impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995). This proposed action would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $128.1 million or more in any 1 year (2 U.S.C. 1532) period to comply with these changes.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and FHWA has determined that this action would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this rulemaking will not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000, and believes that it would not have substantial direct effects on one or more Indian Tribes; would not impose substantial direct compliance costs on Indian Tribal governments; and would not preempt Tribal law. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The FHWA has determined that it is not a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do apply to this program.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. Form FHWA–47 was previously approved under OMB Control Number 2125–0033 in July 1998, and was associated with 5 burden hours. We allowed this control number to expire because we no longer needed the information. Since this action eliminates a current reporting requirement and does not require any entity to write or submit new reports, the FHWA request for approval from OMB under the provisions of the PRA is not required.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

The FHWA has analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this action would not concern an environmental risk to health or safety that may disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

The FHWA does not anticipate that this action would effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

National Environmental Policy Act

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that it would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 635

Contract Procedures, Force Account Construction, Physical Construction Authorization, General Material Requirements.

Issued on: June 9, 2009.

Jeffrey F. Paniati,

Acting Deputy Administrator, Federal Highway Administration.

In consideration of the foregoing, the FHWA proposes to amend chapter I of title 23, Code of Federal Regulations, as set forth below:

PART 635—CONSTRUCTION AND MAINTENANCE

1. The authority citation of part 635 continues to read as follows:

Authority: Sec. 1503 of Public Law 109–59, 119 Stat. 1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.;* Sec. 1041(a), Public Law 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.48(b).

§ 635.126 [Removed and Reserved]

2. Remove and reserve § 635.126.

[FR Doc. E9–14669 Filed 6–22–09; 8:45 am]

BILLING CODE 4910–22–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 74 and 78

[WT Docket No. 02–55, ET Docket Nos. 00–258 and 95–18; FCC 09–49]

Improving Public Safety Communications in the 800 MHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Commission proposes to modify our cost sharing requirements for the 2 GHz BAS band because the circumstances surrounding the BAS transition are very different than what was expected when the cost sharing requirements were adopted. The Commission believes that the best course of action is to propose new requirements that will address the ambiguity of applying the literal language of the current requirements to the changed circumstances, as well as balance the responsibilities for and benefits of relocating incumbent BAS operations among all new entrants in the band based on the Commission's relocation policies set forth in the *Emerging Technologies* proceeding.

DATES: Comments must be filed on or before July 14, 2009, and reply comments must be filed on or before July 24, 2009.

ADDRESSES: You may submit comments, identified by ET Docket No. WT 02–55, ET Docket No. 00–258 and ET Docket No. 95–18, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *E-mail: [Optional: Include the E-mail address only if you plan to accept comments from the public].* Include the docket number(s) in the subject line of the message.
- *Mail: [Optional: Include the mailing address for paper, disk, or CD–ROM submissions needed/requested by your Bureau or Office. Do not include the Office of the Secretary's mailing address here.]*
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Nicholas Oros, Office of Engineering and Technology, (202) 418–0636, e-mail: *Nicholas.Oros@fcc.gov,* TTY (202) 418–2989.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further NPRM of Proposed Rule Making,* WT Docket No. 02–55, ET Docket No. 00–258 and ET Docket No. 95–18, FCC 09–49, adopted June 10, 2009, and released June 12, 2009. The full text of this document is available for public inspection and copying during regular business hours in the Commission's Reference Information Center, Portals II, 445 12th Street, SW., (Room CY–A257), Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room, CY–B402, Washington, DC 20554, telephone (202) 488–5300, facsimile (202) 488–5563 or via e-mail *FCC@BCPIWEB.com.* The full text may also be downloaded at: *http://www.fcc.gov.*

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS*: http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

People With Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty). Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone: (202) 488–5300, fax: (202) 488–5563, or via e-mail *http://www.bcpiweb.com.*

Summary of Further NPRM of Proposed Rulemaking

1. In this Further NPRM of Proposed Rulemaking (Further NPRM), the Commission proposes to modify our cost sharing requirements for the 2 GHz BAS band because the circumstances surrounding the BAS transition are very different than what was expected when the cost sharing requirements were adopted. Sprint Nextel has asked us to issue a declaratory ruling regarding the cost sharing obligations between itself and the MSS and AWS–2 entrants in the band, but we decline to do so at this time. The Commission believes that the best course of action is to propose new requirements that will address the ambiguity of applying the literal language of the current requirements to the changed circumstances, as well as balance the responsibilities for and benefits of relocating incumbent BAS operations among all new entrants in the band based on the Commission's relocation policies set forth in the *Emerging Technologies* proceeding.

2. In the Report and Order and Order, the Commission allowed MSS entrants to operate in markets where the BAS incumbents have not been relocated only if they successfully coordinate operations with the BAS incumbents. In this Further NPRM the Commission seeks comment on whether MSS can operate on an unrestricted and secondary basis in nonrelocated BAS markets.

3. In this Further NPRM, the Commission also proposes to modify the current rules regarding the MSS entrants' obligation to relocate the BAS incumbents to take into account our decision in the Report and Order and Order herein to eliminate the top 30 market rule. Under the current rules, after the top 30 markets are relocated, the MSS entrants are required to complete relocation of the BAS incumbents in markets 31 and above within either three or five years of beginning operations, depending on the size of the BAS market. The Commission proposes to maintain this independent obligation on MSS entrants to relocate BAS incumbents in all markets. The Further NPRM also addresses the independent obligation of AWS entrants to relocate BAS incumbents in the band.

4. Finally, the Commission also seeks comment on whether it should further modify the BAS relocation rules to allow new entrants to begin unencumbered operations in the band before all BAS operations are relocated. The BAS transition is taking longer than initially anticipated and delaying the introduction of new services in the band. The Commission seeks comment on incentives to encourage BAS licensees to complete the relocation process promptly and without unnecessary delay.

A. Cost Sharing

5. In 2003, when fifteen megahertz of spectrum in the 1990–2000 MHz and 2020–2025 MHz bands was reallocated from MSS to Fixed and Mobile services to be used for new terrestrial services, *i.e.,* AWS–2, the Commission decided that responsibility for BAS relocation would be shared between the MSS entrants and the other new entrants to the band. In 2004, Sprint Nextel was assigned five megahertz of this spectrum in the 1990–1995 MHz band (as well as the paired 1910–1915 MHz band) in exchange for giving up spectrum it held in the 800 MHz band. Sprint Nextel also was given the obligation to relocate the BAS incumbents from the entire 35 megahertz of spectrum in the 1990–2025 MHz band, as well as the realignment of the 800 MHz band to resolve ongoing interference between public safety and commercial operations in that band. To ensure that Sprint Nextel did not receive an undeserved windfall by receiving the 1.9 GHz spectrum, Sprint Nextel was required to make an ''anti-windfall'' payment to the U.S. Treasury if the fair value of the spectrum it received, as determined by the Commission ($4.86 billion), exceeded the total of (i) the value the Commission attributed to the 800 MHz spectrum Sprint Nextel was vacating ($2.059 billion); (ii) the costs paid by Sprint Nextel to realign the 800 MHz band; and (iii) the costs paid by Sprint Nextel to clear incumbent users from the BAS spectrum (as well as the paired 1910–1915 MHz band). The Commission required Sprint Nextel to pay any monies owed to the U.S. Treasury under this calculation as part of a ''true-up'' that was originally scheduled to be accomplished within six months of the end of the 36 month 800 MHz transition period. The 36 month 800 MHz transition deadline was later established as June 26, 2008 with the true-up to occur by December 26, 2008. The Commission noted that Sprint Nextel was to complete the relocation of the BAS incumbents by September 7, 2007, prior to both the 800 MHz transition date and the subsequent true-up date.

6. In the 2004 *800 MHz R&O,* 69 FR 67823, November 22, 2005, the Commission provided that the earlier entrant to the band who relocated BAS, whether Sprint Nextel or MSS, could receive reimbursement from a later entrant for the band clearing costs consistent with the *Emerging Technology* relocation principles. However, the unique situation that led to the assignment of the 1.9 GHz spectrum to Sprint Nextel required the Commission to establish additional procedures for the band. Specifically, the Commission established in the *800 MHz R&O* that Sprint Nextel is ''entitled to seek *pro rata* reimbursement * * * from MSS licensees that enter the band'' prior to the end of the 800 MHz 36-month reconfiguration period, and it required Sprint Nextel to notify the MSS entrants of its intention to seek cost sharing. The Commission provided that if Sprint Nextel receives a cost sharing reimbursement from the MSS entrants, the amount is to be deducted from the costs it can claim credit for as BAS relocation expenses in the 800 MHz true-up. Sprint Nextel's right to receive reimbursement from MSS was limited to the costs of clearing the top thirty markets and all fixed BAS facilities, regardless of market size, based on an MSS entrant's *pro rata* share of the 1990–2025 MHz spectrum involved. The Commission notes that when Sprint Nextel undertook its commitment to relocate the BAS licensees, the Commission did not, remove the obligation of the MSS entrants to relocate the BAS licensees, nor did it eliminate the procedures that had already been put in place for doing so. Indeed, the Commission provided an opportunity for the MSS entrants to relocate BAS incumbents, particularly in the top 30 markets, so that they would not be delayed in satisfying their entry requirements. Sprint Nextel, in turn, is required to reimburse MSS entrants for a *pro rata* share of any relocation costs MSS entrants incur if they participate in the relocation of BAS before Sprint Nextel has completed its clearing of the BAS band. When the decision was made to permit Sprint Nextel to use the 1990–1995 MHz band, no BAS licensees had been relocated by the MSS entrants, and there is no evidence that the MSS entrants exercised their right to relocate any BAS incumbents subsequent to the Commission's decision.

7. In the *800 MHz MO&O, 70 FR 76704, December 28, 2005,* adopted in October 2005, the Commission affirmed its decision regarding the obligations of the MSS entrants to reimburse Sprint Nextel. The Commission pointed out that ''[Sprint] Nextel, as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from subsequent entrants, including MSS licensees.'' The Commission explained that ''it decided to end the reimbursement obligations of other entrants to [Sprint] Nextel, and any reimbursement by [Sprint] Nextel to other entrants, at the end of the 800 MHz band true-up period for administrative efficiency in the accounting process and because of the unique circumstances in [Sprint] Nextel's receipt of BAS spectrum.'' Finally, the Commission rejected a request that it move up the date by which MSS entrants had to ''enter the band'' in order for Sprint Nextel to obtain cost sharing from them, and instead decided to ''maintain the schedule previously established, *i.e.,* the true-up period.''

8. As noted, ten megahertz of the 2 GHz BAS spectrum (1995–2000 MHz and 2020–2025 MHz) has been reallocated for use by future AWS–2 licensees. In the *AWS Sixth R&O,* 69 FR 62615, October 27, 2004, the Commission established obligations for the future AWS licensees to reimburse Sprint Nextel for the BAS transition costs. As with the MSS entrants, Sprint Nextel ''is entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during its 36-month 800 MHz reconfiguration period from AWS licensees that enter the band prior to the end of that period.'' Sprint Nextel ''is not entitled to reimbursement'' from the AWS licensees ''after receiving credit for its relocation cost at the 800 MHz true-up.'' The *AWS–2 NPRM of Proposed Rulemaking (AWS–2 NPRM),* 69 FR 63489, November 2, 2004, for

service rules for the AWS–2 licensees was issued concurrently with the *AWS Sixth R&O.* The *AWS–2 NPRM* states that ''we also note that if [Sprint] Nextel has received credit for BAS relocation costs in the 800 MHz true-up, late-entering AWS licensees will not have any reimbursement obligation to Nextel for such costs.'' The *AWS–2 NPRM* sought comment on a number of issues regarding cost-sharing between the AWS entrants and other new entrants to the band. These issues include whether a timetable should be adopted for AWS entrants to relocate BAS; how the reimbursement rights and obligations of each AWS licensee could be most efficiently and equitably allocated, whether on the basis of the geographic area or population covered by each license, or the value of each license as indicated by the winning auction bid, or by some other means; how the relocation costs should be allocated if not all AWS licenses are issued; how later arriving AWS licensees should be treated; and how an accounting between MSS and AWS licensees should occur.

9. Since the time the Commission adopted or proposed cost sharing procedures for Sprint Nextel, MSS, and AWS–2 in the 2 GHz BAS band, many of the assumptions underlying those procedures have not occurred. The 800 MHz transition, which was to be completed within 36 months (June 26, 2008) is not yet complete. The Commission has granted individual 800 MHz licensees waivers of the rebanding deadline, but has not modified the completion date itself. The original ''true-up date'' for calculating the anti-windfall payment, which was linked to the completion of 800 MHz rebanding and set to occur by December 26, 2008, was modified by the Commission in December 2008. The true-up is currently scheduled to occur by July 1, 2009, but it may be delayed further and could occur before 800 MHz rebanding is completed. Sprint Nextel has not completed the BAS relocation, and the BAS transition deadline has been modified several times, most recently to June 10, 2009.

10. In a letter filed June 25, 2008, Sprint Nextel asks the Commission to make a number of adjustments in deadlines and procedures that are tied to the June 26, 2008 end date of the 36-month 800 MHz reconfiguration period. Sprint Nextel posits that these deadlines should be adjusted due to the extension of the BAS relocation deadline and the grant of a large number of waivers of the 800 MHz rebanding deadline to public safety licensees. In particular, Sprint Nextel notes that the *800 MHz R&O* contains references relating the June 26, 2008 rebanding date to the MSS reimbursement obligation to Sprint Nextel for BAS relocation costs, and it requests that these references be harmonized with the postponed true-up date. On the same date, Sprint Nextel filed a lawsuit against ICO and TerreStar in the Eastern District of Virginia seeking *pro rata* reimbursement of its BAS relocation costs. On August 29, 2008, the court referred the case to the Commission and stayed all proceedings pending further decision by the Commission.

11. TerreStar responded to Sprint Nextel's June 25, 2008 letter on September 8, 2008, and ICO responded on September 9, 2008. TerreStar and ICO both argue that the MSS entrants' reimbursement obligation to Sprint Nextel terminated on June 26, 2008. TerreStar and ICO also argue that the Commission limited Sprint Nextel's ability to recover costs from MSS as part of striking ''an appropriate balance'' between Sprint Nextel and the MSS entrants' interests. ICO states that the Commission expected Sprint Nextel to complete the BAS relocation and MSS to begin operations long before reimbursement to Sprint Nextel was due on June 26, 2008. With the long delay in BAS relocation, ICO claims that MSS has no ability to earn revenue prior to the reimbursement due date or the certainty needed to plan to do so. TerreStar argues that, when the *800 MHz R&O* was adopted, Sprint Nextel could not have had a reasonable expectation of recouping expenses from TerreStar and TerreStar had a justifiable expectation that it would not have to pay these expenses because TerreStar's satellite operational milestone was after June 26, 2008; thus, it did not ''enter the band'' before the cost sharing obligation terminated. TerreStar claims that establishing a new date to terminate the cost sharing obligation would upset its settled expectations, reward Sprint Nextel for not completing the 800 MHz reconfiguration on time, and jeopardize TerreStar's initiation of service. ICO claims that because Sprint Nextel has delayed in completing the BAS relocation by the original date, the requirement that BAS in the top 30 markets be relocated before MSS can begin operations has not been satisfied, and thus ICO can not ''enter the band'' and incur a cost sharing obligation even though its satellite was successfully launched and found operational in May 2008.

12. On October 8, 2008, Sprint Nextel filed a letter asking for a declaratory ruling affirming that TerreStar and ICO must reimburse Sprint Nextel for a *pro rata* share of the eligible BAS relocation costs. Sprint Nextel argues that the reimbursement obligation did not end or ''sunset'' on June 26, 2008, as TerreStar and ICO claim, but extends at least through the end of the BAS and 800 MHz relocation projects. Sprint Nextel claims that the cost sharing obligation was connected to the end of the 800 MHz reconfiguration to avoid a windfall to Sprint Nextel and facilitate the accounting in the true-up, which has been extended, and the relevance of the June 26, 2008 date has been superseded by the extended BAS and 800 MHz deadlines. Sprint Nextel points out that TerreStar and ICO have been on NPRM of their obligations for years and cannot have reasonably expected that they would be able to circumvent the Commission's long-standing cost sharing principles. Even if one assumed that the reimbursement obligation sunset on June 26, 2008, Sprint Nextel claims that both ICO and TerreStar have entered the band by that date: ICO by transmissions from its satellite and TerreStar through its licensing activities, system build out, testing, satellite construction, and ATC operations. Sprint Nextel also requests that if it does not owe any payment to the U.S. treasury for the spectrum it is receiving, the Commission should establish 2015 as the BAS relocation reimbursement sunset date.

13. The requirements that the Commission adopted for cost sharing among Sprint Nextel, MSS and AWS–2 entrants were based on a number of assumptions regarding the transition of the 2 GHz and 800 MHz bands, MSS and AWS–2 entry, and the true-up. As reflected in the current requirements, the BAS relocation was contemplated to be complete within thirty months, and thus the Commission expected the BAS relocation to be finished by September 7, 2007, well before the end of the 800 MHz 36-month reconfiguration period, which was ultimately slated to end on June 26, 2008. Because ICO's satellite operational milestone was July 2007 and TerreStar's was November 2008 when the requirements were adopted, the Commission also expected that one and possibly both MSS operators would participate in the BAS relocation process, especially in clearing the top 30 markets, so that they would be able to commence service quickly once their satellites were successfully launched, possibly before the end of the 800 MHz reconfiguration period. Indeed, the Commission's requirements provided an opportunity for the MSS entrants to relocate BAS incumbents even while ordering Sprint Nextel to undertake the same task, and required that Sprint

Nextel reimburse the MSS entrants for any relocation expenses they incurred. For its band clearing efforts, Sprint Nextel would have been able to seek reimbursement for a portion of the relocation costs from the MSS and AWS–2 entrants who entered the band prior to the end of the 800 MHz thirty-six month reconfiguration period on June 26, 2008. The Commission also expected that the total cost of the BAS relocation, 1910–1915 MHz band clearing, and 800 MHz transition would be such that Sprint Nextel would have to make an anti-windfall payment to the United States Treasury even after receiving credit for all of its band clearing and transition costs. Consequently, even if the MSS entrants and AWS–2 licensees did not have to reimburse Sprint Nextel for BAS clearing costs because of delayed entry into the band, the Commission would have anticipated that Sprint Nextel would suffer no adverse financial consequence because the amount of the anti-windfall payment that Sprint Nextel would have to make would be reduced by the amount of any BAS relocation cost not reimbursed by the MSS entrants.

14. The circumstances now surrounding the 2 GHz band BAS transition are very different than what the Commission expected when the cost sharing requirements were adopted and explained in the *800 MHz R&O.* Neither the 800 MHz transition nor the BAS relocation has yet been completed. While the 800 MHz thirty-six month reconfiguration date of June 26, 2008 has never officially been extended, Sprint Nextel and numerous 800 MHz licensees have received waivers of that date. Moreover, the 800 MHz true-up date, which was set to occur within six months after the 800 MHz reconfiguration date, has been extended to July 1, 2009 and may be delayed further. The expected relocation costs for the 800 MHz transition is so large that Sprint Nextel does not now expect to make an anti-windfall payment.

15. In this context, the underlying assumptions of the approach taken by the Commission in the *800 MHz R&O* did not occur, such that a narrow, literal interpretation of certain language in the Commission's decision would not correspond to the stated purposes and structure of the cost sharing principles set forth in the *800 MHz R&O* and other decisions regarding the shared responsibilities of new entrants for BAS relocation. Certain specific language cannot be reasonably applied to the current circumstances.

16. On the one hand, a narrow literal interpretation of certain language in the *800 MHz R&O* could be argued as suggesting that Sprint Nextel may only be entitled to seek *pro rata* reimbursement to the extent that the MSS and AWS–2 licensees entered the 2 GHz band before the then-contemplated 36-month 800 MHz rebanding period ended, a date later established to be June 26, 2008. Moreover, because the Commission has never defined what ''entered the band'' means, applying this interpretation is problematic.

17. On the other hand, such an interpretation of the deadline would arguably undermine the stated purposes of the BAS cost-sharing regime set up by the Commission in the *800 MHz R&O,* where it discussed its decision as generally consistent with the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for that benefit, though modified to fit the particular concerns raised in the 800 Rebanding proceeding. Specifically, as stated in the 2005 *800 MHz MO&O,* the Commission modified the traditional *Emerging Technologies* cost-sharing policy that new entrants who ultimately benefit from having the spectrum cleared should pay their share of band-clearing costs only to the extent necessary to provide ''administrative efficiency in the accounting process'' and to take into account ''the unique circumstances in Nextel's receipt of the BAS spectrum.'' In other words, the Commission limited the time that Sprint Nextel could receive reimbursements from MSS entrants so that Sprint Nextel could not get a double benefit, *i.e.,* receive reimbursements from MSS after it had received credit for these expenses in the true up. The Commission clearly allowed for the possibility that the MSS entrants would incur a cost-sharing obligation, and Sprint Nextel was explicitly allowed to pursue cost sharing from the MSS entrants by giving them NPRM within one year of adoption of the *800 MHz R&O.*

18. Nothing in the text of the relevant orders suggests that the Commission limited the time in which Sprint Nextel could seek reimbursements from MSS entrants to provide an independent benefit to MSS entrants, *e.g.,* to subsidize them or provide them certainty about their business costs. Thus, the Commission finds that the MSS entrants' cost sharing obligations must be interpreted in light of the unanticipated changed circumstances, and these obligations should not be tied to a deadline that is no longer relevant. In short, MSS entrants should pay a *pro rata* share of the BAS relocation costs unless doing so would allow Sprint Nextel to be reimbursed twice (by both the Treasury and the MSS and AWS–2 licensees). Accordingly, the most logical and appropriate interpretation of the language in the 800 MHz orders is that the MSS entrants must pay their *pro rata* share of BAS relocation costs to the extent that they enter the band before the 800 MHz rebanding or true up is complete. The difficulty with applying this interpretation is that there is no future date certain for completing either the 800 MHz rebanding or the true up.

19. The Commission thus declines to resolve the conflict between Sprint Nextel and the MSS entrants by issuing a declaratory ruling. It concludes that, given the changed circumstances surrounding the 2 GHz BAS relocation and the ambiguity between certain language in the *800 MHz R&O* and the overall purposes and structure of the BAS cost-sharing regime caused by the changed circumstances, the best course of action is to propose clearly delineated cost sharing requirements reflecting these changed circumstances to balance the responsibilities for and benefits of relocating incumbent BAS operations among Sprint Nextel, MSS, and AWS–2 based on the Commission's relocation policies set forth in the *Emerging Technologies* proceeding.

20. This Further NPRM provides an opportunity for us to address issues that are ambiguous or not specifically addressed by the current requirements. In particular, we reach the following tentative conclusions:

- Sprint Nextel may either obtain cost sharing for an eligible expense from MSS or AWS–2 entrants when those licensees ''enter the band'' *or* take credit for that expense against the anti-windfall payment to the Treasury (true-up) for the 5 megahertz of BAS spectrum (1990–1995 MHz) it obtained as part of the 800 MHz band realignment.
- The attachment of the cost sharing obligation between Sprint Nextel and MSS and AWS–2 would follow traditional *Emerging Technologies* policies, *i.e.,* the obligation to share costs among new entrants would continue to the BAS sunset date (December 9, 2013); any entity that ''enters the band'' prior to that date would be obligated to reimburse the earlier entrant that incurred the relocation expense a proportional share of cost based on the amount of spectrum assigned to it.
- As in the current requirements, the MSS cost sharing obligation to Sprint Nextel would be limited to the top 30 markets by population and all fixed BAS links.

• An MSS entrant would be deemed to have ''entered the band'' for incurring a cost sharing obligation when its satellite is found operational under its authorization milestone.

• For cost sharing purposes, Sprint Nextel would be required to share with other new entrants information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses and as provided to the 800 MHz Transition Administrator, as required by the *800 MHz R&O.*

21. The overall approach proposed seeks to balance the BAS relocation costs among all new entrants based on the benefit each receives of the total of 35 megahertz of cleared spectrum, consistent with our *Emerging Technologies* policies. Following BAS relocation, MSS will have access to 20 megahertz in the 2000–2020 MHz band (4/7), AWS–2 will have 10 megahertz in the 1995–2000 and 2020–2025 MHz bands (2/7), and Sprint Nextel will have 5 megahertz in the 1990–1995 MHz band (1/7). These basic proportions inform our proposals. As the Commission decided in the *800 MHz R&O,* this approach will follow the traditional relocation principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit.

22. As is the case with our current requirements, the Commission tentatively concludes that Sprint Nextel may not both receive reimbursement from another new entrant and take credit for the same BAS relocation cost at the 800 MHz true-up. If another new entrant enters the band before the true-up and Sprint Nextel obtains reimbursement for relocation costs from the new entrant, Sprint Nextel may not obtain credit against the anti-windfall payment for the reimbursed costs. Further, the Commission tentatively concludes that any new entrant to the band who incurs relocation cost will be able to obtain *pro rata* reimbursement from other new entrants who enter the band prior to the BAS band sunset date of December 9, 2013. In other words, the cost-sharing obligation will no longer be linked to the 800 MHz thirty-six month reconfiguration period or the 800 MHz true-up date. Extending the relocation obligation to the BAS sunset date provides certainty to all new entrants, rather than linking the obligation to the 800 MHz thirty-six month reconfiguration period or the 800 MHz true-up date, since the timing of both of these events is less certain. Thus, the Commission tentatively concludes that the attachment of the cost sharing obligation between Sprint Nextel and MSS and AWS–2 should follow the traditional *Emerging Technologies* policies in obligating new entrants to share the costs of relocating the BAS incumbents. A later entrant's cost-sharing obligation to the earlier entrant who cleared the spectrum shall be in proportion to the spectrum assigned to the later entrant. For example, if a future AWS licensee is assigned 5 megahertz of spectrum in the band on a nationwide basis, the licensee will be responsible for 1/7 of the total spectrum clearing costs if it enters the band before the sunset date.

23. In the *800 MHz R&O,* the MSS entrants' cost sharing obligation to Sprint Nextel was limited to the cost of clearing the thirty largest markets (by population) and all fixed BAS links. This was done because the MSS entrants were required to clear the thirty largest markets and all fixed BAS links before they could begin operations, but were not required to relocate BAS in the other markets until later. Because this exception to the general cost-sharing principle was clearly established in the *800 MHz R&O* in 2004, we propose to continue to limit the MSS entrants' cost-sharing obligation in this way even though we are now eliminating the top 30 market rule.

24. Consequently, the Commission tentatively concludes that Sprint Nextel's right to seek reimbursement from any MSS entrant entering before the sunset date will be limited to the costs Sprint Nextel incurred for clearing the top thirty markets and for relocating all fixed BAS facilities, regardless of market size, and to an MSS entrant's *pro rata* share of the 1990–2025 MHz spectrum. Sprint Nextel claims that under this approach MSS would only be responsible for approximately 27 percent of the total BAS relocation expenses, which is substantially less than the 57 percent of the cleared BAS spectrum assigned to the two MSS entrants. The Commission also seeks comment on whether it should require MSS entrants to pay a *pro rata* share of all BAS relocation costs, regardless of market size.

25. In addition, regarding MSS-to-MSS cost sharing, under the original requirements for MSS entrants to relocate the BAS incumbents, all MSS entrants share in the relocation costs on a *pro rata* basis depending on the amount of spectrum each is assigned. Later entering MSS operators are required to reimburse the earlier MSS entrants who clear the spectrum a *pro rata* share of the earlier MSS entrants' band clearing costs. After the BAS transition is completed, all of the MSS entrants are to ''true-up'' their costs to ensure that each MSS entrant pays a *pro rata* share of the relocation costs based on the amount of spectrum assigned. The Commission proposes to retain these MSS-to-MSS cost sharing requirements. The Commission notes that these inter-service and intra-service cost sharing requirements can work in tandem. For example, if Sprint Nextel was reimbursed from only one MSS entrant, that entrant could in turn seek reimbursement of what it owed Sprint Nextel from another MSS entrant. It appears that Sprint Nextel has asked both ICO and TerreStar to pay equal amounts of relocation costs based on their equal amount of assigned spectrum (*i.e.,* ten megahertz each), consistent with current requirements. The Commisssion seeks comment on whether Sprint Nextel should be allowed to request relocation costs for BAS operations in all of the 20 megahertz of spectrum allocated for MSS from a single MSS entrant that may, in turn, seek reimbursement from another MSS entrant.

26. The Commission also tentatively concludes that AWS–2 licensees will be responsible for reimbursing earlier entrants for relocating BAS operations in their assigned geographic areas, but determining how to apportion a licensee's *pro rata* share will depend on future Commission action to adopt service rules for the AWS licensees in the 1995–2000 MHz and 2020–2025 MHz band. These licenses may be issued either on a nationwide basis or for geographic areas, and could include all or only a portion of the allocated bandwidth. If licenses are issued for geographic areas, the geographic areas are not likely to coincide with the BAS market boundaries and licenses for geographic areas may be issued at different times. Another factor that our service rules will have to address is apportioning the reimbursement costs fairly among AWS licensees. For example, some licensees' service areas cover cleared spectrum for which Sprint Nextel may claim a credit at the true-up, thus preventing Sprint from seeking cost sharing from those AWS licensees. Other AWS licensees' service areas may cover cleared spectrum not claimed by Sprint for a true up credit and thus subject to cost sharing. These factors will complicate the calculation of cost sharing for the AWS entrants to the band. In the 2004 *AWS–2 NPRM* on service rules for the AWS entrants to the band, the Commission sought comment on a number of issues regarding the licensing scheme for the AWS entrants

and the cost-sharing obligations between the AWS entrants and other new entrants to the band. Because the licensing scheme for the AWS entrants to the band has not yet been determined, we are not making proposals here for apportioning an AWS licensee's *pro rata* share for cost-sharing with other new service entrants or between AWS–2 entrants beyond those made in the 2004 *AWS–2 NPRM.* The Commission intends to adopt specific cost-sharing procedures for the AWS entrants when service rules are adopted for the 1995–2000 MHz and 2020–2025 MHz bands.

27. The cost sharing scheme that the Commission adopted in 2004 required that MSS and AWS entrants reimburse Sprint Nextel for the BAS relocation costs after they ''enter the band,'' but did not define the term. For clearing other bands under our *Emerging Technologies* policies, the Commission's rules usually make a distinction between determining when a new entrant must relocate an incumbent operation before it can operate and when a new entrant incurs a cost sharing obligation to an earlier entrant who relocated an incumbent. Generally, Commission rules rely on an interference analysis to determine when a new entrant must relocate an incumbent. On the other hand, a later entrant is generally required to share in the cost that an earlier entrant has incurred in relocating an incumbent if the subsequent entrant would have been in a position to have caused interference to the incumbent. Because the incumbent has already been relocated, the cost sharing determination is not usually based on a rigorous interference analysis but often on a simplified proximity test for ease in administration. The rules may vary from these general principles depending on the technical characteristics of the specific services involved in the relocation.

28. Because the Commission has already determined that MSS and AWS–2 entry in the 2 GHz band requires that all BAS operations in the band be relocated to avoid interference between the new and incumbent services, we only need to determine here when a new entrant ''enters the band'' for purposes of the attachment of the cost sharing obligation. In this regard, we are mindful that in other bands a new entrant incurs a cost sharing obligation at the time the subsequent entrant would be in a position to have caused interference to the now relocated incumbent.

29. With this principle in mind, the Commission tentatively concludes to adopt the following requirements for determining when the MSS entrants have ''entered the band.'' The Commission proposes that an MSS entrant will have entered the band and incurred a cost sharing obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone. For the 2000–2020 MHz band, a satellite is considered operational based upon the occurrence of transmissions between the satellite and an authorized earth station using the 2000–2020 MHz and 2180–2200 MHz bands. The satellite systems which the MSS entrants are deploying are capable of providing nationwide coverage. The customer equipment transmitting to the satellites in this band are therefore capable of causing interference to any of the BAS incumbents in the local area in which that equipment is used. The MSS entrants having an operational satellite is therefore analogous to the Personal Communications Service (PCS) or AWS entrants building a base station in proximity to the incumbent fixed microwave links in the prior spectrum clearings. Like the PCS and AWS entrants, an MSS entrant with an operational satellite is in a position to cause interference to the incumbents and therefore should incur a cost sharing obligation to an earlier entrant who has relocated the incumbents. Simplicity of administration is especially important in the case of BAS because there is no clearinghouse to determine when a party has ''entered the band'' or to parse out the relocation costs on a BAS receiver site-by-site basis.

30. The AWS entrants will operate terrestrial networks and thus the definition of ''enter the band'' which the Commission proposes for the MSS entrants would not be appropriate for AWS. Although no service rules have been adopted for the AWS portions of the 1990–2025 MHz band, the Commission expects that the AWS entrants will deploy terrestrial networks wherein fixed base stations communicate with mobile radios. Because both the AWS entrants and BAS incumbents will employ mobile radios, the interference scenarios will be more complicated than with the fixed point-to-point microwave incumbents being relocated in the PCS, AWS, and MSS downlink bands addressed by other relocation rules. Furthermore, there is no clearinghouse for the BAS relocation that will be able to determine when interference between the AWS entrants and previously relocated BAS incumbents would likely occur. These two facts—the complicated interference scenarios and lack of clearinghouse—require that the test for determining when AWS entrants incur a cost sharing obligation be simple and easy to apply.

31. As one option, the Commission proposes to specify that AWS entrants in the 1990–2025 MHz band be found to have ''entered the band'' and incur a cost sharing obligation upon grant of the long form applications for their licenses. This would provide a clear and easy-to-administer standard and provide certainty for all parties involved. While this proposed requirement does depart somewhat from other relocation rules, it is not entirely inconsistent. Because of the mobile nature of BAS, once the AWS entrant is licensed any deployment of its services could potentially have resulted in interference to mobile BAS incumbents.

32. The Commission also seeks comment on an alternate approach for when AWS entrants should be found to ''enter the band.'' An AWS entrant in the 1990–2025 MHz band could be found to ''enter the band'' and incur a cost sharing obligation when it activates a base station in an AWS–2 license area that overlaps a cleared DMA. The Commission notes that this alternate approach presents a number of issues that could make it difficult to implement. Because there is no clearinghouse for the 1990–2025 MHz band, there currently is no entity that is responsible for tracking when the AWS–2 licensee activates a base station and for determining which DMA's are overlapped by the base station. Each DMA will potentially have a separate ''enter the band'' date, and it is likely that, whatever service rules we ultimately adopt for this band, any given AWS–2 licensee would trigger numerous ''enter the band'' dates. Consequently, the Commission seeks comment on whether, under this approach, an AWS–2 licensee that activates a first base station should incur a cost sharing obligation only for relocating BAS in that DMA or should it incur its entire cost sharing obligation for all DMAs that overlap its service area. Also, under this approach AWS–2 licensees could potentially delay the initiation of service, and thus seek to avoid incurring a cost sharing obligation, until after the BAS sunset date of December 9, 2013, making it more difficult for Sprint Nextel to decide whether to take credit for BAS relocation cost in the 800 MHz true-up because of the uncertainty as to whether AWS–2 licensees will share in the cost of the BAS relocation. The Commission seeks comment on how, if we adopt this alternative approach, we could prevent

AWS–2 licensees from avoiding their cost sharing obligation through delay. If AWS–2 licensee's are able to avoid incurring a cost sharing obligation through delay, the Commission also seeks comment on how to make it easier for Sprint Nextel to determine whether to take credit for BAS relocation cost in the 800 MHz true-up despite the uncertainty as to whether the AWS–2 will share in the BAS relocation cost.

33. When the Commission adopted the requirements allowing Sprint Nextel to pursue reimbursement of BAS relocation costs from MSS and AWS entrants, it did not specify when the MSS and AWS entrants would owe reimbursement to Sprint Nextel. Generally, in other band clearings the later new entrant has to pay its reimbursement costs when beginning operations or shortly thereafter. For example, in the relocation of fixed microwave links by AWS entrants in the 2110–2150 MHz band and by MSS entrants in the 2180–2200 MHz band (this is the paired downlink band for the MSS at issue in this proceeding), the AWS and MSS entrant must notify a clearinghouse prior to initiating operations. The clearinghouse determines if the AWS or MSS entrant must reimburse a prior new entrant for moving an incumbent licensee, and the AWS or MSS entrant has 30 days to pay the reimbursement costs. Similar rules are followed for the relocation of BRS incumbents in the 2150–2162 MHz band by AWS entrants.

34. As the Commission discussed in the Further NPRM, there are unique circumstances in this case that require additional consideration. The Commission has already determined to permit MSS entrants to begin operations in the near term, even if this were to occur before they have actually satisfied the cost sharing reimbursement obligations that would attach under our proposals here. Here, we seek comment on various approaches that the Commission might take concerning when such reimbursements are owed.

35. If the Commission were to apply a similar scheme as that followed by our relocation rules in other bands with the BAS transition in the 2 GHz band, once the later entrant has entered the band, it may not begin operations until it has reimbursed the earlier entrant that relocated BAS incumbents for the later entrant's *pro rata* share of the relocation costs for all BAS markets that have been transitioned as of the date that the later entrant entered the band (or, in the case of MSS, the later of these two dates: the date MSS is determined to have entered the band or the earliest date MSS is permitted to begin operations under our rules). Thereafter, as the BAS relocation continues and each additional BAS market is transitioned to the new channel plan, the new entrant would have to pay its share of the cost of transitioning that market within thirty days of being notified of the market transitioning or cease operations in that band. Under this approach, it may be more reasonable to expect an MSS entrant to pay reimbursement costs only when a BAS market is cleared and it can operate on a primary basis, rather than to pay these costs on a per station basis in nonrelocated BAS markets where it may operate only on a secondary basis. The entrant who is relocating the BAS incumbents could have the responsibility of notifying the other new entrants and the Commission of the transition of each BAS market. The Commission seeks comment generally on this approach, or variations to it.

36. The Commission also seeks comment, given the unique circumstances in this case, on alternative approaches for when MSS entrants should be required to reimburse Sprint Nextel for their *pro rata* share of the BAS relocation costs. Because the MSS entrants have not yet begun to provide commercial services, they do not have an established revenue stream. Consequently, it may be difficult for the MSS entrants to reimburse Sprint Nextel immediately for their *pro rata* share of costs for all of the markets that have transitioned when the MSS entrant enters the band or begins service, as proposed. Rather than require that, when an MSS entrant is ready to begin operations, it pay its reimbursement share for all markets cleared when it either entered the band or was permitted to begin operations under the rules, should MSS entrants only initially have to pay reimbursement costs for those markets in which they choose to operate? If so, what schedule should they follow for reimbursing costs associated with the remaining markets—when they start providing service in those markets, or under a different timetable? The Commission also seeks comment on establishing a reimbursement scheme that is not specifically tied to MSS entry in each market. For example, should MSS entrants be allowed to delay payment of some portion of their *pro rata* share of reimbursement costs until the BAS relocation is complete, or some other date? Would this provide some needed certainty to MSS entrants that they could begin operating? Should the MSS entrants' payments be linked to the pace of the BAS transition—*e.g.,* as additional BAS markets are transitioned, should MSS entrants be required to make additional payments? The Commission also seeks comment on how any of these approaches would affect the true-up, particularly if Sprint Nextel is owed monies that MSS entrants have not yet paid when the true-up occurs. More generally, the Commission also seeks comment on whether any of these approaches would undermine our goal of ensuring that later entrants reimburse, on a *pro rata* basis, the first entrant that paid for relocation, and on what actions we should take if MSS entrants fail to pay.

37. Finally, the Commission tentatively concludes that, for cost sharing purposes, Sprint Nextel would be required to share with other new entrants information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses and as provided to the 800 MHz Transition Administrator, as required by the *800 MHz R&O.* As part of the financial reconciliation process in the 800 MHz true-up, Sprint Nextel is required to conduct an annual external audit of its 2 GHz band clearing expenses and to provide this audit to the Transition Administrator for the 800 MHz rebanding and true-up. Sprint Nextel also is to report to the Transition Administrator the amount of reimbursement it receives from other entrants to the band. With this information, the Transition Administrator will be able to ensure that Sprint Nextel receives the proper amount of credit against the anti-windfall payment for BAS relocation. However, the annual external audit provides data on total expenses, rather than by market, and the Transition Administrator is under no obligation to analyze, audit or verify the data that Sprint Nextel supplies on the cost of clearing the 2 GHz spectrum. Furthermore, if an MSS or AWS licensee enters the band after the true-up occurs, the Transition Administrator will not be present to calculate the amount that Sprint Nextel claims the new entrant owes. To facilitate the cost sharing process, the Commission proposes to require that Sprint Nextel share with any other new entrant who owes it relocation reimbursement information about its relocation costs as documented in its annual external audit and as provided to the Transition Administrator. Similarly, if a new entrant other than Sprint Nextel relocates a BAS incumbent and seeks cost sharing from later entrants, the first entrant would be required to provide the later entrants with documented

relocation costs. The Commission seeks comment.

38. The Commission seeks comment on all of the proposed changes to the cost-sharing requirements for the 1990–2025 MHz BAS relocation. It seeks comment on this proposal as well as alternative proposals.

B. BAS–MSS Spectrum Sharing

39. In the accompanying Report and Order and Order, the Commission eliminated the top 30 market rule which prevented the MSS entrants from beginning operations before the BAS incumbents in the thirty largest markets by population and fixed BAS links in all markets had been relocated. The MSS entrants are now able to operate with primary status in those markets where the BAS incumbents have been relocated to the new channel plan and with secondary status in nonrelocated markets subject to coordination.

40. The Commission concluded that coordination was necessary in nonrelocated markets because we were not persuaded by the record that MSS could conduct unrestricted operations in these markets without causing interference to the BAS incumbents. TerreStar asserts that, based on its probabilistic analysis, interference from MSS handsets to BAS operations is unlikely to occur, and thus suggests that coordination may not be necessary. Rather, it would cease operations if a BAS incumbent experiences interference. MSTV disputes these claims. The Commission is concerned that if interference occurs to BAS licensees in nonrelocated markets, that interference will harm BAS operations and could prove difficult to resolve because the location of the handset which is the source of the interference may not be easily determined. Such interference could have a significant impact given the number of major markets that will transition toward the end of Sprint Nextel's relocation schedule. Nonetheless, the Commission invites additional analysis on whether MSS can operate on an unrestricted and secondary basis in nonrelocated BAS markets. Commenters should include evidence on the likelihood of harmful interference occurring to the nonrelocated BAS incumbents from MSS operations.

41. In the Report and Order and Order the Commission also recognizes that interference could occur to BAS incumbents in a nonrelocated market from MSS operations in an adjacent market where BAS has been relocated. Consequently, it requires that MSS may not operate mobile terminals within line-of-sight of BAS receive sites in markets where the BAS transition has not been completed, absent coordination. The Commission seeks comment on whether this requirement continues to be necessary.

C. MSS Relocation Obligations

42. Our current rules provide that the MSS entrants may not begin operations until BAS in the top 30 markets and all fixed BAS links have been relocated. Once an MSS entrant begins operations, all of the MSS entrants jointly have the responsibility to relocate the BAS incumbents in markets 31–100 within three years and the remaining markets (*i.e.,* 101 and above) within five years. The rule establishes a relocation obligation on MSS that is independent of other new entrants' relocation activity in the band, and provides a market tier approach for completing the BAS relocation that is pegged to beginning operations when the top 30 markets and fixed links are relocated.

43. The accompanying Report and Order and Order removes the requirement that BAS in the top 30 markets and all fixed BAS links must be relocated before MSS can begin operations, but maintains the obligation for the MSS entrants to relocate the BAS incumbents once an MSS entrant begins operations. Thus, this rule needs further modification to specify when an MSS entrant ''begins operations'' for purposes of completing BAS relocation and to account for the relocation of markets 1–30 along with markets 31–100.

44. The Commission proposes to trigger the obligation of an individual MSS operator to relocate BAS incumbents within three or five years, depending on market size—*i.e.,* markets 1–100 within three years, and the remaining markets within five years—on the later of these two dates: When the MSS operator certifies, prior to the BAS sunset date of December 9, 2013, that its satellite system is operational for purposes of meeting its operational milestone; or the date when the top 30 market rule is eliminated. The Commission believes that this is appropriate because once the satellite system is certified operational and the top 30 market rule has been eliminated, an MSS entrant will be in the position to make use of the spectrum. Furthermore, the criteria will be easy to apply because the MSS entrant must notify the Commission when it accomplishes its operational milestone and the elimination of the top 30 market rule will be effective thirty days after publication of the Report and Order and Order in the **Federal Register.** The Commission notes that the obligation to relocate the BAS incumbents within three and five years, depending on market size, is a joint obligation of all the MSS entrants and not just the entrant who has begun operations. Consequently, both MSS entrants will have an obligation to relocate the BAS incumbents in markets 1–100 within three years and the remaining markets within five years.

45. The Commission also proposes to specify that once the MSS entrants have incurred an obligation to relocate the BAS incumbents within the three and five year periods, the occurrence of the December 9, 2013 sunset date will not serve to terminate that obligation. The Commission views this approach as appropriate to ensure that all eligible BAS incumbents who are entitled to relocation are fairly compensated.

46. Finally, the Commission notes that our rules currently are silent on what consequences the MSS entrants face for not meeting the three and five year relocation deadlines. The Commission seeks comment on what consequences, if any, should be applied for failure to meet these deadlines.

D. BAS Relocation Process

47. The bimonthly status reports which Sprint Nextel has filed on the progress of the BAS transition show that BAS relocation activity slows between the time when replacement equipment is ordered for installation by individual licensees, and when all licensees in a market retune to the new channel plan. The reports have cited a number of different reasons for the delays in completing relocation, such as weather conditions, the availability and scheduling of installers, and so on. However, some market delays are due to a single BAS licensee in a market that has lagged in cooperating with the BAS transition and a handful of BAS licensees that have failed to execute frequency relocation agreements.

48. The Commission is concerned that some BAS licensees may not be making a good faith effort to complete the BAS transition in a timely manner. Because of the integrated nature of BAS, all BAS licensees in a market must transition as a group. Consequently, the failure of one BAS licensee to cooperate in the transition can delay many other BAS incumbents from completing the transition. Given that the BAS transition has taken far longer than anyone has expected, the Commission seeks comment on incentives it might apply to encourage all BAS incumbents to diligently work toward completing the BAS transition so as not to delay further the introduction of new services in the band.

49. Under our current rules, the BAS incumbents are primary until they are relocated, they refuse relocation, or the BAS relocation rules sunset on December 9, 2013. Because individual BAS licensees may delay the transition, the Commission seeks comment on the following proposal. If a BAS licensee has not completed relocation by February 9, 2010, the Commission could change its status for interference purposes, but continue to require that new entrants who incur a relocation and cost sharing obligation fulfill this obligation. Thus, Sprint Nextel, MSS and AWS–2 entrants would continue to have an obligation to relocate those BAS incumbents whose initial applications were filed prior to June 27, 2000 and who have primary status in the band.

50. The interference status between a nonrelocated BAS licensee and a new entrant, whether Sprint Nextel, MSS, or AWS–2, could be modified in one of several different ways. First, nonrelocated BAS incumbents could become secondary in the 1990–2025 MHz band and Sprint Nextel, MSS and AWS entrants primary as of February 9, 2010. This would allow Sprint Nextel, MSS and AWS–2 entrants to provide unimpeded commercial service. The nonrelocated BAS incumbent would be able to continue operations in the band if the new entrants are not ready to begin using the band or if the BAS incumbent can operate without causing harmful interference to the new entrants. Second, the Commission could require the nonrelocated BAS incumbent to cease operations in the 1990–2025 MHz band as of February 9, 2010. This proposal has similarities to the BAS relocation rules prior to 2004. Third, the Commission could make the nonrelocated BAS licensee and the new entrants co-primary in the 1990–2025 MHz band as of February 9, 2010. Because a later arriving co-primary licensee must protect the operations of an existing co-primary licensee, the new entrants, whether Sprint Nextel, MSS, or AWS–2, would have to avoid causing interference to the existing BAS systems and accept interference from the BAS licensee. The Commission seeks comment on these approaches, or possible alternative approaches.

51. If the Commission adopts either the first or second of the procedures described, it seeks comment on whether we should look favorably upon waiver request from individual nonrelocated BAS licensees to allow them to maintain their primary status and continue operations if enforcing the rule would cause hardship or otherwise not serve the public interest. The BAS licensee could, for example show that the BAS spectrum in its market is so heavily used that there is no other available channel or that circumstances beyond the incumbent's control have prevented the incumbent from completing the transition by the deadline.

Initial Regulatory Flexibility Analysis

1. 52. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rule Making (Further NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in the Further NPRM. The Commission will send a copy of this Further NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2]

A. Need for, and Objectives of, the Proposed Rules

53. In this Further Notice of Proposed Rulemaking, the Commission seeks comment on tentative conclusions and proposals for modifying and clarifying the Commission's requirements for the new entrants to the 1990–2025 MHz band to share the cost of relocating the incumbent BAS licensees from that band. The BAS incumbents are being removed from the 1990–2025 MHz band to make way for Sprint Nextel, MSS entrants, and future AWS licensees. Sprint Nextel, who will occupy the 1990–1995 MHz spectrum, is required to relocate the BAS incumbents from the band by February 8, 2010. The MSS entrants (ICO and TerreStar), who will occupy the 2000–2020 MHz spectrum, are also obligated to relocate the BAS incumbents before they may begin operations. The AWS licenses for the 1995–2000 MHz and 2020–2025 MHz have not yet been issued.

54. The cost sharing requirements for the BAS relocation must be modified because circumstances surrounding the relocation have significantly changed since the requirements were adopted. When the current cost sharing requirements were adopted in 2004, Sprint Nextel was expected to have completed the BAS transition by September 7, 2007; one or both of the MSS entrants was expected to have entered the band and incurred a cost sharing obligation to Sprint; the reconfiguration of the 800 MHz band, which Sprint Nextel was also undertaking, would have been completed by June 26, 2008; and Sprint Nextel was expected to be able to receive credit for the BAS relocation costs not reimbursed by MSS and AWS licenses toward the value of spectrum it was receiving. None of these assumptions have in fact been correct. Furthermore, the current requirements have a number of ambiguities, such as not specifying a standard for determining how MSS and AWS licenses incur a cost sharing obligation to Sprint Nextel and not specifying when reimbursement of BAS relocation expenses is to occur.

55. The Further NPRM tentatively concludes that Sprint Nextel may not both receive reimbursement for cost sharing from other new entrants and receive credit for the same relocation costs against the value of the spectrum it is receiving. The MSS and AWS–2 entrants can incur a relocation obligation until the band relocation rules sunset on December 9, 2013. The Further NPRM tentatively concludes that an MSS entrant will incur an obligation to reimburse Sprint for BAS relocation costs when it certifies that its satellite is operational for purposes of meeting its operational milestone. As for AWS licensees, the Further NPRM proposes that AWS entrants will incur a cost sharing obligation upon grant of their long form application for their licenses, but also seeks comment on whether the AWS licensees should incur a cost sharing obligation when they activate a base station in an area that overlaps a DMA where the BAS incumbents have been relocated. The Further NPRM also seeks comment on whether once the AWS and MSS entrants incur a cost sharing obligation, they may not begin operations until they have reimbursed the party who relocated the BAS incumbents for their *pro rata* share of relocation costs for BAS markets that have transitioned when they incur the cost sharing obligation. As the BAS relocation continues and each additional BAS market is transitioned, the new entrant must pay their share of relocation costs within 30 days of being notified of the market transitioning. The Further NPRM also seeks comment on alternative proposals on when AWS and MSS entrants should be required to reimburse earlier entrants for their share of the BAS relocation costs.

56. In addition, the Further NPRM tentatively concludes that the MSS

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 847 (1996).

[2] *See* 5 U.S.C. 603(a).

entrants' reimbursement obligation to Sprint Nextel should continue to be limited to a *pro rata* share of the costs of relocating BAS in the thirty largest markets (by population) and all fixed BAS links. The FNPRM seeks comment on whether this limitation on the MSS entrants' liability should be removed. Furthermore, the Further NPRM proposes to retain the MSS-to-MSS cost sharing, under which the MSS entrants are to ''true-up'' their cost after the BAS transition is complete to ensure that that each MSS entrant pays a *pro rata* share of the relocation cost depending on the amount to spectrum assigned. The Further NPRM also seeks comment on allowing Sprint Nextel to recover BAS relocation costs from one of the MSS entrants for BAS operations on 20 MHz of spectrum (the entire MSS allocation in the band), after which that MSS entrants could seek reimbursement from the other MSS entrant. The Further NPRM tentatively concludes that Sprint Nextel be required to share with other new entrants from whom it is seeking reimbursement, information about its relocation cost as documented in its annual external audit and as Sprint Nextel provides to the Transition Administrator of the 800 MHz transition. Furthermore, the Further NPRM proposes that if new entrants other than Sprint Nextel relocate BAS incumbents and seek reimbursement from other new entrants, the first entrant must provide the later entrants with documented relocation costs.

57. The current relocation rules require that the MSS entrants relocate BAS incumbents in markets 31–100 within three years of beginning operations and markets above 100 within five years of beginning operations. The Further NPRM proposes that the MSS entrants be required to relocate BAS incumbents in markets 1–30 within three years of beginning operations, as they are currently required to do for BAS incumbents in markets 31–100. For purposes of this rule, the FNPRM proposes that ''beginning operations'' be defined as the later of two dates: when an MSS operator certifies that its satellite is operational for purposes of meeting its operational milestone; or the date when the top 30 market rule is eliminated. The Further NPRM also proposes that the December 9, 2013 sunset date for the band not serve to terminate this obligation once it has been incurred. In addition, the Further NPRM seeks comment on what consequences, if any, should be applied for the failure of MSS entrants to meet these deadlines.

58. The Futher NPRM also seeks comment on incentives for all BAS incumbents to work diligently toward completing the BAS transition. The Further NPRM seeks comments on several approaches to changing the interference status of the BAS incumbents: Nonrelocated BAS could become secondary while Sprint Nextel, MSS, and AWS could become primary in the 1990–2025 MHz band on February 9, 2010; Nonrelocated BAS could be required to cease operation in the 1990–2025 MHz band on February 9, 2010; Nonrelocated BAS could become co-primary with Sprint Nextel, MSS, and AWS in the 1990–2025 MHz band on February 9, 2010. If any of these approaches are adopted, the Further NPRM seeks comment on whether we should look favorably upon waiver request from nonrelocated BAS licensees to allow them to maintain primary status and continue operations if enforcing the rule would cause hardship or otherwise not serve the public interest. Furthermore, the Further NPRM invites additional analysis of whether MSS entrants should be able to operate on an unrestricted and secondary basis in nonrelocated BAS markets instead of just when MSS entrants can successfully coordinate with nonrelocated BAS incumbents.

B. Legal Basis

59. The proposed action is taken pursuant to Sections 4(i), 5(c), 303(f), 332, 337 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(c), 303(f), 332, 337 and 405.

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

60. 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, if adopted.[3] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[4] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[5] 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.[6]

61. 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, if adopted.[7] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[8] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[9] 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.[10]

62. The proposed rule modifications may affect the interest of BAS, LTTS, and CARS licensees (which we have been referring to throughout this document generically as ''BAS'') because these licensees are being relocated from the 1990–2025 MHz band by the new entrants. In addition, the rule modifications will affect the interest of the new entrants to the 1990–2025 MHz band: MSS, Sprint Nextel, and future AWS entrants to the band.

63. BAS. This service uses a variety of transmitters to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the stations). The BAS licensees in the 1990–2110 MHz band will ultimately be required to use only the 2020–2110 MHz portion of that band. It is unclear how many of the BAS licensees will be affected by our new rules.

64. The Commission has not developed a definition of small entities specific to BAS licensees. However, the U.S. Small Business Administration (SBA) has developed small business size

[3] 5 U.S.C. 603(b)(3).

[4] 5 U.S.C. 601(6).

[5] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to the RFA, 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**.'' 5 U.S.C. 601(3).

[6] Small Business Act, 15 U.S.C. 632 (1996).

[7] 5 U.S.C. 603(b)(3).

[8] 5 U.S.C. 601(6).

[9] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to the RFA, 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**.'' 5 U.S.C. 601(3).

[10] Small Business Act, 15 U.S.C. 632 (1996).

standards. For BAS, we use the size standard for Television Broadcasting.[11] The SBA has developed a size standard for firms in this category, which is all firms having revenues less than $14 million. The only data which we have available for this category are for when the SBA size standard was for firms having revenues of less than $13.5 million. According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations [12] (or approximately 72 percent) have revenues of $13.5 million or less and thus qualify as small entities under the SBA definition. Thus, under this standard, the majority of firms can be considered small.

65. *CARS.* The CARS licensees in the 1990–2110 MHz band will ultimately be required to use only the 2020–2110 MHz portion of that band. CARS licenses are issued to the owners or operators of cable television systems, cable networks, licensees of the BRS/EBS band, and private cable operators or other multichannel video programming distributors.[13] It is unclear how many of these will be affected by our new rules.

66. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [14] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.[15] To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts.[16] According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[17] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[18] Thus, the majority of these firms can be considered small.

67. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers, nationwide.[19] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[20] In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers.[21] Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.[22] Thus, under this second size standard, most cable systems are small.

68. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' [23] The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[24] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[25] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million,[26] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

69. *Wireless Telecommunications Carriers (except satellite).* Wireless Telecommunications Carriers (except satellite) is an SBA standard which has a size standard of fewer than 1500 employees.[27] Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (''BRS''), formerly Multipoint Distribution Service (''MDS''), and the Educational Broadband Service (''EBS''), formerly Instructional Television Fixed Service (''ITFS''), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As noted, within the category of Wireless Telecommunications Carriers, except satellite, such firms with fewer than 1500 employees are considered to be small.[28] The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution,

[11] 13 CFR 121.201, NAICS code 515120.

[12] Although we are using BIA's estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1374. *See* News Release, ''Broadcast Station Totals as of December 31, 2006'' (dated Jan. 26, 2007); *see http://www.fcc.gov/mb/audio/totals/bt061231.html.*

[13] 47 CFR 78.13.

[14] U.S. Census Bureau, 2007 NAICS Definitions, ''517110 Wired Telecommunications Carriers'' (partial definition); *http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[15] 13 CFR 121.201, NAICS code 517110.

[16] 13 CFR 121.201, NAICS code 517110.

[17] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[18] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[19] 47 CFR 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration,* 10 FCC Rcd 7393, 7408 (1995).

[20] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[21] 47 CFR 76.901(c).

[22] Warren Communications News, *Television & Cable Factbook 2006,* ''U.S. Cable Systems by Subscriber Size,'' page F–2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[23] 47 U.S.C. 543(m)(2); *see* 47 CFR 76.901(f) & nn. 1–3.

[24] 47 CFR 76.901(f); *see* Public NPRM, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator,* DA 01–158 (Cable Services Bureau, Jan. 24, 2001).

[25] These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006,* ''Top 25 Cable/Satellite Operators,'' pages A–8 & C–2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006,* ''Ownership of Cable Systems in the United States,'' pages D–1805 to D–1857.

[26] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

[27] 13 CFR 121.201, NAICS Code 517210. Standard for small business is 1500 employees or fewer.

[28] 13 CFR 121.201, NAICS Code 517210.

and which referred to all such firms having $13.5 million or less in annual receipts.[29] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[30] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[31] The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers, which consists of such entities with fewer than 1,500 employees, appears applicable to MDS and ITFS.

70. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates 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. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Wireless Telecommunications Carriers (except satellite).[32] As noted, within the category of Wireless Telecommunications Carriers, such firms with fewer than 1500 employees are considered to be small.[33] The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having $13.5 million or less in annual receipts.[34] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[35] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[36] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

71. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

72. *LTTS.* The Local Television Transmission Service (LTTS) in the 1990–2110 MHz band is used by communications common carriers to provide service to television broadcast stations, television broadcast networks, cable system operations, and cable network entities.[37] There are 45 LTTS licensees in the 1990–2110 MHz band, and these licensees will ultimately be required to use only the 2025–2110 MHz portion of that band. It is unclear how many of these will be affected by our new rules. The Commission has not yet defined a small business with respect to local television transmission services. For purposes of this IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite). As noted, within the category of Wireless Telecommunications Carriers, except satellite, such firms with fewer than 1500 employees are considered to be small.[38] The data presented were acquired when the applicable SBA small business size standard was called Cellular and Other Wireless Telecommunications—which referred to all such firms having no more than 1,500 persons. According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[39] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[40] Thus, under this size standard, the majority of firms can be considered small.

73. *MSS.* There are two MSS operators in the 1990–2110 MHz band. These operators will provide services using the 2000–2020 MHz portion of the band. The SBA has developed a small business size for Satellite Telecommunications, which consist of all companies having annual revenues of less than $15 million.[41] Neither of the two MSS operators currently has revenues because one has not launched a satellite yet and the other is unable to provide service with its satellite because of the delays in the BAS transition. However, given that as of December 31, 2008, these MSS operators had assets of $1.341 billion and $664 million, respectively, we expect that both of these companies will have annual revenue of over $15 million once they are able to offer commercial services.[42] Consequently, we find that neither MSS operator is a small business. Small businesses often do not have the financial ability to become MSS system operators due to high implementation costs associated with launching and operating satellite systems and services.

74. *AWS.* The AWS licensees have not been issued and the Commission has no definite plans to issue these licensees. Presumably some of the businesses which will eventually obtain AWS licensees will be small businesses. However, we have no means to estimate how many of these licensees will be small businesses.

75. *Sprint Nextel.* Sprint Nextel as a new entrant to the band will occupy spectrum from 1990–1995 MHz. The Report and Order and Order grants Sprint Nextel a waiver of the deadline by which it must relocate the BAS, CARS, and LTTS incumbents from the 1990–2025 MHz portion of the band. Sprint Nextel belongs to the SBA category Wireless Telecommunications Carriers (except satellite).[43] Businesses in this category are considered small if

[29] 13 CFR 121.201, NAICS Code 517110.

[30] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[31] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[32] 13 CFR 121.201, NAICS Code 517210.

[33] 13 CFR 121.201, NAICS Code 517210.

[34] 13 CFR 121.201, NAICS Code 517110.

[35] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

[36] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[37] 47 CFR 101.803(b).

[38] 13 CFR 121.201, NAICS Code 517210.

[39] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Employment Size of Firms Subject to Federal Income Tax: 1997,'' Table 5, NAICS code 517212 (issued Oct. 2000).

[40] *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.''

[41] 13 CFR 121.201, NAICS Code 517410.

[42] TerreStar Corp., SEC Form 10–K 2008 Annual Report, filed March 12, 2009 at F2; ICO Global Communications (Holdings) Limited, SEC Form 10–K 2008 Annual Report, filed March 31, 2009 at 52. ICO's subsidiary which controls its satellite covering the United States has recently filed for bankruptcy. ICO Global Communications (Holdings) Limited, Form 8–K, filed May 15, 2009.

[43] 13 CFR 121.201, NAICS Code 517210.

they have fewer than 1500 employees.[44] As of December 31, 2008 Sprint Nextel had about 56,000 employees.[45] Consequently, we find that Sprint Nextel is not a small business.

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

76. The FNPRM proposes that if a new entrant other than Sprint Nextel relocates BAS, CARS, or LTTS incumbents and seeks cost sharing from a new entrant who enters the band later, then the first new entrant must provide the later new entrant with documentation of the relocation costs. The new entrants to whom this requirement applies may be an MSS operator or a future AWS licensee. Some of the future AWS licensees may be small entities.

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

77. Our primary concern in this FNPRM, which we release at the same time we release the Report and Order and Order, continues to be balancing the needs of incumbent BAS, CARS, and LTTS licensees to provide service without suffering harmful interference and the introduction of new MSS in a timely manner. The interest of the BAS, CARS, and LTTS licensees would be affected if one of the approaches for modifying the interference status of the nonrelocated BAS, CARS, and LTTS incumbents on February 9, 2010 is adopted: such as making the nonrelocated BAS, CARS, and LTTS incumbents secondary; requiring them to discontinue operations; or making them co-primary with the new entrants. The potential harm to BAS, CARS, and LTTS will depend on the particular changes made to the rules and the progress of Sprint Nextel in relocating the BAS, CARS, and LTTS incumbents. If Sprint Nextel is able to relocate all of the BAS, CARS, and LTTS incumbents by the February 8, 2010, then no BAS, CARS, and LTTS licensees will be harmed by the proposed changes. However, if not all of the BAS, CARS, and LTTS incumbents are relocated by February 8, 2010, the changes to the remaining incumbents' interference status on February 9, 2010 may cause significant economic harm to these incumbents.

78. The degree of harm suffered by nonrelocated BAS, CARS, and LTTS incumbents will depend on many factors. If the BAS, CARS, and LTTS incumbents' interference status is changed to co-primary, they would suffer no economic harm because, as the first primary licensees to enter the band, they would enjoy interference protection from the new entrants and would not have to avoid interfering with new entrants. If the nonrelocated BAS, CARS, and LTTS incumbents' status is changed to secondary, the BAS, CARS, and LTTS incumbents would still be able to operate their equipment as long as they do not cause interference to the primary users of the band. If the nonrelocated BAS, CARS, and LTTS incumbents are required to discontinue operations, they will suffer economic harm. BAS is used primarily for electronic newsgathering and fixed television relay links. If the BAS incumbents are not able to use their BAS equipment, the quality of their newscast may be affected and they would have to find alternate means of replacing the relay links. If CARS licensees are not able to use their equipment, they may have difficulty in delivering their cable television programming.

79. The possible change in the incumbents' interference status as of February 9, 2010 will affect any BAS, CARS, or LTTS incumbents who have not been relocated from the 1990–2025 MHz band by that date. This status change will affect all incumbent licensees equally. Consequently, we do not believe that the proposed rule changes will have a disparate impact on small entities.

80. Because of the integrated nature of BAS, CARS, and LTTS, all licensees in a market must transition to the new band plan at the same time. As a result, a single licensee who lags behind its peers in completing the transition could cause inconvenience and hardship to the new entrants as well as the other incumbent licensees in the market. Consequently, in the FNPRM the Commission seeks comment on changing the interference status of nonrelocated BAS, CARS, and LTTS incumbents despite the potential of these incumbents experiencing interference or having to discontinue use of part of their licensed spectrum.

81. Nonetheless, however, we note that the number of BAS, CARS, and LTTS incumbents that will be affected by the change in interference status should be small because Sprint Nextel is required to complete the BAS transition by February 8, 2010. To minimize the potential hardship to BAS, CARS, and LTTS incumbents, we seek comment on whether we should look favorably on requests from individual incumbents for waiver of the change of the interference status in the event that it would cause hardship or not be in the public interest. In addition, the possible change in the interference status of the BAS, CARS, and LTTS incumbents would not change the obligation of the new entrants to relocate the remaining incumbents until the band sunset date of December 9, 2013.

82. Most of the proposals in the FNPRM address the cost sharing obligations between the MSS entrants, AWS entrants, and Sprint Nextel. However, the interest of BAS, CARS, and LTTS licensees would be positively affected by making it more likely that these licensees in the thirty largest markets will be relocated to the new channel plan. The FNPRM proposes adding the requirement that MSS entrants relocate BAS, CARS, and LTTS in markets 1–30 within three years of beginning operations. Because BAS, CARS, and LTTS that are not relocated by the band sunset date of December 9, 2013 become secondary, increasing the likelihood that BAS, CARS, and LTTS will be relocated by MSS is a potential benefit for the incumbents—especially since the MSS entrants will be required to provide the relocated incumbents with comparable facilities. Note that because Sprint Nextel has an obligation to relocate the BAS, CARS, and LTTS incumbents by February 8, 2010, the MSS entrants may not have to relocate the incumbents.

83. The proposals made in the FNPRM may affect the interest of future AWS licensees in the band, some of whom may be small businesses. However, because these licenses have not been issued, we have no means to determine whether the proposals will have a disparate impact on these potentially small businesses. We also have no means to determine what steps would minimize the impact on any of these potentially small businesses.

F. Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rules

84. None.

Ordering Clauses

85. Pursuant to Sections 4(i), 5(c), 303(f), 332, 337 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(c), 303(f), 332, 337 and 405, this Further NPRM of Proposed Rulemaking *is adopted*.

86. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Report and Order and Order and*

[44] *Id.*

[45] Sprint Nextel Corp., SEC Form 10–K 2008 Annual Report, filed Feb. 27, 2009 at 14.

Further NPRM of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E9–14757 Filed 6–22–09; 8:45 am]

BILLING CODE 6712–01–P

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1545 and 1552

[EPA–HQ–OARM–2008–0817; FRL–8906–4]

EPAAR Prescription and Clauses—Government Property—Contract Property Administration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) amends the EPA Acquisition Regulation (EPAAR) to update policy, procedures, and contract clauses. The proposed rule consolidates the EPAAR physical property clauses (Decontamination, Fabrication, and Government Property), re-designates the prescription number in the data clause, and updates the roles and responsibilities of the contractor, DCMA and CPC.

DATES: Comments must be received on or before July 23, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OARM–2008–0817, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* docket.oei@epa.gov.
- *Fax:* (202) 566–1753.
- *Mail:* EPA–HQ–OARM–2008–0817, OEI Docket, Environmental Protection Agency, 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of three (3) copies.
- *Hand Delivery:* EPA Docket Center-Attention OEI Docket, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OARM–2008–0817. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket, and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment, and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties, and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov,* or in hard copy at the Government Property-Contract Property Administration Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the EPA Docket Center is (202) 566–1752. This Docket Facility is open from 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: Iris Redmon, Policy, Training and Oversight Division, Acquisition, Policy and Training Service Center (3802R), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; *telephone number:* 202–564–2644; *fax number:* 202–565–2475; *e-mail address: redmon.iris@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI, and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket.

Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

The Federal Acquisition Regulation (FAR) on Government Property was revised June 14, 2007. This revision removed the previous restriction on providing government property for contract performance, and gave