within 20 days (excepting Saturdays, Sundays and legal public holidays) after receipt of such request, except for unusual circumstances, in which case the time limit may be extended for up to 10 working days by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched.

(i)(2)(i) If the General Counsel or designee determines that a request or portion thereof is for the Office of Inspector General records, the General Counsel or designee shall promptly refer the request or portion thereof to the Office of Inspector General and send notice of such referral to the requester. If the Counsel to the Inspector General or designee determines that a request or portion thereof is for Corporation records not maintained by the Office of Inspector General, the Counsel to the Inspector General or designee shall promptly refer the request or portion thereof to the Office of Legal Affairs and send notice of such referral to the requester.

(ii) The 20-day period under paragraph (i)(1) of this section shall commence on the date on which the request is first received by the appropriate Office (the Office of Legal Affairs or the Office of Inspector General), but in no event later than 10 working days after the request has been received by either the Office of Legal Affairs or the Office of Inspector General. The 20-day period shall not be tolled by the Office processing the request except that the processing Office may make one request to the requester for information pursuant to paragraph (c) of this section and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester under this section; or, if necessary to clarify with the requester issues regarding fee assessment. In either case, the processing Office's receipt of the requester's response to such a request for information or clarification ends the tolling period.

* * * * *

■ 5. Paragraph (b) introductory text of § 1602.9 is revised to read as follows:

§ 1602.9 Exemptions for withholding records.

* * * * *

(b) In the event that one or more of the exemptions in paragraph (a) of this section apply, any reasonably segregable portion of a record shall be provided to the requester after deletion of the portions that are exempt. The amount of information deleted and the exemption under which the deletion is being made shall be indicated on the released portion of the record, unless doing so would harm the interest protected by the exemption under which the deletion is made. If technically feasible, the amount of information deleted and the exemption under which the deletion is being made shall be indicated at the place in the record where the deletion occurs.

* * * * *

■ 6. Paragraph (b) of § 1602.10 is revised to read as follows:

§ 1602.10 Officials authorized to grant or deny requests for records.

* * * * *

(b) The General Counsel or designee and the Counsel to the Inspector General or designee are authorized to grant or deny requests under this part. In the absence of a Counsel to the Inspector General, the Inspector General shall name a designee who will be authorized to grant or deny requests under this part and who will perform all other functions of the Counsel to the Inspector General under this part. The General Counsel or designee shall consult with the Office of the Counsel to the Inspector General or designee prior to granting or denying any request for records or portions of records which originated with the Office of Inspector General, or which contain information which originated with the Office of Inspector General, but which are maintained by other components of the Corporation. The Counsel to the Inspector General or designee shall consult with the Office of the General Counsel prior to granting or denying any request for records or portions of records which originated with any component of the Corporation other than the Office of Inspector General, or which contain information which originated with a component of the Corporation other than the Office of Inspector General, but which are maintained by the Office of Inspector General.

■ 7. Paragraph (b) of § 1602.13 is amended by redesignating paragraph (b) as (b)(1) and adding paragraph (b)(2) to read as follows:

§ 1602.13 Fees.

* * * * *

(b) * * *

(2) If no unusual circumstances, as set forth in § 1602.8 apply, for requests received on or after December 31, 2008, if LSC has failed to comply with the time limits set forth in that section, otherwise applicable search fees will not be charged to a requester. In such cases, if the requester is a representative of the news media, otherwise applicable duplication fees will not be charged.

Victor M. Fortuno,

Vice President and General Counsel.

[FR Doc. E8–26961 Filed 11–14–08; 8:45 am]

BILLING CODE 7050–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 05–62; WT Docket No. 02–55; FCC 08–244]

Amendment of the Commission's Rules To Improve Public Safety Communications in the 800 MHz Band, and to Consolidate the 800 MHz and 900 MHz Business and Industrial/Land Transportation Pool Channels

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) retains the current site-based licensing paradigm for the 900 MHz B/ILT spectrum, and declines to adopt competitive bidding rules or geographic service areas for the licensing of 900 MHz B/ILT ''white space;'' adopts interference protection rules applicable to all licensees operating in the 900 MHz B/ILT spectrum; and lifts, on a rolling basis, the freeze placed on applications for new 900 MHz B/ILT licenses in September 2004, the lift being tied to the completion of rebanding in each 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region. The Commission takes these actions to balance the needs of incumbent 900 MHz B/ILT licensees and commercial providers that operate in the spectrum.

DATES: Effective December 17, 2008.

FOR FURTHER INFORMATION CONTACT: Michael Connelly, *Michael.Connelly@FCC.gov,* Mobility Division, Wireless Telecommunications Bureau, (202) 418–0620, or TTY (202) 418–7233. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Judith Boley at 202–418–0214, or via the Internet at *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's *Report and Order (R&O),* FCC 08–244, adopted October 9, 2008, and released October 22, 2008. The full text of the *R&O* is available for public inspection and

copying during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from the Commission's duplicating contractor, Best Copying and Printing, Inc. (BCPI), 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, FCC 08–244, for the *R&O.* The *R&O* is also available on the Internet at the Commission's Web site through its Electronic Document Management System (EDOCS): *http://hraunfoss.fcc.gov/edocs_public/SilverStream/Pages/edocs.html.*

Paperwork Reduction Act of 1995 Analysis

The *R&O* does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, it does not contain any new or modified ''information collection burden for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

Synopsis of Report and Order

I. Background

1. In 1986, the Commission established a pool structure for the 900 MHz PLMR spectrum and allocated 2.5 MHz for the Industrial/Land Transportation Pool (99 channels) and 2.5 MHz for the Business Pool (100 channels) (collectively, the B/ILT Pools) at 51 FR 37398, Oct. 22, 1986. The B/ILT Pools were established for use by site-by-site licensees engaged in commercial activities, the operation of educational, philanthropic, or ecclesiastical institutions, clergy activities, or the operation of hospitals, clinics, or medical associations. In addition, eligibility was also provided for any corporations furnishing nonprofit radio communication service to its parent corporation or subsidiary. Currently, applications for use of the B/ILT frequencies are limited to private, internal use systems.

2. In its *800 MHz Report and Order (800 MHz R&O)* at 69 FR 67823, Nov. 22, 2004, the Commission adopted significant technical and procedural measures designed to address the problem of interference to public safety communications in the 800 MHz band. As part of its reconfiguration plan at 800 MHz, the Commission consolidated the B/ILT Pools in the 800 MHz and 900 MHz bands, allowing any eligible B/ILT licensee to be licensed on the consolidated channels. The Commission also provided for additional flexibility in the 900 MHz band by allowing 900 MHz PLMR licensees to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use. The Commission reasoned that since it permitted CMRS use of PLMR frequencies in the 800 MHz land mobile band, similar rules should apply in the 900 MHz land mobile spectrum, in the interest of regulatory symmetry. The Commission also noted that in order to provide the ''green space'' necessary to effect reconfiguration of the 800 MHz band, some operations may need to shift from the 800 MHz to 900 MHz band.

3. In September 2004, the Bureau issued a *Public Notice* freezing acceptance of applications for new 900 MHz B/ILT licenses until further notice. The Wireless Telecommunications Bureau (the Bureau) indicated that an exceptionally large number of applications for 900 MHz authorizations had been filed subsequent to the release of the *800 MHz R&O,* which allowed 900 MHz B/ILT licensees to initiate commercial operations on their licensed spectrum or to assign their authorizations to others for commercial use. The Bureau noted its concern that additional such filings might compromise the ability to accommodate displaced systems while the 800 MHz band is reconfigured to abate unacceptable interference to public safety, critical infrastructure, and other ''high site'' 800 MHz systems. The Bureau determined that applications for modification of existing facilities, assignment of license, or transfer of control of a licensee would continue to be accepted, subject to applicable rules regarding eligibility, loading, and other requirements. In addition, applicants were advised that they might have recourse via the Commission's waiver provisions to request an exception to the freeze.

4. The Commission adopted a *Notice of Proposed Rulemaking (NPRM)* at 70 FR 13,143, March 18, 2005, in WT Docket 05–62 proposing to amend it's rules to facilitate more flexible use of the 900 MHz B/ILT band and to license any remaining spectrum in the band using a geographic area licensing scheme. The *NPRM* also sought comment on defining the rights of B/ILT licensees already operating on the 900 MHz B/ILT frequencies, and on using competitive bidding rules, in the event mutually exclusive applications were filed for the proposed 900 MHz geographic licenses. The Commission also reaffirmed the Bureau's freeze on new applications for 900 MHz B/ILT licenses, concluding that allowing the continued filing of applications for new 900 MHz B/ILT licenses during the rulemaking period might limit the effectiveness of the decisions ultimately made in WT Docket No. 05–62. In response to the *NPRM,* the Commission received 20 comments, ten reply comments, and numerous *ex parte* filings.

II. Discussion

A. Retention of Site-Based Licensing for 900 MHz B/ILT Channels

5. In the *R&O,* the Commission retained the current site-based licensing paradigm for new applications for 900 MHz B/ILT licenses, declining to adopt at this time the geographic area and competitive bidding licensing rules and policies proposed in the *NPRM.* There, the Commission proposed service rules for 900 MHz B/ILT channels to provide licensees with the flexibility to employ the spectrum for any use permitted by the United States Table of Frequency Allocations contained in part 2 of our rules (*i.e.*, fixed or mobile services). The Commission tentatively concluded to adopt a geographic area licensing scheme for the 900 MHz B/ILT spectrum because such an approach would be consistent with flexible use management principles, and requested comment on that tentative conclusion.

6. Some commenters supported competitive bidding and flexible use rules (including geographic area licensing) for all unlicensed 900 MHz B/ILT spectrum. For example, Nextel asserted that the existing 900 MHz B/ILT access rules are limiting, inefficient, and a gross underutilization of spectrum that, if unchanged, would impede the ability of the marketplace to respond to consumer demand. While conceding that there may be circumstances under which the Commission may need to ''set aside'' spectrum for particular uses in order to achieve important public interest goals, Nextel notes the Commission has in the past decade adopted flexible and competitive licensing policies to promote an innovative marketplace, and that auctioning all unused 900 MHz B/ILT spectrum will facilitate successful 800 MHz reconfiguration.

7. The majority of commenters opposed using competitive bidding to license the remaining 900 MHz B/ILT spectrum using geographic service

areas, many of whom urge the Commission, if it were to conduct an auction, to set aside some portion of currently unlicensed 900 MHz B/ILT white space for traditional B/ILT use. For example, the Joint Commenters contended that auctioning all 900 MHz B/ILT white space was tantamount to a ''complete loss'' of the 900 MHz band for incumbent B/ILT licensees, and would ''strand'' incumbents at their existing capacity levels and service areas. The Joint Commenters questioned whether the public interest truly is best served by allocating all unencumbered spectrum for cell phones and utilizing spectrum auctions in light of the growth needs of traditional B/ILT licensees. In the event the Commission were to decide to auction and license all available 900 MHz B/ILT white space, the Joint Commenters urge the Commission to reserve some spectrum for continued site-based licensing under current eligibility requirements.

8. The Commission found that the record, as developed in the docket, supports retention of the current site-based licensing formula for the 900 MHz B/ILT spectrum, and therefore declined to adopt competitive bidding rules or geographic service areas to license 900 MHz B/ILT ''white space.'' It was persuaded by the record that the dedicated spectrum allotted to B/ILT licensees at 900 MHz represents one of the few remaining opportunities for such licensees to obtain much-needed spectrum, noting geographic-based service area licensing in lieu of site-based licensing would do little in terms of meeting the needs of current and future 900 MHz B/ILT licensees, many of whom would be forced to acquire at auction more spectrum than what they actually need, or can afford, to ensure that they have adequate spectrum necessary for wireless telecommunications systems to support their operations. Even if a traditional 900 MHz B/ILT licensee determined that it was fiscally responsible to acquire a geographic-based license, the Commission remained concerned that portions of the acquired spectrum would remain unused and undervalued, precisely the result the Commission sought to avoid when it opened this proceeding.

9. A significant underlying rationale for proposing geographic service areas and competitive bidding rules to license 900 MHz B/ILT spectrum white space was the need to facilitate 800 MHz rebanding, on the theory that 800 MHz commercial licensees would need to relocate to a band with similar spectral characteristics. Sprint Nextel, an 800 MHz commercial licensee, has indicated that it has acquired hundreds of 900 MHz B/ILT site-based licenses, and will continue to acquire such licenses, in order to support 800 MHz rebanding. In addition, Sprint Nextel has obtained special temporary authority (STA) from the Commission to operate on a temporary basis on 900 MHz B/ILT spectrum in order to support its 800 MHz rebanding efforts. Finally, Sprint Nextel is using spectrum leasing arrangements as a means for obtaining 900 MHz B/ILT spectrum to be used on a time-limited basis to facilitate 800 MHz rebanding. Those options remain open to Sprint Nextel under the action the Commission took in the *R&O.* In light of the opportunities Nextel has for obtaining 900 MHz B/ILT spectrum to support its 800 MHz rebanding activities, adoption of geographic area licensing and competitive bidding rules for 900 MHz B/ILT spectrum is no longer essential to the success of the 800 MHz rebanding process, and may in fact impede the effective use of this spectrum by many other incumbents and potential licensees in the 900 MHz B/ILT band.

B. Interference Protection in the 900 MHz B/ILT Band

10. In the *NPRM,* the Commission proposed requiring geographic area licensees to afford the same protection to incumbent 900 MHz B/ILT systems that 900 MHz SMR MTA licensees must currently provide to incumbents. The Commission also asked if additional interference protection requirements were necessary and, if so, what additional rules should apply and why. The Commission specifically asked whether the overall approach to interference protection should be modified to include the interference abatement requirements mandated in the *800 MHz R&O,* or an enhanced or voluntary Best Practices approach to address potential interference in this band.

11. A number of commenters urged adoption of the same or similar interference abatement requirements for the 900 MHz B/ILT spectrum as those previously established for a post-rebanded 800 MHz environment in the *800 MHz R&O.* In initial comments in this proceeding, for example, the Joint Commenters asserted that it is imperative that incumbents be adequately protected from interference caused by new (commercial) entrants. They also asserted there is reason to believe the introduction of commercial cellular networks into the 900 MHz bands would cause harmful interference to incumbents in the bands. AAR also urges adoption of the 800 MHz interference abatement rules. In a subsequent *ex parte* presentation, the Joint Commenters, joined by Enterprise Wireless Alliance and United Parcel Service, urged that § 90.672(a) of the Commission's rules regarding unacceptable interference to non-cellular 800 MHz licensees from 800 MHz cellular systems or part 22 cellular systems be amended to include 900 MHz B/ILT spectrum. Section 90.672(a) defines ''unacceptable interference'' as occurring when a fully operational transceiver receives minimum median desired signal strengths of −104/−101 dBm, as measured at the radio frequency (RF) input of the receiver of a mobile/portable unit, and when a voice transceiver receives an undesired signal or signals that cause the measured Carrier to Noise plus Interference (C/(I+N)) ratio of a receiver to be less than 20 dB.

12. Sprint Nextel opposed implementing the same standards in 900 MHz B/ILT spectrum as the Commission adopted for post-rebanded 800 MHz spectrum. Initially, in responding to the proposals set out in the *NPRM,* Nextel asserted that new 900 MHz B/ILT geographic area licensees should provide the same level of protection to co-channel 900 MHz B/ILT incumbents that 900 MHz SMR licensees must provide, and that incumbents are entitled to protection within their originally-licensed 40 dBμ V/m field strength contours. Further, it urges voluntary ''Best Practices'' and a commitment by 900 MHz CMRS licensees to cooperate on a case-by-case basis with incumbent 900 MHz B/ILT licensees. Nextel cautioned strongly against adopting the interference abatement requirements adopted in the *800 MHz R&O,* on the grounds that there are no public safety channels allocated at 900 MHz; that incumbents can finance robust, interference-resistant systems; that there have been no complaints regarding Sprint Nextel's dual band 800 MHz/900 MHz Enhanced Specialized Mobile Radio (ESMR) system (operating since 2002); and that to adopt the 800 MHz interference measures for the 900 MHz white space would impose substantial operational burdens on geographic licensees, and would be contrary to the FCC's flexible use policies. In a subsequent *ex parte* presentation, Sprint Nextel suggested that, to the extent the Commission looks to the 800 MHz rebanding proceeding for guidance regarding interference protection standards and practices for the 900 MHz B/ILT spectrum, the interference protection standards that apply to the 800 MHz band's interleaved

spectrum during the transition to spectral segregation would be more appropriate than the standards to be applied when the rebanding is completed. Sprint Nextel avers that the interference abatement protection it has to extend in an interleaved environment, during the rebanding transition, while lower than the protection afforded post-rebanding, is a more comparable standard in light of the nature of operations in the 900 MHz B/ILT band.

13. The Commission noted that in the *800 MHz Supplemental Report and Order,* 70 FR 6757, Feb. 8, 2005, in the 800 MHz rebanding proceeding, it had acknowledged that the rules adopted for a post-rebanded environment could impose substantial operational restrictions on ESMR carriers operating in the interleaved channels prior to completion of band reconfiguration, and that field experience had shown that a lesser standard, while less ''complete,'' could nevertheless provide meaningful interference protection during transition. The Commission therefore waived §§ 22.970(a) and 90.672(a) of its rules until band reconfiguration was complete in a particular NPSPAC region. In waiving the rules, the Commission determined that, during the interim transition period, non-cellular systems would enjoy interference protection for signal strengths of −85 dBm for portables and −88 dBm for mobiles. While noting that these levels were not universally applauded, the Commission observed that they were supported by Nextel and several commercial, private, and public safety members of the 800 MHz community. The Commission found a direct relationship between these interim interference protection levels and the ability of ESMR and cellular carriers to serve their subscribers adequately, a factor affecting both the public's access to wireless services and the viability of a carrier's business.

14. Noting that a spectrally interleaved environment, where technically different systems operate on a co-channel and/or adjacent channel basis, is developing within the 900 MHz band, the Commission adopted standards in the *R&O* based on the standards it had implemented for the rebanding transition period in the 800 MHz band. Specifically, all licensees operating in the 900 MHz B/ILT frequencies are entitled to interference protection for portable/hand-held units with a minimum median desired signal strength of −85 dBm and for mobile/vehicular units with a minimum median desired signal strength of −88 dBm. Similar to the Commission's observation in the context of 800 MHz rebanding, it concluded that these values likewise are ''within the range of reason'' for providing meaningful interference protection for all licensees operating on 900 MHz B/ILT frequencies. The Commission adopted a revision to § 90.672 of it's rules that provides that unacceptable interference will be deemed to occur to operations in the 900 MHz B/ILT band where, assuming all other conditions as provided in the amended rule section are met, a voice transceiver is receiving an undesired signal or signals that cause the measured Carrier to Noise plus Interference (C/(I+N)) ratio of the transceiver's received to be less than 17 dB. As with the median desired signal, the value the Commission adopted for this ratio is consistent with the value that is applicable to the 800 MHz band during the rebanding transition. Finally, the Commission adopted the proposal put forth by the Joint Commenters for establishing minimum receiver standards for mobile and portable units used in the 900 MHz B/ILT band: 60 dB intermodulation rejection ratio; 60 dB adjacent channel rejection; and −116 dBm reference sensitivity. These minimum receiver standards are part of the package of rule provisions designed to guard against unacceptable interference in the 900 MHz B/ILT band.

C. Lifting the Freeze Place on Applications for New 900 MHz B/ILT Licenses

15. The Bureau imposed a freeze on the acceptance of applications for new 900 MHz B/ILT licenses in September 2004 at 19 FCC Rcd 18277 (WTB 2004), and the Commission affirmed that freeze in the *NPRM.* Because the Commission is concluding WT Docket 05–62, and in light of the actions it took in the *R&O,* the Commission lifted the freeze placed on the filing of applications for new 900 MHz B/ILT authorizations. Specifically, the freeze will be lifted in a NPSPAC region six months after rebanding is complete in that particular NPSPAC region. The Commission believes this approach best balances the demands for 900 MHz B/ILT spectrum, including the ongoing needs of Nextel for access to this spectrum to support its rebanding efforts. As of October 9, 2008, the Commission has granted special temporary authorizations to Sprint Nextel to operate temporarily on 900 MHz B/ILT spectrum in 101 markets in order to provide ''green space'' necessary to enable the relocation of 800 MHz incumbents during the reconfiguration of this band. The Commission is concerned that lifting the 900 MHz B/ILT application freeze in its entirety at this time could jeopardize Nextel's 800 MHz rebanding efforts. Accordingly, we will not lift the freeze in a particular NPSPAC region until six months after the date that rebanding is completed in that particular region. We believe that this timeframe will provide Nextel a reasonable opportunity to relocate its facilities off the 900 MHz B/ILT frequencies it is now using under special temporary authority. In order to avoid any confusion regarding the date when the 900 MHz B/ILT application freeze is lifted in any particular NPSPAC region, the Commission directed the Bureau, in coordination with the Public Safety and Homeland Security Bureau, to provide public notice as to when the freeze will end within 60 days of rebanding being completed within a specific NPSPAC region.

16. In addition, the Commission noted there may be situations in which an applicant seeks a 900 MHz B/ILT authorization for spectrum in a NPSPAC region where the freeze has been lifted that could extend the applicant's service contour into an adjacent NPSPAC region where the freeze has not been lifted. In such a case, the applicant may file a waiver request to allow its coverage to extend into the NPSPAC region in which the freeze remains in effect, provided the overlapping coverage area is limited and would not disrupt Nextel's rebanding efforts in the region. Further, the Commission reminded potential 900 MHz B/ILT applicants that, under the applicable rules, co-channel frequency usage in a NPSPAC region where the freeze has not yet been lifted may limit the geographic area in which applications can be permissibly filed in a NPSPAC region where the freeze is no longer in effect.

III. Conclusion

17. In the *R&O,* the Commission decided to retain site-based licensing for the 900 MHz B/ILT band, believing this action will help ensure the continued viability of 900 MHz B/ILT communications operations, which play an essential role in emergencies, critical infrastructure operations, homeland security, and the U.S. economy. At the same time, Nextel will retain a number of mechanisms to access 900 MHz B/ILT spectrum to be used as ''green space'' during the course of the 800 MHz rebanding process. The Commission also adopted interference standards that will help to facilitate interference-free operation in this band and accommodate the range of licensees operating in this band. Finally, the Commission lifted the freeze on the filing of applications for new 900 MHz

B/ILT licenses in each 800 MHz NPSPAC region six months after 800 MHz rebanding is completed in that region. The Commission believes that its actions in this proceeding achieve a balance of competing interests that will best serve the needs of the public.

IV. Procedural Matters

A. Regulatory Flexibility Act

18. As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules adopted in this *R&O.* The analysis is found in an appendix to the *R&O.*

B. Congressional Review Act

19. The Commission will send a copy of the *R&O* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

C. Accessible Formats

20. Accessible formats of the *R&O* (Braille, large print, electronic files, audio format), are available to persons with disabilities by sending an e-mail to *fcc504@fcc.gov* or by calling the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY). The R&O can also be downloaded at *http://www.fcc.gov.*

V. Final Regulatory Flexibility Act Analysis

21. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*). The Commission sought written public comment on the proposals in the *NPRM,* including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Rules

22. In the *R&O,* the Commission takes three actions: First, it retains the current site-based licensing paradigm for the 199 channels allocated to the Business and Industrial Land Transportation (B/ILT Pool) in the 896–901/935–940 MHz (900 MHz) band (900 MHz B/ILT Pool) and declines to adopt competitive bidding rules or geographic service areas for the 900 MHz B/ILT ''white space;'' second, it amends part 90 of the Commission's rules to establish interference protection rules for licensees operating in the 900 MHz B/ILT Pool; and third, it lifts, on a rolling basis, the freeze on applications for new licenses in the 900 MHz B/ILT Pool.

23. Regarding retention of the current site-based licensing paradigm, the spectrum allotted to 900 MHz B/ILT licensees is one of the few remaining area where such licensees can obtain spectrum essential to their safe and efficient operation; transitioning to geographic area licensing could in many cases frustrate normal B/ILT system growth. Traditional B/ILT licensees have a vital communications role in safeguarding critical infrastructure (CI) industries, including such varied and critical industries as utilities, land transportation, manufacturers/industry, and petro-chemical. Finally, an important rationale for originally proposing to adopt geographic service areas and competitive bidding processes was to facilitate rebanding at 800 MHz by allowing Sprint Nextel to relocate to spectrally-similar 900 MHz B/ILT spectrum. Through a combination of acquisition of site-based licenses, special temporary authorizations, and spectrum leasing at 900 MHz, Sprint Nextel appears to have acquired sufficient spectrum at 900 MHz to allow it to proceed with the 800 MHz rebanding, and the Commission concludes that geographic licensing and competitive bidding rules are not now essential to the success of 800 MHz rebanding.

24. Regarding amending part 90 of the Commission's rules to establish interference protection standards, the environment at 900 MHz is similar to the spectrally interleaved environment that exists today at 800 MHz during the current rebanding transition period. In the *800 MHz Supplemental Report and Order,* the Commission adopted an ''interim'' interference protection standard that cellular licensees need to afford non-cellularized systems prior to the completion of rebanding. Because the 900 MHz band has and will continue to include systems employing different technologies and with different operational characteristics that are spectrally interleaved, the 800 MHz ''interim'' environment is sufficiently similar to the 900 MHz spectrum environment that the rules the Commission adopted for use during the 800 MHz rebanding transition are appropriate for the 900 MHz B/ILT spectrum.

25. Regarding lifting the freeze on applications for new licenses in the 900 MHz B/ILT Pool, the freeze placed on applications for new 900 MHz B/ILT licenses in September 2004 will be lifted on a rolling basis, tied to the completion of rebanding in each 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region. Specifically, the freeze will be lifted in a NPSPAC region six months after rebanding is complete in that particular NPSPAC region. The Commission will provide notice to the public regarding the date on which the freeze will be lifted in each NPSPAC region after rebanding concludes in that region. Accepting applications for new authorizations on a rolling basis best balance the demands for 900 MHz B/ILT spectrum, including the ongoing needs of Sprint Nextel for access to this spectrum to support its rebanding efforts. Lifting the freeze on a rolling basis, with a six-month ''grace period,'' will provide Sprint Nextel a reasonable opportunity to relocate its facilities off the 900 MHz B/ILT frequencies it is now using under special temporary authority.

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

26. No comments or reply comments were filed in direct response to the IRFA.

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

27. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

28. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.

29. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.

30. *Small Governmental Jurisdictions.* The term ''small governmental jurisdiction'' is defined as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' As of 2002, there were approximately 87,525 governmental jurisdictions in the United States. This number includes 38,967 county governments, municipalities, and townships, of which 37,373

(approximately 95.9%) have populations of fewer than 50,000, and of which 1,594 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 85,931 or fewer. In completing this FRFA, we recognize that small governmental jurisdictions are, in fact, likely to be 900 MHz B/ILT licensees.

31. *Wireless Telecommunications Carriers.* The SBA has developed a small business size standard for wireless firms within the broad economic census category of ''Wireless Telecommunications Carriers (except Satellite).'' Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of wireless telecommunications carrier, Census Bureau data for 2002 show that there were 11,156 firms in this category that operated for the entire year. Of this, 9,770 had fewer than 100 (one hundred) employees. Thus, under this category and size standard, the great majority of firms can be considered small.

32. Licensees in the 900 MHz B/ILT band generally fall into one of two categories: wireless telecommunications carrier (except satellite) that provide service to other parties, and entities that use the spectrum solely for internal purposes, not to provide telecommunications services to other, but rather to support their primary operations. The first category of licensees, those that provide telecommunications service to others, are typically incumbent B/ILT licensees that have either converted their operations to commercial use, as is allowed under Commission rules, or assigned their licenses to a commercial operator for commercial use. Others in this category include commercial entities operating in this band under special temporary authority, or through a leasing arrangement with an incumbent B/ILT licensee. In the second category are more traditional B/ILT licensees, ''traditional'' in that provision of telecommunications services is not their primary operation. Rather, these licensees hold authorizations to operate in the 900 MHz B/ILT only to the extent that holding such authorizations, and providing communication, further their primary operations. Examples include public utilities, small, mid-size, and large manufacturers, parcel delivery companies, etc.

33. *Estimates for Private Land Mobile Radio (PLMR) Licensees, including 900 MHz B/ILT Licensees.* As a preliminary matter, we note that 900 MHz B/ILT licensees fall under the SBA designation of wireless telecommunications carriers (except satellite). Private land mobile radio systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. Because of the vast array of PLMR users, the Commission has not developed a definition of small entities specifically applicable to PLMR users, nor has the SBA developed so specific a definition. As noted above, under this category and size standard, the great majority of firms can be considered small. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission's fiscal year 1994 annual report indicates that, at the end of fiscal year 1994, there were 1,101,711 licensees operating 12,882,623 transmitters in the PLMR bands below 512 MHz. For purposes of FRFA analysis, we assume the vast majority of all PLMR licensees are small.

34. The Commission has determined that there are approximately 1,000 licensees in the 896–901 MHz and 935–940 MHz B/ILT MHz bands, as of October 9, 2008; the Commission does not know how many licensees in these bands are small entities, as the Commission does not collect that information for these types of entities. The Commission notes that, under the action it takes in this Order, entities, including small businesses, may resume filing for authorizations in this service. The Commission does not know how many entities that will file for authorization will be small entities. Thus, the Commission assumes, for purposes of the FRFA, that all prospective licensees are small entities as that term is defined by the SBA or by our proposed small business definitions for these bands.

D. Description of Projected Reporting, Recordkeeping, and other Compliance Requirements

35. There are no new reporting or recordkeeping requirements adopted in the *R&O* that impose new compliance requirements on affected entities.

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

36. 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.

37. Regarding retention of the current site-based licensing formula, the Commission considered adopting competitive bidding rules and geographic-area licensing, but found that the adverse effects of changing the licensing system on all current and future licensees in this service, and particularly including small businesses, were too great. The Commission is in particular concerned that traditional 900 MHz B/ILT licensees, whose primary business is something other than provision of communications services, would have to acquire far more spectrum at auction than they would need, causing the type of spectrum hoarding and warehousing the Commission has worked against. The Commission therefore decided to retain the current licensing system.

38. Regarding amending part 90 of the Commission's rules to account for, and limit harmful interference within, the interleaved environment of the 900 MHz B/ILT spectrum, the Commission considered three options: To adopt the same rules as will be applied in the post-rebanded 800 MHz environment; to retain the current 900 MHz B/ILT interference protection rules; and to adopt the rules currently in effect at 800 MHz during the rebanding transition period. The first option could have been too burdensome for Sprint Nextel and possibly other 900 MHz B/ILT licensees; complying with 800 MHz-type interference protection would have been so costly as to prevent Sprint Nextel from even considering use of the 900 MHz B/ILT band. The second option, based as it is on the assumption of little interference, may not provide sufficient protection for a number of 900 MHz B/ILT licensees from powerful commercial carrier such as Sprint Nextel, which in turn would impede their (*i.e.*, incumbent and ''traditional'' 900 MHz B/ILT licensees) ability to operate effectively. Adversely affected entities under either option could include small businesses. The Commission adopted the third option as an appropriate balancing of burdens and achievement of suitable interference protection. The Commission has acknowledged that the interference protection standard adopted here is the most appropriate for all parties for an interleaved spectral

environment such as the 900 MHz B/ILT band.

39. In the Commission's view, establishing a generally-applicable interference protection standard for the 900 MHz B/ILT Pool will effectively eliminate costs that all licensees, including small entities, would incur to resolve an interference complaint. The Commission believes that any up-front costs associated with initial compliance with the amended rule outweigh the costs associated with addressing and resolving an interference issue. Finally, the Commission believes that among the alternative rules proposed in the *NPRM,* the one it adopts in the *R&O* (*i.e.*, holding all 900 MHz B/ILT Pool licensees to the same interference protection rights and obligations, as opposed to adopting two or more interference protection standards) is the least onerous to, and most effective for, all parties, including small entities, in that adopting a generally-applicable standard puts all licensees in an equal position.

40. Regarding lifting the freeze placed on applications for new authorizations for 900 MHz B/ILT licenses, with adoption of the *R&O,* there is no compelling reason to maintain the freeze; the Commission's action will only benefit small businesses, as it will allow them to apply for new or additional 900 MHz B/ILT spectrum.

F. Report to Congress

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

IV. Ordering Clauses

42. Pursuant to sections 1, 4(i), 303, 309, 316, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303, 309, 316, and 332, the *R&O* is hereby adopted.

43. Part 90 of the Commission's rules is amended as set forth in Appendix B of the *R&O* and that these rules shall be effective December 17, 2008.

44. The Petitions for Reconsideration filed by the Association of American Railroads on December 17, 2004, by the National Association of Manufacturers and MRFAC, Inc. on December 22, 2004, and by Exelon Corporation on December 22, 2004, in WT Docket No. 02–55 *et. al.* are granted to the extent described herein.

45. The freeze placed on applications for new 900 MHz Business/Industrial Land Transportation licenses by Public Notice, September 17, 2004, is hereby lifted, at such time and under the conditions set forth in the *R&O.*

46. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *R&O,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 90

Communications common carriers.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

■ 2. Section 90.672 is revised to read as follows:

§ 90.672 Unacceptable interference to non-cellular 800 MHz licensees from 800 MHz cellular systems or Part 22 Cellular Radiotelephone systems, and within the 900 MHz Business/Industrial Land Transportation Pool.

(a) *Definition.* Except as provided in 47 CFR 90.617(k), unacceptable interference to non-cellular licensees in the 800 MHz band from 800 MHz cellular systems or part 22 of this chapter, Cellular Radiotelephone systems and within the 900 MHz Business/Industrial Land Transportation (B/ILT) Pool will be deemed to occur when the below conditions are met:

(1) A transceiver at a site at which interference is encountered:

(i) Is in good repair and operating condition, and is receiving:

(A) A median desired signal strength of −104 dBm or higher if operating in the 800 MHz band, or a median desired signal strength of –88 dBm if operating in the 900 MHz B/ILT Pool, as measured at the R.F. input of the receiver of a mobile unit; or

(B) A median desired signal strength of −101 dBm or higher if operating in the 800 MHz band, or a median desired signal strength of –85 dBm if operating in the 900 MHz B/ILT Pool, as measured at the R.F. input of the receiver of a portable *i.e.*, hand-held unit; and either

(ii) Is a voice transceiver:

(A) With manufacturer published performance specifications for the receiver section of the transceiver equal to, or exceeding, the minimum standards set out in paragraph (b) of this section, and;

(B) Receiving an undesired signal or signals which cause the measured Carrier to Noise plus Interference (C/(I+N)) ratio of the receiver section of said transceiver to be less than 20 dB if operating in the 800 MHz band, or less than 17 dB if operating in the 900 MHz B/ILT Pool, or;

(iii) Is a non-voice transceiver receiving an undesired signal or signals which cause the measured bit error rate (BER) (or some comparable specification) of the receiver section of said transceiver to be more than the value reasonably designated by the manufacturer.

(2) Provided, however, that if the receiver section of the mobile or portable voice transceiver does not conform to the standards set out in paragraph (b) of this section, then that transceiver shall be deemed subject to unacceptable interference only at sites where the median desired signal satisfies the applicable threshold measured signal power in paragraphs (a)(1)(i) of this section after an upward adjustment to account for the difference in receiver section performance. The upward adjustment shall be equal to the increase in the desired signal required to restore the receiver section of the subject transceiver to the 20 dB C/(I+N) ratio of paragraph (a)(1)(ii)(B) of this section. The adjusted threshold levels shall then define the minimum measured signal power(s) in lieu of paragraphs (a)(1)(i) of this section at which the licensee using such non-compliant transceiver is entitled to interference protection.

(b) *Minimum Receiver Requirements.* Voice transceivers capable of operating in the 806–824 MHz portion of the 800 MHz band, or in the 900 MHz Business/Industrial Land Transportation Pool, shall have the following minimum performance specifications in order for the system in which such transceivers are used to claim entitlement to full protection against unacceptable interference. (See paragraph (a)(2) of this section.)

(1) Voice units intended for mobile use: 75 dB intermodulation rejection ratio; 75 dB adjacent channel rejection ratio; –116 dBm reference sensitivity.

(2) Voice units intended for portable use: 70 dB intermodulation rejection

ratio; 70 dB adjacent channel rejection ratio; –116 dBm reference sensitivity.

(3) Voice units intended for mobile or portable use in the 900 MHz Business/Industrial Land Transportation Pool: 60 dB intermodulation rejection ratio; 60 dB adjacent channel rejection ratio; –116 dBm reference sensitivity.

[FR Doc. E8–27246 Filed 11–14–08; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 0811101438–81439–01]

RIN 0648–XL74

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the Atlantic Large Whale Take Reduction Plan's (ALWTRP) implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 1,650 nm^2 (5,659.5 km^2), east of Gloucester, Massachusetts and Portsmouth, New Hampshire, for 15 days. The purpose of this action is to provide protection to an aggregation of northern right whales (right whales).

DATES: Effective beginning at 0001 hours November 19, 2008, through 2400 hours December 3, 2008.

ADDRESSES: Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION:

Electronic Access

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.noaa.gov/whaletrp/*.

Background

The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of three endangered species of whales (right, fin, and humpback) due to incidental interaction with commercial fishing activities. In addition, the measures identified in the ALWTRP would provide conservation benefits to a fourth species (minke), which are neither listed as endangered nor threatened under the Endangered Species Act (ESA). The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's DAM program (67 FR 1133). On August 26, 2003, NMFS amended the regulations by publishing a final rule, which specifically identified gear modifications that may be allowed in a DAM zone (68 FR 51195). The DAM program provides specific authority for NMFS to restrict temporarily on an expedited basis the use of lobster trap/pot and anchored gillnet fishing gear in areas north of 40° N. lat. to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 5-day period; (2) allow lobster trap/pot and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to sufficiently reduce the risk of entanglement; and/or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15-day period and asking fishermen not to set any additional gear in the DAM zone during the 15-day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75 nm^2 (139 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm^2 (1.85 km^2). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On November 4, 2008, an aerial survey reported an aggregation of 4 right whales in the proximity of 42° 54' N. lat. and 70° 19' W. long. The position lies approximately 20nm east of Portsmouth, New Hampshire. After conducting an investigation, NMFS ascertained that the report came from a qualified individual and determined that the report was reliable. Thus, NMFS has received a reliable report from a qualified individual of the requisite right whale density to trigger the DAM provisions of the ALWTRP.

Once a DAM zone is triggered, NMFS determines whether to impose restrictions on fishing and/or fishing gear in the zone. This determination is based on the following factors, including but not limited to: the location of the DAM zone with respect to other fishery closure areas, weather conditions as they relate to the safety of human life at sea, the type and amount of gear already present in the area, and a review of recent right whale entanglement and mortality data.

NMFS has reviewed the factors and management options noted above relative to the DAM under consideration. As a result of this review, NMFS prohibits lobster trap/pot and anchored gillnet gear in this area during the 15-day restricted period unless it is modified in the manner described in this temporary rule.

The DAM Zone is bound by the following coordinates:

43°15′ N., 70°35′ W. (NW Corner)
43°15′ N., 69°48′ W.
42°32′ N., 69°48′ W.
42°32′ N., 70°44′ W.
43°34′ N., 70°44′ W. Following the shoreline northward to
42°40′ N., 70°44′ W.
43°02′ N., 70°44′ W. Following the shoreline northward to
43°15′ N., 70°35′ W. (NW Corner)

In addition to those gear modifications currently implemented under the ALWTRP at 50 CFR 229.32, the following gear modifications are required in the DAM zone. If the requirements and exceptions for gear modification in the DAM zone, as described below, differ from other ALWTRP requirements for any