to increase spectrum access, particularly in rural areas. (¶¶ 2, 6). The Commission's partitioning and disaggregation rules, adopted in 1996,^[2] enable certain wireless spectrum licensees to assign portions of their licenses to other users. A licensee may seek Commission approval to assign portions of their license based on geographic area (geographic partitioning) and/or based on blocks of their licensed spectrum (spectrum disaggregation). (¶ 3). The parties to partitioning and disaggregation agreements may elect for one party to be responsible for satisfying the performance

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requirements, or the parties may agree to share these responsibilities. (¶ 4). In 2003 the Commission adopted a comprehensive set of requirements and procedures to allow wireless licensees to lease spectrum usage rights to third-party entities (spectrum leasing).[3] (¶ 6). The approval processes and performance requirements that apply to the lessor and lessee depend on the level of compliance control retained by the lessor, as well as the length of the license term. (¶¶ 8, 9).

Section 616 of the MOBILE NOW Act requires that, within a year of the Statute's enactment, the Commission initiate a rulemaking proceeding assessing three questions regarding programs for the partitioning, disaggregation, and leasing of spectrum licenses:[4] (¶ 12)

1. Whether reduced performance requirements applicable to partitioned or disaggregated licenses would promote the availability of advanced telecommunications services in rural areas or spectrum availability for small covered carriers?
2. What conditions may be needed to eliminate impediments to transfers of spectrum to small carriers to allow them to build out in a reasonable period of time?
3. What incentives may encourage licensees to lease or sell spectrum to small carriers or unaffiliated carriers that will serve rural areas?

In addressing each of these questions, commenters are asked to expand on how their proposed modifications would lead to increased rural area deployment and whether the Commission would have to pair proposed modifications with increased oversight and/or penalties. (¶¶ 16, 27, 30). The Commission asks commenters to discuss the potential costs of any modifications in terms of speed and quality of deployment, as well as benefits in terms of increased coverage and quality of service. (¶¶ 18-19, 22-24, 27, 30). The Commission also asks commenters to discuss the administrative costs and benefits of any proposed implementation, particularly in light of Section 616's requirement that the Commission consider the administrative feasibility of implementing proposed changes. (¶¶ 12, 14, 19, 24, 31). Furthermore, the Commission seeks insight into how it would measure any changes in service to rural areas under these potential modifications. (¶¶ 16, 18, 19, 24, 27, 30, 31).

B. Reduced Performance Requirements in Rural Areas

First, the Commission seeks comment on whether reduced performance requirements for partitioned or disaggregated licenses would facilitate the deployment of advanced telecommunications services in rural areas or spectrum availability for small covered carriers. (¶ 15). Commenters are asked to address whether substantive adjustments (e.g. reduced buildout requirements) or temporal adjustments (e.g. extending deadlines for performance) would promote deployment in rural areas. (¶ 16).

One example provided by the Commission is the possibility of extending by one year a receiving party's construction deadline for a partitioned or disaggregated license when (i) the receiving party is a rural carrier or is acquiring spectrum that includes "rural areas,"[5] and (ii) the receiving party elects to meet the construction requirement independently for its partitioned or disaggregated license area. (¶ 17).

In addressing the Commission's example of a construction deadline extension, and in advocating for other approaches involving reduced performance requirements, commenters are asked to describe in detail how such approaches would be implemented, including how and when they would take effect, to whom they would apply, and any specific conditions that should apply. (¶ 19).

C. Conditions on Transfer of Spectrum to Covered Small Carriers

Second, the Commission seeks comment on whether the current rules should be adjusted to include special conditions for covered small carriers that obtain access to spectrum through partition or disaggregation. The Commission asks commenters to address whether procedural and/or substantive barriers foreclose certain parties from partitioning, disaggregating, or leasing spectrum. (¶¶ 21, 22). The Commission also seeks comment on whether the current rules promote an efficient level of secondary market transactions. (¶ 23).

Commenters are asked whether reduced or modified performance requirements, such as reduced construction obligations or extended performance deadlines, would increase the number of covered small carriers that are willing and able to obtain spectrum through partitioning, disaggregation, or lease arrangements. Commenters are asked to describe in detail the extent to which any proposed conditions are necessary or likely to increase covered small carrier participation in partitioning, disaggregation, and leasing programs. The Commission also seeks comment on how it could best ensure that a reduction in construction requirements does not lead to a reduction in services deployed. (¶ 22).

Given the MOBILE NOW Act only requires the Commission to focus on programs that promote the availability of spectrum for "covered small carriers,"^[6] the Commission also seeks comment on whether it should apply any rule revisions to an expanded class of licensees beyond those required by Congress. (¶ 20).

4. Incentives to Encourage Lease or Sale

Third, the Commission seeks comment on what, if any, incentives might encourage licensees to lease or sell spectrum to small carriers or unaffiliated carriers seeking to provide service to rural areas. (¶ 25)

For example, under current rules, licensees that enter long-term leases have the added incentive of being able to attribute the buildout and performance activities of the lessee for purposes of satisfying the licensee/lessor's own performance obligations. Commenters are asked whether this incentive is sufficient to encourage licensees to sell or lease their spectrum rights, or whether modified performance requirements or longer license terms might encourage more licenses to sell or lease their spectrum rights. (¶ 26).

The Commission also seeks comment on whether allowing for the reaggregation of spectrum that has been partitioned or disaggregated would reduce the regulatory and administrative burdens of holding multiple licenses, thereby increasing the incentives of parties to lease or sell spectrum in the first place. The Commission notes that current rules require licensees to hold multiple licenses for what was once a single license, which imposes burdens on licensees, including construction requirements, renewal showings, continuous service requirements, and the need to maintain up-to-date information in ULS. If spectrum reaggregation were allowed, commenters are asked what safeguards the Commission could employ to

prevent carriers from using the process to avoid construction requirements. (¶ 28).

Commenters are asked to identify any substantive or procedural barriers to leasing that inefficiently limit use of the program by spectrum licensees. The Commission asks, for example, whether the administrative burden of seeking approval prior to consummation of a sale disproportionately deters transactions with such carriers. (¶ 25). Commenters are also asked to address whether the existing secondary markets rules are sufficiently flexible to provide adequate incentives to encourage spectrum lease and sale. (¶ 26).

Kamila Benzina, a Law Clerk in Telecom, Media & Technology practice, contributed to this alert.

For further information on these issues, please contact any of the following: Scott Delacourt (202.719.7459 | sdelacourt@wiley.law), Anna M. Gomez (202.719.7261 | agomez@wiley.law), Meredith Singer (202.719.7507 | msinger@wiley.law), Richard B. Engelman (202.719.4143 | rengelman@wiley.law)

[1] MOBILE NOW Act, Pub. L. No. 115-141, Division P, Title VI, § 601 *et seq.* (2018). The MOBILE NOW Act became law on March 23, 2018.

[2] *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, para. 1 (1996).

[3] *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604 (2003).

[4] See MOBILE NOW Act at § 616(b)(2)(A)-(C).

[5] “Rural area” is defined by Section 616 as any area other than “(A) a city, town, or incorporated area that has a population of more than 20,000 inhabitants; or (B) an urbanized area contiguous and adjacent to a city or town that has a population of more than 50,000 inhabitants.” *Id.* at § 616(a)(2).

[6] The Mobile NOW Act requires the Commission use the definition of “carrier” contained in Section 3 of the Communications Act of 1934, which is defined to encompass only common carriers. See 47 U.S.C. § 153(11).