

and other parties subsequently may request a license to operate in that unused spectrum. In the geographically-based cellular service, initial licensees are given five years to construct facilities and begin providing service within a geographic service area. At the end of the initial five-year period, the licensee is allowed to keep those portions of its licensed area in which it has constructed, while the unconstructed portions of the market become available for licensing to other parties via the cellular "unserved area" licensing process. We refer to this standard as a "keep what you use" approach.

12. Other geographically licensed services, in contrast, face notably different construction benchmarks and means by which unused spectrum may be reclaimed and re-licensed by the Commission. For example, PCS licensees must meet five- and ten-year benchmarks that mandate coverage of a certain percentage of the population of their licensed areas, or where applicable, make a showing of substantial service. Failure to meet these benchmarks results in automatic cancellation or non-renewal of the entire license, including the rights to operate from any facilities already constructed under the authorization. Moreover, for many services, if the licensee loses its authorization for failing to meet the coverage requirements, it is often ineligible to reapply for that authorization. However, once these benchmarks are achieved, licensees are generally afforded exclusive rights and a renewal expectancy for the entire area and band under the license regardless of whether service is being provided in all parts of the area or over all of the spectrum. Because licensees that fail to comply with this coverage requirement lose their entire license, we refer to this standard of termination or forfeiture as the "complete forfeiture" approach. Among the advantages of this model, since licensees do not have to cover their entire geographic license areas or use all of their licensed spectrum capacity, there is a greater incentive for licensees to build out those areas that will ensure their economic viability as providers. Among the disadvantages is the potentially lower likelihood that rural and less-populous areas will be served by the licensee, because there may be an incentive for construction to focus first on populous areas and little corresponding incentive for licensees to construct in rural areas.

13. In addition, there are other approaches the Commission may use to transition spectrum to higher-valued

uses. For example, as the Spectrum Policy Task Force observed, the Commission could create expanded "overlay" rights to licensed spectrum, whereby usage rights are given to new licensees. To address issues related to the incumbent licensees in these bands, the Commission could adopt various policies, including mandatory relocation of incumbents to other bands, grandfathering incumbents in the existing band, or providing incentives for band-clearing. Overlays with relocation of incumbents were used in broadband PCS, while grandfathering of incumbents was used in services such as paging and SMR. Among the advantages of this approach, overlays may be more flexible and, in some cases, less burdensome on incumbents. Among the disadvantages of this approach are potential incumbent hold-out problems, lengthy periods for incumbent relocation, and the expense of additional auctions. Because the "keep what you use," "complete forfeiture," and other approaches such as overlays may not be effective tools to ensure prompt delivery of service to rural and underserved areas, we explore below alternative methods to facilitate access to and use of spectrum in these markets.

## 2. Discussion

### a. What Constitutes "Use" of Spectrum

14. As the Commission attempts to increase efficient access to and use of spectrum, and as it subsequently establishes policies for access to unused spectrum, we must provide a clear definition of "use" for all parties affected by these rules. That is, licensees that construct or lease their spectrum must understand how this use is construed in terms of construction requirements, re-licensing, and other policies that may affect them so that they will know what rights licensees will retain in the event they do not "use" their spectrum, however we define it. We seek comment on how to define "use" in order to effectively promote access to and use of spectrum in rural areas. We also inquire how to define this term in a flexible manner so as to recognize the many ways in which licensees provide service, or allow other parties to provide service, with their licensed spectrum. Under our current rules for many service bands, "use" is defined to reflect construction and operation of specified facilities by the licensee. We seek comment on whether this is the appropriate baseline standard for determining use and, if not, what this standard or other "performance" criteria should be.

15. We recognize that leasing via secondary markets may require viewing the concept of use from a different perspective. That is, under a negotiated spectrum leasing arrangement, a licensee assigns a usage right to a third party. We propose that spectrum in rural areas that is leased by a licensee, and for which the lessee meets the performance requirements that are applicable to the licensee, should be construed as "used" for the purposes of this proceeding and any other performance criteria we adopt. We note that merely leasing spectrum, where the lessee does not fully meet the lessors' performance requirements, would not be considered "use" under this proposal. We seek comment on this approach and other ways we could better tailor or expand the concept of "use" to encourage service by licensees or lessees in rural and underserved areas. Finally, should our definition of "use" be in any way limited as it applies to leasing?

16. Under one approach to defining construction, the Commission would rely on the filings of wireless providers, perhaps with certain reporting criteria. This approach is based on the presumption that wireless providers are in the best position to determine the meaning of "built" for their particular technology and application. Moreover, such an approach is consistent with recent Commission precedent and trends. With broadband PCS licensees, for example, the Commission did not attempt to specify a particular signal level, but instead required licensees to provide a signal level "sufficient to provide adequate service" to one-third of the population in the market within five years, and to two-thirds within ten years. In applying this approach to measuring construction, the Commission could provide guidance regarding what type of range would be acceptable and how this might vary from service to service. Alternatively, we could decline to provide direction and simply monitor the various means by which licensees report their construction.

17. We recognize that the approach described above, however, may present certain risks, particularly in the event that a licensee claims that it is satisfying the more flexible "substantial service" standard, instead of satisfying a concrete coverage benchmark. The Commission may not have sufficient resources to verify that the many different uses of rural spectrum likely to emerge will actually serve the goals of our build out requirements. Additionally, we note that this approach might present some risk for the licensee. For example, were