

APPENDIX B
Final Regulatory Flexibility Analysis
Second Report and Order

As required by the Regulatory Flexibility Act (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*.² The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and objectives of, the *Second Report and Order* in WT Docket No. 93-61:

The provisions adopted in the *Second Report and Order* enhance the efficiency of the competitive bidding process and promote use of the 902-928 band for the multilateration Location and Monitoring Service ("LMS"). The adopted provisions are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and to carry out statutory mandates that certain designated entities, including small businesses, are afforded an opportunity to participate in the competitive bidding process and in the provision of multilateration LMS services. The adopted provisions are based on the competitive bidding authority of Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j), which authorized the Commission to use auctions to select from among mutually exclusive initial applications in certain services, including multilateration LMS.

B. Summary of significant issues raised by public comments in response to the IRFA:

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, PR Docket No. 93-61, 12 FCC Rcd 13942, 13981 (1997) ("*Further Notice*").

³ See 5 U.S.C. § 604.

There were no comments filed directly in response to the IRFA; however, the Commission received 2 comments in response to the *Further Notice*. This FRFA analyzes the modifications adopted in response to those comments, and their possible economic impact on small entities. See detailed discussion in Section E, *infra*.

C. Description and estimate of the number of small entities to which rules will apply:

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 our rules.⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁶ 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 Small Business Administration (SBA).⁷ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁸ Nationwide, as of 1992, there were approximately 275,801 small organizations.⁹ "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹⁰ As of 1992, there were approximately 85,006 such jurisdictions in the United States.¹¹ This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.¹² The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006

⁴ 5 U.S.C. § 603(b)(3).

⁵ *Id.* § 601(6).

⁶ 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).

⁷ Small Business Act, 15 U.S.C. § 632 (1996).

⁸ 5 U.S.C. § 601(4).

⁹ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

¹⁰ 5 U.S.C. § 601(5).

¹¹ U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

¹² *Id.*

governmental entities, we estimate that 81,600 (91 percent) are small entities. Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the rules.

The SBA has developed a definition of small entities applicable to LMS licensees. Therefore, the applicable definition under SBA rules of a small entity is the definition under the rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.¹³ According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.¹⁴ Therefore, using such data, even if all twelve of these firms were LMS companies, nearly all such carriers were small businesses under the SBA's definition. As a practical matter, there are only a handful of existing LMS licensees -- those being those licensed under the former Automatic Vehicle Monitoring service.

In the *Second Report and Order*, the Commission has adopted more refined definitions for small business categories. The definition of a "small business" is an entity with average annual gross revenues for the preceding three years not to exceed \$15 million. The definition of a "very small business" is an entity with average annual gross revenues for the preceding three years not to exceed \$3 million. We are seeking SBA approval for these new LMS size standards.¹⁵

As noted in the *Second Report and Order*, there are 528 licenses to be awarded in the upcoming auction. New entrants could obtain multilateration LMS licenses through the competitive bidding procedure, and take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation. Additionally, entities that are neither incumbent licensees nor geographic area licensees could enter the market by obtaining a multilateration LMS license through partitioning or disaggregation. The Commission cannot estimate how many licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation, because it has not yet determined the size or number of multilateration LMS licenses that will be granted in the future.

Therefore, the number of small entities that will be affected is unknown. Given the fact that no reliable estimate of the total number of future multilateration LMS licensees can be made, the Commission assumes for purposes of this FRFA that all of the licenses will be

¹³ 13 C.F.R. § 121.201, SIC code 4812.

¹⁴ 1992 Census, Series UC92-S-1, at Table 5, SIC code 4812.

¹⁵ See also *Second Report and Order*, supra at n. 47.

awarded to small businesses. It is also possible that a significant number of the potential licensees who could take the opportunity to partition and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small entities.

D. Summary of the projected reporting, recordkeeping, and other compliance requirements:

The rules and provisions adopted in the *Second Report and Order* include the possibility of new reporting and recordkeeping requirements for a number of small business entities, as follows:

1. Competitive Bidding Applications. LMS license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for LMS licenses by filing a short-form application (FCC Form 175), and will file a long-form application (FCC Form 601) at the conclusion of the auction. Additionally, entities seeking treatment as small businesses will need to submit information pertaining to the gross revenues of the small business applicant and its affiliates and certain investors in the applicant. Such entities will also need to maintain supporting documentation at their principal place of business.

2. Construction Requirements. The proposals in the *Second Report and Order* include reporting and recordkeeping requirements for new LMS licensees to establish compliance with the coverage requirements.¹⁶ This includes, for example, the requirement that licensees file with the Commission a map and other supporting documentation at the five- and ten-year construction benchmarks.

3. Geographic Partitioning and Spectrum Disaggregation. The proposals in the *Second Report and Order* include reporting and recordkeeping requirements for small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine whether the licensee is a qualifying entity to obtain partitioned or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 490 (or 430 and/or 603 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents, which may include small businesses, will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents, which may include small businesses, are estimated to employ in-house staff to provide the information.

¹⁶ See *Second Report and Order*, *supra* at ¶ 30.

Applicants, including small businesses, filing the package under cover of FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. The Commission estimates that 75 percent of the applicants may file electronically. The Commission estimates that applicants contracting out the information would use an attorney or engineer, with an average cost of \$200 per hour, to prepare the information.

E. Steps taken to minimize significant economic impact on small entities, and significant alternatives considered:

The *Second Report and Order* adopts certain provisions for smaller entities designed to ensure that such entities have the opportunity to participate in the competitive bidding process and in the provision of multilateration LMS services. These proposals will affect small businesses that avail themselves of these provisions, including small businesses currently holding multilateration LMS licenses that choose to partition and/or disaggregate and small businesses that may acquire licenses through partitioning and/or disaggregation. The small business definitions are intended to accommodate the broadest cross section of small businesses because it will include, at a minimum, all entities recognized as small businesses in the LMS contexts for which we have either adopted or proposed small businesses definitions. The Commission anticipates that most LMS licensees will fit the definition of small business or very small business.

1. Small Business Definitions and Bidding Credits

Commenters favor establishing a "small business" definition for the multilateration LMS.¹⁷ Comtrak recommends that the Commission adopt two small business categories in the LMS auction: (1) a "small business" category, for businesses with average gross revenues of over \$3 million but not to exceed \$10 million; and (2) a "very small business" category, for businesses with average gross revenues not to exceed \$3 million.¹⁸ Comtrak suggests that these categories be based on the gross revenues of the business for the three years preceding the filing of the entity's application.¹⁹ Comtrak also argues that the Commission should avoid the Small Business Administration's definition of a small business and, as it has done in previous auctions, rely solely on gross revenues, and not the number of employees, for the purpose of determining an entity's eligibility for small incentives.²⁰ Comtrak also

¹⁷ Teletrac Comments at 15; Comtrak Comments at 5.

¹⁸ Comtrak Comments at 4.

¹⁹ *Id.*

²⁰ *Id.* at 5.

recommends bidding credits of 25 percent for small businesses and 35 percent for very small businesses.²¹ These provisions were adopted.

2. Attribution of Gross Revenues and Affiliates

Comtrak suggests that the Commission establish a clear definition of what constitutes control, including examples of the kinds of financial investments that will cause an investor or its affiliates to become affiliates of the small business applicant.²² Teletrac urges the Commission to augment the Part 1, Subpart Q rules with administrative procedures to provide preliminary determinations of affiliation status before the auction begins.²³ Teletrac argues that even the most carefully crafted rules cannot anticipate every form of control and business relationship.²⁴

The Commission adopted a "controlling interest" standard as the general attribution rule for all future auctions. The Commission has found that these definitions, which also contain detailed discussions and examples of relevant terms such as "control" and "identity of interest," has proven workable and is broad enough to address a wide variety of business structures. The Commission believes that these definitions are consistent with its proposals in the *Part 1 Third Report and Order*.²⁵

The Commission rejected Teletrac's suggestion that the Commission augment the Part 1 rules with administrative procedures to provide applicants with preliminary determinations of affiliation status before the auction begins. The Commission believes such procedures are administratively inefficient and would unnecessarily delay the auction of LMS spectrum.²⁶

3. Partitioning and Disaggregation

With respect to partitioning and disaggregation, the Commission concludes that unjust enrichment provisions should apply when a licensee has benefitted from the small business provisions in the auction rules and applies to partition or disaggregate a portion of the geographic license area to another entity that would not qualify for such benefits. The

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.*

²⁴ Teletrac Comments at 16.

²⁵ *Id.*

²⁶ See also *Second Report and Order*, *supra* at ¶ 27.

alternative to applying the unjust enrichment provisions would be to allow an entity who had benefitted from the special bidding provisions for small businesses to become unjustly enriched by partition or disaggregating a portion of their license area to parties that do not qualify for such benefits.

F. Report to Congress:

The Commission shall send a copy of the *Second Report and Order*, including this FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Second Report and Order*, including FRFA, to the Chief Counsel for advocacy of the Small Business Administration. A copy of the *Second Report and Order* and this FRFA (or summary thereof) will be published in the *Federal Register*. See 5 U.S.C. § 604(b).

APPENDIX C - FINAL RULES

Chapter I of Title 47 of the Code of Federal Regulations, Part 90 is amended as follows:

I. Part 90 - Private Land Mobile Radio Services

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

AUTHORITY: Secs. 4, 251-2, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251-2, 303, 309 and 332, unless otherwise noted.

2. Section 90.155 is revised to read as follows:

§ 90.155 Time in which station must be placed in operation.

* * * * *

(d) Multilateration LMS EA-licensees, authorized in accordance with Section 90.353, must construct and place in operation a sufficient number of base stations that utilize multilateration technology (see paragraph (e) of this section) to provide multilateration location service to one-third of the EA's population within five years of initial license grant, and two thirds of the population within ten years. In demonstrating compliance with the construction and coverage requirements, we will allow licensees to individually determine an appropriate field strength for reliable service, taking into account the technologies employed in their system design and other relevant technical factors. At the five and ten year benchmarks, licensees will be required to file a map and other supporting documentation showing compliance with the coverage requirements.

3. Section 90.364 is added to read as follows:

§ 90.364 Designated entities.

(a) This section addresses certain issues concerning designated entities in the Location and Monitoring Service (LMS) subject to competitive bidding. Issues that are not addressed in this section are governed by the designated entity provisions in Part 1, Subpart Q of this chapter.

(b) *Eligibility for small business provisions.*

(1) A small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed \$3 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(4) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(5) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (b)(1) of this section (or each of which individually satisfies the definition in paragraph (b)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(c) *Controlling interest.*

(1) For purposes of this section, controlling interest includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(2) *Calculation of certain interests.*

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person, or its affiliate pursuant to § 1.2110(b)(4) of this chapter, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

- (i) The nature or types of services offered by such an applicant or licensee;
- (ii) The terms upon which such services are offered; or
- (iii) The prices charged for such services.

(d) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 80.1252(b)(1) or § 80.1252(b)(5) of this subpart may use the bidding credit specified in § 1.2110(e)(2)(ii) of this chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 80.1252(b)(2) or § 80.1252(b)(5) of this subpart may use the bidding credit specified in § 1.2110(e)(2)(i) of this chapter.

4. Section 90.365 is added to read as follows:

Sec. 90.365 Partitioned licenses and disaggregated spectrum.

(a) *Eligibility*--(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to Section 90.153.

(2) Multilateration LMS licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses. Multilateration LMS licensees may partition or disaggregate to any party that is also eligible to be a multilateration LMS licensee. Partitioning is permitted along any service area defined by the parties, and spectrum may be disaggregated in any amount. The Commission will also consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(b) *Technical Requirements*--In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area, and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every three seconds along the partitioned service area unless a Commission recognized service area is utilized (i.e., Major Trading Area, Basic Trading Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required

based on NAD27. In the case where a Commission recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of Commission designations or county names) that constitute the partitioned area.

(c) *License term.* The license term for a partitioned license area, and for disaggregated spectrum shall be the remainder of the original licensee's license term.

(d) *Unjust enrichment--(1) Scope.* (i) If a licensee that utilized a bidding credit in obtaining its license seeks to partition or disaggregate its license to an entity not meeting the eligibility standards for bidding credits, the licensee must reimburse the government for the amount of the bidding credit as a condition of the approval for such partition or disaggregation.

(ii) If a licensee that utilized a bidding credit in obtaining its license seeks to partition or disaggregate its license to an entity that meets the eligibility standards for a lesser amount of bidding credit, the licensee must reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the transferee is eligible as a condition of the approval for such partition or disaggregation.

(2) *Apportioning unjust enrichment payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

(3) *Adjustment for time passed.* The amount of payments made pursuant to paragraphs (c)(1) and (c)(2) of this section will be reduced over time as follows:

(A) a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible) for the partitioned license area or disaggregated spectrum;

(B) in year three of the license term the payment will be 75 percent;

(C) in year four the payment will be 50 percent;

(D) in year five the payment will be 25 percent;

(E) there will be no assessment for transfers made past the fifth year.

(e) *Construction requirements--(1) Requirements for partitioning.*

(i) Parties seeking authority to partition must meet one of the following construction requirements:

(A) The partitionee may certify that it will satisfy the applicable construction requirements for the partitioned license area; or

(B) The original licensee may certify that it has or will meet the construction requirement for the entire license area.

(ii) Applications requesting authority to partition must include a certification by each party as to which of the above construction options they select.

(iii) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned or disaggregated license without further Commission action.

(2) *Requirements for disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the twelve month construction requirement for the licensed market. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.