

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);

- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997); is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 3, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are

encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Particulate matter, Wilderness areas.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: October 25, 2010.

**Jared Blumenfeld,**

*Regional Administrator, EPA Region IX.*

[FR Doc. 2010-27634 Filed 11-1-10; 8:45 am]

**BILLING CODE 6560-50-P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 74 and 78

[WT Docket No. 02-55, ET Docket No. 00-258 and 95-18; FCC 10-179]

#### Relocation Cost Sharing in the Broadcast Auxiliary Service

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This document concludes the Commission's longstanding efforts to relocate the Broadcast Auxiliary Service (BAS) from the 1990-2110 MHz band to the 2025-2110 MHz band, freeing up 35 megahertz of spectrum in order to foster the development of new and innovative services. This decision addresses the outstanding matter of Sprint Nextel Corporation's (Sprint Nextel) inability to agree with Mobile Satellite Service (MSS) operators in the band on the sharing of the costs to relocate the BAS incumbents. To resolve this controversy, the Commission applies its time-honored relocation principles for emerging technologies previously adopted for the BAS band to the instant relocation process, where delays and unanticipated developments have left ambiguities and misconceptions among the relocating parties. In the process, the Commission balances the responsibilities for and benefits of relocating incumbent BAS operations among all the new entrants in the different services that will operate in the band.

**DATES:** Effective December 2, 2010.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Oros, (202) 418-0636, Policy and Rules Division, Office of Engineering and Technology, *Nicholas.Oros@fcc.gov*.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling*, WT Docket No. 02-55, ET Docket No. 00-258 and 95-18, adopted September 29, 2010, and released September 29, 2010. The full text of this document is available on the Commission's Internet site at *www.fcc.gov*. It is also available for inspection and copying during regular business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW., Washington, DC 20554. The full text of this document also may be purchased from the Commission's duplication contractor, Best Copy and Printing Inc., Portals II, 445 12th St., SW., Room CY-B402, Washington, DC 20554; telephone (202) 488-5300; fax (202) 488-5563; e-mail *FCC@BCPIWEB.COM*.

#### Summary of the Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling

1. This Report and Order and Declaratory Ruling concludes the Commission's longstanding efforts to relocate the Broadcast Auxiliary Service (BAS) from the 1990-2110 MHz band to the 2025-2110 MHz band, freeing up 35 megahertz of spectrum in order to foster the development of new and innovative services that can provide mobile broadband and nationwide communications capabilities. This decision in particular addresses the outstanding matter of Sprint Nextel Corporation's (Sprint Nextel) inability to agree with Mobile Satellite Service (MSS) operators in the band on the sharing of the costs to relocate the BAS incumbents. To date, Sprint has shouldered the entire cost of this relocation, which was completed on July 15, 2010.

2. To resolve this important issue, the Commission applied its time-honored relocation principles for emerging technologies previously adopted for the BAS band to the instant relocation process, where delays and unanticipated developments have left ambiguities and misconceptions among the relocating parties. These principles have been a fundamental part of the Commission's past efforts to unlock value and promote investment through the relocation process. In the end, the

Commission balanced the responsibilities for and benefits of relocating incumbent BAS operations among all the new entrants in the different services that will operate in the band.

3. The Commission has sought to relocate BAS licensees to a more spectrally efficient band plan and make spectrum available for other uses, while fairly distributing the relocation costs among the new users. Because the path leading to this Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling (Report and Order and Declaratory Ruling) has been especially complex, the Commission summarized the history of this proceeding to the extent relevant to the decisions it was making; see paragraphs 4 through 12 of the Report and Order and Declaratory Ruling. In the Declaratory Ruling the Commission addresses a number of disputes that have arisen in this proceeding involving requirements that were established when the current BAS relocation scheme was adopted in 2004; see paragraphs 15 through 44 of the Report and Order and Declaratory Ruling.

#### Discussion

4. The Report and Order and Declaratory Ruling addresses disputes regarding sharing the cost of relocating the 2 GHz BAS incumbents. The Commission concludes that the best course of action is to clarify and modify the cost sharing requirements to address the ambiguity or lack of definition in the current requirements to correspond to the stated purposes and structure of the cost sharing principles set forth in the *Commission decision which established Sprint Nextel's entry into the band, the 800 MHz R&O (69 FR 67823)*, as well as to balance the responsibilities for and benefits of relocating incumbent BAS operations among all the new entrants in the band in a way that is consistent with the Commission's relocation policies set forth in the *Emerging Technologies* proceeding. One of the important underlying principles of the relocation policy is that 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. The Commission noted its concern that were it to stray from the traditional application of the *Emerging Technologies* relocation policy, future licensees might be unwilling or unable to assume the burden and cost of clearing spectrum quickly if they were unsure of the likelihood that they will be reimbursed by other new entrants.

#### Termination Date of the Cost Sharing Obligations

5. As explained in the Declaratory Ruling adopted along with this Report and Order, the MSS and AWS entrants have an obligation to reimburse Sprint Nextel for a portion of the costs of relocating the BAS incumbents if they enter the band prior to either the end of two future events connected to adoption of the *800 MHz R&O*: the 800 MHz reconfiguration or the 800 MHz true-up. Because the timing of either of these events is presently unknown, the new entrants are in a state of uncertainty as to their financial obligation. The Commission believes that all of the parties will be served by adopting a date certain for extinguishing cost-sharing obligations—the band sunset date of December 9, 2013. This will harmonize the relocation requirements for the BAS band with the relocation rules for other bands that were based on the *Emerging Technologies* principles. The MSS entrants argue that the cost sharing requirements for this band have departed from the *Emerging Technologies* principles in a number of ways and argue that the Commission should not follow the principles in regard to their cost sharing obligations. While the Commission has made departures from the *Emerging Technologies* procedures, those limited departures were made because of the unique features of the BAS transition. However, where circumstances do not require some deviation from *Emerging Technologies*, the Commission shall adhere closely to these time-tested principles to balance the interest of incumbent licensees, new entrants who relocate incumbents, and new entrants who benefit from the band clearing. In this case, because the main reason for allowing early termination of the new entrants' cost-sharing obligation no longer applies—*i.e.* Sprint Nextel will probably not be taking credit for all of its BAS relocation costs against the anti-windfall payment that is described in the *800 MHz R&O*—there is no compelling reason to end the cost sharing obligation of the new entrants any earlier than the band sunset date. Consequently, any new entrant that enters the band before December 9, 2013 will be required to reimburse the entrant who relocated BAS incumbents a *pro rata* share of the relocation costs, subject to the limitations discussed in the Report and Order.

6. The Commission left in place the current band sunset date of December 9, 2013, despite the request by Sprint Nextel to adjust the date until 2015. The sunset date is a vital component of the

*Emerging Technologies* policies because, among other things, it specifies the date upon which unrellocated incumbents become secondary and it provides a length of time for incumbent licensees to transition from the band. Because the BAS relocation has been completed, there is no need to change the sunset date to 2015. While Sprint Nextel is correct that AWS licensees may not enter the band by the current sunset date, the Commission's goal in choosing the sunset date is not to provide the entrant who relocates incumbents with a greater likelihood of receiving cost sharing from later entrants. When Sprint Nextel undertook the responsibility to relocate the BAS incumbents as a result of the *800 MHz R&O*, it knew the timing of the band sunset and the uncertainties of the entrance of AWS licensees.

#### Definition of "Enter the Band"

7. The "enter the band" terminology was used in the *800 MHz R&O* and *AWS Sixth R&O* to denote when the new entrants would incur an obligation to reimburse Sprint Nextel for a *pro rata* share of the cost of relocating the BAS incumbents, but neither order defined the term.

8. The Commission concludes that an MSS entrant will "enter the band" and therefore incur a cost sharing obligation when the MSS entrant certifies that its satellite is operational for purposes of meeting its operational milestone. In previous *Emerging Technologies* band clearings, the later entrant becomes responsible for reimbursing the earlier entrants' relocation cost when the later entrant is in the position to cause interference to the incumbent licensees prior to their relocation. The Commission previously determined that it does not believe in general that the MSS entrants may operate without causing interference to the BAS incumbents. Consequently, once the MSS satellites are operational, they would have the potential for causing interference to the incumbent BAS operations. As with the tests used in previous band clearings, the definition adopted here is easy to apply and not subject to contention. Also, the test is in keeping with the nature of the BAS service.

9. The AWS entrants require a different definition of "enter the band." The Commission concludes that an AWS entrant will "enter the band" on a license-by-license basis on the date that the grant of each long-form application becomes a final action. This requirement has the advantage of ease of administration, and conforms to the overall *Emerging Technologies* policies.

Once the AWS entrant's long form application has been granted, signifying the issuance of a license, the AWS entrant will be in the position to roll out service and benefit from Sprint's relocation of the BAS incumbents. Sprint Nextel's right to seek reimbursement from an AWS licensee that enters the band prior to the sunset date is limited to an AWS licensee's proportional share of the costs incurred in the BAS clearance, on a *pro rata* basis according to the amount of spectrum that each licensee is assigned in the 1990–2025 MHz band. The Commission intends to adopt specific cost sharing rules for AWS in the 1995–2000 MHz and 2020–2025 MHz bands when it adopts service rules which define the licensing scheme for these bands.

#### Limitations on MSS Cost Sharing Obligations

10. In the *800 MHz R&O*, the costs for which the MSS entrants had to reimburse Sprint Nextel were limited to a *pro rata* share of relocating the top 30 markets and fixed BAS links because these were the BAS incumbents that the MSS entrants had to relocate before they could begin operations. The Commission concludes that even with the changed circumstances surrounding the BAS relocation, the most appropriate course is to retain the current cost sharing obligations for MSS entrants. Although the Commission recognizes that the parties have conflicting interests at stake, this requirement was clearly established from the outset and the Commission declines to reverse it now, where all parties involved have been aware of their respective rights and obligations and presumably structured their activities accordingly.

11. TerreStar, one of the MSS entrants, claims that equitable factors argue for limiting the MSS entrants' reimbursement obligation to the expenses Sprint Nextel incurred before September 7, 2007 because if Sprint Nextel had completed the BAS relocation by the end of the BAS 30-month relocation period there would have been no relocation expenses incurred after this date. The Commission is not persuaded that equitable factors support allowing TerreStar or DBSD (the other MSS entrant) to escape paying a *pro rata* share of the BAS relocation costs. The MSS entrants have suffered little harm from the delays in the BAS relocation, and the Commission has taken steps to minimize the impact that delays in the transition would have on DBSD and TerreStar's plans to begin operations. It concludes that there is no reason to

reduce their cost sharing obligations further.

12. The Commission rejects DBSD's suggestion that the amount that the MSS entrants owe for BAS relocation be depreciated from when Sprint Nextel signed frequency relocation agreements with the BAS incumbents. The Commission also rejects DBSD's suggestion that cost caps be applied to the BAS relocation costs. Finally, the Commission will not limit Sprint Nextel's ability to seek reimbursement from MSS entrants to only those expenses it cannot receive credit against the 800 MHz anti-windfall payment, as suggested by TerreStar.

#### Payment Issues

13. In the Report and Order the Commission adopts a policy affirming the tentative conclusion made in the *June 2009 Further Notice* that Sprint Nextel may not both receive credit in the 800 MHz true-up and receive reimbursement from the MSS and AWS entrants for the same costs. This has been the rule since the cost sharing requirements were adopted in the *800 MHz R&O*, and is necessary to prevent Sprint Nextel from receiving the unjustified windfall of a double recovery, and no party has objected to this conclusion. If the true-up occurs prior to Sprint Nextel receiving reimbursement from another entrant, the Commission will require Sprint Nextel to inform the other entrant of the expenses for which it has received credit in the 800 MHz true-up prior to receiving reimbursement. The other entrant will not be obligated to reimburse Sprint Nextel for what would otherwise be its share of those particular expenses.

14. The principle that Sprint Nextel is not entitled to make a double recovery also applies to reimbursements it receives from among the new entrants. Multiple new entrants may have an interest in the same portion of the relocated BAS spectrum because, for example, entrants change business structure or assign their licenses. Accordingly, the Commission specifies that Sprint Nextel is not entitled to obtain reimbursement from a new entrant for relocation costs that Sprint Nextel has already received from another new entrant. Thus, if a new entrant assigns its license to a third party after the new entrant has reimbursed Sprint Nextel, the Commission would reject a claim that the assignee is responsible for reimbursing Sprint Nextel for that same relocation expense. The converse also holds: An assignee would be considered a new entrant and is responsible for

unpaid cost sharing associated with a particular portion of the spectrum. However, to the extent that a new entrant seeks to assign its license to a third party prior to satisfying its reimbursement obligation, the assignor and assignee would be jointly and severally liable for the reimbursement costs until paid.

15. As for when Sprint Nextel should be reimbursed by the other new entrants for its BAS relocation cost, the Commission does not adopt either of the proposals on which it sought comment on the *June 2009 Further Notice*. The Commission concludes that the reimbursement deadline for a new MSS or AWS entrant will be based on when the new entrant has "entered the band." Once the new entrant has entered the band, but no later than the sunset date, Sprint Nextel may provide the new entrant with the required documentation and request payment. The new entrant will then have thirty days to submit its reimbursement to Sprint Nextel, unless, the parties agree to different terms (such as an installment plan). This approach avoids complexities of administering separate deadlines for each market and provides certainty to the parties.

16. The Commission will not require, nor will it object if parties agree to, an installment payment plan for BAS relocation reimbursement. The Commission encourages the parties interested in making installment payments to use the 30-day payment window to negotiate an appropriate installment payment plan. If no installment plan is agreed upon, a new entrant must pay the full cost sharing amount in one payment at the reimbursement deadline.

17. The Commission sees no reason to link the payment of new entrants' cost sharing obligations to the true-up as the MSS entrants have suggested. The Commission does not think it would be prudent to introduce the uncertainty associated with the true-up date to the payment date of the BAS cost sharing, especially given that it has prohibited Sprint Nextel from both claiming credit for BAS relocation costs against the anti-windfall payment and receiving cost sharing payments from new entrants for the same costs.

18. As the Commission proposed in the *June 2009 Further Notice*, it will require that Sprint Nextel share with any other entrant from whom it seeks reimbursement its relocation cost as documented in its annual audit as provided to the transition administrator, copies of third-party audited statements of expenses associated with the BAS relocation, and copies of the relevant

frequency relocation agreements. As discussed, the new entrant will have 30 days, unless other terms are agreed upon, to make its reimbursement payment after Sprint Nextel has provided this documentation.

19. The MSS entrants have requested the ability to examine and contest individual expenses while Sprint Nextel has expressed concern that the MSS entrants are merely trying to delay or limit their cost sharing obligations. With regard to disputes that may arise with either MSS entrants or future AWS entrants, we note that parties have several options to resolve disputes that may arise including mediation, arbitration, or pursuing civil remedies in the court system. Parties contesting a specific cost sharing obligation shall provide evidentiary support to demonstrate that their calculation is reasonable and made in good faith; specifically, they are expected to exercise due diligence to obtain the information necessary to prepare an independent estimate of the relocation costs in question.

20. The Commission did not adopt the proposal in the *June 2009 Further Notice* to allow Sprint Nextel to recover relocation costs associated with all 20 megahertz of MSS spectrum from a single MSS entrant. In reaching the decision, we observe that under the Commission's *Emerging Technologies* policies the amount that the earlier entrant could recover has always been based on the amount of the later entrant's spectrum that the earlier entrant has cleared. The Commission concludes that it should not depart from these traditional *Emerging Technologies* policies.

21. As to future AWS entrants, the Commission adopted rules consistent with the tentative conclusion the Commission made in the *June 2009 Further Notice* that the future AWS licensees that enter the band prior to the sunset date will be responsible for reimbursing Sprint Nextel for relocating the BAS incumbents, less any BAS relocation costs for which Sprint Nextel had received credit against the anti-windfall payment. This conclusion is consistent with past actions in this proceeding and with the traditional *Emerging Technologies* policies. However, as the Commission noted in the *June 2009 Further Notice*, determining how to apportion the relocation cost among the future AWS licensees will have to wait until the licensing scheme for the AWS licensees is adopted. The Commission intends to adopt specific cost sharing rules, consistent with this Order, to govern the cost-sharing process between Sprint

Nextel and AWS entrants in the 1995–2000 MHz and the 2020–2025 MHz bands, when the Commission adopted service rules which defined the licensing scheme for these bands.

22. The Commission will adopt no specific policies or procedures as to how it should proceed if later new entrants fail to reimburse an earlier entrant for the cost of relocating BAS incumbents as required. Instead, it will address complaints regarding failure to make required payments that are filed before the Commission through our existing enforcement mechanisms.

#### **The Automatic Stay of Section 362 of the Bankruptcy Code**

23. DBSD filed a petition to stay the rulemaking proposed in the *June 2009 Further Notice* on the grounds that the rulemaking must be automatically stayed under section 362(a) of the Bankruptcy Code, 11 U.S.C. 362(a). The Commission finds DBSD's arguments misplaced, and denies its petition for stay.

24. The automatic stay of the Bankruptcy Code, 11 U.S.C. 362(a), essentially bars actions against the debtor to recover a pre-petition claim against the bankruptcy estate or to obtain possession or exercise control over property of the estate. The regulatory exception to the automatic stay, 11 U.S.C. 362(b)(4), excepts from the automatic stay actions taken pursuant to a government unit's or organization's police or regulatory powers, including enforcement of a judgment other than a money judgment.

25. The *June 2009 Further Notice*, which focused on clarifying the cost-sharing and reimbursement obligations set forth in prior Commission orders, was designed to further the Commission's long stated public policy goals of efficient management of the radio spectrum. The *June 2009 Further Notice*, therefore, falls squarely within the regulatory exception to the automatic stay. DBSD's arguments to the contrary are without merit. The declaratory ruling, which includes matters of Commission policy related to but not subject to the *June 2009 Further Notice*, likewise fits the regulatory exception: the Commission has no pecuniary interest in the outcome and is acting in the public interest for a public purpose.

26. Based on the legal standards, the Commission agrees with Sprint Nextel that the general rulemaking proceeding is not subject to the automatic stay merely because one of the parties to the rulemaking is a debtor in a bankruptcy case.

27. Nor is there any basis to exclude the DBSD debtors from the effects of this Report and Order and accompanying Declaratory Ruling merely because it may result in a financial impact on one or more of those parties. Moreover, under the well-established principles of the regulatory exception to the automatic stay, a regulatory body can implement its public policies, and even adopt orders directed at particular industry participants, without violating the automatic stay so long as the regulatory body does not seek to enforce a money judgment outside of the bankruptcy claims process.

28. The Commission rejects DBSD's contention that the regulatory exception does not apply because, according to DBSD, the *June 2009 Further Notice* will effectively adjudicate or resolve the reimbursement dispute between Sprint Nextel and DBSD. The express purpose of this Report and Order and accompanying Declaratory Ruling is to further the policy goals of promoting more efficient use of spectrum and permitting the introduction of new services. This Report and Order and accompanying Declaratory Ruling promotes the general regulatory policies of the Commission, but does not seek to determine the pecuniary interest of any individual debtor or creditor. The rulemaking and declaratory ruling apply to a variety of industry participants, not just to DBSD, and are applicable to all similarly situated entities. Moreover, the final result of this Report and Order and accompanying Declaratory Ruling is not a judgment for or against Sprint Nextel on its particular reimbursement claims. Now that the obligations are clarified, it is up to Sprint Nextel to pursue its claims. With respect to the DBSD bankruptcy, any proceedings by Sprint Nextel on a claim for monetary recovery against a debtor in the DBSD bankruptcy case is a matter for the Bankruptcy Court and is not addressed in this Report and Order and accompanying Declaratory Ruling. Thus, the Commission's rulemaking and issuance of a declaratory ruling have remained within the limits of the regulatory exception to the automatic stay.

29. In addition, the results of this Report and Order and Declaratory Ruling meet both the pecuniary purpose and public policy tests limiting the regulatory exception. With respect to the pecuniary purpose test, the Commission is acting solely in its regulatory capacity and has no creditor interest in the DBSD bankruptcy case or in the outcome of the Sprint Nextel-DBSD dispute. The Commission's actions here also meet the "public policy" test. The Commission's actions

are not designed to protect the claim of Sprint Nextel or any other creditor against the DBSD bankruptcy estates.

30. Although the Eastern District of Virginia has referred claims to the Commission for “resolution,” the actions the Commission takes here are not an adjudication of the claims that Sprint Nextel, DBSD, and TerreStar have raised in that court proceeding. Instead, the Commission clarifies its relocation rules to assist the parties, as well as the court, in determining the responsibilities of each party in the ongoing BAS relocation.

#### Retroactivity

31. The question about cost sharing requirements in the Report and Order involves when the MSS entrants’ obligation to share the costs of BAS relocation ends, not whether they are under such an obligation. In the Declaratory Ruling, the Commission explained that under the requirements set out in the *800 MHz Order*, the MSS operators incur a cost sharing obligation if they enter the band before the 800 MHz band reconfiguration or true-up process is complete. Once incurred, the operator’s reimbursement obligation continues until discharged by payment or cut off by intervening events. Because the 800 MHz rebanding process has unfolded in unexpected ways, the precise timing and nature of the triggering events that would cut off these obligations was unspecified, and, under these circumstances, the exact dates that the MSS operators’ ongoing payment obligations would terminate were not set.

32. To the extent the Commission’s clarification of the triggering events for termination of the payment obligations constitutes a new or modified rule, it would be considered primarily retroactive only if it changed the past legal consequences of past actions. This clarification, however, has worked no change in the legal consequences (*i.e.*, incurrence of the reimbursement obligation) of the MSS operators’ past actions (*i.e.*, entering the band). Moreover, the clarification does not change how the MSS operators would have been treated if the band reconfiguration had proceeded according to plan. Since it did not, however, the circumstances that would have relieved the MSS operators of their payment obligations did not come about, leaving them with these obligations intact and the manner of their termination (other than for payment) unspecified. In taking action now to establish a firm date in the future (December 9, 2013) that will cut off the MSS operators’ cost sharing

obligations, the Commission acts prospectively.

#### Paperwork Reduction Analysis

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

#### Congressional Review Act

34. The Commission SHALL SEND a copy of this Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A). In addition, the Commission’s Consumer and Governmental Affairs Bureau will send a copy of the Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling, including the FRFA, to the Chief Counsel for Advocacy of the SBA.

#### Final Regulatory Flexibility Analysis

35. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making (FNPRM)*.<sup>2</sup> The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA.<sup>3</sup> No commenting parties specifically addressed the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>4</sup>

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

36. In this Fifth Report and Order, Eleventh Report and Order, and Sixth Report and Order and Declaratory Ruling (collectively, Report and Order), we modify and clarify 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 have been 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, completed relocation of the BAS incumbents from the band on July 15, 2010. The MSS entrants (DBSD and TerreStar), who will occupy the 2000–2020 MHz spectrum, have both launched satellites. The AWS licenses for the 1995–2000 MHz and 2020–2025 MHz bands have not yet been issued.

37. 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 has 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.

38. The Report and Order 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 entrants can incur a relocation obligation until the band relocation rules sunset on December 9, 2013. The Report and Order further 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 Report and Order concludes that AWS entrants will incur a cost sharing obligation upon grant of their long form application for their licenses. The Report and Order decrees that Sprint Nextel may provide a new entrant with documentation of the relocation expenses for which reimbursement is

<sup>1</sup> *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. 857 (1996).

<sup>2</sup> *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02–55, ET Docket No. 00–258 and ET Docket No. 95–18, Report and Order and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 7904 Appendix C (2009).

<sup>3</sup> *See Id.* at ¶ 1.

<sup>4</sup> *See* 5 U.S.C. 604.

owed only after the new entrant has “entered the band” and therefore incurred a cost sharing obligation. The new entrant will then have thirty days to pay the amount owed Sprint Nextel, unless the parties agree to a different schedule.

39. In addition, the Report and Order concludes that the MSS 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 Report and Order requires Sprint Nextel 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, copies of frequency relocation agreements that it has with any BAS incumbent for which it is seeking cost sharing, and third-party audited statements of expenses associated with the BAS relocation.

#### B. Legal Basis

40. The action is taken pursuant to sections 4(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332.

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

41. 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 rules, if adopted.<sup>5</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>6</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>7</sup> 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.<sup>8</sup>

42. 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.

43. 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.<sup>9</sup> Neither of the two MSS operators currently has revenues because, while they both have operational satellites, they are not providing commercial service. 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.<sup>10</sup> 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.

44. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.<sup>11</sup> Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”<sup>12</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>13</sup> Because Census Bureau data are not yet available for the new

category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.<sup>14</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.<sup>15</sup> For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.<sup>16</sup> Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.<sup>17</sup> Thus, we estimate that the majority of wireless firms are small.

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

46. *Sprint Nextel*. Sprint Nextel as a new entrant to the band will occupy spectrum from 1990–1995 MHz. The Third Report 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)*.<sup>18</sup> Businesses in this category are considered small if they have fewer than 1,500 employees.<sup>19</sup> As of December 31, 2009 Sprint Nextel had about 40,000 employees.<sup>20</sup> Consequently, we find that Sprint Nextel is not a small business.

<sup>5</sup> Small Business Act, 15 U.S.C. 632 (1996).

<sup>9</sup> 13 CFR 121.201, NAICS Code 517410.

<sup>10</sup> TerreStar Corp., SEC Form 10-K 2008 Annual Report, filed March 12, 2009 at F-2; 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 is currently in bankruptcy. ICO Global Communications (Holdings) Limited, Form 8-K, filed May 15, 2009.

<sup>11</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

<sup>12</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

<sup>13</sup> 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

<sup>14</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

<sup>15</sup> *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 for firms with “1,000 employees or more.”

<sup>16</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

<sup>17</sup> *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 for firms with “1,000 employees or more.”

<sup>18</sup> 13 CFR 121.201, NAICS Code 517210.

<sup>19</sup> *Id.*

<sup>20</sup> Sprint Nextel Corp., SEC Form 10-K 2009 Annual Report, filed Feb. 26, 2010 at 12.

<sup>5</sup> 5 U.S.C. 603(b)(3).

<sup>6</sup> 5 U.S.C. 601(6).

<sup>7</sup> 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).

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

47. The Report and Order clarifies the existing obligation of new entrants to reimburse the party who relocates BAS incumbents for a portion of the relocation costs. It specifies that an AWS entrant incurs a cost sharing obligation upon grant of the long-form application for its license, and an MSS entrant incurs an obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone. The reimbursement obligation continues until the December 9, 2013 band sunset date. The Report and Order also specifies when payment of relocation cost is due.

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

48. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>21</sup>

49. Most of the decisions in the Report and Order address cost sharing obligations between the MSS entrants, future AWS entrants, and Sprint Nextel for relocating the BAS incumbents. Of these new entrants only the future AWS entrants may be small entities. Because no licensing scheme for the AWS spectrum has been determined, we are unable to determine how many (if any) of these future licensees may be small entities. It is also difficult to determine how the impact of the cost sharing rules on them may be reduced.

50. All of the new entrants benefit from the clarity that the Report and Order brings to the cost sharing rules. The new entrants can now be certain how they incur a cost sharing obligation, what expenses are eligible for cost sharing, when they must make payment, and when the obligation will end if they do not incur a cost sharing obligation (*i.e.* they do not enter the band by the sunset date). In this way the

cost sharing requirements adopted in the Report and Order benefit those future AWS entrants who may be small entities.

51. Under the cost sharing rules, Sprint Nextel may receive cost sharing from the other new entrants to the band. One possible alternative to lessen the impact on new entrants who are small entities would be to reduce the amount that small entities are required to reimburse other entrants for the BAS relocation. This would in effect require Sprint Nextel to subsidize the small entities. This would be unfair because Sprint Nextel did not volunteer to subsidize the small entities, the small entities would likely be direct competitors of Sprint Nextel, and Sprint Nextel has spent a large sum of money on the BAS transition. Sprint Nextel is only receiving 5 megahertz of the 35 megahertz of spectrum and up to this point has shouldered the entire cost of the BAS transition. Not requiring the future AWS entrants who are small entities to pay their share of the relocation cost would also harm the Commission's future relocation policies. In the future licensees are not likely to volunteer to relocate incumbents if they are forced to subsidize other licensees.

52. Another alternative would be to let the small entities pay their cost sharing obligation on the installment plan.<sup>22</sup> Allowing use of installment payments would in effect make the party who relocated the incumbents a creditor of the small entity. This would be more costly for the party who relocated the incumbents because they will receive payment later. It would also subject the relocating party to increased risk of non-payment. There is also no record as to what specific installment plan could be adopted.

53. Because of these drawbacks, we do not believe either of these alternatives is appropriate. Furthermore, because no AWS licenses have been issued, no small entities currently have a cost sharing obligation for the BAS transition. When AWS licenses are issued at some future date, the potential licensees will know for certain that they face a cost sharing liability because of the refinement of the cost sharing rules adopted in this Report and Order.

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

54. None.

<sup>22</sup> We rejected requiring the MSS entrants to pay their obligation under an installment plan. See paragraph 16, *supra*.

**Ordering Clauses**

55. Pursuant to sections 4(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332, this Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order *is adopted* and will become effective 30 days after publication in the **Federal Register**.

56. Pursuant to sections 4(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 303(c), 303(f), 303(g), 303(r), 303(y), and 332, this Declaratory Ruling *is adopted* and was effective September 29, 2010.

57. The Petition for Stay filed by New DBSD Satellite Services G.P. *is denied*.

58. The Commission *shall send* a copy of this Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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**DEPARTMENT OF TRANSPORTATION**

**National Highway Traffic Safety Administration**

**49 CFR Part 571**

[Docket No. NHTSA-2010-0148]

RIN 2127-AK39

**Federal Motor Vehicle Safety Standards; Head Restraints**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Final rule; technical amendments; response to petitions for reconsideration and petitions for rulemaking.

**SUMMARY:** This document responds to petitions for reconsideration of the agency's May 2007 final rule amending our head restraint standard, and to related petitions for rulemaking. This document also makes technical corrections. The May 2007 final rule was issued in response to petitions for reconsideration of our December 2004 final rule upgrading our head restraint standard. We are partially granting and partially denying the petitions for reconsideration.

<sup>21</sup> See 5 U.S.C. 603(c).