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United States (US) Footnotes

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US276 Except as otherwise provided for herein, use of the band 2360–2395 MHz by the mobile service is limited to aeronautical telemetering and associated telecommand operations for flight testing of aircraft, missiles or major components thereof. The following three frequencies are shared on a co-equal basis by Federal and non-Federal stations for telemetering and associated telecommand operations of expendable and reusable launch vehicles, whether or not such operations involve flight testing: 2364.5 MHz, 2370.5 MHz, and 2382.5 MHz. All other mobile telemetering uses shall not cause harmful interference to, or claim protection from interference from, the above uses.

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Federal Government (G) Footnotes

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G122 In the bands 2300–2310 MHz, 2395–2400 MHz, 2400–2417 MHz, and 4940–4990 MHz, Federal operations may be authorized on a non-interference basis to authorized non-Federal operations, and shall not constrain the implementation of any non-Federal operations.

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PART 87—AVIATION SERVICES

■ 5. The authority citation for part 87 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 307(e) unless otherwise noted. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–156, 301–609.

■ 6. Section 87.303 is amended by revising paragraph (d)(1) to read as follows:

§ 87.303 Frequencies.

* * * * *

(d)(1) Frequencies in the bands 1435–1525 MHz and 2360–2395 MHz are assigned in the mobile service primarily for aeronautical telemetry and associated telecommand operations for flight testing of aircraft and missiles, or their major components. The bands 2310–2320 MHz and 2345–2360 MHz are also available for these purposes on a secondary basis. Permissible uses of these bands include telemetry and associated telecommand operations associated with the launching and reentry into the Earth's atmosphere, as well as any incidental orbiting prior to reentry, of objects undergoing flight tests. In the band 1435–1525 MHz, the following frequencies are shared with flight telemetry mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, and 1524.5 MHz. In the band 2360–2395 MHz, the following frequencies may be assigned for telemetry and associated telecommand operations of expendable and re-usable launch vehicles, whether or not such operations involve flight testing: 2364.5, 2370.5 and 2382.5 MHz. In the band 2360–2395 MHz, all other mobile telemetry uses shall not cause harmful interference to, or claim protection from interference from, the above uses.

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[FR Doc. 06–4655 Filed 5–23–06; 8:45 am]

BILLING CODE 6712–01–C

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22, 27, and 101

[ET Docket No. 00–258; WT Docket No. 02–353; FCC 06–45]

Advanced Wireless Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document establishes procedures for the relocation of Broadband Radio Service (BRS) operations from the 2150–2160/62 MHz band, as well as for the relocation of Fixed Microwave Service (FS) operations from the 2160–2175 MHz band, and modifies existing relocation procedures for the 2110–2150 MHz and 2175–2180 MHz bands. This document also establishes cost-sharing rules to identify the reimbursement obligations for Advanced Wireless Service (AWS) and Mobile Satellite Service (MSS) entrants benefiting from the relocation of incumbent FS operations in the 2110–2150 MHz and 2160–2200 MHz bands and AWS entrants benefiting from the relocation of BRS incumbents in the 2150–2160/62 MHz band. We continue our ongoing efforts to promote spectrum utilization and efficiency with regard to the provision of new services, including AWS. This document also dismisses a petition for reconsideration filed by the Wireless Communications Association International, Inc. (WCA) as moot.

DATES: Effective June 23, 2006, except for §§ 27.1166(a), (b) and (e); 27.1170; 27.1182(a), (b); and 27.1186, which contain information collection requirements that have not been approved by the Office of Management and Budget. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date of these sections.

FOR FURTHER INFORMATION CONTACT: Patrick Forster, Office of Engineering & Technology, (202) 418–7061.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Ninth Report and Order and Order,* ET Docket No. 00–258, WT Docket No. 02–353, FCC 06–45, adopted April 12, 2006, and released April 21, 2006. The full text of this document is available on the Commission's Internet site at *http://www.fcc.gov.* It is also available for inspection and copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The full text of this document also may be purchased from the Commission's duplication contractor, Best Copy and Printing Inc., Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554; telephone (202) 488–5300; fax (202) 488–5563; e-mail *FCC@BCPIWEB.COM.*

Summary of the Report and Order (ET Docket No. 00–258)

1. In the *Ninth Report and Order* (''*Ninth R&O*'') in ET Docket No. 00–258, the Commission discusses the specific relocation procedures that will apply to BRS and FS incumbents in the 2150–2160/62 MHz and 2160–2175 MHz bands, respectively. We also discuss the cost-sharing rules that identify the reimbursement obligations for AWS and MSS entrants benefiting from the relocation of incumbent FS operations in the 2110–2150 MHz and 2160–2200 MHz bands and AWS entrants benefiting from the relocation of BRS incumbents in the 2150–2160/62 MHz band. The Commission, in earlier decisions in this docket, has allocated the spectrum in the 2150–2160/62 MHz and 2160–2175 MHz bands for Advanced Wireless Service (AWS), which is the collective term we use for new and innovative fixed and mobile terrestrial wireless applications using bandwidth that is sufficient for the provision of a variety of applications, including those using voice and data (such as Internet browsing, message services, and full-motion video) content. Advanced wireless systems could provide, for example, a wide range of voice, data, and broadband services over a variety of mobile and fixed networks. In establishing these relocation procedures, we facilitate the introduction of AWS in these bands, while also ensuring the continuation of BRS and FS service to the public.

A. Relocation of BRS in the 2150–2160/62 MHz Band

2. In the *AWS Fifth Notice of Proposed Rulemaking* in ET Docket 00–258 (''*AWS Fifth Notice*''), 70 FR 61752, October 26, 2005, the Commission proposed to generally apply our Emerging Technologies policies to the relocation procedures new AWS entrants should follow when relocating BRS incumbent licensees from the 2150–2160 MHz band. Comments generally support the proposal to use policies for relocation based on those used in the Commission's prior Emerging Technologies proceedings, with modifications to accommodate the incumbents in the band at issue. The Commission has used the Emerging Technologies policies in establishing relocation schemes for a variety of new entrants in frequency bands occupied by different types of incumbent operations. In establishing these relocation schemes, the Commission has found that the Emerging Technologies relocation policies best balance the interest of new licensees seeking early entry into their respective bands in order to deploy new technologies and services with the need to minimize disruption to incumbent operations used to provide service to customers during the transition.

3. BRS operators are providing four categories of service offerings today: (1) Downstream analog video; (2) downstream digital video; (3) downstream digital data; and (4) downstream/upstream digital data. Licensees and lessees have deployed or sought to deploy these services via three types of system configurations: High-power video stations, high-power fixed two-way systems, and low-power, cellularized two-way systems. Traditionally, BRS licensees were authorized to operate within a 35-mile-radius protected service area (PSA) and winners of the 1996 MDS auction were authorized to serve BTAs consisting of aggregations of counties. In the proceeding that restructured the BRS band at 2496–2690 MHz, the Commission adopted a geographic service area (GSA) licensing scheme for existing BRS incumbents. Therefore, BRS relocation procedures must take into account the unique circumstances faced by the various incumbent operations and the new AWS licensees.

4. As an initial matter, it appears that there are active BRS channel 1 and/or 2/2A operations throughout the United States, with many licensees serving a relatively small customer base of several thousand or fewer subscribers each. The Commission draws this conclusion from a number of sources of information, including BRS operations data submitted to the Commission in response to the *Order* portion of the *AWS Eighth R&O, 70 FR 61742, October 26, 2005, Fifth Notice and Order in ET Docket 00–258,* as well as pleadings in the record of this proceeding including representations made by WCA, an industry group that represents many BRS licensees. In response to the request for information to assist in determining the scope of AWS entrants' relocation obligations, 69 BRS licensees provided information on 127 stations. An examination of this data indicates that BRS operations can be found across the United States, in approximately 65 of the 176 U.S. Economic Areas.

5. WCA has estimated that BRS channels 1 and/or 2 are used in 30–50 markets in the U.S., providing ''tens of thousands'' of subscribers in urban and rural areas with wireless broadband service, and in some cases, multichannel video programming service. While Sprint Nextel appears to be the largest licensee with approximately 20,000 subscribers in 14 markets across the country, many operators have described smaller operations in more discrete geographic areas. Examples of these licensees include: Northern Wireless Communications, which provides broadband services on BRS channels 1 and 2 to approximately 725 subscribers from hub sites located in Aberdeen and Redfield, South Dakota, and multichannel video programming to approximately 950 subscribers; and W.A.T.C.H. TV, which provides more than 200 channels of digital video and audio to more than 12,000 subscribers in and around Lima, Ohio, with more than 5,000 subscribers using BRS channels 1 and 2 for upstream wireless broadband.

1. Relocation Process

6. *Transition Plan.* In the *AWS Fifth Notice,* the Commission proposed to require the AWS entrant to relocate BRS operations on a link-by-link basis, based on interference potential. We also proposed to allow the AWS entrant to determine its own schedule for relocating incumbent BRS operations so long as it relocates incumbent BRS licensees before beginning operation in a particular geographic area and subject to any other build-out requirements that may be imposed by the Commission on the AWS entrant. We further proposed to require that the AWS licensee relocate all incumbent BRS operations that would be affected by the new AWS operations, in order to provide BRS operators with comparable facilities.

7. The Commission anticipates that an AWS licensee will likely use a terrestrial network that is comprised of several discrete geographic areas served by multiple base stations. Unlike satellite systems, for example, whose signals can blanket the whole country simultaneously, the terrestrial nature of an AWS licensee's service allows for the gradual relocation of incumbents during a geographically-based build-out period. We recognize that this build-out period may take time because of the large service areas to be built out for new AWS networks, but expect that the AWS licensees and the incumbent BRS licensees will work cooperatively to ensure a smooth transition for incumbent operations. Upon review of the concerns raised in the record regarding our initial proposal for a link-by-link approach for relocation, we are convinced that adopting a ''system-by-system'' basis for relocation, based on potential interference to BRS, will better accommodate incumbent BRS operations. If an analysis shows that a BRS incumbent's ''system'' needs to be relocated, we will require that the base station and all end user units served by that base station be relocated to comparable facilities.

8. The Commission rejects proposals that would allow BRS incumbents to voluntarily self relocate, *i.e.*, to unilaterally determine when relocation would occur and to require AWS entrants to reimburse BRS incumbents based on a cost estimate for comparable facilities that were selected and deployed at the discretion of the incumbent without the involvement of and negotiation with the AWS licensee. We conclude that the diversity of incumbent BRS facilities and services makes it difficult to allow self relocation based on cost estimates and a cost cap, as some commenters suggest. As a practical matter, we expect a BRS incumbent to take an active role in the actual relocation of its facilities, including selecting and deploying comparable facilities, but we find that relocation should result from AWS–BRS negotiations or the involuntary relocation process discussed below. To address the concerns raised by BRS incumbents regarding the disclosure of their proprietary customer information to potential AWS competitors we do not require that AWS entrants be permitted to approach the incumbents' customers directly for relocation purposes. To balance AWS interests with the need to minimize disruption to an incumbent's customers, we do not allow the AWS entrant to begin operations in a particular geographic area until the

affected BRS incumbent is relocated (and subject to any other build-out requirements that may be imposed by the Commission on the AWS entrant).

9. *Comparable Facilities.* Under the Emerging Technologies policy, the Commission allows new entrants to provide incumbents with comparable facilities using any acceptable technology. Incumbents must be provided with replacement facilities that allow them to maintain the same service in terms of: (1) Throughput—the amount of information transferred within the system in a given amount of time; (2) reliability—the degree to which information is transferred accurately and dependably within the system; and (3) operating costs—the cost to operate and maintain the system. Thus, the comparable facilities requirement does not guarantee incumbents superior systems at the expense of new entrants. We note that our relocation policies do not dictate that systems be relocated to spectrum-based facilities or even to the same amount of spectrum as they currently use, only that comparable facilities be provided. In the *AWS Fifth Notice,* the Commission proposed that if relocation were deemed necessary, BRS incumbents with primary status would be entitled to comparable facilities and sought comment on how to apply the comparable facilities requirement to unique situations faced by BRS licensees

10. The Commission concludes that the Emerging Technologies policy of comparable facilities is the best approach to minimize disruption to existing services and to minimize the economic impact on licensees of those services, and requires that AWS licensees provide BRS incumbents with replacement facilities that allow them to maintain the same service in terms of: (1) Throughput—the amount of information transferred within the system in a given amount of time; (2) reliability—the degree to which information is transferred accurately and dependably within the system; and (3) operating costs—the cost to operate and maintain the system. In order to minimize disruption to the incumbent's customers, we also find that the replacement of CPE (*i.e.*, end user equipment) in use at the time of relocation and that is necessary for the provision of BRS service should be part of the comparable facilities requirement. Further, consistent with our Emerging Technologies policy, during involuntary relocation, new AWS entrants will only be required to provide BRS incumbents with enough throughput to satisfy their system use at the time of relocation, not to match the overall capacity of the system. For post-1992 licensees operating on a combination of BRS channels 1 and 2/2A (*e.g.*, integrated for downstream two-way broadband operations), whose operations are likely to transition to new channels in the restructured band at different times, we require the relocation of operations on both BRS channels 1 and 2/2A where the BRS licensee is using the same facility for both channels in order to provide service to customers.

11. The Commission does not further expand the comparable facilities definition as the parties request (*e.g.*, requiring only a wireless solution; adopting a definition used in the decisions in WT Docket 02–55 (collectively the ''*800 MHz proceeding*''); and including internal administrative costs of the incumbent) and rejects parties' suggestions that comparable facilities requires only a wireless solution. Given advances in technology, *e.g.*, changing from analog to digital modulation and the flexibility provided by our existing relocation procedures to make incumbents whole, we believe that these differences should be taken into account when providing comparable facilities. In the *800 MHz proceeding*, incumbents in the 800 MHz band were being relocated within the same band as part of an overall band reconfiguration process designed to resolve the interference concerns of public safety licensees in the band. Therefore, a comparable facilities definition based on equivalent capacity was the better approach in the *800 MHz proceeding*, because, for example, the services, equipment, and propagation characteristics were not likely to change significantly in the newly reconfigured band. Further, the level of detail in the comparable facilities definition in the *800 MHz proceeding* was necessary to ensure that the costs for relocation and reconfiguration were easy to compute and verify since these expenses were to be used to calculate the credit due to the U.S. Treasury at the end of the 800 MHz transition. In the instant case, BRS incumbents are to be relocated to a new band where, for example, the equipment and propagation characteristics are different, and BRS incumbents use various technologies to deploy their services. We therefore believe that a more flexible definition of comparable facilities is justified in this case and find that the factors we have identified as most important for determining comparability (*i.e.*, throughput, reliability, operating costs, and now end user equipment) provide the degree of flexibility that will better serve the parties during negotiations. Finally, consistent with our Emerging Technologies policies, we will not require that new AWS licensees reimburse BRS incumbents for their internal costs for relocation because these costs are difficult to determine and verify.

12. The Commission further notes that under our relocation policies only stations with primary status are entitled to relocation. Because secondary operations, by definition, cannot cause harmful interference to primary operations nor claim protection from harmful interference from primary operations at frequencies already assigned or assigned at a later date, new entrants are not required to relocate secondary operations. Because BRS stations licensed after 1992 to use the 2160–2162 MHz band operate on a secondary basis a portion of BRS channel 2 will have secondary status in some cases, and this portion would not be entitled to relocation under existing Emerging Technologies policies. BRS stations licensed after 1992 to use the remaining portion of BRS channel 2 (2156–2160 MHz) operate on a primary basis and thus, would be entitled to relocation. In this situation, we expect the parties will work together in negotiating appropriate compensation for the costs to relocate four megahertz of a six megahertz block of spectrum. We therefore adopt our relocation policies regarding stations with primary and secondary status for the BRS.

13. *Leasing.* Some BRS licensees of channel(s) 1 and/or 2/2A currently lease their spectrum capacity to other commercial operators, and the Commission has determined that future leasing of BRS spectrum will be allowed under the Secondary Markets policy. In all leasing cases, the BRS licensee retains *de jure* control of the license and is the party entitled to negotiate for ''comparable facilities'' in the relocation band. The Commission concludes that the approach we proposed in the *AWS Fifth Notice* is consistent with the purpose of the ''comparable facilities'' policy to provide new facilities in the relocation band so that the public continues to receive service, and disagrees with commenters who request additional protections for or requirements on the lessee. Disputes with respect to private leasing agreements between the licensee and lessee are best addressed using applicable contractual remedies outside the Commission's purview. While we recognize the benefit of including the lessee in negotiations for comparable facilities, we do not believe a requirement for participation is necessary, and thus conclude that, in

cases where the BRS licensees continue to lease their spectrum to third parties when they relocate to the 2.5 GHz band, the licensee may include the lessee in negotiations but lessees would not have a separate right of recovery—*i.e.*, the new entrant would not have to reimburse both the licensee and lessee for ''comparable facilities.'' We also adopt our proposal to allow incumbent BRS licensees to rely on the throughput, reliability, and operating costs of facilities operated by a lessee in negotiating ''comparable facilities.'' BRS licensees may also use these same factors for determinations of ''comparable facilities'' during involuntary relocation, except that the BRS licensee may only rely on the facilities that are ''in use'' pursuant to 47 CFR 101.75 by the lessee at the time of relocation. Finally, in cases where the BRS licensee discontinues leasing arrangements prior to relocation, the lessee is not entitled to recover lost investment from the new AWS entrant.

14. *Licensee Eligibility.* In the *AWS Fifth Notice,* the Commission proposed that a primary BRS licensee whose license, prior to relocation, is renewed or assigned, or whose control of the license is transferred, will continue to be eligible for relocation. The Commission also proposed that no new licenses would be issued in the 2150–2160/62 MHz band if a grandfathered BRS license is cancelled or forfeited and does not automatically revert to the BRS licensee that holds the corresponding BTA license. The Commission adopts the proposals to apply the relocation policies to BRS incumbent primary licensees who seek comparable facilities at the time of relocation. Any incumbent licensee whose license is renewed before relocation would have the right to relocation. An assignment or transfer of control would not disqualify a BRS incumbent in the 2150–2160 MHz band from relocation eligibility unless, as a result of the assignment or transfer of control, the facility is rendered more expensive to relocate. In addition, if a grandfathered BRS license (*i.e.*, authorized facilities operating with a 35-mile-radius PSA) is cancelled or forfeited, and the right to operate in that area has not automatically reverted to the BRS licensee that holds the corresponding BTA license, no new licenses would be issued for BTA service in the 2150–2160/62 MHz band. Finally, in the *AWS Fifth Notice,* the Commission did not propose, nor do we suggest here, that BRS licensees would be entitled to relocation compensation as a consequence of reallocating BRS spectrum for other services. We note, in particular, that the Emerging Technologies relocation policies were intended to prevent disruption of existing services and minimize the economic impact on licensees of those services. Thus, where authorized BRS licensees have not constructed facilities and are not operational, there is no need to prevent disruption to existing services. We therefore conclude that BRS licensees whose facilities have not been constructed and are in use per § 101.75 of the Commission's rules as of the effective date of this *Report and Order* are not eligible for relocation.

15. Consistent with our Emerging Technologies relocation policy and in order to provide some certainty to new AWS licensees on the scope of their relocation obligation, the Commission generally adopts the proposals for major modifications described in the *AWS Fifth Notice.* Specifically, we find that major modifications to BRS systems that are in use made by BRS licensees in the 2150–2160 MHz band after the effective date of this *Report and Order* will not be eligible for relocation. Further, major modifications and extensions to BRS systems that are in use, as discussed below, will be authorized on a secondary basis to AWS systems in the 2150–2160 MHz band after the effective date of this *Report and Order.* In addition, BRS facilities newly authorized in the 2150–2160 MHz band after the effective date of this *Report and Order* would not be eligible for relocation. Based on our review of the record, and consistent with Emerging Technologies principles, we classify the following as types of modifications that are major, and thus not eligible for relocation: (1) Additions of new transmit sites or base stations made after the effective date of this *Report and Order;* and (2) changes to existing facilities made after the effective date of this *Report and Order* that would increase the size or coverage of the service area or interference potential and that would also increase the throughput of an existing system (*e.g.*, sector splits in the antenna system). However, we will allow BRS incumbents to make changes to already deployed facilities to fully utilize existing system throughput, *i.e.*, to add customers, even if such changes would increase the size or coverage of the service area or interference potential, and not treat these changes as major modifications. Because relocation of incumbent facilities depends on the availability of spectrum in the 2.5 GHz band, existing licensees must have some flexibility to continue to provide service in their communities, including adding new customers, until relocation occurs. On the other hand, new entrants should not be required to reimburse a potential competitor for the costs of its system expansion. All other modifications would be classified as major and their operations authorized on a secondary basis and thus not eligible for relocation. Where a BRS licensee who is otherwise eligible for relocation has modified its existing facilities in a manner that would be classified as ''major'' for purposes of relocation, that BRS licensee continues to maintain primary status (*e.g.*, unless it is classified as secondary for other reasons or until the sunset date); the major modifications themselves are considered secondary and not eligible for relocation. Thus, in such cases, the AWS licensee is only required to provide comparable facilities for the portions of the system that are primary and eligible for relocation.

16. Because the Commission has already identified relocation spectrum in the 2496–2690 MHz band (2.5 GHz band) for BRS licensees currently in the 2150–2160/62 MHz band (2.1 GHz band), the *AWS Fifth Notice* also sought comment on a proposal whereby the Commission would reassign 2.1 GHz BRS licensees, whose facilities have not been constructed and are not in use per § 101.75 of the Commission's rules, to their corresponding frequency assignments in the 2.5 GHz band as part of the overall BRS transition. Specifically, the Commission proposed to modify the licenses of these 2.1 GHz BRS licensees to assign them 2.5 GHz spectrum in the same geographic areas covered by their licenses upon the effective date of the *Report and Order* in this proceeding. Under this proposal, no subscribers would be harmed by immediately reassigning these licensees to the 2.5 GHz band, consistent with our policy. Further, these BRS licensees could become proponents in the transition of the 2.5 GHz band and avoid delay in initiating new service (they would be limited in initiating or expanding service in the 2.1 GHz band under other proposals put forth in the *AWS Fifth Notice*), and new AWS entrants in the 2.1 GHz band could focus their efforts on relocating the remaining BRS operations and their subscribers, facilitating their ability to clear the band quickly and provide new service.

17. Upon consideration of the record, the Commission does not mandate reassignment of BRS licensees who have no facilities constructed and in use as of the effective date of this *Report and Order,* but we will not preclude these BRS incumbents from voluntarily

seeking such reassignment from the Commission. Thus, these BRS licensees will not be forced to exchange their existing license in the 2.1 GHz band for an updated license authorizing operation in the 2.5 GHz band upon the effective date of this *Report and Order* because their corresponding channel assignments in the 2.5 GHz band may be unavailable for use pending the transition to the new band plan. We will instead afford these BRS licensees the flexibility to seek the reassignment of their licenses to their corresponding frequencies in the 2.5 GHz band at a time that is most convenient (*e.g.*, when the transition for their geographic area is complete). However, as noted above, BRS licensees who have no facilities constructed and in use as of the effective date of this *Report and Order* are not entitled to relocation to comparable facilities, regardless of whether they initiated operations under an existing (2.1 GHz band) or reassigned (2.5 GHz band) license.

2. Negotiation Periods/Relocation Schedule

18. Under the Emerging Technologies policies, there are two periods of negotiations—one voluntary and one mandatory—between new entrants and incumbents for the relocation of incumbent operations, followed by the involuntary relocation of incumbents by new entrants where no agreement is reached. In the *AWS Fifth Notice,* the Commission generally proposed to require that negotiations for relocation of BRS operations be conducted in accordance with our Emerging Technologies policies, except that the Commission proposed to forego a voluntary negotiation period and instead require only a mandatory negotiation period that must expire before an emerging technology licensee could proceed to request involuntary relocation. The Commission recognized that the new band where the BRS incumbents are to be relocated is undergoing its own transition process that may not be completed until at least 2008. In light of these considerations, the Commission proposed to forego a voluntary negotiation period and institute ''rolling'' mandatory negotiation periods (*i.e.*, separate, individually triggered negotiation periods for each BRS licensee) of three years followed by the involuntary relocation of BRS incumbents. The Commission also proposed that the mandatory negotiation period would be triggered for each BRS licensee when an AWS licensee informs the BRS licensee in writing of its desire to negotiate. If no agreement is reached during negotiations, the Commission proposed that an AWS licensee may proceed to involuntary relocation of the incumbent. In such a case, the new AWS licensee must guarantee payment of all relocation expenses, and must construct, test, and deliver to the incumbent comparable replacement facilities consistent with Emerging Technologies procedures. The Commission noted that under Emerging Technologies principles, an AWS licensee would not be required to pay incumbents for internal resources devoted to the relocation process or for fees that cannot be legitimately tied to the provision of comparable facilities, because such expenses are difficult to determine and verify. Finally, the Commission sought comment on whether to apply a ''right of return'' policy to AWS/BRS relocation negotiations similar to rule 47 CFR 101.75(d) (*i.e.*, if after a 12 month trial period, the new facilities prove not to be comparable to the old facilities, the BRS licensee could return to the old frequency band or otherwise be relocated or reimbursed).

19. Based on its review of the record, the Commission will continue to generally follow our Emerging Technologies policies for negotiations and adopt our proposal to forego a voluntary negotiation period and establish ''rolling'' mandatory negotiation periods (*i.e.*, separate, individually triggered negotiation periods for each BRS licensee) of three years followed by an involuntary relocation period during which the AWS entrant may involuntarily relocate the BRS incumbents. During mandatory negotiations, the parties are afforded flexibility in the process except that an incumbent licensee may not refuse to negotiate and all parties are required to negotiate in good faith. Each mandatory negotiation period would be triggered for each BRS licensee when an AWS licensee informs the BRS licensee in writing of its desire to negotiate. The new 2.5 GHz band where the BRS incumbents are to be relocated is undergoing its own transition process that may not be completed for several years. Thus, we will allow the BRS licensees to suspend the running of the three year negotiation period for up to one year if the BRS licensee cannot be relocated to comparable facilities at the time the AWS licensee seeks entry into the incumbent's GSA, *i.e.*, if the BRS licensee's spectrum in the 2.5 GHz band is not yet available because of the 2.5 GHz band transition. If no agreement is reached during negotiations, an AWS licensee may proceed to involuntary relocation of the incumbent. During involuntary relocation, the new AWS licensee must guarantee payment of all relocation expenses necessary to provide comparable replacement facilities. Consistent with the Emerging Technologies principles, an AWS licensee would not be required to pay incumbents for internal resources devoted to the relocation process or for fees that cannot be legitimately tied to the provision of comparable facilities, because such expenses are difficult to determine and verify. In addition, an AWS entrant must ensure that the BRS incumbent's spectrum in the 2.5 GHz band is available for the market at issue (or an alternate location, *e.g.*, a temporary location in the 2.5 GHz band, for the provision of comparable facilities) prior to relocating that incumbent. This approach is generally consistent with Emerging Technologies procedures for involuntary relocation, except that, because AWS entrants and BRS incumbents are potential competitors, we must include special provisions to protect the BRS licensees' legitimate commercial interests. Accordingly, BRS incumbents cannot be required to disclose subscriber location information so that AWS licensees would be able to construct, test, and deliver replacement facilities to the incumbent and will have to take a much more active role in the deployment of comparable facilities in an involuntary relocation than has typically been the case under previous applications of the Emerging Technologies policies. In order to ensure that all parties are acting in good faith while simultaneously protecting BRS licensees' legitimate commercial interests, we will permit AWS licensees to request that the BRS incumbent verify the accuracy of its subscriber counts by, for example, requesting a one-to-one return or exchange of existing end user equipment.

20. Finally, the Commission finds that a ''right of return'' policy is appropriate. The ''right of return'' policy will apply to AWS/BRS involuntary relocations only—if one year after relocation, the new facilities prove not to be comparable to the old facilities, the AWS licensee must remedy the defects by reimbursement or pay to relocate the BRS licensee to its former frequency band or other comparable facility (until the sunset date).

21. *Sunset Date.* In the *AWS Fifth Notice,* the Commission proposed to apply the sunset rule of 47 CFR 101.79 to BRS relocation negotiations. This sunset rule provides that new licensees are not required to pay relocation expenses after ten years following the

start of the negotiation period for relocation. The Commission also proposed that the ten year sunset date commence from the date the first AWS license is issued in the 2150–2160 MHz band. The Commission disagrees with commenters who argue that no sunset date should be applied or that a relocation deadline of either ten or fifteen years is more appropriate. Because the Emerging Technologies principles are intended to allow new licensees early entry into the band and are not designed as open-ended mechanisms for providing relocation compensation to displaced incumbents, it would be inconsistent with those principles to eliminate the sunset date. We continue to believe that the sunset date is a vital component of the Emerging Technologies relocation principles because it provides a measure of certainty for new technology licensees, while giving incumbents time to prepare for the eventuality of moving to another frequency band. Further, the unique circumstances, *i.e.*, reconfiguring and transitioning the 800 MHz band to alleviate unacceptable interference to public safety operations in the band, that required setting a relocation deadline for clearing incumbent operations in the 800 MHz proceeding are not present here. However, as noted above, we recognize that the 2.5 GHz band, where the BRS incumbents are to be relocated, is undergoing its own transition process and that relocation of existing 2.5 GHz operations may not be completed for several years. Also, because portions of the spectrum in the 2150–2160/62 MHz band will be made available for AWS auction at different times, *i.e.*, spectrum now occupied by part of BRS channel 1 (2150–2155 MHz) will be licensed in an upcoming auction of the 2110–2155 MHz band, while spectrum occupied by BRS channels 2 and 2A and the upper one megahertz of BRS channel 1 (2155–2160/62 MHz) will be licensed at a later date, the entry of AWS licensees into the entire band will occur at different times. To account for these unique circumstances, we believe that additional time before the AWS entrant's relocation obligation ends may be warranted. We therefore adopt a single sunset date of fifteen years, commencing from the date the first AWS license is issued in the 2150–2160 MHz band, after which new AWS licensees are not required to pay for BRS relocation expenses.

22. *Good Faith Requirement.* The Commission expects the parties involved in the replacement of BRS equipment to negotiate in good faith, that is, each party will be required to provide information to the other that is reasonably necessary to facilitate the relocation process. Among the factors relevant to a good-faith determination are: (1) Whether the party responsible for paying the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) the steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably withheld information essential to the accurate estimation of relocation costs and procedures requested by the other party. The record generally supports a good faith requirement and we therefore adopt our proposal to apply the good faith guidelines of 47 CFR 101.73 to BRS negotiations. In addition, we note that our cost-sharing rules require the AWS relocator to obtain a third party appraisal of relocation costs, which, in turn, would require the appraiser to have access to the BRS incumbent's system prior to relocation. Accordingly, we will require that a BRS incumbent cooperate with an AWS licensee's request to provide access to the facilities to be relocated, other than subscribers' end user equipment, so that an independent third party can examine the system and prepare an appraisal of the costs to relocate the incumbent to comparable facilities.

3. Interference Issues/Technical Standards

23. Under § 24.237 of the Commission's rules, PCS licensees operating in the 1850–1990 MHz band and AWS licensees operating in the 2110–2155 MHz band must, prior to commencing operations, perform certain engineering analyses to ensure that their proposed operations do not cause interference to incumbent fixed microwave services. Part of that evaluation calls for the use of Telecommunications Industry Association Telecommunications Systems Bulletin 10–F (TIA TSB 10–F) or its successor standard. In the *AWS Fifth Notice,* the Commission sought comment on whether a rule comparable to § 24.237 in the Commission's rules should be developed that could be used to determine whether proposed AWS operations would cause interference to incumbent BRS systems operating in the 2150–2160 MHz band and, if so, what procedures and mechanisms such a rule should contain. As an initial matter, the Commission concludes that relocation zones are appropriate for assessing the interference potential between new co-channel AWS entrants' operations and existing BRS facilities. In addition to being supported by many commenters, the line-of-sight approach embodied in the relocation zone approach will draw on the established methodology that was formerly set out in Part 21 of our Rules, as well as previous Commission decisions regarding the BRS and EBS, and will provide an easy-to-implement calculation that will afford new AWS entrants some certainty in planning new systems. To the extent that a relocation zone may require an AWS entrant to relocate some BRS systems that would not receive actual harmful interference, we agree with those commenters who assert that the administrative ease realized by implementing the relocation zone's ''bright-line test'' will serve to promote the rapid deployment of new AWS operations by eliminating complex and time consuming site-based analyses, and outweighs any disadvantages associated with any over inclusiveness.

24. To determine whether a proposed AWS base station will have line of sight to a BRS receive station hub, the Commission is requiring AWS entrants that propose to implement co-channel operations in the BRS band (*i.e.*, AWS licensees using the upper five megahertz of channel block F—or the 2150–2155 MHz portion of the 2145–2155 MHz block, or the 2155–2162 MHz portion of the 2155–2175 MHz band) to use the methodology the Commission developed for licensees to employ when conducting interference studies from and to two-way MDS/ITFS systems. Where the AWS entrant has determined that its station falls within the relocation zone under this methodology, then the AWS entrant must first relocate the co-channel BRS system that consists of that hub and associated subscribers before the AWS entrant may begin operation. In the particular case of an incumbent BRS licensee that uses channel(s) 1 and/or 2/2A for the delivery of video programming to subscribers, we recognize that the relocation zone approach will need to operate in a slightly different manner because potential interference from the AWS licensee would occur at the subscriber's location instead of at a BRS receive station hub. In order to provide interference protection to subscribers in a manner that does not require disclosure of sensitive customer data, and to recognize that these BRS licensees may add subscribers anywhere within their licensed GSA, the most appropriate method to ascertain whether interference could occur to BRS systems providing one-way video delivery in channels 1 and/or 2/2A is to determine whether the AWS base

station has line of sight to a co-channel BRS incumbent's GSA. To make this determination, we will require co-channel AWS entrants to use the methodology that was formerly codified in 47 CFR 21.902(f)(5) (2004) of the Commission's rules.

25. Although the relocation zone approach is well suited for new entrants that propose to implement co-channel operations in the BRS band, the Commission concludes that simply using a line-of-sight methodology for determining the relocation obligations of adjacent channel (*e.g.*, AWS licensees using the lower five megahertz of channel block F—or the 2145–2150 MHz portion of the 2145–2155 MHz block) and non-adjacent channel AWS licensees (*e.g.*, AWS licensees using channel blocks A–E, from 2110–2145 MHz), is not appropriate. In this situation, such AWS operations will not pose a large enough potential for interference to BRS incumbent licensees to warrant an automatic relocation obligation without first determining whether harmful interference to BRS will actually occur. We specifically reject the contention that any AWS base station in the 2.1 GHz band that proposes to operate within line of sight of a centralized BRS channel 1 and/or 2/2A receive station hub will always interfere with the BRS receive station hub and likewise do not believe that the potential for AWS intermodulation (*i.e.* interference caused when multiple signals from different frequency bands combine to create harmful interference in a particular frequency band—the band in which BRS operations are located, in this instance) or AWS cross-modulation (interference caused by the modulation of the carrier of a desired signal by an undesired signal) is so severe that either situation warrants special treatment. Accordingly, a line-of-sight test for AWS entrants operating outside the 2150–2160/62 MHz band would be much more over inclusive than the application of such a test to in-band operations, and we do not implement a relocation zone for AWS entrants in the 2110–2150 MHz band or in the 2160/62–2175 MHz band, as applicable. We emphasize, however, that if any AWS system—regardless of where within the 2110–2175 MHz band—causes actual and demonstrable interference to a BRS system, then the AWS licensee is responsible for taking the necessary steps to eliminate the harmful interference, up to and including relocation of the BRS licensee.

B. Relocation of FS in the 2160–2175 MHz Band

26. In the *AWS Fifth Notice,* the Commission discussed how our *Emerging Technologies* relocation principles have been applied to past relocation decisions for AWS bands, and sought comment on the appropriate relocation procedures to adopt for FS incumbents in the 2160–2175 MHz band. In the *AWS Second Report and Order* in ET Docket 00–258 (''*AWS Second R&O*''), 66 FR 47618, September 13, 2001, the Commission applied a modified version of these Emerging Technologies relocation procedures to the 2110–2150 MHz band. Under these procedures, the Commission eliminated the voluntary negotiation period for relocation of FS incumbents by MSS in the 2165–2200 MHz band. In addition, the Commission decided that a single mandatory negotiation period for the band would be triggered when the first MSS licensee informs, in writing, the first FS incumbent of its desire to negotiate. More recently, in the *AWS Sixth Report and Order* in ET Docket 00–258, 69 FR 62615, October 27, 2004, the Commission concluded that, consistent with its decision in the *AWS Second R&O,* it would be appropriate to apply the same procedures to the relocation of FS by AWS licensees in the 2175–2180 MHz paired band.

27. The Commission's relocation policies were first adopted to promote the rapid introduction of new technologies into bands hosting incumbent FS licensees. Thus, we continue to believe, as a general matter, that the Emerging Technologies relocation procedures are particularly well suited for this band. The Commission's review of the historic and current applications of our relocation procedures leads us to adopt the following: we will forgo the voluntary negotiation period and instead adopt a mandatory negotiation period to be followed by the right of the AWS licensee to trigger involuntary relocation procedures. We also adopt, as proposed, a ten-year sunset period for the 2160–2175 MHz band that will be triggered when the first AWS licensee is issued in the band. The sunset date is vital for establishing a date certain by which incumbent operations become secondary in the band, and the date the first license is issued will be both easy to determine and well known among licensees and incumbents in the band.

28. The Commission also adopts ''rolling'' negotiation periods, as proposed in the *AWS Fifth Notice*. Under this approach, a mandatory negotiation period will be triggered when an AWS licensee informs a FS licensee, in writing, of its desire to negotiate for the relocation of a specific FS facility. The result will be a series of independent mandatory negotiation periods, each specific to individual incumbent FS facilities. We conclude that this approach best serves both incumbent licensees and new AWS entrants, and is consistent with the process that was successfully employed for the relocation of FS incumbents by PCS entrants. Because, under this approach, a mandatory negotiation period could be triggered such that it would still be in effect at the sunset date, we further clarify that the sunset date shall supersede and terminate any remaining mandatory negotiation period that had not been triggered or had not yet run its course. We similarly modify our relocation procedures for the 2110–2150 MHz and 2175–2180 MHz bands to establish individually triggered mandatory negotiation periods and to modify the sunset date to be ten years after the first AWS license is issued in each band, because doing so promotes harmonization of FS relocation procedures among the various AWS designated bands.

29. The Commission adopts its proposal to apply the most current *Emerging Technologies* relocation procedures to part 22 licensees, and will modify part 22 to align the relocation procedures in part 101 to the AWS relocation of part 22 FS licensees in the 2110–2130 MHz and 2160–2180 MHz bands. All FS licenses operating in reallocated bands, regardless of whether they are licensed under part 22 or part 101, will remain subject to the applicable relocation procedures in effect for the band, including the sunset date at which existing operations become secondary to new entrants. We also note that, pursuant to § 553(b)(B) of the Administrative Procedure Act, we are amending our relocation rules for FS licensees to delete references to outdated requirements. The decision to set forth the appropriate relocation procedures that new AWS entrants will follow when relocating FS incumbents in the 2160–2175 MHz band does not substitute for the establishment of service rules for the band (or a larger spectrum block that encompasses this band). We continue to anticipate the issuance of a separate Notice of Proposed Rulemaking that will examine specific licensing and service rules that will be applicable to new AWS entrants in the band.

C. Cost Sharing

30. In 1996, the Commission adopted a plan to allocate cost-sharing

obligations stemming from the relocation of incumbent FS facilities then operating in the 1850–1990 MHz band (1.9 GHz band) by new broadband PCS licensees. This cost-sharing regime created a process by which PCS entities that incurred costs for relocating microwave links could receive reimbursement for a portion of those costs from other PCS entities that also benefit from the spectrum clearance. In a series of decisions in WT Docket 95–157 (collectively, the ''*Microwave Cost Sharing* proceeding''), the Commission stated that the adoption of a cost-sharing regime serves the public interest because it (1) Distributes relocation costs more equitably among the beneficiaries of the relocation; (2) encourages the simultaneous relocation of multi-link communications systems; and (3) accelerates the relocation process, promoting more rapid deployment of new services.

1. Relocation of Incumbent FS Licensees in the 2110–2150 MHz and 2160–2200 MHz Bands

31. Currently, FS incumbents operate microwave links in the 2110–2150 MHz and 2160–2200 MHz bands, mostly composed of paired channels in the lower and upper bands (*i.e.*, 2110–2130 MHz with 2160–2180 MHz and 2130–2150 MHz with 2180–2200 MHz). Section 101.82 of the Commission's part 101 relocation rules provides that when a new licensee in either of these bands relocates an incumbent paired FS link with one path in the 2110–2150 MHz band and the paired path in the 2160–2200 MHz band, the new licensee is entitled to reimbursement of fifty percent of its relocation costs from any subsequently entering new licensee which would have been required to relocate the same FS link, subject to a monetary ''cap.'' The AWS Fifth NPRM explained that this rule applied to both new AWS licensees in the 2110–2150 MHz and 2160–2180 MHz bands, as well as to MSS licensees in the 2180–2200 MHz band.

a. Cost Sharing Between AWS Licensees

32. In the *Notice of Proposed Rulemaking* in WT Docket No. 04–356 (''*AWS–2 Service Rules NPRM*''), 69 FR 63489, November 2, 2004, the Commission sought comment on whether it should adopt formal procedures for apportioning relocation costs among multiple AWS licensees in the 2110–2150 MHz and 2175–2180 MHz bands and, in particular, whether it should apply the cost-sharing rules in Part 24 that were used by new PCS licensees when they relocated incumbent FS links in the 1850–1990 MHz band. In the *AWS Fifth NPRM*, the Commission sought comment on the same issues in the 2160–2175 MHz band and whether AWS licensees in the 2160–2175 MHz band should be subject to the same cost-sharing regime as it adopts to govern the relocation of FS incumbents in the 2110–2150 MHz and 2175–2180 MHz bands. Under the part 24 cost-sharing plan, new entrants that incurred costs relocating an FS link were eligible to receive reimbursement from other entrants that also benefited from that relocation. Relocators could submit their reimbursement claims to one of the private not-for-profit clearinghouses designated by the Wireless Telecommunications Bureau (''WTB'') to administer the plan. Specifically, new entrants filing a prior coordination notice (PCN) were also required to submit their PCN to the clearinghouse(s) before beginning operations. After receiving the PCN, a clearinghouse with a reimbursement claim on file determined whether the new entrant benefited from the relevant relocation using a Proximity Threshold Test. Under the Proximity Threshold Test, a new entrant triggered cost-sharing obligations for a microwave link if all or part of the microwave link was initially co-channel with the PCS band(s) of any PCS entrant, a PCS relocator had paid to relocate the link, and the new PCS entrant was prepared to start operating a base station within a specified geographic distance of the relocated link. The clearinghouse then used the cost-sharing formula specified in § 24.243 of the Commission's Rules to calculate the amount of the beneficiary's reimbursement obligation. This amount was subject to a cap of $250,000 per relocated link, plus $150,000 if a new or modified tower was required. The beneficiary was required to pay reimbursement within 30 days of notification, with an equal share of the total going to each entrant that previously contributed to the relocation. Payment obligations and reimbursement rights under the part 24 cost-sharing plan can be superseded by a privately negotiated cost-sharing arrangement between licensees. Disputes over cost-sharing obligations under the rules were addressed, in the first instance, by the clearinghouse. If the clearinghouse was unable to resolve the dispute, parties were encouraged to pursue alternative dispute resolution (ADR) alternatives such as binding arbitration.

33. Based on the record, the Commission concludes that it will apply the part 24 cost-sharing rules, as modified, to the relocation of FS incumbents by AWS entrants in the 2.1 GHz band. Doing so will accelerate the relocation process and promote rapid deployment of new advanced wireless services in the 2.1 GHz band. Adoption of the part 24 cost-sharing rules, with minor modifications, serves the public interest because it will distribute relocation costs more equitably among the beneficiaries of the relocation, encourage the simultaneous relocation of multi-link communications systems, and accelerate the relocation process, thereby promoting more rapid deployment of new services. We also incorporate the part 24 cost-sharing provisions for voluntary self-relocating FS incumbents to obtain reimbursement from those AWS licensees benefiting from the self-relocation. Incumbent participation will provide FS incumbents in the 2.1 GHz band with the flexibility to relocate themselves and the right to obtain reimbursement of their relocation costs, adjusted by depreciation, up to the reimbursement cap, from new AWS entrants in the band. We also find that incumbent participation will accelerate the relocation process by promoting system wide relocations and result in faster clearing of the 2.1 GHz band, thereby expediting the deployment of new advanced wireless services to the public. Therefore, we require AWS licensees in the 2.1 GHz band to reimburse FS incumbents that voluntarily self-relocate from the 2110–2150 MHz and 2160–2200 MHz bands and AWS licensees will be entitled to *pro rata* cost sharing from other AWS licensees that also benefited from the self-relocation. Accordingly, subject to the clarifications and modifications explained below, we adopt rules based on the formal cost-sharing procedures codified in part 24 of our rules to apportion relocation costs among AWS licensees in the 2110–2150 MHz, 2160–2175 MHz, and 2175–2180 MHz bands.

34. The Commission finds that the record in this proceeding warrants certain modifications to the part 24 cost-sharing plan to help distribute cost-sharing obligations equitably among the beneficiaries of the relocation and also encourage and accelerate the relocation process. For FS incumbents that elect to self-relocate their paired channels in the 2130–2150 MHz and 2180–2200 MHz bands (with AWS in the lower band and MSS in the upper band), we will impose cost-sharing obligations on AWS licensees but not on MSS operators. Where a voluntarily relocating microwave incumbent relocates a paired microwave link with paths in the 2130–2150 MHz and 2180–2200 MHz bands, it is entitled to partial reimbursement

from the first AWS beneficiary, equal to fifty percent of its actual costs for relocating the paired link, or half of the reimbursement cap, whichever is less. This amount is subject to depreciation. For purposes of applying the cost-sharing formula relative to other AWS licensees that benefit from the self-relocation, the fifty percent attributable to the AWS entrant shall be treated as the entire cost of the link relocation, and depreciation shall run from the date on which the clearinghouse issues the notice of an obligation to reimburse the voluntarily relocating microwave incumbent.

35. The Commission declines to adopt commenters' suggestion that we eliminate in its entirety the Part 24 requirement that a relocator or self-relocating microwave incumbent file documentation of its relocation agreement or discontinuance of service to the clearinghouse. We do require AWS relocators in the 2.1 GHz band to file their reimbursement requests with the clearinghouse within 30 calendar days of the date the relocator signs a relocation agreement with an incumbent. Consistent with the Part 24 approach of imposing the same obligations on self-relocators seeking reimbursement that apply to relocators, we will also require self-relocating microwave incumbents in the 2.1 GHz band to file their reimbursement requests with the clearinghouse within 30 calendar days of the date that they submit their notice of service discontinuance with the Commission.

36. All AWS licensees in the 2.1 GHz band that are constructing a new site or modifying an existing site will have to file site-specific data with the clearinghouse prior to initiating operations for a new or modified site. The site data must provide a detailed description of the proposed site's spectral frequency use and geographic location. Those entities will have a continuing duty to maintain the accuracy of the data on file with the clearinghouse. Utilizing the site-specific data submitted by AWS licensees, the clearinghouse determines the cost-sharing obligations of each AWS entrant by applying the Proximity Threshold Test. We find that the presence of an AWS entrant's site within the Proximity Threshold Box, regardless of whether it predates or postdates relocation of the incumbent, and regardless of the potential for actual interference, will trigger a cost-sharing obligation. Accordingly, any AWS entrant that engineers around the FS incumbent will trigger a cost-sharing obligation once relocation of the FS incumbent occurs. The Proximity Threshold Test is a bright-line test that does not require extensive engineering studies or analyses, and it yields consistent, predictable results by eliminating the variations—and thus disputes—which can be associated with the use of interference standards such as the TIA TSB 10–F. The use of such a bright-line test in this context will expedite the relocation process by facilitating cost-sharing, minimizing the possibility of disputes that may arise through the use of other standards or tests, and encouraging new entrants to relocate incumbent licensees in the first instance.

37. The Commission adopts a rule that precludes entrants that have triggered a cost-sharing obligation, pursuant to the rules adopted herein, from avoiding that obligation by deconstructing or modifying their facilities. We find that such a policy will promote the goals of this proceeding and encourage the relocation of incumbents. We do not find, however, that the record in this proceeding demonstrates a need to specifically incorporate the phrase ''one trigger—one license'' into the triggering language of § 24.243 of the Commission's Rules. The rule already explicitly states that the *pro rata* reimbursement formula is based on the number of entities that would have interfered with the link and we do not find that further clarification is required.

38. Consistent with precedent, the Commission establishes that the cost-sharing plans will sunset on the date on which the relocation obligation for the subject band terminates. The sunset dates for the 2110–2150 MHz, 2160–2175 MHz, 2175–2180 MHz bands may vary among the bands, but by establishing sunset dates for cost sharing purposes that are commensurate with the sunset date for AWS relocation obligations in each band, the Commission appropriately balances the interests of all affected parties and ensures the equitable distribution of costs among those entrants benefiting from the relocations. AWS entrants that trigger a cost-sharing obligation prior to the sunset date must satisfy their payment obligation in full.

39. Under part 24, WTB has delegated authority to assign the administration of the cost-sharing rules to one or more private not-for-profit clearinghouses. As the Commission noted in the *AWS Fifth NPRM*, management of the part 24 cost-sharing rules by third-party clearinghouses has been highly successful. The Commission therefore adopts the part 24 clearinghouse rules and delegates to WTB the authority to select one or more entities to create and administer a neutral, not-for-profit clearinghouse to administer the cost-sharing plan for the FS incumbents in the 2.1 GHz band. The selection criteria will be established by WTB. WTB shall issue a Public Notice announcing the criteria and soliciting proposals from qualified parties. Once WTB is in receipt of such proposals, and the opportunity for public comment on such proposals has elapsed, WTB will make its selection. When WTB designates an administrator for the cost-sharing plan, it shall announce the effective date of the cost-sharing rules. We decline TMI/TerreStar's suggestion to delegate the task of selecting a clearinghouse(s) jointly to WTB and the International Bureau. Our clearinghouse decisions today will impose mandatory requirements only on terrestrial operations and we believe that delegating authority to one bureau will promote consistency and uniformity.

40. The Commission continues to require participants in the cost-sharing plan to submit their disputes to the clearinghouse for resolution in the first instance. Where parties are unable to resolve their issues before the clearinghouse, parties are encouraged to use expedited ADR procedures, such as binding arbitration, mediation, or other ADR techniques. We decline, however, to institute the procedures suggested by some commenting parties that would permit the clearinghouse to refer requests for declaratory rulings and policy interpretations to the Commission for expedited consideration because we are not convinced that a special procedure is warranted. We do, however, agree with PCIA and T-Mobile that a clearinghouse should not be required to maintain all documentary evidence. Except for the independent third party appraisal of the compensable relocation costs for a voluntarily relocating microwave incumbent and documentation of the relocation agreement or discontinuance of service required for a relocator or self-relocator's reimbursement claim, both of which must be submitted in their entirety, we will require participants in the cost-sharing plan to only provide the uniform cost data requested by the clearinghouse subject to the continuing requirements that relocators and self-relocators maintain documentation of cost-related issues until the sunset date and provide such documentation, upon request, to the clearinghouse, the Commission, or entrants that trigger a cost-sharing obligation. In addition, we will also require that parties of interest contesting the clearinghouse's

determination of specific cost-sharing obligations must provide evidentiary support to demonstrate that their calculation is reasonable and made in good faith. Specifically, these parties are expected to exercise due diligence to obtain the information necessary to prepare an independent estimate of the relocation costs in question and to file the independent estimate and supporting documentation with the clearinghouse. New entrants and incumbent licensees are expected to act in good faith in all matters relating to the cost-sharing process herein established. The Commission declines to adopt a definition of what constitutes ''good faith'' in the context of cost sharing. We find that the question of whether a particular party was acting in good faith is best addressed on a case-by-case basis.

b. Cost Sharing Triggers and Clearinghouse for AWS, MSS/ATC

41. Mobile-Satellite Service (MSS) is allocated to the 2180–2200 MHz band. FS links in this band are paired with FS links in the 2130–2150 MHz band, which is designated for AWS. Cost sharing between MSS and AWS licensees in these paired bands is governed by section 101.82. This rule provides that when a new licensee in either of these bands relocates an incumbent paired FS link with one path in one band and the paired path in the other band, the new licensee is entitled to reimbursement of fifty percent of its relocation costs (*i.e.*, the total cost of relocating both paths) subject to a monetary ''cap,'' from any subsequently entering new licensee that would have been required to relocate the same FS link. The Commission adopted relocation rules for MSS that recognize the unique characteristics of a satellite service. For example, unlike a new terrestrial entrant such as AWS that can clear the band on a link-by-link basis, MSS (space-to-Earth) must clear all incumbent FS operations in the 2180–2200 MHz band within the satellite service area if interference will occur. Thus, the relocation obligations and cost sharing among MSS new entrants in the 2180–2200 MHz are relatively straightforward and can function without a clearinghouse or formal cost-sharing procedures.

42. In the *AWS Fifth NPRM*, the Commission noted that § 101.82 establishes a cost-sharing obligation between MSS and AWS that is reasonable and relatively easy to implement, and because it does not depreciate cost-sharing obligations, it provides MSS licensees with additional assurance of cost recovery. Furthermore, the Commission stated that it did not wish to change the relocation and cost-sharing rules applicable to MSS, because MSS licensees are currently in the midst of the implementation and relocation process. The Commission also sought comment on whether MSS entrants entitled to reimbursement under Section 101.82 should submit their reimbursement claims to an AWS clearinghouse, including any procedures adopted for filing such claims. The Commission believed that this approach would relieve MSS licensees of the burden of identifying the AWS licensees who would be obligated to pay relocation costs, and sought comment on this proposal.

43. Based on the record before us, the Commission concludes that MSS operators will have different cost-sharing obligations for microwave links that are relocated for space-to-Earth downlink operations than for microwave links that are relocated for MSS ATC operations. As noted above, we had previously adopted rules (*see* Section 101.82) for MSS cost sharing based on an interference criteria (TIA Technical Services Bulletin 86 (TIA TSB 86)), and the *AWS Fifth NPRM* did not propose to change these relocation and cost-sharing obligations because the MSS operators were already in the midst of implementing these processes. The *AWS Fifth NPRM* did, however, seek comment on whether MSS operators should use a clearinghouse for cost sharing. The relocation and cost-sharing obligations triggered by space-to-Earth links is relatively straightforward to implement because the MSS operator will relocate all incumbent microwave operations within the satellite service area before it begins operations if interference will occur. The MSS operator and the AWS licensees can therefore easily identify the parties with whom they will share costs. We thus conclude here that we will not require MSS operators to use a clearinghouse for microwave links relocated for space-to-Earth downlinks and we will continue to apply the relocation and cost-sharing obligations provided in § 101.82 to MSS operators that relocate microwave links for space-to-Earth downlink operations. We further conclude that MSS operators that relocate microwave links for space-to-Earth downlink operations should have the right, but not the obligation, to submit their claims for reimbursement (from AWS licensees) to the AWS clearinghouse pursuant to the procedures we adopted. We clarify that if an MSS operator submits a claim to the clearinghouse, the interference criteria for determining cost-sharing obligations for an MSS space-to-Earth downlink is TIA TSB 86.

44. The Commission finds that, since § 101.82 is silent as to reimbursement for microwave links relocated for ATC base stations, it is appropriate to adopt a specific rule for ATC reimbursement for relocated terrestrial microwave facilities. Based on the record before us, we conclude that MSS operators that relocate microwave links for ATC operations will be required to use a clearinghouse for cost sharing and thus will have the same cost-sharing obligations as AWS entrants. ATC operations will trigger incumbent microwave relocations on a link-by-link basis in the same way as AWS operations. The Commission previously determined that cost sharing would be determined using the relevant interference modeling and that TIA TSB 10–F, or its successor standard, is an appropriate standard for purposes of triggering relocation obligations by new terrestrial (ATC or AWS) entrants in the 2 GHz band. The Commission also noted that procedures other than TIA TSB 10–F that follow generally acceptable good engineering practices are also acceptable. We conclude that the Proximity Threshold Test is an acceptable alternative to TIA TSB 10–F to determine interference for purposes of AWS-to-ATC and ATC-to-AWS cost sharing, and we adopt its use here as well.

45. Furthermore, the Commission has specifically concluded that MSS terrestrial operations are technically similar to PCS and that TIA TSB 10–F is a relevant standard for determining whether a new ATC base station must relocate an incumbent microwave operation. Given that the Proximity Threshold Test used for PCS, and now AWS cost-sharing obligations, is an acceptable alternative to TIA TSB 10–F to determine interference for purposes of cost sharing, we find it reasonable to also use this test for triggering ATC to AWS cost-sharing obligations. Under this approach, reimbursement is only triggered if all or part of the relocated microwave link was initially co-channel with the licensed band(s) of the AWS or ATC operator. The Proximity Threshold Test will be easier to administer than TIA TSB 10–F and does not require extensive engineering studies or analyses, and it yields consistent, predictable results by eliminating the variations which can be associated with the use of TIA TSB 10–F.

46. Given that AWS and ATC are terrestrial operations, the Commission agrees that MSS participation in the clearinghouse process should be

mandatory for ATC operations so that the clearinghouse can accurately track cost-sharing obligations as they relate to all terrestrial operations. Thus, MSS operators must file notices of operation with the clearinghouse for all ATC base stations following the same rules and procedures that that will govern all AWS base stations. On the other hand, we find that the record before us provides no technical basis for adopting PCIA's proposal that, when MSS initiates space-to-Earth operations, cost sharing should be triggered nationwide automatically (rather than based on an interference analysis) for all previously relocated co-channel links. Moreover, the Commission previously concluded that TIA TSB 86 is the appropriate standard for purposes of triggering both relocation and cost-sharing obligations of new MSS downlink (space-to-Earth) operations.

47. Under § 101.79, MSS is not required to pay relocation costs after the relocation rules sunset, *i.e.*, ten years after the mandatory negotiation period began for MSS/ATC licensees in this service. For MSS/ATC, the relocation sunset date will be December 8, 2013. Under part 101, new cost-sharing obligations under § 101.82 sunset along with the relocation sunset. Nonetheless, TMI/TerreStar's concern that any clearinghouse-based reimbursement option should be available until at least December 31, 2014, appears to be satisfied because, the AWS cost-sharing obligation sunset will not occur until after 2015.

48. The Commission declines the suggestion to impose an obligation on MSS to share costs with self-relocating FS incumbents because the proposal is beyond the scope of the *AWS Fifth NPRM*. Similarly, we decline the suggestion to adopt part 24 depreciation for AWS/MSS cost sharing both because it beyond the scope of the *AWS Fifth NPRM* and because the Commission concluded in 2000 that the part 24 amortization formula, whereby the amount of reimbursement owed by later entrants diminishes over time, is irrelevant to AWS/MSS cost sharing. The record before us presents no basis for reversing this earlier conclusion. Thus, as noted in the *AWS Fifth NPRM*, the part 24 plan formula, *e.g.*, depreciation, will not govern reimbursement due to an MSS licensee who requests reimbursement from an MSS or AWS licensee, or to reimbursement due to an AWS licensee who requests reimbursement from an MSS licensee under § 101.82. If an AWS licensee reimburses an MSS licensee under § 101.82, this sum shall be treated as the entire actual cost of the link relocation for purposes of applying the cost-sharing formula relative to other AWS licensees that benefit. In such instances, the AWS licensee must register the link with a clearinghouse within 30 calendar days of making the payment to the MSS operator. The suggestion to require MSS/ATC to coordinate with FS incumbents is similarly beyond the scope of the *AWS Fifth NPRM*, which focused on whether MSS should participate in the terrestrial clearinghouse. The *AWS Fifth NPRM* expressly declined to revisit the MSS relocation and cost-sharing matters decided between 2000 and 2003 and directly stated that new MSS licensees would continue to follow the cost-sharing approach set forth in § 101.82. Comsearch's point that it is no longer a certainty that MSS will begin operations before AWS is well taken. Nonetheless, as noted in the *AWS Fifth NPRM*, the relocation process adopted for MSS is already underway. In this connection, we note that the mandatory negotiation period for non-public safety and public safety incumbents ended on December 8, 2004, and December 8, 2005, respectively. Therefore, because these additional suggestions are beyond the scope of the *AWS Fifth NPRM* and address issues already decided in prior Commission decisions, we decline to adopt these requests.

2. Relocation of Incumbent BRS Licensees in the 2150–2160/62 MHz Band

49. In the *AWS Fifth NPRM,* the Commission stated that there may be instances where an AWS entrant relocates more BRS facilities than an interference analysis would indicate was technically necessary. The Commission noted, for example, that an AWS entrant might be required to relocate facilities outside its own service area to comply with the comparable facilities requirement. In that event, a subsequent co-channel AWS entrant in an adjacent geographic area might also benefit from the relocation. The Commission noted, in addition, that the relocation of a single BRS facility might benefit more than one AWS entrant. The Commission therefore sought comment on whether it should require AWS licensees who benefit from an earlier AWS licensee's relocation of a BRS incumbent in the 2150–2160/62 MHz band to share in the cost of that relocation. In particular, the Commission sought comment on what criteria could be used to identify whether a subsequent AWS licensee has an obligation to share the cost of relocating a BRS incumbent and how costs should be apportioned among new entrants. The Commission further sought comment on whether cost-sharing obligations should be subject to a specific cap, whether it should adopt formal cost-sharing procedures such as the part 24 cost-sharing plan, and whether a clearinghouse should be assigned to administer the process.

50. The Commission finds that cost sharing will provide for a more equitable relocation process by spreading the costs of the relocation among the AWS licensees that benefit. In addition, cost sharing should accelerate the relocation process by encouraging new entrants to relocate systems themselves rather than wait for another entrant to do so. We therefore conclude that we should establish cost-sharing obligations for AWS licensees that benefit from another AWS licensee's relocation of a BRS incumbent from the 2150–2160/62 MHz band. We further conclude that the part 24 cost-sharing rules provide an appropriate framework for BRS relocation cost sharing. The part 24 cost-sharing rules and procedures have proven effective in sharing the costs of FS relocation. Admittedly, as the Commission noted in the *AWS Fifth NPRM,* applying the PCS cost-sharing regime to BRS will require significant changes to account for the differences between BRS services and fixed point-to-point services. We find, however, that in most respects, the PCS cost-sharing regime can be applied to BRS. We further find that the PCS cost-sharing system provides the best balance of competing concerns, such as precision and ease of administration. Adopting a regime based on the PCS cost-sharing rules will also benefit AWS licensees to the extent that they already have a familiarity with the system. In addition, we anticipate, that an administrator of the cost-sharing system can achieve efficiencies by jointly administering BRS cost sharing with the very similar regime we have established for relocation of FS incumbents. Therefore our implementation of a BRS cost-sharing regime is guided generally by the PCS cost-sharing rules and departs from those rules only where a different approach is justified.

51. *Clearinghouse.* The Commission agrees with those commenters who recommend using a clearinghouse to administer any cost-sharing rules the Commission may adopt in the relocation of BRS incumbents from the 2150–2160/62 MHz band. We therefore delegate to WTB the authority to select one or more entities to create and administer a neutral, not-for-profit clearinghouse. Selection shall be based on criteria established by WTB. WTB shall publicly

announce the criteria and solicit proposals from qualified parties. Once such proposals have been received, and an opportunity has elapsed for public comment on them, WTB shall make its selection. When WTB selects an administrator, it shall announce the effective date of the cost-sharing rules.

52. *Triggering a Reimbursement Obligation.* The Commission establishes the following rules for identifying when an AWS licensee entering a market triggers a cost-sharing obligation in connection with the prior relocation of a BRS system in the 2150–2160/62 MHz band. First, we limit cost-sharing obligations to those AWS entrants licensed in spectrum that is co-channel, at least in part, with the bands previously used by the relocated BRS system (*i.e.*, those AWS entrants who operate using licenses that overlap with the 2150–2160/62 MHz band). We note that the Commission similarly limited the PCS cost-sharing obligations to new entrants that would have caused co-channel interference to the incumbent, and we agree with U.S. Cellular that excluding other AWS channels [non-co-channel] for cost sharing purposes ''greatly simplifies the cost-sharing plan and eliminates many possible disagreements over whether an AWS system would have caused or experienced adjacent channel interference.''

53. When an AWS entrant turns on a fixed base station using a license that overlaps spectrum in the 2150–2160/62 MHz band previously used by a relocated BRS system, a cost obligation will be triggered if the base station transmitting antenna is determined to have a line-of-sight path with the receiving antenna of the relocated BRS system hub. For BRS systems using the 2150–2160/62 MHz band exclusively to provide one-way transmission to subscribers, *i.e.*, delivery of video programming, we employ a different line-of-sight test, as we have above in the relocation process, to account for the fact that interference to the BRS system would occur at the subscriber's end user equipment. For these systems, a cost obligation will be triggered if the AWS entrant has line of sight to the BRS incumbent's GSA.

54. The Commission chooses the line-of-sight test described as the test for triggering cost-sharing obligations for a number of reasons. As an initial matter, line of sight provides an appropriate test for determining whether an AWS entrant in the 2150–2160/62 MHz band must relocate a co-channel BRS incumbent. It is therefore also an appropriate means of determining whether other AWS entrants would have been required to relocate the system, and have thus benefited from the relocation. As a 'bright line' test, it also satisfies the requests of several commenters for clarity and certainty in the cost-sharing process. We also expect that the administrative burden of applying the line-of-sight test to identify beneficiaries of a relocation and the potential for disputes over its application will be limited for several reasons. First, because we have excluded licensees operating solely in adjacent and non-adjacent spectrum from cost-sharing obligations, only co-channel interference need be considered. Second, there are a relatively limited number of BRS systems and thus few systems for whom potential beneficiaries will need to be determined. Third, because the 2145–2155 MHz block will be licensed on a REAG basis, which is the largest geographic area license in the AWS spectrum, we expect that only one 2145–2155 MHz licensee would typically cause interference to a BRS system, and thus that there will be few instances of cost sharing between 2145–2155 MHz licensees.

55. *Obtaining Reimbursement Rights.* As in the PCS system, in order to receive reimbursement from licensees that benefit from a relocation, we require an AWS relocator to register the system that has been relocated with a cost-sharing clearinghouse. Following the PCS model, as modified above for AWS relocation of FS, we provide that AWS licensees receive rights to reimbursement on the date that they enter into an agreement to relocate a BRS system in the 2150–2160/62 MHz band, and we require them to register documentation of the relocation agreement, with a clearinghouse within 30 calendar days of the date that the relocation agreement is signed. In the event that relocation is involuntary, we require the AWS licensee to file documentation of the relocation with the clearinghouse within 30 calendar days after the end of the relocation process, which will be the end of the one-year trial period in the absence of any disputes during that period.

56. The Commission further requires AWS licensees, in registering their reimbursement rights with a clearinghouse, to provide certain information necessary to implement the reimbursement trigger test we have established. To determine whether an AWS licensee beginning operation of a base station has triggered a reimbursement obligation, a clearinghouse will apply a line-of-sight test. The precise line-of-sight method differs depending on whether the relocated system used the 2150–2160/62 MHz band for one-way transmissions to their subscribers' end user equipment or to receive broadband data at the BRS receive station hub. Therefore, we require AWS licensees registering relocated systems to provide the following information to the clearinghouse: (1) A detailed description of the relocated system's spectral frequency use; (2) if the system exclusively provided one-way transmission to subscribers, the GSA of the relocated system; and (3) if the system did not exclusively provide one-way transmission to subscribers, the system hub antenna's geographic location and the above ground level height of the receive station hub's receiving antenna centerline.

57. *Registration of New or Modified AWS Stations.* Every AWS licensee that constructs a new site or modifies an existing site in the 2.1 GHz band must file certain site information with the clearinghouse(s) prior to commencing operations. To ensure that a clearinghouse can apply the line-of-sight test to identify beneficiaries of a BRS relocation, however, we will require AWS licensees that construct or modify a site in the 2150–2162 MHz band to file, in addition to the information required from other 2.1 GHz AWS licensees, the above ground level height of the transmitting antenna centerline. We note, in particular, that the duty to file this information applies to an AWS licensee that modifies the frequencies used by a station such that a station previously operating entirely outside the 2150–2162 MHz band now operates inside the band. We further impose a continuing duty on entities to maintain the accuracy of the data on file with the clearinghouse, including height data and spectrum use.

58. *Determining Reimbursement Rights.* A particular beneficiary's cost-sharing obligation will be calculated using the PCS cost-sharing formula, which imposes on each beneficiary a *pro rata* share of the relocation cost reduced in amount by a depreciation factor. We modify the PCS formula in one respect however using a fifteen year depreciation period rather than the ten year period used by PCS and AWS licensees. Choosing the same fifteen-year period for depreciation that we have chosen above for the relocation sunset period ensures that any AWS beneficiary that enters BRS spectrum before the relocation sunset will incur some obligation to share in the cost of the prior relocation.

59. The Commission follows the policy in the PCS cost-sharing rules that entitles relocators to full reimbursement

without depreciation (rather than a *pro rata* amount subject to depreciation) where they relocate facilities that do not pose an interference problem to their own stations. This policy is intended to provide a new licensee with an incentive to relocate an incumbent's entire network instead of only those facilities that the licensee would be required to relocate under an interference analysis. Here, because we require relocation on a system-by-system basis (*i.e.*, a licensee that interferes with part of a BRS system must relocate the entire system, but not necessarily a separate system that is part of the BRS incumbent's network), we hold that relocators will be entitled to 100 percent reimbursement for the costs of relocating a particular system if they would not have triggered a relocation obligation for that system. As with the PCS and AWS rules, we adopt a simplified test for determining when a relocator would have been required to relocate the system that ignores the possibility of adjacent or non-adjacent channel interference. Specifically, we will allow full reimbursement of compensable costs if either (1) the AWS relocator's licensed frequency band is fully outside the BRS system's spectrum; or (2) the AWS relocator would not have triggered relocation under the applicable line-of-sight test. We decline to adopt a cap on the amount of reimbursement that benefiting entrants may owe. Even if the cap were to apply only to cost-sharing obligations, we are not persuaded that it is practical for incumbents to determine such costs at this time. We also note that a cap on cost-sharing obligations would have no effect on incumbents' rights to relocation costs and would only limit the rights of AWS licensees to receive reimbursement from other AWS licensees. In addition, there is no basis in the record to for the Commission to determine a specific cap. AWS licensees will therefore not have the safeguard and assurance of a specific cap on their reimbursement obligations as they do under the PCS cost-sharing rules. We nevertheless conclude that the rules we adopt below will provide beneficiaries with adequate protection from excessive reimbursement obligations. The PCS cost-sharing rules that we will incorporate include many other protections against excessive costs and, in addition, we have made modifications to the rules, as discussed below, to add to those protections.

60. First, in defining reimbursable costs, we follow the policy in the PCS cost-sharing rules of limiting reimbursement to the actual cost of providing comparable facilities. Actual costs include those costs for which a relocator would be responsible in an involuntary relocation. In addition, incumbent transaction costs that are directly attributable to the relocation will also be subject to cost-sharing reimbursement up to a cap of two percent of the ''hard'' costs. Any relocation payments beyond these costs described, so-called ''premium'' payments, are not reimbursable. As we have with the FS cost-sharing regime, we further require relocators to prepare and submit an itemized documentation of all reimbursable relocation costs. In providing itemization, we direct parties to provide itemization of any applicable costs listed in § 24.243(b), and for other costs, such as equipment not listed in § 24.243(b), to be guided by that provision in determining appropriate detail of itemization. We direct the clearinghouse to require re-filing of any documentation found to be insufficiently specific.

61. In addition to preparing the documentation, the Commission requires each relocator, as a prerequisite for receiving reimbursement through the cost-sharing regime, to obtain a third-party appraisal of the actual costs of replacing the system with comparable facilities prior to relocation, and to provide this appraisal to the clearinghouse with its registration. We provide one exception to the requirement of a third-party appraisal that should allow for a more efficient process in cases where cost claims are well within the bounds of reasonableness. An AWS relocator may register its reimbursement claim without providing the third-party appraisal, on condition that, in submitting its cost claim, it consents to binding resolution of any good faith disputes regarding that claim by the clearinghouse under the following standard: the relocator shall bear the ultimate burden of proof, and shall be required to demonstrate by clear and convincing evidence that its request does not exceed the actual costs of relocating the relevant BRS system or systems to comparable facilities. We expect that, by imposing on AWS relocators a substantial burden of proof and the risk of losing reimbursement rights, we will discourage them from exercising the option to waive an appraisal except in those cases where, even in the absence of an appraisal, disputes are unlikely to arise.

62. The Commission further notes that the depreciation of reimbursement obligations itself should help to deter excessive relocation costs. The fact that reimbursement obligations depreciate over time (with the limited exception noted above) will mean that the relocator will usually bear the largest share of the burden. Thus it will provide the relocator with greater incentive to obtain relocation at a reasonable cost in the first instance.

63. Taken together, these measures should provide subsequent entrants with sufficient assurance in most cases that their cost-sharing obligations are not excessive. Should parties have good faith objections to reimbursement claims, however, they may exercise the same dispute resolution options available under the PCS cost-sharing rules including review by the clearinghouse, and possible resolution by alternative dispute resolution methods such as arbitration. We require, as we have above with FS cost-sharing disputes, that parties submit BRS cost-sharing disputes to the clearinghouse in the first instance.

64. *Participation in the Cost-sharing Plan.* The cost-sharing obligations we establish above merely serve as defaults. As in the PCS cost-sharing rules parties remain free to enter into private cost-sharing arrangements that alter some or all of these default obligations. Such private agreements may serve to further limit disputes regarding particular obligations. We emphasize, however, that parties to a private cost-sharing agreement may continue to seek reimbursement under the cost-sharing rules from those licensees that are not party to the agreement. Further, except insofar as there is a superseding agreement, we require all AWS licensees to participate in the cost-sharing process as established above. Thus, AWS relocators of a BRS system, to receive reimbursement, must pursue such reimbursement through the process established above, except to the extent that they have made agreements to an alternative process. Likewise, all AWS licensees that benefit from a relocation will be subject to the cost-sharing obligations established above unless there is an applicable agreement that supersedes those obligations.

65. *Payment Issues and Incorporation of FS Rulings.* With regard to the timing of payments, and the eligibility for installment payments, the Commission adopts the same rules for the BRS cost-sharing regime as we applied in the PCS cost-sharing system. We also follow, in the BRS context, the ruling that cost-sharing obligations are not terminated by the physical deconstruction of the benefiting AWS base station.

66. *Sunset.* The Commission concludes that the cost-sharing regime should terminate on the same day that the relocation obligation in the 2150–

2160/62 MHz band sunsets. We note that after the obligation to relocate BRS incumbents sunsets, a new AWS entrant need not incur any expense to require incumbents to vacate, and therefore receives no benefit from an earlier relocation. Because licensees entering after the relocation sunset receive no benefit from an earlier relocation, we conclude that it is appropriate that they should incur no cost obligations. Accordingly, while any reimbursement obligation that has accrued on or before the cost-sharing sunset date will continue, no new obligations will accrue after that date.

Summary of the Order (WT Docket No. 02–353)

67. In 2003, the Commission adopted a rule in the *Report and Order in WT Docket No. 02–353* (''*AWS–1 Service Rules Order*''), 69 FR 5711, February 6, 2004, to require AWS licensees in the 2110–2155 MHz band to coordinate with incumbent BRS licensees operating in the 2150–2155 MHz band prior to initiating operations from any base or fixed station. WCA filed a Petition for Reconsideration averring that this rule inadequately protects BRS incumbents operating in the 2150–2160/62 MHz band from interference. WCA contends that this coordination approach is inconsistent with the Commission's statement in the *AWS–1 Service Rules Order* that ''until such time as [MDS] operations are relocated, they must be protected from interference from AWS systems.'' WCA adds that ''had the [*AWS–1 Service Rules Order*] ended there [WCA's] petition for reconsideration would not have been necessary.''

68. In the *Ninth R&O* in ET Docket No. 00–258, we adopt significant revisions to our rules and policies regarding BRS channel 1 and 2/2A relocation. We find that our actions in the *Ninth R&O* have rendered the WCA Petition moot. We therefore dismiss the petition for that reason.

Procedural Matters

69. Final Regulatory Flexibility Analysis for Ninth Report and Order. *As required by* Section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the proposals suggested in this document. The FRFA is set forth in Appendix B.

70. *Final Paperwork Reduction Analysis.* This *Ninth Report and Order* contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3705(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collections contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law No. 107–198 (*see* 44 U.S.C. 3506(c)(4)), the Commission previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

71. *Congressional Review Act.* The Commission will send a copy of this *Ninth Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Final Regulatory Flexibility Analysis

124. As required by the Regulatory Flexibility Act (RFA) [1] an Initial Regulatory Flexibility Analysis was incorporated in the *Fifth Notice of Proposed Rule Making* (Fifth Notice) in ET Docket 00–258, 70 FR 61752, October 26, 2005.[2] The Commission sought written public comment on the proposals in the *Fifth Notice,* including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objectives of, the Ninth Report and Order

125. The *Ninth Report and Order* (Ninth R&O) adopts relocation procedures to govern the relocation of: (1) Broadband Radio Service (BRS) [4] licensees in the 2150–2160/62 MHz band; and (2) Fixed Microwave Service (FS) licensees in the 2110–2150 MHz and 2160–2180 MHz bands. The *Ninth R&O* also adopts cost sharing rules that identify the reimbursement obligations for Advanced Wireless Service (AWS) and Mobile Satellite Service (MSS) entrants benefiting from the relocation of FS operations in the 2110–2150 MHz band 2160–2200 MHz band and AWS entrants benefiting from the relocation of BRS operations in the 2150–2160/62 MHz band. The adopted relocation and cost sharing procedures generally follow the Commission's relocation and cost sharing policies delineated in the Emerging Technologies proceeding, and as modified by subsequent decisions.[5] These relocation policies are designed to allow early entry for new technology providers by allowing providers of new services to negotiate financial arrangements for reaccommodation of incumbent licensees, and have been tailored to set forth specific relocation schemes appropriate for a variety of different new entrants, including AWS, MSS, Personal Communications Service (PCS) licensees, 18 GHz Fixed Satellite Service (FSS) licensees, and Sprint Nextel. While these new entrants occupy different frequency bands, each entrant has had to relocate incumbent operations. The relocation and cost sharing procedures we adopt in the *Ninth R&O* are designed to ensure an orderly and expeditious transition of, with minimal disruption to, incumbent BRS operations from the 2150–2160/62 MHz band and FS operations from the 2110–2150 MHz and 2160–2180 MHz bands, in order to allow early entry for new AWS licensees into these bands.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

126. One comment was filed in response to the *Order* portion of the *Eighth Report and Order, Fifth Notice of Proposed Rule Making and Order,*

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] Amendment of part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00–258, *Eighth Report and Order, Fifth Notice of Proposed Rule Making and Order,* 20 FCC Rcd 15866 (2005).

[3] 5 U.S.C. 604.

[4] The Multipoint Distribution Service (MDS) was renamed the Broadband Radio Service (BRS). *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 MHz Band, WT Docket No. 03–66, *Report and Order and Further Notice of Proposed Rulemaking,* 19 FCC Rcd 14165 (2004).

[5] *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92–9, *First Report and Order and Third Notice of Proposed Rule Making,* 7 FCC Rcd 6886 (1992); *Second Report and Order,* 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order,* 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order,* 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order,* 9 FCC Rcd 7797 (1994); *aff'd Association of Public Safety Communications Officials-International, Inc. v. FCC,* 76 F.3d 395 (DC Cir. 1996) (collectively, ''*Emerging Technologies* proceeding''). *See also Teledesic, LLC v. FCC,* 275 F.3d 75 (DC Cir. 2001) (affirming modified relocation scheme for new satellite entrants to the 17.7–19.7 GHz band). *See also* Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95–157, *First Report and Order and Further Notice of Proposed Rule Making,* 11 FCC Rcd 8825 (1996); *Second Report and Order,* 12 FCC Rcd 2705 (1997) (collectively, *Microwave Cost Sharing* proceeding).

objecting to the suggestion by some commenters to the *Fifth NPRM* that the BRS entities should submit an estimate of the costs necessary to relocate the BRS entities' stations. The Wireless Communications Association International, Inc. objects to the imposition of any future information disclosure obligations on BRS channel 1 and 2 licensees regarding their relocation costs because it would require BRS licensees to speculate as to future events, conduct extensive due diligence to identify information that is not presently within their possession, or provide AWS auction participants with commercially sensitive information that could be utilized by AWS auction winners to the detriment of BRS licensees and lessees. In the *Ninth R&O,* the Commission decides not to require BRS licensees to submit an estimate of their relocation costs. Accordingly, we need not further address WCA's comments for purposes of this FRFA.

C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

127. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of entities that will be affected by the rules adopted herein.[6] The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[7] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[8] Under the Small Business Act, a ''small business concern'' is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).[9]

128. *Broadband Radio Service.* The Broadband Radio Service (BRS) consists of Multichannel Multipoint Distribution Service (MMDS) systems, which were originally licensed to transmit video programming to subscribers using the microwave frequencies of Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[10] In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard.[11] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[12] Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[13]

129. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[14] which includes all such companies generating $13.5 million or less in annual receipts.[15] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category that had operated for the entire year.[16] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[17] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies. Because the Commission's action only affects MDS operations in the 2155–2160/62 MHz band, the actual number of MDS providers who will be affected by the proposed reallocation will only represent a small fraction of these small businesses.

130. *Fixed Microwave Services.* Microwave services include common carrier,[18] private-operational fixed,[19] and broadcast auxiliary radio services.[20] At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of the FRFA, we will use the SBA's definition applicable to Cellular and other Wireless Telecommunications companies—*i.e.,* an entity with no more than 1,500 persons.[21] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[22] Of this total, 965 firms had employment of 999 or fewer employees, and an additional twelve firms had employment of 1,000

[6] 5 U.S.C. 604(a)(3).

[7] 5 U.S.C. 601(6).

[8] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[9] 15 U.S.C. 632.

[10] Amendment of parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Report and Order,* 10 FCC Rcd 9589, 9593, ¶ 7 (1995) (''MDS Auction R&O''). The MDS and ITFS was renamed the Broadband Radio Service (BRS) and Educational Broadband Service (EBS), respectively. *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 MHz Band, WT Docket No. 03–66, *Report and Order and Further Notice of Proposed Rulemaking,* 19 FCC Rcd 14165 (2004).

[11] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration (dated Mar. 20, 2003) (noting approval of $40 million size standard for MDS auction).

[12] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See MDS Auction R&O,* 10 FCC Rcd at 9608, ¶ 34.

[13] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for ''other telecommunications'' (annual receipts of $13.5 million or less). *See* 13 CFR 121.201, NAICS code 517910.

[14] 13 CFR 121.201, NAICS code 517510.

[15] *Id.*

[16] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4 (issued October 2000).

[17] *Id.*

[18] 47 CFR part 101 *et seq.* (formerly, part 21 of the Commission's Rules) for common carrier fixed microwave services (except MDS).

[19] Persons eligible under parts 80 and 90 of the Commission's rules can use Private-Operational Fixed Microwave services. *See* 47 CFR parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[20] Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. *See* 47 CFR part 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[21] 13 CFR 121.201, NAICS code 517212.

[22] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Employment Size of Firms Subject to Federal Income Tax: 1997,'' Table 5 (issued Oct. 2000).

employees or more.[23] Thus, under this size standard, majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

131. Advanced Wireless Service (AWS). We do not yet know how many applicants or licensees in the 2110–2150 MHz and 2160–2200 MHz bands will be small entities. Thus, the Commission assumes, for purposes of this FRFA, that all prospective licensees are small entities as that term is defined by the SBA or by our two special small business size standards for these bands. Although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS bands are comparable to those used for cellular service and personal communications service.

132. *Wireless Telephony Including Cellular, Personal Communications Service (PCS) and SMR Telephony Carriers.* The SBA has developed a small business size standard for wireless small businesses within the two separate categories of *Paging*[24] *and Cellular and Other Wireless Telecommunications.*[25] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. According to the Commission's most recent data,[26] 1,012 companies reported that they were engaged in the provision of wireless service. Of these 1,012 companies, an estimated 829 have 1,500 or fewer employees and 183 have more than 1,500 employees.[27] Consequently, the Commission estimates that most wireless service providers are small entities that may be affected by the rules and policies adopted herein.

133. *Mobile Satellite Service.* There are currently two space-station authorizations for Mobile Satellite Service (MSS) systems that would operate with 2 GHz mobile Earth stations. Although we know the number and identity of the space-station operators, neither the number nor the identity of future 2 GHz mobile-Earth-station licensees can be determined from that data. The Commission notes that small businesses are not likely to have the financial ability to become MSS system operators because of the high implementation costs, including construction of satellite space stations and rocket launch, associated with satellite systems and services.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

134. The Ninth R&O adopts relocation and cost-sharing procedures applicable to AWS licensees relative to incumbent BRS licensees in the 2150–2160/62 MHz band and incumbent FS licensees in the 2110–2130 MHz and 2160–2180 MHz bands, and AWS and MSS/ATC relative to incumbent FS licensees in the 2130–2150 MHz and 2180–2200 MHz bands, but does not adopt service rules. The *Ninth R&O* includes requirements for interference analyses (for FS) and line-of-sight determinations (for BRS), as well as good faith negotiations for relocation purposes. All AWS entities that benefit from the clearance of this spectrum by other AWS entities or by a voluntarily relocating microwave incumbent must contribute to such relocation costs. AWS entities may satisfy their reimbursement requirement by entering into private cost-sharing agreements. These negotiations are likely to require the skills of accountants and engineers to evaluate the economic and technical requirements of relocation. AWS entities are required to reimburse other AWS entities or voluntarily relocating microwave incumbents that incur relocation costs and are not parties to the alternative agreement. In addition, parties to a private cost-sharing agreement may seek reimbursement through the clearinghouse. To obtain reimbursement, the relocator must submit documentation itemizing relocation costs to the clearinghouse in the form of uniform cost data along with a copy, without redaction, of the relocation agreement, if relocation was undertaken pursuant to a negotiated contract. A third party appraisal of relocation costs must be prepared and submitted to the clearinghouse by AWS relocators of BRS systems and by voluntarily relocating microwave incumbents. AWS relocators, MSS/ATC relocators and voluntarily relocating microwave incumbents must maintain documentation of cost-related issues until the applicable sunset date and provide such documentation upon request, to the clearinghouse, the Commission, or entrants that trigger a cost sharing obligation.

135. AWS entities and MSS/ATC operators are required to file a notice containing site-specific data with the clearinghouse prior to initiating operations in the subject bands for newly constructed sites and for modified existing sites. However, AWS entities and MSS/ATC operators may satisfy this requirement by submitting a prior coordination notice (PCN) to the clearinghouse if a PCN was prepared in order to comply with coordination requirements previously adopted by the Commission. AWS entities and MSS/ATC operators that file either a notice or a PCN have a continuing duty to maintain the accuracy of the site-specific data on file with the clearinghouse until the sunset date specified in the Commission's Rules. AWS entities and MSS/ATC operators must pay the amount owed within 30 calendar days of receiving written notification of an outstanding reimbursement obligation. Parties of interest contesting the clearinghouse's determination of specific cost sharing obligations must provide evidentiary support to demonstrate that their calculation is reasonable and made in good faith. Specifically, these parties are expected to exercise due diligence to obtain the information necessary to prepare an independent estimate of the relocation costs in question and to file the independent estimate and supporting documentation with the clearinghouse.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

136. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.'' [28]

137. In the *Ninth R&O*, the Commission decides to adopt relocation and cost sharing rules that are designed to support the introduction of AWS, with minimal disruption to incumbent BRS and FS operations, because doing

[23] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is ''Firms with 1,000 employees or more.''

[24] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517211 (changed from 513321 in October 2002).

[25] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517212 (changed from 513322 in October 2002).

[26] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, ''Trends in Telephone Service'', Table 5.3, page 5–5 (June 2005). This source uses data that are current as of October 1, 2004.

[27] *Id.*

[28] 5 U.S.C. 603(c).

so will promote the rapid deployment of efficient radio communications but won't interrupt incumbents' provision of service to subscribers. An alternative option would have been to offer no relocation or cost sharing processes, and instead require incumbent licensees to cease use of the band by a date certain and prohibit new licensees from entering the band until that date. We believe that an *Emerging Technologies*-based relocation and cost sharing procedure is preferable, as it draws on established and well-known principles (such as time-based negotiation periods and the requirement of negotiating in good faith), benefits small BRS and FS licensees because the proposals would require new AWS licensees to pay for the costs to relocate their incumbent operations to comparable facilities, and—for small AWS licensees—offers a process by which new services can be brought to the market expeditiously. Moreover, we believe that the provision of additional spectrum that can be used to support AWS will directly benefit small business entities by providing new opportunities for the provision of innovative new fixed and mobile wireless services.

138. In the *Ninth R&O*, the Commission also avoids imposing additional burdens on licensees by adopting rules that permit, to the extent practicable, licensees to satisfy certain requirements by using documents that are prepared in compliance with other Commission Rules. For example, AWS entities and MSS/ATC operators are required to file a notice containing site-specific data with the clearinghouse prior to initiating operations in the subject bands for newly constructed sites and for modified existing sites. However, AWS entities and MSS/ATC operators may satisfy this requirement by submitting a prior coordination notice (PCN) to the clearinghouse if a PCN was prepared in order to comply with coordination requirements previously adopted by the Commission. In addition, the Ninth R&O adopts a rule that allows an AWS relocator of a BRS system to avoid incurring the costs of preparing and submitting a third party appraisal of relocation costs if it consents to binding resolution by the clearinghouse of any good faith cost disputes regarding the reimbursement claim.

F. Report to Congress

139. The Commission will send a copy of the *Ninth R&O,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[29] In addition, the Commission will send a copy of the *Ninth R&O*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Ninth R&O* and the FRFA (or summaries thereof) will also be published in the **Federal Register**.[30]

Ordering Clauses

140. Pursuant to Sections 1, 4(i), 7(a), 301, 303(f), 303(g), 303(r), 307, 316, 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 157(a), 301, 303(f), 303(g), 303(r), 307, 316, and 332, this Ninth Report and Order *is adopted* and parts 22, 27, and 101 of the Commission's Rules *are amended,* as specified in Appendix A, effective June 23, 2006, except for §§ 27.1166(a), (b) and (e); 27.1170; 27.1182(a), (b); and 27.1186, which contain information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections when approved. Also, the Petition for Reconsideration filed by the Wireless Communications Association International on March 8, 2004 (WT Docket No. 02–353), *is dismissed* as moot.

141. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Ninth Report and Order and Order*, including the Final Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 22

Communications common carriers, Communications equipment, Radio, Reporting and recordkeeping requirements.

47 CFR Part 27

Communications common carriers, Radio.

47 CFR Part 101

Communications, equipment, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 22, 27, and 101 as follows:

[29] *See* 5 U.S.C. 801(a)(1)(A).

[30] *See* 5 U.S.C. 604(b).

PART 22—PUBLIC MOBILE SERVICES

■ 1. The authority citation for part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 222, 303, 309, and 332.

■ 2. Section 22.602 is amended by removing and reserving paragraphs (b) and (h), revising paragraphs (c), (d) introductory text, (e) introductory text and (j), and by adding a new paragraph (k) to read as follows:

§ 22.602 Transition of the 2110–2130 MHz and 2160–2180 MHz channels to emerging technologies.

* * * * *

(c) Relocation of fixed microwave licensees in the 2110–2130 MHz and 2160–2180 MHz bands will be subject to mandatory negotiations only. A separate mandatory negotiation period will commence for each fixed microwave licensee when an ET licensee informs that fixed microwave licensee in writing of its desire to negotiate. Mandatory negotiation periods are defined as follows:

(1) Non-public safety incumbents will have a two-year mandatory negotiation period; and

(2) Public safety incumbents will have a three-year mandatory negotiation period.

(d) The mandatory negotiation period is triggered at the option of the ET licensee. Once mandatory negotiations have begun, a PARS licensee may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. In evaluating claims that a party has not negotiated in good faith, the FCC will consider, *inter alia,* the following factors:

* * * * *

(e) *Involuntary period.* After the end of the mandatory negotiation period, ET licensees may initiate involuntary relocation procedures under the Commission's rules. ET licensees are obligated to pay to relocate only the specific microwave links to which their systems pose an interference problem. Under involuntary relocation, a PARS licensee is required to relocate, provided that:

* * * * *

(j) *Sunset.* PARS licensees will maintain primary status in the 2110–2130 MHz and 2160–2180 MHz bands unless and until an ET licensee requires use of the spectrum. ET licensees are not required to pay relocation costs after the relocation rules sunset (*i.e.*, for the 2110–2130 MHz and 2160–2180 MHz bands, ten years after the first ET license

is issued in the respective band). Once the relocation rules sunset, an ET licensee may require the incumbent to cease operations, provided that the ET licensee intends to turn on a system within interference range of the incumbent, as determined by TIA TSB 10–F or any standard successor. ET licensee notification to the affected PARS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the PARS licensee must turn its license back into the Commission, unless the parties have entered into an agreement which allows the PARS licensee to continue to operate on a mutually agreed upon basis. If the parties cannot agree on a schedule or an alternative arrangement, requests for extension will be accepted and reviewed on a case-by-case basis. The Commission will grant such extensions only if the incumbent can demonstrate that:

(1) It cannot relocate within the six-month period (*e.g.*, because no alternative spectrum or other reasonable option is available), and;

(2) The public interest would be harmed if the incumbent is forced to terminate operations (*e.g.*, if public safety communications services would be disrupted).

(k) *Reimbursement and relocation expenses in the 2110–2130 MHz and 2160–2180 MHz bands.* Whenever an ET licensee in the 2110–2130 MHz and 2160–2180 MHz band relocates a paired PARS link with one path in the 2110–2130 MHz band and the paired path in the 2160–2180 MHz band, the ET license will be entitled to reimbursement pursuant to the procedures described in §§ 27.1160 through 27.1174 of this chapter.

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

■ The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

Subpart L—1710–1755 MHz, 2160–2180 MHz Bands

■ 3. The heading for subpart L is revised to read as set forth above.

■ 3a. Section 27.1102, section heading is revised to read as follows:

§ 27.1102 Designated Entities in the 1710–1755 MHz and 2110–2155 MHz bands

* * * * *

■ 4. Section 27.1111 is revised to read as follows:

§ 27.1111 Relocation of fixed microwave service licensees in the 2110–2150 MHz band.

Part 22, subpart E and part 101, subpart B of this chapter contain provisions governing the relocation of incumbent fixed microwave service licensees in the 2110–2150 MHz band.

■ 5. Section 27.1132 is revised to read as follows:

§ 27.1132 Protection of incumbent operations in the 2150–2160/62 MHz band.

All AWS licensees, prior to initiating operations from any base or fixed station, shall follow the provisions of § 27.1255 of this part.

■ 6. Part 27, Subpart L is amended by adding §§ 27.1160, 27.1162, 27.1164, 27.1166, 27.1168, 27.1170, 27.1172, 27.1174, 27.1176, 27.1178, 27.1180, 27.1182, 27.1184, 27.1186, 27.1188, and 27.1190 to read as follows:

Cost-Sharing Policies Governing Microwave Relocation From the 2110–2150 MHz and 2160–2200 MHz Bands

§ 27.1160 Cost-sharing requirements for AWS.

Frequencies in the 2110–2150 MHz and 2160–2180 MHz bands listed in § 101.147 of this chapter have been reallocated from Fixed Microwave Services (FMS) to use by AWS (as reflected in § 2.106) of this chapter. In accordance with procedures specified in § 22.602 and §§ 101.69 through 101.82 of this chapter, AWS entities are required to relocate the existing microwave licensees in these bands if interference to the existing microwave licensee would occur. All AWS entities that benefit from the clearance of this spectrum by other AWS entities or by a voluntarily relocating microwave incumbent must contribute to such relocation costs. AWS entities may satisfy their reimbursement requirement by entering into private cost-sharing agreements or agreeing to terms other than those specified in § 27.1164. However, AWS entities are required to reimburse other AWS entities or voluntarily relocating microwave incumbents that incur relocation costs and are not parties to the alternative agreement. In addition, parties to a private cost-sharing agreement may seek reimbursement through the clearinghouse (as discussed in § 27.1162) from AWS entities or other Emerging Technologies (ET) entities, including Mobile Satellite Service (MSS) operators (for Ancillary Terrestrial Component (ATC) base stations), that are not parties to the agreement. The cost-sharing plan is in effect during all phases of microwave relocation specified in § 22.602 and 101.69 of this chapter. If an AWS licensee enters into a spectrum leasing arrangement (as set forth in part 1, subpart X of this chapter) and the spectrum lessee triggers a cost-sharing obligation, the licensee is the AWS entity responsible for satisfying the cost-sharing obligations under §§ 27.1160–27.1174.

§ 27.1162 Administration of the Cost-Sharing Plan.

The Wireless Telecommunications Bureau, under delegated authority, will select one or more entities to operate as a neutral, not-for-profit clearinghouse(s). This clearinghouse(s) will administer the cost-sharing plan by, *inter alia,* determining the cost-sharing obligation of AWS and other ET entities for the relocation of FMS incumbents from the 2110–2150 MHz and 2160–2200 MHz bands. The clearinghouse filing requirements (see §§ 27.1166(a), 27.1170) will not take effect until an administrator is selected.

§ 27.1164 The cost-sharing formula.

An AWS relocator who relocates an interfering microwave link, *i.e.*, one that is in all or part of its market area and in all or part of its frequency band or a voluntarily relocating microwave incumbent, is entitled to *pro rata* reimbursement based on the following formula:

$$R_N = \frac{C}{N} \times \frac{[120 - (T_m)]}{120}$$

(a) R_N equals the amount of reimbursement.

(b) *C* equals the actual cost of relocating the link(s). Actual relocation costs include, but are not limited to, such items as: Radio terminal equipment (TX and/or RX—antenna, necessary feed lines, MUX/Modems); towers and/or modifications; back-up power equipment; monitoring or control equipment; engineering costs (design/path survey); installation; systems testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment (vendor required); spare equipment; project management; prior coordination notification under § 101.103(d) of this chapter; site lease renegotiation; required antenna upgrades for interference control; power plant upgrade (if required); electrical grounding systems; Heating Ventilation and Air Conditioning (HVAC) (if required); alternate transport equipment; and leased facilities. Increased recurring costs represent part of the actual cost of relocation and, even if the compensation to the incumbent is in the form of a commitment to pay five years of charges, the AWS or MSS/ATC relocator is entitled to seek immediate reimbursement of the lump sum amount based on present value using current interest rates, provided it has entered into a legally binding agreement to pay the charges. *C* also includes voluntarily relocating microwave incumbent's independent third party appraisal of its compensable relocation costs and incumbent transaction expenses that are directly attributable to the relocation, subject to a cap of two percent of the ''hard'' costs involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. *C* may not exceed $250,000 per paired link, with an additional $150,000 permitted if a new or modified tower is required.

(c) *N* equals the number of AWS and MSS/ATC entities that have triggered a cost-sharing obligation. For the AWS relocator, *N*=1. For the next AWS entity triggering a cost-sharing obligation, *N*=2, and so on. In the case of a voluntarily relocating microwave incumbent, *N*=1 for the first AWS entity triggering a cost-sharing obligation. For the next AWS or MSS/ATC entity triggering a cost-sharing obligation, *N*=2, and so on.

(d) T_m equals the number of months that have elapsed between the month the AWS or MSS/ATC relocator or voluntarily relocating microwave incumbent obtains reimbursement rights for the link and the month in which an AWS entity triggers a cost-sharing obligation. An AWS or MSS/ATC relocator obtains reimbursement rights for the link on the date that it signs a relocation agreement with a microwave incumbent. A voluntarily relocating microwave incumbent obtains reimbursement rights for the link on the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of the link, pursuant to § 101.305 of the Commission's rules.

§ 27.1166 Reimbursement under the Cost-Sharing Plan.

(a) *Registration of reimbursement rights.* Claims for reimbursement under the cost-sharing plan are limited to relocation expenses incurred on or after the date when the first AWS license is issued in the relevant AWS band (start date). If a clearinghouse is not selected by that date (see § 27.1162) claims for reimbursement (see § 27.1166) and notices of operation (see § 27.1170) for activities that occurred after the start date but prior to the clearinghouse selection must be submitted to the clearinghouse within 30 calendar days of the selection date.

(1) To obtain reimbursement, an AWS relocator or MSS/ATC relocator must submit documentation of the relocation agreement to the clearinghouse within 30 calendar days of the date a relocation agreement is signed with an incumbent. In the case of involuntary relocation, an AWS relocator or MSS/ATC relocator must submit documentation of the relocated system within 30 calendar days after the end of the relocation.

(2) To obtain reimbursement, a voluntarily relocating microwave incumbent must submit documentation of the relocation of the link to the clearinghouse within 30 calendar days of the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of the link, pursuant to § 101.305 of the Commission's rules.

(b) *Documentation of expenses.* Once relocation occurs, the AWS relocator, MSS/ATC relocator, or the voluntarily relocating microwave incumbent, must submit documentation itemizing the amount spent for items specifically listed in § 27.1164(b), as well as any reimbursable items not specifically listed in § 27.1164(b) that are directly attributable to actual relocation costs. Specifically, the AWS relocator, MSS/ATC relocator, or the voluntarily relocating microwave incumbent must submit, in the first instance, only the uniform cost data requested by the clearinghouse along with a copy, without redaction, of either the relocation agreement, if any, or the third party appraisal described in (b)(1), if relocation was undertaken by the microwave incumbent. AWS relocators, MSS/ATC relocators and voluntarily relocating microwave incumbents must maintain documentation of cost-related issues until the applicable sunset date and provide such documentation upon request, to the clearinghouse, the Commission, or entrants that trigger a cost-sharing obligation. If an AWS relocator pays a microwave incumbent a monetary sum to relocate its own facilities, the AWS relocator must estimate the costs associated with relocating the incumbent by itemizing the anticipated cost for items listed in § 27.1164(b). If the sum paid to the incumbent cannot be accounted for, the remaining amount is not eligible for reimbursement.

(1) *Third party appraisal.* The voluntarily relocating microwave incumbent, must also submit an independent third party appraisal of its compensable relocation costs. The appraisal should be based on the actual

cost of replacing the incumbent's system with comparable facilities and should exclude the cost of any equipment upgrades or items outside the scope of § 27.1164(b).

(2) *Identification of links.* The AWS relocator, MSS/ATC relocator, or the voluntarily relocating microwave incumbent, must identify the particular link associated with appropriate expenses (*i.e.*, costs may not be averaged over numerous links). Where the AWS relocator, MSS/ATC relocator, or voluntarily relocating microwave incumbent relocates both paths of a paired channel microwave link (*e.g.*, 2110–2130 MHz with 2160–2180 MHz and 2130–2150 MHz with 2180–2200 MHz), the AWS relocator, MSS/ATC relocator, or voluntarily relocating microwave incumbent must identify the expenses associated with each paired microwave link.

(c) *Full Reimbursement.* An AWS relocator who relocates a microwave link that is either fully outside its market area or its licensed frequency band may seek full reimbursement through the clearinghouse of compensable costs, up to the reimbursement cap as defined in § 27.1164(b). Such reimbursement will not be subject to depreciation under the cost-sharing formula.

(d) *Good Faith Requirement.* New entrants and incumbent licensees are expected to act in good faith in satisfying the cost-sharing obligations under §§ 27.1160 through 27.1174. The requirement to act in good faith extends to, but is not limited to, the preparation and submission of the documentation required in paragraph (b) of this section.

(e) *MSS Participation in the Clearinghouse.* MSS operators are not required to submit reimbursements to the clearinghouse for links relocated due to interference from MSS space-to-Earth downlink operations, but may elect to do so, in which case the MSS operator must identify the reimbursement claim as such and follow the applicable procedures governing reimbursement in part 27. MSS reimbursement rights and cost-sharing obligations for space-to-Earth downlink operations are governed by § 101.82 of this chapter.

(f) *Reimbursement for Self-relocating FMS links in the 2130–2150 MHz and 2180–2200 MHz bands.* Where a voluntarily relocating microwave incumbent relocates a paired microwave link with paths in the 2130–2150 MHz and 2180–2200 MHz bands, it may not seek reimbursement from MSS operators (including MSS/ATC operators), but is entitled to partial reimbursement from the first AWS beneficiary, equal to fifty percent of its actual costs for relocating the paired link, or half of the reimbursement cap in § 27.1164(b), whichever is less. This amount is subject to depreciation as specified § 27.1164(b). An AWS licensee who is obligated to reimburse relocation costs under this rule is entitled to obtain reimbursement from other AWS beneficiaries in accordance with §§ 27.1164 and 27.1168. For purposes of applying the cost-sharing formula relative to other AWS licensees that benefit from the self-relocation, the fifty percent attributable to the AWS entrant shall be treated as the entire cost of the link relocation, and depreciation shall run from the date on which the clearinghouse issues the notice of an obligation to reimburse the voluntarily relocating microwave incumbent. The cost-sharing obligations for MSS operators in the 2180–2200 MHz band are governed by § 101.82 of this chapter.

§ 27.1168 Triggering a Reimbursement Obligation.

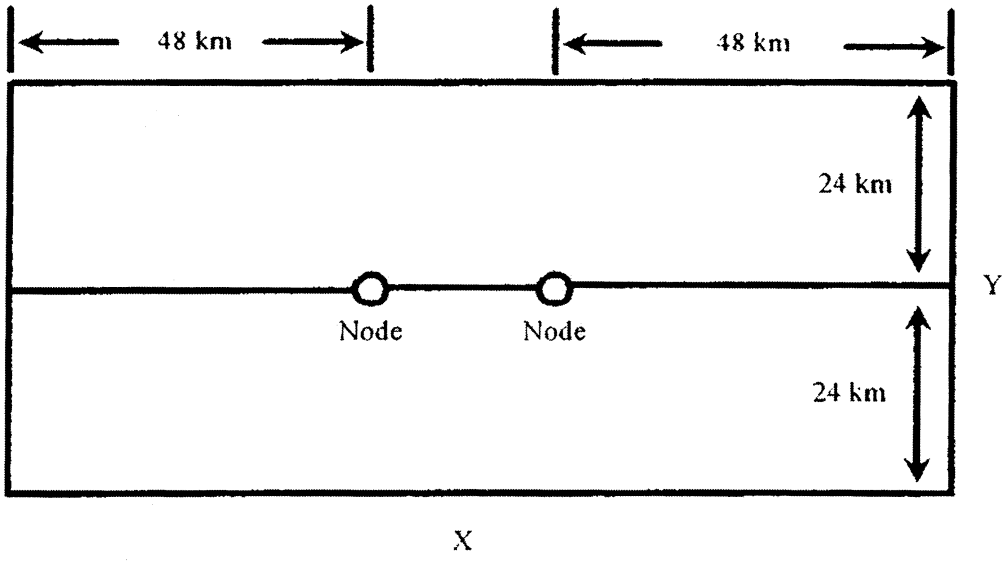
(a) The clearinghouse will apply the following test to determine when an AWS entity or MSS/ATC entity has triggered a cost-sharing obligation and therefore must pay an AWS relocator, MSS relocator (including MSS/ATC), or a voluntarily relocating microwave incumbent in accordance with the formula detailed in § 27.1164:

(1) All or part of the relocated microwave link was initially co-channel with the licensed AWS band(s) of the AWS entity or the selected assignment of the MSS operator that seeks and obtains ATC authority (see § 25.149(a)(2)(i) of this chapter);

(2) An AWS relocator, MSS relocator (including MSS/ATC) or a voluntarily relocating microwave incumbent has paid the relocation costs of the microwave incumbent; and

(3) The AWS or MSS entity is operating or preparing to turn on a fixed base station (including MSS/ATC) at commercial power and the fixed base station is located within a rectangle (Proximity Threshold) described as follows:

(i) The length of the rectangle shall be *x* where *x* is a line extending through both nodes of the microwave link to a distance of 48 kilometers (30 miles) beyond each node. The width of the rectangle shall be *y* where *y* is a line perpendicular to *x* and extending for a distance of 24 kilometers (15 miles) on both sides of *x*. Thus, the rectangle is represented as follows:



(ii) If the application of the Proximity Threshold Test indicates that a reimbursement obligation exists, the clearinghouse will calculate the reimbursement amount in accordance with the cost-sharing formula and notify the AWS or MSS/ATC entity of the total amount of its reimbursement obligation.

(b) Once a reimbursement obligation is triggered, the AWS or MSS/ATC entity may not avoid paying its cost-sharing obligation by deconstructing or modifying its facilities.

§ 27.1170 Payment Issues.

Prior to initiating operations for a newly constructed site or modified existing site, an AWS entity or MSS/ATC entity is required to file a notice containing site-specific data with the clearinghouse. The notice regarding the new or modified site must provide a detailed description of the proposed site's spectral frequency use and geographic location, including but not limited to the applicant's name and address, the name of the transmitting base station, the geographic coordinates corresponding to that base station, the frequencies and polarizations to be added, changed or deleted, and the emission designator. If a prior coordination notice (PCN) under § 101.103(d) of this chapter is prepared, AWS entities can satisfy the site-data filing requirement by submitting a copy of their PCN to the clearinghouse. AWS entities or MSS/ATC entities that file either a notice or a PCN have a continuing duty to maintain the accuracy of the site-specific data on file with the clearinghouse. Utilizing the site-specific data, the clearinghouse will determine if any reimbursement obligation exists and notify the AWS entity or MSS/ATC entity in writing of its repayment obligation, if any. When the AWS entity or MSS/ATC entity receives a written copy of such obligation, it must pay directly to the relocator the amount owed within 30 calendar days.

§ 27.1172 Dispute Resolution Under the Cost-Sharing Plan.

(a) Disputes arising out of the cost-sharing plan, such as disputes over the amount of reimbursement required, must be brought, in the first instance, to the clearinghouse for resolution. To the extent that disputes cannot be resolved by the clearinghouse, parties are encouraged to use expedited Alternative Dispute Resolution (ADR) procedures, such as binding arbitration, mediation, or other ADR techniques.

(b) *Evidentiary requirement.* Parties of interest contesting the clearinghouse's determination of specific cost-sharing obligations must provide evidentiary support to demonstrate that their calculation is reasonable and made in good faith. Specifically, these parties are expected to exercise due diligence to obtain the information necessary to prepare an independent estimate of the relocation costs in question and to file the independent estimate and supporting documentation with the clearinghouse.

§ 27.1174 Termination of Cost-Sharing Obligations.

The cost-sharing plan will sunset for all AWS and MSS (including MSS/ATC) entities on the same date on which the relocation obligation for the subject AWS band (*i.e.*, 2110–2150 MHz, 2160–2175 MHz, or 2175–2180 MHz) in which the relocated FMS link was located terminates. AWS or MSS (including MSS/ATC) entrants that trigger a cost-sharing obligation prior to the sunset date must satisfy their payment obligation in full.

Cost-Sharing Policies Governing Broadband Radio Service Relocation From the 2150–2160/62 MHz Band

§ 27.1176 Cost-sharing requirements for AWS in the 2150–2160/62 MHz band.

(a) Frequencies in the 2150–2160/62 MHz band have been reallocated from the Broadband Radio Service (BRS) to AWS. All AWS entities who benefit from another AWS entity's clearance of BRS incumbents from this spectrum, including BRS incumbents occupying the 2150–2162 MHz band on a primary basis, must contribute to such relocation costs. Only AWS entrants that relocate BRS incumbents are entitled to such reimbursement.

(b) AWS entities may satisfy their reimbursement requirement by entering into private cost-sharing agreements or agreeing to terms other than those specified in § 27.1180. However, AWS entities are required to reimburse other AWS entities that incur relocation costs and are not parties to the alternative agreement. In addition, parties to a private cost-sharing agreement may seek reimbursement through the clearinghouse (as discussed in § 27.1178) from AWS entities that are not parties to the agreement. The cost-sharing plan is in effect during all phases of BRS relocation until the end of the period specified in § 27.1190. If an AWS licensee enters into a spectrum leasing arrangement and the spectrum lessee triggers a cost-sharing obligation, the licensee is the AWS entity responsible for satisfying cost-sharing obligations under these rules.

§ 27.1178 Administration of the Cost-Sharing Plan.

The Wireless Telecommunications Bureau, under delegated authority, will select one or more entities to operate as a neutral, not-for-profit clearinghouse(s). This clearinghouse(s) will administer the cost-sharing plan by, *inter alia,* determining the cost-sharing obligations of AWS entities for the relocation of BRS incumbents from the 2150–2162 MHz band. The clearinghouse filing requirements (*see* §§ 27.1182(a), 27.1186) will not take effect until an administrator is selected.

§ 27.1180 The cost-sharing formula.

(a) An AWS licensee that relocates a BRS system with which it interferes is entitled to *pro rata* reimbursement based on the cost-sharing formula specified in § 27.1164, except that the depreciation factor shall be $[180 - T_m]/180$, and the variable *C* shall be applied as set forth in paragraph (b) of this section.

(b) *C* is the actual cost of relocating the system, and includes, but is not limited to, such items as: Radio terminal equipment (TX and/or RX—antenna, necessary feed lines, MUX/Modems); towers and/or modifications; back-up power equipment; monitoring or control equipment; engineering costs (design/path survey); installation; systems testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment (vendor required); spare equipment; project management; site lease renegotiation; required antenna upgrades for interference control; power plant upgrade (if required); electrical grounding systems; Heating Ventilation and Air Conditioning (HVAC) (if required); alternate transport equipment; leased facilities; and end user units served by the base station that is being relocated. In addition to actual costs, *C* may include the cost of an independent third party appraisal conducted pursuant to § 27.1182(a)(3) and incumbent transaction expenses that are directly attributable to the relocation, subject to a cap of two percent of the ''hard'' costs involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. There is no cap on the actual costs of relocation.

(c) An AWS system shall be considered an interfering system for purposes of this rule if the AWS system is in all or part of the BRS frequency band and operates within line of sight to BRS operations under the applicable test specified in § 27.1184. An AWS relocator that relocates a BRS system

with which it does not interfere is entitled to full reimbursement, as specified in § 27.1182(c).

§ 27.1182 Reimbursement under the Cost-Sharing Plan.

(a) *Registration of reimbursement rights.* (1) To obtain reimbursement, an AWS relocator must submit documentation of the relocation agreement to the clearinghouse within 30 calendar days of the date a relocation agreement is signed with an incumbent. In the case of involuntary relocation, an AWS relocator must submit documentation of the relocated system within 30 calendar days after the end of the one-year trial period.

(2) Registration of any BRS system shall include:

(i) A description of the system's frequency use;

(ii) If the system exclusively provides one-way transmissions to subscribers, the Geographic Service Area of the system; and

(iii) If the system does not exclusively provide one-way transmission to subscribers, the system hub antenna's geographic location and the above ground level height of the system's receiving antenna centerline.

(3) The AWS relocator must also include with its system registration an independent third party appraisal of the compensable relocation costs. The appraisal should be based on the actual cost of replacing the incumbent's system with comparable facilities and should exclude the cost of any equipment upgrades that are not necessary to the provision of comparable facilities. An AWS relocator may submit registration without a third party appraisal if it consents to binding resolution by the clearinghouse of any good faith cost disputes regarding the reimbursement claim, under the following standard: The relocator shall bear the burden of proof, and be required to demonstrate by clear and convincing evidence that its request does not exceed the actual cost of relocating the relevant BRS system or systems to comparable facilities. Failure to satisfy this burden of proof will result in loss of rights to subsequent reimbursement of the disputed costs from any AWS licensee.

(b) *Documentation of expenses.* Once relocation occurs, the AWS relocator must submit documentation itemizing the amount spent for items specifically listed in § 27.1180(b), as well as any reimbursable items not specifically listed in § 27.1180(b) that are directly attributable to actual relocation costs. Specifically, the AWS relocator must submit, in the first instance, only the uniform cost data requested by the clearinghouse along with copies, without redaction, of the relocation agreement, if any, and the third party appraisal described in (a)(3), of this section, if prepared. The AWS relocator must identify the particular system associated with appropriate expenses (*i.e.*, costs may not be averaged over numerous systems). If an AWS relocator pays a BRS incumbent a monetary sum to relocate its own facilities in whole or in part, the AWS relocator must itemize the actual costs to the extent determinable, and otherwise must estimate the actual costs associated with relocating the incumbent and itemize these costs. If the sum paid to the incumbent cannot be accounted for, the remaining amount is not eligible for reimbursement. All AWS relocators seeking reimbursement through the clearinghouse have an ongoing duty to maintain all relevant records of BRS relocation-related expenses until the sunset of cost-sharing obligations, and to provide, upon request, such documentation, including a copy of the independent appraisal if one was conducted, to the clearinghouse, the Commission, or AWS entrants that trigger a cost-sharing obligation.

(c) *Full reimbursement.* An AWS relocator who relocates a BRS system that is either:

(1) Wholly outside its frequency band; or

(2) Not within line of sight of the relocator's transmitting base station may seek full reimbursement through the clearinghouse of compensable costs. Such reimbursement will not be subject to depreciation under the cost-sharing formula.

(d) *Good Faith Requirement.* New entrants and incumbent licensees are expected to act in good faith in satisfying the cost-sharing obligations under §§ 27.1176 through 27.1190. The requirement to act in good faith extends to, but is not limited to, the preparation and submission of the documentation required in paragraph (b) of this section.

§ 27.1184 Triggering a reimbursement obligation.

(a) The clearinghouse will apply the following test to determine when an AWS entity has triggered a cost-sharing obligation and therefore must pay an AWS relocator of a BRS system in accordance with the formula detailed in § 27.1180:

(1) All or part of the relocated BRS system was initially co-channel with the licensed AWS band(s) of the AWS entity;

(2) An AWS relocator has paid the relocation costs of the BRS incumbent; and

(3) The other AWS entity has turned on or is preparing to turn on a fixed base station at commercial power and the incumbent BRS system would have been within the line of sight of the AWS entity's fixed base station, defined as follows.

(i) For a BRS system using the 2150–2160/62 MHz band exclusively to provide one-way transmissions to subscribers, the clearinghouse will determine whether there is an unobstructed signal path (line of sight) to the incumbent licensee's geographic service area (GSA), based on the following criteria: use of 9.1 meters (30 feet) for the receiving antenna height, use of the actual transmitting antenna height and terrain elevation, and assumption of 4/3 Earth radius propagation conditions. Terrain elevation data must be obtained from the U.S. Geological Survey (USGS) 3-second database. All coordinates used in carrying out the required analysis shall be based upon use of NAD–83.

(ii) For all other BRS systems using the 2150–2160/62 MHz band, the clearinghouse will determine whether there is an unobstructed signal path (line of sight) to the incumbent licensee's receive station hub using the method prescribed in ''Methods for Predicting Interference from Response Station Transmitters and to Response Station Hubs and for Supplying Data on Response Station Systems. MM Docket 97–217,'' in Amendment of 47 CFR parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97–217, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking,* 15 FCC Rcd 14566 at 14610, Appendix D.

(b) If the application of the trigger test described in paragraphs (a)(3)(i) and (ii) of this section, indicates that a reimbursement obligation exists, the clearinghouse will calculate the reimbursement amount in accordance with the cost-sharing formula and notify the subsequent AWS entity of the total amount of its reimbursement obligation.

(c) Once a reimbursement obligation is triggered, the AWS entity may not avoid paying its cost-sharing obligation by deconstructing or modifying its facilities.

§ 27.1186 Payment issues.

Payment of cost-sharing obligations for the relocation of BRS systems in the 2150–60/62 MHz band is subject to the rules set forth in § 27.1170. If an AWS licensee is initiating operations for a newly constructed site or modified

existing site in licensed bands overlapping the 2150–2160/62 MHz band, the AWS licensee must file with the clearinghouse, in addition to the site-specific data required by § 27.1170, the above ground level height of the transmitting antenna centerline. AWS entities have a continuing duty to maintain the accuracy of the site-specific data on file with the clearinghouse.

§ 27.1188 Dispute resolution under the Cost-Sharing Plan.

(a) Disputes arising out of the cost-sharing plan, such as disputes over the amount of reimbursement required, must be brought, in the first instance, to the clearinghouse for resolution. To the extent that disputes cannot be resolved by the clearinghouse, parties are encouraged to use expedited Alternative Dispute Resolution (ADR) procedures, such as binding arbitration, mediation, or other ADR techniques.

(b) *Evidentiary requirement.* Parties of interest contesting the clearinghouse's determination of specific cost-sharing obligations must provide evidentiary support to demonstrate that their calculation is reasonable and made in good faith. Specifically, these parties are expected to exercise due diligence to obtain the information necessary to prepare an independent estimate of the relocation costs in question and to file the independent estimate and supporting documentation with the clearinghouse.

§ 27.1190 Termination of cost-sharing obligations.

The plan for cost-sharing in connection with BRS relocation will sunset for all AWS entities fifteen years after the relocation sunset period for BRS relocation commences, *i.e.*, fifteen years after the first AWS licenses are issued in any part of the 2150–2162 MHz band. AWS entrants that trigger a cost-sharing obligation prior to the sunset date must satisfy their payment obligation in full.

■ 6. Part 27, Subpart M is amended by adding §§ 27.1250 through 27.1255 to read as follows:

Relocation Procedures for the 2150–2160/62 MHz Band

§ 27.1250 Transition of the 2150–2160/62 MHz band from the Broadband Radio Service to the Advanced Wireless Service.

The 2150–2160/62 MHz band has been allocated for use by the Advanced Wireless Service (AWS). The rules in this section provide for a transition period during which AWS licensees may relocate existing Broadband Radio Service (BRS) licensees using these frequencies to their assigned frequencies in the 2496–2690 MHz band or other media.

(a) AWS licensees and BRS licensees shall engage in mandatory negotiations for the purpose of agreeing to terms under which the BRS licensees would:

(1) Relocate their operations to other frequency bands or other media; or alternatively

(2) Accept a sharing arrangement with the AWS licensee that may result in an otherwise impermissible level of interference to the BRS operations.

(b) If no agreement is reached during the mandatory negotiation period, an AWS licensee may initiate involuntary relocation procedures. Under involuntary relocation, the incumbent is required to relocate, provided that the AWS licensee meets the conditions of § 27.1252.

(c) Relocation of BRS licensees by AWS licensees will be subject to a three-year mandatory negotiation period. BRS licensees may suspend the running of the three-year negotiation period for up to one year if the BRS licensee cannot be relocated to comparable facilities at the time the AWS licensee seeks entry into the band.

§ 27.1251 Mandatory Negotiations.

(a) Once mandatory negotiations have begun, a BRS licensee may not refuse to negotiate and all parties are required to negotiate in good faith. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. The BRS licensee is required to cooperate with an AWS licensee's request to provide access to the facilities to be relocated, other than the BRS customer location, so that an independent third party can examine the BRS system and prepare an appraisal of the costs to relocate the incumbent. In evaluating claims that a party has not negotiated in good faith, the FCC will consider, *inter alia,* the following factors:

(1) Whether the AWS licensee has made a bona fide offer to relocate the BRS licensee to comparable facilities in accordance with § 27.1252(b);

(2) If the BRS licensee has demanded a premium, the type of premium requested (*e.g.*, whether the premium is directly related to relocation, such as analog-to-digital conversions, versus other types of premiums), and whether the value of the premium as compared to the cost of providing comparable facilities is disproportionate (*i.e.*, whether there is a lack of proportion or relation between the two);

(3) What steps the parties have taken to determine the actual cost of relocation to comparable facilities;

(4) Whether either party has withheld information requested by the other party that is necessary to estimate relocation costs or to facilitate the relocation process.

(b) Any party alleging a violation of our good faith requirement must attach an independent estimate of the relocation costs in question to any documentation filed with the Commission in support of its claim. An independent cost estimate must include a specification for the comparable facility and a statement of the costs associated with providing that facility to the incumbent licensee.

(c) Mandatory negotiations will commence for each BRS licensee when the AWS licensee informs the BRS licensee in writing of its desire to negotiate. Mandatory negotiations will be conducted with the goal of providing the BRS licensee with comparable facilities, defined as facilities possessing the following characteristics:

(1) *Throughput.* Communications throughput is the amount of information transferred within a system in a given amount of time. System is defined as a base station and all end user units served by that base station. If analog facilities are being replaced with analog, comparable facilities may provide a comparable number of channels. If digital facilities are being replaced with digital, comparable facilities provide equivalent data loading bits per second (bps).

(2) *Reliability.* System reliability is the degree to which information is transferred accurately within a system. Comparable facilities provide reliability equal to the overall reliability of the BRS system. For digital systems, reliability is measured by the percent of time the bit error rate (BER) exceeds a desired value, and for analog or digital video transmission, it is measured by whether the end-to-end transmission delay is within the required delay bound. If an analog system is replaced with a digital system, only the resulting frequency response, harmonic distortion, signal-to-noise ratio and its reliability will be considered in determining comparable reliability.

(3) *Operating Costs.* Operating costs are the cost to operate and maintain the BRS system. AWS licensees would compensate BRS licensees for any increased recurring costs associated with the replacement facilities (*e.g.*, additional rental payments, and increased utility fees) for five years after relocation. AWS licensees could satisfy this obligation by making a lump-sum

payment based on present value using current interest rates. Additionally, the maintenance costs to the BRS licensee would be equivalent to the replaced system in order for the replacement system to be comparable.

(d) AWS licensees are responsible for the relocation costs of end user units served by the BRS base station that is being relocated. If a lessee is operating under a BRS license, the BRS licensee may rely on the throughput, reliability, and operating costs of facilities in use by a lessee in negotiating comparable facilities and may include the lessee in negotiations.

§ 27.1252 Involuntary Relocation Procedures.

(a) If no agreement is reached during the mandatory negotiation period, an AWS licensee may initiate involuntary relocation procedures under the Commission's rules. AWS licensees are obligated to pay to relocate BRS systems to which the AWS system poses an interference problem. Under involuntary relocation, the BRS licensee is required to relocate, provided that the AWS licensee:

(1) Guarantees payment of relocation costs, including all engineering, equipment, site and FCC fees, as well as any legitimate and prudent transaction expenses incurred by the BRS licensee that are directly attributable to an involuntary relocation, subject to a cap of two percent of the ''hard'' costs involved. Hard costs are defined as the actual costs associated with providing a replacement system, such as equipment and engineering expenses. There is no cap on the actual costs of relocation. AWS licensees are not required to pay BRS licensees for internal resources devoted to the relocation process. AWS licensees are not required to pay for transaction costs incurred by BRS licensees during the mandatory period once the involuntary period is initiated, or for fees that cannot be legitimately tied to the provision of comparable facilities; and

(2) Completes all activities necessary for implementing the replacement facilities, including engineering and cost analysis of the relocation procedure and, if radio facilities are used, identifying and obtaining, on the incumbents' behalf, new microwave frequencies and frequency coordination.

(b) *Comparable facilities.* The replacement system provided to an incumbent during an involuntary relocation must be at least equivalent to the existing BRS system with respect to the following three factors:

(1) *Throughput.* Communications throughput is the amount of information transferred within a system in a given amount of time. System is defined as a base station and all end user units served by that base station. If analog facilities are being replaced with analog, the AWS licensee is required to provide the BRS licensee with a comparable number of channels. If digital facilities are being replaced with digital, the AWS licensee must provide the BRS licensee with equivalent data loading bits per second (bps). AWS licensees must provide BRS licensees with enough throughput to satisfy the BRS licensee's system use at the time of relocation, not match the total capacity of the BRS system.

(2) *Reliability.* System reliability is the degree to which information is transferred accurately within a system. AWS licensees must provide BRS licensees with reliability equal to the overall reliability of their system. For digital data systems, reliability is measured by the percent of time the bit error rate (BER) exceeds a desired value, and for analog or digital video transmissions, it is measured by whether the end-to-end transmission delay is within the required delay bound.

(3) *Operating costs.* Operating costs are the cost to operate and maintain the BRS system. AWS licensees must compensate BRS licensees for any increased recurring costs associated with the replacement facilities (*e.g.*, additional rental payments, increased utility fees) for five years after relocation. AWS licensees may satisfy this obligation by making a lump-sum payment based on present value using current interest rates. Additionally, the maintenance costs to the BRS licensee must be equivalent to the replaced system in order for the replacement system to be considered comparable.

(c) AWS licensees are responsible for the relocation costs of end user units served by the BRS base station that is being relocated. If a lessee is operating under a BRS license, the AWS licensee shall on the throughput, reliability, and operating costs of facilities in use by a lessee at the time of relocation in determining comparable facilities for involuntary relocation purposes.

(d) *Twelve-month trial period.* If, within one year after the relocation to new facilities, the BRS licensee demonstrates that the new facilities are not comparable to the former facilities, the AWS licensee must remedy the defects or pay to relocate the BRS licensee to one of the following: Its former or equivalent 2 GHz channels, another comparable frequency band, a land-line system, or any other facility that satisfies the requirements specified in paragraph (b) of this section. This trial period commences on the date that the BRS licensee begins full operation of the replacement system. If the BRS licensee has retained its 2 GHz authorization during the trial period, it must return the license to the Commission at the end of the twelve months.

§ 27.1253 Sunset Provisions.

(a) BRS licensees will maintain primary status in the 2150–2160/62 MHz band unless and until an AWS licensee requires use of the spectrum. AWS licensees are not required to pay relocation costs after the relocation rules sunset (*i.e.* fifteen years from the date the first AWS license is issued in the band). Once the relocation rules sunset, an AWS licensee may require the incumbent to cease operations, provided that the AWS licensee intends to turn on a system within interference range of the incumbent, as determined by § 27.1255. AWS licensee notification to the affected BRS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the BRS licensee must turn its license back into the Commission, unless the parties have entered into an agreement which allows the BRS licensee to continue to operate on a mutually agreed upon basis.

(b) If the parties cannot agree on a schedule or an alternative arrangement, requests for extension will be accepted and reviewed on a case-by-case basis. The Commission will grant such extensions only if the incumbent can demonstrate that:

(1) It cannot relocate within the six-month period (*e.g.*, because no alternative spectrum or other reasonable option is available); and

(2) The public interest would be harmed if the incumbent is forced to terminate operations.

§ 27.1254 Eligibility.

(a) BRS licensees with primary status in the 2150–2162 MHz band as of June 23, 2006, will be eligible for relocation insofar as they have facilities that are constructed and in use as of this date.

(b) *Future Licensing and Modifications.* After June 23, 2006, all major modifications to existing BRS systems in use in the 2150–2160/62 MHz band will be authorized on a secondary basis to AWS systems, unless the incumbent affirmatively justifies primary status and the incumbent BRS licensee establishes that the modification would not add to the relocation costs of AWS licensees. Major modifications include the following:

(1) Additions of new transmit sites or base stations made after June 23, 2006;

(2) Changes to existing facilities made after June 23, 2006, that would increase the size or coverage of the service area, or interference potential, and that would also increase the throughput of an existing system (*e.g.*, sector splits in the antenna system). Modifications to fully utilize the existing throughput of existing facilities (*e.g.*, to add customers) will not be considered major modifications even if such changes increase the size or coverage of the service area, or interference potential.

§ 27.1255 Relocation Criteria for Broadband Radio Service Licensees in the 2150–2160/62 MHz band.

(a) An AWS licensee in the 2150–2160/62 MHz band, prior to initiating operations from any base or fixed station that is co-channel to the 2150–2160/62 MHz band, must relocate any incumbent BRS system that is within the line of sight of the AWS licensee's base or fixed station. For purposes of this section, a determination of whether an AWS facility is within the line of sight of a BRS system will be made as follows:

(1) For a BRS system using the 2150–2160/62 MHz band exclusively to provide one-way transmissions to subscribers, the AWS licensee will determine whether there is an unobstructed signal path (line of sight) to the incumbent licensee's geographic service area (GSA), based on the following criteria: use of 9.1 meters (30 feet) for the receiving antenna height, use of the actual transmitting antenna height and terrain elevation, and assumption of 4/3 Earth radius propagation conditions. Terrain elevation data must be obtained from the U.S. Geological Survey (USGS) 3-second database. All coordinates used in carrying out the required analysis shall be based upon use of NAD–83.

(2) For all other BRS systems using the 2150–2160/62 MHz band, the AWS licensee will determine whether there is an unobstructed signal path (line of sight) to the incumbent licensee's receive station hub using the method prescribed in ''Methods for Predicting Interference from Response Station Transmitters and to Response Station Hubs and for Supplying Data on Response Station Systems. MM Docket 97–217,'' in Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97–217, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking,* 15 FCC Rcd 14566 at 14610, Appendix D.

(b) Any AWS licensee in the 2110–2180 MHz band that causes actual and demonstrable interference to a BRS licensee in the 2150–2160/62 MHz band must take steps to eliminate the harmful interference, up to and including relocation of the BRS licensee, regardless of whether it would be required to do so under paragraph (a), of this section.

PART 101—FIXED MICROWAVE SERVICES

■ The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

■ 9. Section 101.69 is amended by removing and reserving paragraphs (b) and (c) and adding paragraph (g) to read as follows:

§ 101.69 Transition of the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands from the fixed microwave services to personal communications services and emerging technologies.

* * * * *

(g) If no agreement is reached during the mandatory negotiation period, an ET licensee may initiate involuntary relocation procedures. Under involuntary relocation, the incumbent is required to relocate, provided that the ET licensee meets the conditions of § 101.75.

§ 101.71 [Removed and Reserved]

■ 7. Section 101.71 is removed and reserved.

■ 8. Section 101.73 is amended by revising paragraphs (a) and the introductory text to paragraph (d) to read as follows:

§ 101.73 Mandatory Negotiations.

(a) A mandatory negotiation period may be initiated at the option of the ET licensee. Relocation of FMS licensees by Mobile Satellite Service (MSS) operators (including MSS operators providing Ancillary Terrestrial Component (ATC) service) and AWS licensees in the 2110–2150 MHz and 2160–2200 MHz bands will be subject to mandatory negotiations only.

* * * * *

(d) *Provisions for Relocation of Fixed Microwave Licensees in the 2110–2150 and 2160–2200 MHz bands.* Except as otherwise provided in § 101.69(e) pertaining to FMS relocations by MSS/ATC operators, a separate mandatory negotiation period will commence for each FMS licensee when an ET licensee informs that FMS licensee in writing of its desire to negotiate. Mandatory negotiations will be conducted with the goal of providing the FMS licensee with comparable facilities defined as facilities possessing the following characteristics:

* * * * *

■ 9. Section 101.75 is amended by revising paragraph (a) introductory text to read as follows:

§ 101.75 Involuntary relocation procedures.

(a) If no agreement is reached during the mandatory negotiation period, an ET licensee may initiate involuntary relocation procedures under the Commission's rules. ET licensees are obligated to pay to relocated only the specific microwave links to which their systems pose an interference problem. Under involuntary relocation, the FMS licensee is required to relocate, provided that the ET licensee:

* * * * *

■ 10. Section 101.77 is amended by revising the introductory text to paragraph (a) to read as follows:

§ 101.77 Public safety licensees in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands.

(a) In order for public safety licensees to qualify for a three year mandatory negotiation period as defined in § 101.69(d)(2), the department head responsible for system oversight must certify to the ET licensee requesting relocation that:

* * * * *

■ 11. Section 101.79 is amended by revising paragraph (a) to read as follows:

§ 101.79 Sunset provisions for licensees in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands.

(a) FMS licensees will maintain primary status in the 1850–1990 MHz, 2110–2150 MHz, and 2160–2200 MHz bands unless and until an ET licensee (including MSS/ATC operator) requires use of the spectrum. ET licensees are not required to pay relocation costs after the relocation rules sunset. Once the relocation rules sunset, an ET licensee may require the incumbent to cease operations, provided that the ET licensee intends to turn on a system within interference range of the incumbent, as determined by TIA TSB 10–F (for terrestrial-to-terrestrial situations) or TIA TSB 86 (for MSS satellite-to-terrestrial situations) or any standard successor. ET licensee notification to the affected FMS licensee must be in writing and must provide the incumbent with no less than six months to vacate the spectrum. After the six-month notice period has expired, the FMS licensee must turn its license back

into the Commission, unless the parties have entered into an agreement which allows the FMS licensee to continue to operate on a mutually agreed upon basis. The date that the relocation rules sunset is determined as follows:

(1) For the 2110–2150 MHz and 2160–2175 MHz and 2175–2180 MHz bands, ten years after the first ET license is issued in the respective band; and

(2) For the 2180–2200 MHz band, December 8, 2013 (*i.e.*, ten years after the mandatory negotiation period begins for MSS/ATC operators in the service).

* * * * *

■ 12. Section 101.82 is revised to read as follows:

§ 101.82 Reimbursement and relocation expenses in the 2110–2150 MHz and 2160–2200 MHz bands.

(a) Reimbursement and relocation expenses for the 2110–2130 MHz and 2160–2180 MHz bands are addressed in §§ 27.1160–27.1174.

(b) *Cost-sharing obligations between AWS and MSS (space-to-Earth downlink).* Whenever an ET licensee (AWS or Mobile Satellite Service for space-to-Earth downlink in the 2130–2150 or 2180–2200 MHz bands) relocates an incumbent paired microwave link with one path in the 2130–2150 MHz band and the paired path in the 2180–2200 MHz band, the relocator is entitled to reimbursement of 50 percent of its relocation costs (see paragraph (e)) of this section from any other AWS licensee or MSS space-to-Earth downlink operator which would have been required to relocate the same fixed microwave link as set forth in paragraphs (c) and (d) of this section.

(c) *Cost-sharing obligations for MSS (space-to-Earth downlinks).* For an MSS space-to-Earth downlink, the cost-sharing obligation is based on the interference criteria for relocation, *i.e.*, TIA TSB 86 or any standard successor, relative to the relocated microwave link. Subsequently entering MSS space-to-Earth downlink operators must reimburse AWS or MSS space-to-Earth relocators (see paragraph (e)) of this section before the later entrant may begin operations in these bands, unless the later entrant can demonstrate that it would not have interfered with the microwave link in question.

(d) *Cost-sharing obligations among terrestrial stations.* For terrestrial stations (AWS and MSS Ancillary Terrestrial Component (ATC)), cost-sharing obligations are governed by §§ 27.1160 through 27.1174 of this chapter; provided, however, that MSS operators (including MSS/ATC operators) are not obligated to reimburse voluntarily relocating FMS incumbents in the 2180–2200 MHz band. (AWS reimbursement and cost-sharing obligations relative to voluntarily relocating FMS incumbents are governed by § 27.1166 of this chapter).

(e) The total costs of which 50 percent is to be reimbursed will not exceed $250,000 per paired fixed microwave link relocated, with an additional $150,000 permitted if a new or modified tower is required.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 36

[CC Docket No. 80–286; FCC 06–70]

Jurisdictional Separations and Referral to the Federal-State Joint Board

AGENCY: Federal Communications Commission.

ACTION: Interim rule.

SUMMARY: Jurisdictional separations is the process by which incumbent local exchange carriers (incumbent LECs) apportion regulated costs between the intrastate and interstate jurisdictions. In this document, the Commission extends, on an interim basis, the current freeze of part 36 category relationships and jurisdictional cost allocation factors, which would otherwise expire on June 30, 2006. Extending the freeze will allow the Commission to provide stability for carriers that must comply with the Commission's separations rules while the Commission considers issues relating to comprehensive reform of the jurisdictional separations process.

DATES: Effective June 23, 2006.

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Order* in CC Docket No. 80–286, FCC 06–70, released on May 16, 2006. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554.

1. Jurisdictional separations is the process by which incumbent LECs apportion regulated costs between the intrastate and interstate jurisdictions. The *Order* extends, on an interim basis, the current freeze of part 36 category relationships and jurisdictional cost allocation factors, which would otherwise expire on June 30, 2006. Specifically, the duration of such extension shall be no longer than three years from the initial date of this extension or until comprehensive reform of the jurisdictional separations process can be completed by the Commission and Federal-State Joint Board on Jurisdictional Separations (Joint Board), whichever is sooner. Extending the freeze will allow the Commission to provide stability for carriers that must comply with the Commission's separations rules while the Commission considers issues relating to comprehensive separations reform.

2. In the *2001 Separations Freeze Order,* 66 FR 33202, June 21, 2001, that established the current freeze, the Commission concluded that it had the authority to adopt an interim separations freeze to preserve the status quo pending reform and provide for a reasonable allocation of costs. The analysis performed there remains applicable here.

3. In addition, under the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B), an administrative agency may implement a rule without public notice and comment ''when the agency for good cause finds * * * that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' The Commission finds that good cause exists in this instance. Extending the freeze will prevent the wasteful expenditure of significant resources by carriers to develop the ability to perform separations in a manner that likely would only be relevant for a relatively short time while the Commission considers comprehensive separations reform. The Commission finds, as it did in the *2001 Separations Freeze Order,* that avoiding a sudden cost shift will provide regulatory certainty that offsets the concern that there may be a temporary misallocation of costs between the jurisdictions.

4. The Commission also finds that an interim extension of the separations freeze without public notice and comment is consistent with *Mid-Tex Electric Cooperative, Inc.* v. *FERC,* 822 F.2d 1123 (DC Cir. 1987). Here, too, the interim extension of the separations freeze is limited, and the concurrent adoption of the companion *Further Notice of Proposed Rulemaking* should allow for a timely resolution of the underlying issues. In addition, the Commission finds that the interim extension of the separations freeze does not require a referral to the Joint Board, because it is temporary in scope and