Although we have modified the eighteen month benchmark, *supra*, we reiterate that Nextel must totally complete band reconfiguration within no more than thirty-six months from the commencement date discussed in the following paragraph.

54. We decline to adopt Nextel's blanket request that it be allowed to operate on all vacant and vacated channels below 817 MHz/862 MHz during band reconfiguration.[115] We agree with those parties which argue that this request, coupled with the relaxed eighteen-month benchmark, could provide Nextel an incentive to delay completing band reconfiguration for as long as possible.[116] Thus we will entertain individual applications from Nextel for such channels on the same basis as applications from any other eligible entity seeking to acquire new channels prior to imposition of the freeze set out in the *800 MHz R&O*.[117]

55. The *800 MHz R&O* specifies that the eighteen-month and thirty-six-month benchmarks are measured against the date the Commission releases a *Public Notice* announcing the start date of reconfiguration in the first NPSPAC Region. Since release of the *800 MHz R&O*, we have gained additional insight into the complexity of the rebanding process, including the hiring of personnel, the complexity of the information necessary to develop schedules and the attendant need to coordinate with equipment manufacturers. In order to avoid initial missteps in these processes which ultimately could impair progress, we agree that it is reasonable to issue a *Public Notice* announcing the starting date for computation of the eighteen and thirty-six-month benchmarks. That *Public Notice* will state that the starting date for computation of the benchmarks will be a date thirty days after the issuance of said *Public Notice*.[118]

H. Secondary, Mobile-Only Operations

56. Currently, public safety and Critical Infrastructure Industry licensees operate fewer than fifty mobile-only systems on former 800 MHz Channels 1-120 on a secondary basis.[119] The *800 MHz R&O* does not specifically address whether these secondary, mobile-only systems must be moved from former Channels 1-120. Because these stations are secondary, and do not have as great a potential for interference as base stations, we do not believe it necessary to remove them from former Channels 1-120 and will continue to accept public safety and CII applications for such secondary, mobile-only operations on these channels.

I. Licensing Issues

57. In the *800 MHz R&O*, we divided the lower portion of the 800 MHz band, *i.e.*, frequencies

[115] *See id.* at 1.

[116] *See Cinergy Comments* at 8-10; Entergy *Comments* at 5-7.

[117] *800 MHz R&O*, 19 FCC Rcd 15078 ¶ 204.

[118] This revision in computation-of-time dates is consistent with that proposed by Nextel. *See* Attachment to *Sep. 21 Nextel Ex Parte* at 4.

[119] *See, e.g.,* Station KA61037. A licensee that operates on a secondary basis must accept interference from primary operations and may not cause interference to primary operations. *See* 47 C.F.R. § 90.7.

below 817/862 MHz, into four pools or categories: General Category, Public Safety, B/ILT, and SMR.[120] Prior to the *800 MHz R&O*, our Rules specified similar groupings. However, rules adopted in the *800 MHz R&O* changed operations in the pools and redistributed frequencies within the pools. This redistribution has raised questions concerning eligibility and licensing requirements for certain frequencies in these pools.[121] We take this opportunity to clarify certain aspects of the licensing process for this lower portion of the band. We also make changes that promote consistency and flexibility in the 800 MHz band reconfiguration rules.

58. Nextel will relinquish all of its 800 MHz spectrum holdings below 817/862 MHz as part of band reconfiguration.[122] Other ESMR licensees may also relocate from the lower portion of the 800 MHz band. Eligibility for any ESMR-vacated spectrum in the lower portion of the 800 MHz band that is available after reconfiguration is complete in a given NPSPAC region, except for vacated spectrum in the Public Safety Pool, will be limited to public safety and CII eligibles.[123] These channels will be available to public safety for the first three years following the completion of band reconfiguration of the NPSPAC region and to public safety and CII eligibles for the following two years.[124] After this time, any eligible entity can apply for ESMR-vacated spectrum. However, eligibility for ESMR-vacated spectrum in the public safety pool is limited to public safety.[125] The Commission will announce by *Public Notice* when entities may file for ESMR-vacated spectrum in a given NPSPAC region. Any recognized Part 90 frequency-coordinator for the pool where the vacated spectrum is located can coordinate frequencies in that pool.[126]

59. We hereby clarify the licensing status of site-based SMR frequencies which are vacated by ESMR licensees. These channels will be reserved for five years after the completion of band reconfiguration in a given NPSPAC region for public safety and CII licensees as described *supra*. This will be the case even if these vacated site-based SMR channels are located within another SMR

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[120] *See 800 MHz R&O*, 19 FCC Rcd 14977 ¶ 11; *see also 800 MHz R&O* Appendix C, §§ 90.615 and 90.617, 19 FCC Rcd 15180-15185.

[121] *See, e.g., Shulman Rogers Comments* at 11, 14.

[122] *See 800 MHz R&O*, 19 FCC Rcd 14977 ¶ 11.

[123] *See id.* at 15052 ¶ 152.

[124] *Id.* This eligibility restriction also applies to channels vacated by licensees electing to relocate to the Guard Band. *See* 47 C.F.R. §§ 90.615(a) and (b). While we originally restricted eligibility to this vacated spectrum from the effective date of the *800 MHz R&O*, we modify this date now to ensure that all public safety and CII licensees enjoy the same amount of exclusive access to ESMR-vacated spectrum.

[125] There should be very few ESMR-vacated channels in the public safety pool. There may be some as a result of the exchange of twelve public safety channels with twelve SMR channels to create the expansion band. *See 800 MHz R&O*, 19 FCC Rcd 15053 ¶ 155. We clarify here that B/ILT eligibles, including CII entities, can apply for these frequencies under the inter-category sharing rules, but only after five years.

[126] A list of Part 90 800 MHz band frequency coordinators is available on the Commission's web page (http://wireless.fcc.gov/services/plmrs/). Although any coordinator may file applications involving these frequencies, inter-category sharing applications require the concurrence of an in-pool coordinator. For example, if a public safety applicant is seeking to apply for ESMR-vacated spectrum in the B/ILT Pool, the applicant's coordinator must obtain concurrence from a Commission-certified frequency coordinator having jurisdiction over the B/ILT pool. This approach is consistent with the current procedure governing inter-category sharing applications.

licensee's EA. After five years, any of these vacated site-based SMR channels—which are still available—will revert to the SMR licensee holding the EA licensee for that geographic area. If there is no EA licensee for a particular area, then after five years, these vacated site-based SMR channels will be available for site-based licensing to SMR eligibles.[127]

1. General Category Pool.

60. Under the *800 MHz R&O*, the new General Category Pool consists of Channels 231-260 and 511-550.[128] Frequencies in this pool are available for public safety, B/ILT and SMR (site based, non-cellular) operations. The former rules for the General Category channels required applicants for site-based stations to provide a showing of frequency coordination.[129] The frequency coordination requirement did not, however, pertain to geographic area licenses (non site-based stations). We clarify here that we will not require frequency coordination for stations associated with grandfathered geographic area licenses. When coordinating new site-based licenses or major modifications to existing site-based licenses, the interference contours (22 dBμV/M) of any or new modified site-based licensees must not extend beyond the boundaries of the co-channel geographic licensees' EAs. This requirement applies regardless of frequency pool. Further, except as noted *infra*, we will continue to apply the frequency coordination requirement to site-based applications. We note that the *800 MHz R&O* charges the Transition Administrator with developing a master 800 MHz band reconfiguration plan.[130] In that process, a relocating incumbent receives a replacement channel for each existing channel requiring relocation.[131] The replacement channels must conform to applicable Commission rules. Requiring separate frequency coordination in this context would be superfluous; we therefore clarify that we are not requiring evidence of frequency coordination for applications for modifications of license to channels designated by the Transition Administrator as part of band reconfiguration.[132] However, applications filed after the completion of band reconfiguration in a given NPSPAC region will be subject to the frequency coordination requirements specified in Section 90.175 of our Rules.[133]

61. The *800 MHz R&O* envisioned clearing Channels 231-260 of all non-public safety, non-CII incumbents. Nextel has argued that relocating incumbent B/ILT or high-site SMR licensees from Channels 231-260 is unnecessary to implement band reconfiguration, would disrupt incumbents without countervailing public interest benefits, and would not result in any additional spectrum becoming

[127] *See* ¶¶ 67-68, *infra*.

[128] *See id.*, Appendix C, § 90.615. *See* para 50 *infra*.

[129] *See* 47 C.F.R. § 90.175.

[130] *See 800 MHz R&O*, 19 FCC Rcd 15075 ¶ 201.

[131] *Id.* at 15074 ¶ 199.

[132] We anticipate that, in a very few instances, 800 MHz band reconfiguration modification applications may be filed where the licensee is requesting more than just adding a new channel(s). For example, the station location may need to be changed or the power increased. Frequency coordination is required for 800 MHz band reconfiguration modification applications involving a major change other than the addition of one or more channels consistent with the Transition Administrator plan.

[133] *See* 47 C.F.R. § 90.175.

available for public safety use.[134] We agree, and upon further reflection, we modify our decision and will allow non-public safety and non-CII incumbents to continue to operate on Channels 231-260. This modification is consistent with our goal to minimize disruption and strikes a reasonable balance between the needs of private wireless interests and public safety spectrum capacity needs. If we were to retain our earlier decision to make Channels 231-260 available exclusively for Public Safety and CII use, we would inadvertently disrupt existing private wireless operations because they might be required to relocate unnecessarily. Additionally, requiring private wireless incumbents to relocate would ignore the reality that there may be insufficient spectrum elsewhere in the 800 MHz band to which these non-Nextel Channel 231-260 incumbents could relocate. Moreover, this modification does not eliminate some of the spectrum gains for public safety and CII licensees, which could be used to meet interoperability needs, as public safety and CII would continue to have access to ESMR-vacated spectrum.

62. Finally, we inadvertently omitted listing channels in the 816-817/861-862 MHz band (*i.e.,* Guard Band channels 511-550) in the rules. Since this spectrum is available for licensing to a wide variety of users (*e.g.,* B/ILT and SMRs), we believe this spectrum is most appropriately categorized as General Category. Consistent with our approach to the other General Category spectrum discussed above, frequency coordination is required for these frequencies except for 800 MHz modification applications associated with band reconfiguration and stations associated with grandfathered EA licensees.[135]

2. Public Safety Pool.

63. The Public Safety Pool consists of two basic sub-groups: the public safety pool frequencies in the interleaved segment of the band and the NPSPAC frequencies. Because these two groups are licensed differently, they are treated separately, *infra.*[136]

64. *Interleaved Segment:* The public safety pool channels in the interleaved segment of the band are interspersed with channels in other pools throughout the 809-815/854-860 MHz band segment.[137] Frequencies in this group are available, in general, only to public safety eligibles.[138] As noted above, we clarify that applications for modification of facilities in the interleaved segment that only involve a change in frequency in order to implement the relocation channel plan established by the Transition Administrator need not be accompanied by evidence of frequency coordination.[139] Applications filed

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[134] *See Sep. 16th Nextel Ex Parte* at 2. *See also ITA Comments* at 9-10. *But see* Comments of Preferred Communications Systems, Inc. at 27-28 filed Dec 2, 2004 (*Preferred Comments)* (clearing Channels 231-260 would provide public safety additional public safety spectrum).

[135] EA licensees are grandfathered. *See 800 MHz R&O*, 19 FCC Rcd 15054 ¶ 157. Grandfathered EA licenses are subject to Sections 90.681-699 (47 C.F.R. §§ 90.681-90.699).

[136] For example, NPSPAC frequencies are subject to regional planning and the interleaved public safety frequencies are not.

[137] *See* 47 C.F.R. § 90.617, Table 1 for a specific list of these frequencies.

[138] *See* 47 C.F.R. § 90.20. These channels are also available to B/ILT eligibles through inter-category sharing. *See 800 MHz R&O* Appendix C, § 90.621(e), 19 FCC Rcd 15190. Finally, the Commission grandfathered non-cellular SMR licensees operating on these channels. *See 800 MHz R&O*, 19 FCC Rcd 15054 ¶ 156.

[139] Coordination is unnecessary because the Transition Administrator will have taken coordination issues into account in determining that the new channel offers "comparable facilities." We are not certifying the Transition (continued....)

after the completion of band reconfiguration in a given NPSPAC region will be subject to the frequency coordination requirements specified in Section 90.175 of our Rules.[140] The frequency coordination requirement also does not apply to stations associated with grandfathered geographic area licenses.[141]

65. *NPSPAC Channels.* Public safety entities have exclusive access to the NPSPAC frequencies (Channels 1-230).[142] Under the 800 MHz reconfiguration plan, the licenses of current NPSPAC licensees[143] will be modified by moving the current operating frequencies fifteen megahertz downward, thereby transferring the entire NPSPAC band to its new allocation at 806-809/851-854 MHz.[144] Because these modifications involve only a uniform frequency change for each applicant, the current coverage/interference environment will remain the same after the modification. Hence we will not require these applications to have evidence of frequency coordination. Moreover, we will not require approval of, nor consider objections from, Regional Planning Committees for such modifications. Thus, for example, any NPSPAC licensee currently operating at variance with a Regional Plan will have its operating channel(s) modified in the same manner as other NPSPAC licensees. Once band reconfiguration has been accomplished in a given NPSPAC region, the relevant Regional Planning Committee shall conform its plan to the new allocation and file said amended plan with the Commission within thirty days. These amended plans shall not contain any changes other than moving each frequency in the plan fifteen megahertz downward and will not require Commission approval.

3. Business/Industrial/Land Transportation (B/ILT) Pool.

66. The B/ILT pool consists of interleaved channels in the 809-816/854-861 MHz band segment.[145] Channels in this pool, in general, are available only to B/ILT eligibles.[146] Applications for modification of B/ILT licensees as specified by the Transition Administrator in order to implement band reconfiguration need not be accompanied by evidence of frequency coordination.[147] Applications filed after the completion of band reconfiguration in a given NPSPAC region will be subject to the frequency

(Continued from previous page)

Administrator as a frequency coordinator; but expect that the Transition Administrator will enlist the assistance of the relevant Commission-certified frequency coordinator in instances in which coordination issues arise.

[140] *See* 47 C.F.R. § 90.175. We clarify that only recognized Part 90 800 MHz B/ILT coordinators can coordinate frequencies in this pool.

[141] *See* n. 125 *supra.*

[142] The assignment of these frequencies is done in accordance with policies defined in Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz Bands by the Public Safety Services, *Report and Order*, GEN Docket No. 87-112, 3 FCC Rcd 905 (1987) (*NPSPAC R&O*).

[143] NPSPAC licensees currently operate in the 821-824 MHz / 866-869 MHz band segment. The process for relocation of NPSPAC channels in the border areas may differ from that described *supra* for the remainder of the country. We cannot address those differences here because final border-area band plans have not yet been developed by U.S., Canadian, and Mexican, authorities.

[144] *See 800 MHz R&O*, 19 FCC Rcd 15072 ¶ 195.

[145] For specific frequencies see 47 C.F.R. § 90.617, Table 2.

[146] *See* 47 C.F.R. § 90.35. EA licensees are grandfathered.

[147] *See* n.139 *supra.*

coordination requirements specified in Section 90.175 of our Rules.[148]

4. SMR Pool (Non-cellular)

67. This pool consists of interleaved channels in the 809-816/854-861 MHz band.[149] Frequencies in this pool are available for commercial operations.[150] There are both site-based and EA geographical-area licenses in this pool. Applications for modification of SMR licenses as specified by the Transition Administrator in order to implement band reconfiguration need not be accompanied by evidence of frequency coordination.[151] Applications filed after the completion of band reconfiguration in a given NPSPAC region will be subject to the frequency coordination requirements specified in Section 90.175 of our Rules.[152] Finally, we note that grandfathered EA licensees remain subject to Sections 90.681-90.699 of our Rules.[153]

68. In the former SMR pool where geographic area licensing was employed there was no requirement for a showing of frequency coordination and hence no recognized frequency coordinators for this pool. By requiring frequency coordination for certain stations operating in this pool we must authorize frequency coordinators to conduct the coordinations. Because this pool is similar to the General Category (*e.g.*, spectrum is available to a wide variety of users—public safety, B/ILT, SMRs) we believe we should take the same approach that we did for coordinating frequencies in the General Category and certify multiple coordinators. Based on our experience, we conclude that 800 MHz General Category coordinators are qualified to coordinate spectrum in the SMR pool.[154] Any of these coordinators interested in coordinating frequencies in this pool must notify the Wireless Telecommunications Bureau[155] within forty-five days of release of this *Order*.[156] In all other cases, including applications for ESMR-vacated spectrum available after band reconfiguration is complete in a given NPSPAC region; the frequency coordination requirements specified in Section 90.175 of our

[148] *See* 47 C.F.R. § 90.175. We clarify that only recognized Part 90 800 MHz B/ILT coordinators can coordinate frequencies in this pool.

[149] For specific frequencies *see* 47 C.F.R. § 90.617, Table 4B.

[150] We clarify that the frequencies in this pool can also be used for public safety and B/ILT operations.

[151] *See* n. 139 *supra*.

[152] *See* 47 C.F.R. § 90.175.

[153] *See* 47 C.F.R. §§ 90.681-699.

[154] *See* United Telecom Council Informal Request for Certification as a Frequency Coordinator in the PLMR 800 MHz and 900 MHz Bands, *Order*, 16 FCC Rcd 8436 (2001) (*Coordination Order*).

[155] We note here that the Wireless Telecommunications Bureau has delegated authority to select frequency coordinators in the services it administers. *See* Amendment of Parts 2 and 95 of the Commission's Rules to Create a Wireless Medical Telemetry Service, *Report and Order*, ET Docket No. 99-255, 15 FCC Rcd 11206, 11218 ¶ 36 (2000).

[156] Notification should be addressed to the Public Safety and Critical Infrastructure Division, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. *See Coordination Order*, 16 FCC Rcd 8445 ¶ 18.

Rules[157] apply to frequencies in this pool.

J. Cost Responsibility

1. Nextel Retuning

69. The *800 MHz R&O* limits Nextel's credit for funds spent reconfiguring its own 800 MHz system to expenditures strictly limited to costs absolutely essential to implement band reconfiguration and shall not include any costs for improvement, by way of equipment replacement or otherwise, of the capacity or features of Nextel's infrastructure or subscriber units.[158] At Nextel's request, we clarify that this prohibition does not extend to "capacity" cells that are necessary to sustain subscriber capacity of Nextel's system during band reconfiguration and which, thereafter, remain in service, potentially increasing Nextel's overall post-reconfiguration subscriber capacity.[159] We disagree with Cingular's contention that Nextel's request is untimely and that Nextel should have sought credit for these costs prior to the release of the *800 MHz R&O.*[160] Because the concept of the "true-up" with the attendant discussion of what constituted creditable costs originated in the *800 MHz R&O,* it is disingenuous to argue that Nextel should have anticipated this issue. Moreover, Nextel is merely seeking the same rights as any other relocating 800 MHz licensee—the right to comparable facilities. In the case of each "capacity" cell, we require Nextel to demonstrate to the Transition Administrator that said cell is essential to maintaining subscriber levels during band reconfiguration. Assuming that Nextel meets that burden, we will permit Nextel to include the cost of the cell as part of Nextel's legitimate expenses incurred in band reconfiguration. We are sensitive, however, to the argument Nextel may attempt to leverage this provision into an inappropriate subsidy for the construction of its 1.9 GHz network.[161] We therefore direct the Transition Administrator to disallow Nextel credit for facilities associated with the 1.9 GHz band. We further note that Nextel may not claim credit for any expenditure it makes to obtain additional spectrum in any band, whether by purchase, lease or some other secondary market mechanism.[162]

2. Transactional Costs

70. Although we recognized that band reconfiguration to resolve the unacceptable interference would be costly,[163] we were concerned that sole reliance upon Enhanced Best Practices would entail a continuing expense that would eventually eclipse the high initial cost of band reconfiguration.[164] To address cost reimbursement issues we adopted rules that tracked rules the Commission has successfully

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[157] *See* 47 C.F.R. § 90.175.

[158] *See 800 MHz R&O,* 19 FCC Rcd 14989 n.74.

[159] See Attachment to *Nextel Sep. 21 Ex Parte* at 8.

[160] *Cingular Comments* at 2-3.

[161] *Cingular Comments* at 3-5.

[162] Regardless of whether Nextel obtains this spectrum via auction, secondary market transactions, spectrum purchase or a leasing arrangement.

[163] *800 MHz R&O*, 19 FCC Rcd 15064 ¶ 177.

[164] *Id.*

used to accomplish previous band reconfigurations.[165] We note, as one party has pointed out,[166] that there is a conflict between the statement in the *800 MHz R&O* that Nextel must absorb all costs of band reconfiguration, including transactional costs, and the provision in existing rule Section 90.699(c), which we incorporated by reference in the *800 MHz R&O*, which limits transactional costs to no more than "2% of the hard costs involved."[167] We resolve that conflict in favor of the statement in the text of the *800 MHz R&O*, but believe that the two-percent restriction in the rule provides a useful guideline for determining when transactional costs are excessive or unreasonable and charge the Transition Administrator to give a particularly hard look at any request involving transactional costs that exceed two percent. We believe that, in the vast majority of cases, the party requesting transactional costs in excess of two percent will have to meet a high burden of justification. However, we decline to use two percent as a fixed limit in the knowledge that, particularly with respect to public safety entities, outside expertise may be required in the negotiation of agreements and in analysis of "comparable facilities" proposals. We can foresee that such outside costs could raise the transactional cost above two percent of the "hard costs." Moreover, the instant band reconfiguration process is distinguished from others in which Section 90.699(c) applied, by the presence of the Transition Administrator which serves, *inter alia*, as a watchdog over excess transactional costs and "goldplating." We were clear in the *800 MHz R&O* that parties must submit disputes involving cost allocations to the Transition Administrator for resolution.[168] In the event that the Transition Administrator is unable to resolve the dispute the matter will be referred to the Wireless Telecommunications Bureau for *de novo* review.[169] These provisions should provide a sufficient safeguard against excessive claims for transactional costs associated with band reconfiguration.

K. Payment Authorization and Auditing

71. Under the terms of the *800 MHz R&O*, we defined the role of the Transition Administrator broadly and, by way of example, listed duties that would fall within the expertise of the Transition Administrator. These duties include, but are not limited to, the authorization of funds to licensees, vendors, *etc.*,[170] establishing the schedule setting forth the commencement of band reconfiguration in each NPSPAC region,[171] auditing the amount expended at the conclusion of a system reconfiguration,[172] and submitting an audited statement of relocation funds expended at each anniversary date of the *800 MHz R&O*.[173] Concern has been expressed that we did not state explicitly that the Transition

[165] *800 MHz R&O,* 19 FCC Rcd 15048 ¶ 148 & n.398 *citing* 47 C.F.R. § 90.699(d).

[166] *Shulman Rogers Comments* at 10.

[167] 47 C.F.R. § 90.699(c).

[168] *800 MHz R&O,* 19 FCC Rcd 15064, ¶ 178.

[169] *800 MHz R&O,* 19 FCC Rcd 15064, 15071-73 ¶¶ 178, 194-197.

[170] *800 MHz R&O,* 19 FCC Rcd 15072 ¶ 195 and n.513.

[171] *800 MHz R&O,* 19 FCC Rcd 15073 ¶ 196. On November 24, 2004, the Public Safety and Critical Infrastructure Division extended the deadline for the Transition Administrator to submit the schedule until January 31, 2005. *See* Improving Public Safety Communications in the 800 MHz Band, *Order*, DA 04-3676 ¶ 6 (WTB PSCID Nov. 24, 2004).

[172] *800 MHz R&O*, 19 FCC Rcd 15073 ¶ 197.

[173] *800 MHz R&O* 19 FCC Rcd 15073 ¶ 196.

Administrator could authorize disbursement of funds before retuning of a given system begins.[174] As noted in paragraph 14, *supra,* the Transition Administrator may authorize disbursement of funds upon approval of a negotiated estimate of the cost of reconfiguring an existing system and that the cost of preparing the estimate and costs of negotiating the agreement are allowable and can be provided in advance upon application to the Transition Administrator. We have been asked whether costs incurred by public safety systems in advance of the commencement of band reconfiguration would be eligible for reimbursement.[175] We affirm here that our description of the duties of the Transition Administrator, as set forth in the *800 MHz R&O*, was illustrative, not exhaustive, and that the Transition Administrator may authorize the disbursement of funds for any reasonable and prudent expense directly related to the retuning of a specific 800 MHz system. We also clarify that the Transition Administrator may retain the services of others in connection with its work and that its audit process must conform to the Generally Accepted Accounting Procedures and industry standards.[176]

72. As noted *supra*, our description of the duties of the Transition Administrator was not exhaustive. The overriding obligation of the Transition Administrator is to facilitate timely band reconfiguration in a manner that is equitable to all concerned, including the United States government. We foresee, for example, that the Transition Administrator may exercise its discretion to change the schedule it establishes for band reconfiguration in order to meet unanticipated demands, *e.g.,* to reconfigure two or more regions simultaneously because of the existence of systems spanning multiple regions. The Transition Administrator's authority also extends to such matters as involving manufacturers, installers, and other infrastructure providers in the negotiation of reconfiguration agreements. In sum, the Transition Administrator's portfolio includes taking "the most effective actions, in the short- term and long-term, to promote robust and reliable public safety communications in the 800 MHz band to ensure the safety of life and property."[177]

L. Relocation Negotiations

73. The *800 MHz R&O* provides licensees flexibility in negotiating relocation agreements with Nextel. Parties may require the Transition Administrator to deal with Nextel on their behalf or licensees may choose to negotiate directly with Nextel.[178] Similarly, Nextel may require that negotiations with a given licensee take place through the Transition Administrator as an intermediary.[179] The underlying

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[174] *Shulman Rogers Comments* at 6.

[175] Oral communication between David Buchanan, Regional Chairman, Southern California Area Regional Planning Committee, and Michael Wilhelm, Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau, Nov. 15, 2004. *See also PSIC Comments* at 4-6. Comments of the Office of Chief Technology Officer of the District of Columbia at 1-4

[176] We decline to state, as requested by Shulman Rogers, that the services of a Regional Planning Committee in support of band reconfiguration can be compensated. That, and other such determinations would be fact-specific and are committed to the Transition Administrator. *See Shulman Rogers Comments* at 6, 8, 10, 11.

[177] *800 MHz R&O,* 19 FCC Rcd 14975 ¶ 7.

[178] *800 MHz R&O,* 19 FCC Rcd 15075-77 ¶ 201.

[179] *See Sep. 16th Nextel Ex Parte* at 2.

theme governing all reconfiguration negotiations is "good faith."[180] Although we cannot predict what "good faith" may be for all parties in all circumstances, we envision that it extends to making a counteroffer to a reasonable offer, rather than refusing an offer outright.[181] We also caution parties to memorialize agreements in writing to be signed by authorized parties of both the relocating incumbent and Nextel. We finally note that the Transition Administrator cannot unilaterally bind Nextel or the incumbent to any obligation associated with band reconfiguration.[182] Thus, for example, the Transition Administrator cannot unilaterally require Nextel to pay a sum not authorized in an agreement between Nextel and an incumbent.[183]

74. The *800 MHz R&O* states that Nextel personnel shall not be "involved" in the reconfiguring of a licensee's system.[184] We now recognize that an overly restrictive interpretation of this language could unnecessarily prevent Nextel from utilizing the institutional knowledge that it gained in the Upper 200 relocation process.[185] We therefore determine that the prohibition extends only to Nextel's personnel gaining direct access to an incumbent's physical system. Moreover, even that restriction would be inapplicable if the involved licensee explicitly authorized Nextel personnel to physically examine or adjust a system

M. Relocating EA Licensees

75. We clarify several aspects of the *800 MHz R&O* regarding the relocation of non-Nextel non-SouthernLINC EA licensees operating ESMR systems. First, Nextel, AIRPEAK, and Airtel all have sought clarification concerning the process for determining the ultimate location of non-Nextel, non-SouthernLINC ESMR licensees.[186] Nextel supports relocating licensees out of the "non-cellular" channel block to the 816-817/861-862 MHz block before relocating licensees above 817/862 MHz.[187] AIRPEAK and Airtel ask the Commission to clarify that a relocating incumbent may specify the channels to which it

[180] *See 800 MHz R&O,* 19 FCC Rcd 15075-77 ¶ 201. *See also Sep. 21 Nextel Ex Parte* at 7 (requesting clarification of good faith requirement).

[181] Evidence of "good faith" may also consist of an explanation of why the offer was rejected. *See e.g., PSIC* Comments at 6-7.

[182] The *800 MHz R&O* contained other indicia of good faith, or not, *e.g.,* (1) whether the party responsible for paying the cost of band reconfiguration has made a *bona fide* offer to relocate the incumbent to comparable facilities; (2) the steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and procedures, requested by the other party. *See 800 MHz R&O,* 19 FCC Rcd 15076, n.524 *citing* Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rulemaking,* 11 FCC Rcd 8825, 8837-8838 ¶ 21.

[183] Note, however, that nothing in this paragraph precludes the Commission from directing Nextel to pay, or an incumbent to accept, any payment arising from Commission adjudication of a dispute between Nextel and an incumbent. *See 800 MHz R&O,* 19 FCC Rcd 15076 ¶ 201.

[184] *See 800 MHz R&O,* 19 FCC Rcd 15075-77 ¶ 198.

[185] *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144.

[186] *See generally AIRPEAK/Airtel Ex Parte* and *Sep. 16th Nextel Ex Parte* at 2.

[187] *Sep. 16th Nextel Ex Parte* at 2.

will be relocated.[188]

76. *Relocating 800 MHz Geographical Area EA Licensees*: In the *800 MHz R&O*, we required that EA licensees such as AIRPEAK and Airtel, must be provided comparable facilities, and afforded them the option of: (a) remaining on their EA Block(s) on a non-interference basis; (b) moving their EA Block(s) as close to the ESMR portion of the band as possible, also on an non-interference basis, or (c) relocating their EA Block(s) into the ESMR portion of the band.[189] We charged the Transition Administrator with determining where, in the ESMR portion of the band, such relocating ESMR licensees should be relocated. We have been offered no good reason why we should either defer to Nextel's request that non-Nextel, non-SouthernLINC licensees be moved to a particular portion of the 800 MHz band, in a particular sequence of channels, or to AIRPEAK's and Airtel's request that they be permitted to chose the specific channels to which they are relocated. As with all incumbents relocated in the course of band reconfiguration—EA licensees or otherwise—incumbents are entitled only to comparable facilities not their choice of channels. Thus, we confer considerable discretion on the part of the Transition Administrator with respect to the choice of replacement channels. However, we envision that the Transition Administrator would commence relocations on channels immediately above 817/862 MHz and progress upward, unless otherwise indicated by considerations of sound spectrum management principles.

77. In the case of an EA licensee with an ESMR system relocating to the ESMR portion of the band, comparable facilities consist of providing encumbrance-free spectrum in the ESMR portion of the band at Nextel's expense. We recognize that, in some instances, the relocating ESMR licensee could benefit by "trading" encumbered spectrum for unencumbered spectrum. We believe this may provide an incentive for such licensees to transition from the interleaved spectrum with a consequent reduction in interference to public safety and other systems. The implementation of the comparable facilities standard rests, initially, with the Transition Administrator and, ultimately, with the Wireless Telecommunications Bureau in the event of intractable disputes.[190]

78. *Relocating Site Based Systems Associated With a Relocating ESMR EA licensee.* In the *800 MHz R&O*, we stated that non-Nextel EA ESMR licensees which have augmented their EA licenses with site-specific channels may move both their geographic and site-based channels into comparable spectrum above 862 MHz.[191] We reiterate what was said in the *800 MHz R&O*: in order to transfer a site-based facility into the ESMR segment, a licensee must: (a) currently hold an EA license in the relevant market; and (b) be using the site-based facility as part of a cellular-architecture system in that market as of the date of publication of this *Report and Order* in the Federal Register,[192] and (c) must have been an

[188] *See generally AIRPEAK/Airtel Ex Parte.*

[189] *See 800 MHz R&O,* 19 FCC Rcd 15056-57 ¶ 162.

[190] If a non-Nextel ESMR licensee agrees to relocate into spectrum between 861-862 MHz, Nextel may satisfy the comparable facility standard by funding the purchase and installation of any filters necessary to allow the licensee to operate without creating unacceptable interference to systems operating below 861 MHz.

[191] *See 800 MHz R&O,* 19 FCC Rcd 15057 ¶ 163.

[192] *Id.* It is possible that a circumstance could arise in which there was a pending, but not yet granted, application for assignment of the license of a site based system to the EA licensee in the same market, and that the site based system already was part of the EA licensee's ESMR system pursuant to a spectrum lease. Should that, or a similar circumstance arise, parties have recourse to the Commission's waiver process to argue that the channels in (continued....)

operational part of the licensee's ESMR system, within the relevant EA. We slightly modify our criteria in this regard to provide that a non-Nextel, non-SouthernLINC, EA licensee, operating an ESMR system and relocating to the ESMR portion of the band, may also elect to relocate site-based cells, licensed to it as of the date the *800 MHz R&O* was published in the Federal Register under the following conditions:[193]

- The site-based cell must have been an integral part of the EA licensee's ESMR system as of the date the *800 MHz R&O* was published in the Federal Register. A cell that is an integral part of a ESMR system is a cell that has a 40 dBμ/V coverage contour overlapping the 40 dBμ/V coverage contour of another cell integral to the ESMR system, and must be capable of "hand-off" of calls to and from the cell its 40 dBμ/V coverage contour overlaps.

- Such a site-based cell may be moved into the ESMR spectrum, but is limited to the 40 dBμ/V coverage contour it provided as of the date the *800 MHz R&O* was published in the Federal Register.[194]

79. *Relocating non-ESMR EA licensees.* We also clarify several aspects of the *800 MHz R&O* regarding the relocation of non-ESMR EA licensees. Previously, Nextel sought clarification of the *800 MHz R&O* with regard to the relocation channel options for non-ESMR EA licensees.[195] Specifically Nextel sought clarification that non-ESMR EA licensees on channels 1-120 could be relocated to comparable channels below 861.4 MHz only. We clarify and slightly modify that provision to provide that any non-ESMR EA licensee, whether or not it has constructed facilities, has the option to relocate into the ESMR portion of the band. However, when it does so, it receives only the analog of comparable facilities, the same unencumbered area that it had before it relocated, *i.e.,* its "white area." We emphasize that the "white area" the non-ESMR EA licensee attains when it relocates to the ESMR portion of the band is strictly limited to the boundaries of the "white area" that existed before it relocated and which it had on the date the *800 MHz R&O* was published in the Federal Register. If additional unencumbered area in the EA exists after the non-ESMR EA licensee is relocated, that additional unencumbered "white area" will be available for use by Nextel. Moreover, non-ESMR EA licensees that elect to relocate to the ESMR portion of the band—whether they have constructed non-ESMR facilities or not—will be entitled only to reasonable transactional costs, such as for legal and engineering fees directly related to determination of comparable spectrum, such as determining channel assignments or "white area." They will not be entitled in any event to costs associated with infrastructure, replacement of subscriber equipment, tower leases, or any other "hardware related" expenses.[196]

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the site-based system should be moved into the ESMR portion of the band, where they would not be encumbered within the EA.

[193] We will entertain requests for waiver of these conditions provided these waiver requests meet the standards for waiver set forth in Section 1.925 of our Rules. *See* 47 C.F.R. § 1.925

[194] This is true whether the site-based cell is within the EA but on channel(s) outside the EA licensee's block or if the site-based cell falls outside of the geographical boundaries of the EA licensee's EA.

[195] *See e.g.*, Sept. 16 Ex Parte at 2 and Sept. 21, Ex Parte at 8.

[196] We considered whether EA licensees that have constructed non-ESMR, *e.g.*, "high site" SMR, systems should be paid for relocating their hardware systems to the ESMR portion of the band if they elect that option. However, because this relocation is optional, high-site systems are not permitted above 862 MHz, and because such systems employ technology incompatible with ESMR systems, it would not be possible to merely "retune" (continued....)

80. The following conditions apply to non-ESMR EA licensees that have to relocate in order to implement band reconfiguration, *e.g.*, from channels 1-120, and do not want to exercise the option of relocating to the ESMR portion of the band:

- *EA Licensees That Have Constructed Systems:* Their existing facilities—infrastructure and subscriber equipment—must be retuned, or, when necessary, replaced, at Nextel's expense. They must be relocated to new channels which have, at a minimum, the same unencumbered EA geographical area as did their prior channels. If an encumbering facility—other than an ESMR facility[197]—is eliminated as a consequence of the change of channels, or subsequently ceases to be licensed, thereby increasing the relocating licensee's "white area,"[198] the relocating licensee shall be entitled to operate in that increased "white area."

- *EA Licensees That Have Not Constructed:* These licensees shall be relocated to new channels which have, at a minimum, the same unencumbered geographical area as did their prior channels. If an encumbering facility—other than an ESMR facility[199]—is eliminated as a consequence of the change of channels, or subsequently ceases to be licensed, thereby increasing the relocating licensee's "white area,"[200] the relocating licensee shall be entitled to operate in that increased "white area." These entities will be entitled only to reasonable transactional costs, such as for legal and engineering fees directly related to determination of comparable spectrum, such as determining channel assignments or "white area." They will not be entitled in any event to costs associated with infrastructure, tower leases, or any other "hardware related" expenses.

81. *Restrictions on All Licensees Relocating to ESMR Spectrum.* Any licensee electing to relocate to the ESMR portion of the band is bound by the rules applicable to ESMR systems and may not operate non-ESMR systems in that portion of the band. Were we to allow otherwise, we could undercut one of the basic tenets of this proceeding: that incompatible "high-site" non-ESMR technology must be segregated from "low-site" ESMR technology if unacceptable interference is to be avoided. It would be contrary to that tenet, indeed, incongruous, to allow "high site" systems in the ESMR portion of the band, or high-density cellular systems in the spectrum below the ESMR portion.[201] We further note the relocation of any licensee, whether such relocation is voluntary or involuntary, and whenever accomplished, does not act to toll the licensee's construction deadlines, except as may explicitly be stated otherwise in the *800 MHz R&O*.[202]

(Continued from previous page)
such systems to new channels. We believe the expense thereof is properly allocated to the non-ESMR EA licensee that chooses to relocate to the ESMR portion of the band.

[197] Channels vacated by ESMRs are exclusively available to public safety for three years and to public safety and CII applicants in years four and five, and to any eligible applicant thereafter. *See* para. 58 *supra*. The permissible coverage area of a channel(s) so acquired is limited to the permissible coverage area of the vacated ESMR channel(s). *See also* 47 C.F.R. §§ 90.615(a), 90.617(g).

[198] *See* para. 79 *supra*.

[199] *See* n.197 *supra*.

[200] *See* para. 79 *supra*.

[201] *See 800 MHz R&O,* 19 FCC Rcd 15056-57 ¶¶ 162-163.

[202] *See 800 MHz R&O,* 19 FCC Rcd 15079 ¶¶ 205-206.

82. *Nextel and SouthernLINC Channels.* Finally, we note that the foregoing discussion of relocating ESMR and non-ESMR licensees does not apply to the relocation of channels licensed to Nextel and SouthernLINC in SouthernLINC's territory described in Appendix G of the 800 MHz R&O. Those channels are the subject of a separate agreement between SouthernLINC and Nextel which is subject to Commission approval.[203]

83. In the *800 MHz R&O*, we prohibited the issuance of new 800 MHz EA licenses in Spectrum Blocks G-V.[204] However, we recognize that, in the course of band reconfiguration, situations may arise in which it is necessary or desirable for licensees to "exchange" their EA licensees. Such an action constitutes modification of license and does not fall within the prohibition against issuance of "new" licenses.

84. We have considered that the band reconfiguration process could result in Nextel exchanging its EA licenses with other EA licensees that obtained their licenses through auctions in which they received small business bidding credits.[205] We find that this Commission mandated exchange does not trigger the "unjust enrichment" provisions of Section 1.2111 of our Rules, which requires refund of the bidding credit, plus interest, if the small business licensee transfers its license, during the initial term, to an applicant not qualifying for such credit. The rule is inapplicable here because the EA licenses at issue are not being transferred, but rather modified by Commission action pursuant to Section 316 of the Communications Act[206] as part of a "swap" of 800 MHz spectrum in order to avoid interference to public safety, CII and other "high-site" 800 MHz licensees. The Commission awards bidding credits to licensees based on eligibility for such benefits, not upon the characteristics of the particular spectrum license.[207] Here, where there is not a transfer or assignment of a license to trigger a Commission review of whether there is an unjust enrichment eligibility issue, the licensee will retain the designated entity benefits it received, albeit for modified spectrum licenses. All rights and obligations imposed upon the licensees that received licenses through an auction will remain in effect after the modifications.[208] Accordingly, we hold that, in the narrow circumstances present here, Section 1.2111 does not require an "unjust enrichment" analysis; and, therefore, that there is no need for waiver of Section 1.2111 of our Rules as suggested by Shulman Rogers.[209] The only change to the license will be the frequencies on which the licensee will operate its system.

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[203] *See 800 MHz R&O,* 19 FCC Rcd 15058, 15130 ¶¶ 167, 346.

[204] *See* 47 C.F.R. § 90.617(d).

[205] *See Shulman Rogers Comments* at 12.

[206] 37 U.S.C. § 316.

[207] *See* 47 C.F.R. § 1.2110.

[208] Should a designated entity licensee later seek to assign or transfer its modified spectrum license to an applicant that is not eligible for such benefits, the Commission will conduct an unjust enrichment analysis as of the date of the filing of the application. *See, e.g.,* ,Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order,* 13 FCC Rcd. 15743, 15768 (1998).

[209] *See Shulman Rogers Comments* at 12.

N. CMRS Relocation to the Guard Band

85. In the *800 MHz R&O* we established a "Guard Band" in the 816-817 MHz/861-862 MHz segment of the 800 MHz band to guarantee public safety licensees an additional one megahertz spectral separation from the cellular portion of the band.[210] We prohibited the involuntary relocation of licensees—including public safety and CII licensees—to the Guard Band and grandfathered all non-Nextel CMRS licensees that currently operate within the Guard Band.[211] Grandfathered licensees could continue operating on their current frequencies, with currently authorized facilities, on a strict non-interference basis, subject to pre-coordination of any new or modified operations.[212]

86. Subsequent to the release of *800 MHz R&O*, Motient asked us to consider whether it could voluntarily relocate its non-ESMR CMRS systems to the Guard Band[213] to, *inter alia*, reduce the possibility that their systems, if later converted to different technology, could cause interference to public safety systems located below 816/862 MHz.[214] We note that our rules currently permit any licensee currently operating between 851 MHz and 861 MHz, except licensees proposing new ESMR systems, to relocate to the 861-862 MHz Guard Band on a voluntary basis. Thus, to the extent that non-ESMR licensees wish to relocate to Guard Band channels that are: (a) unoccupied; and (b) are not necessary to accommodate existing ESMR systems that have elected to relocate there, such Guard Band channels may be used by licensees, such as Motient, that propose to operate non-ESMR systems there. We also note Motient's request that uniform Guard Band channels be designated for it in all markets in which it operates.[215] Although we decline to require such uniform designation of channels, we envision that the Transition Administrator will attempt to accommodate such requests from Motient, or any other non-ESMR, licensee seeking to relocate to the Guard Band, so long as such an accommodation is consistent with sound spectrum policy.[216] We note, however, that, in the event that non-ESMR licensees, such as Motient, elect to move to the Guard Band, they will be subject to the technical and other restrictions associated with the Guard Band, including the sliding scale of interference protection.[217] Moreover, non-ESMR systems operating in the Guard Band are subject to the same interference restrictions as ESMRs operating in the Guard Band. We further note that if the requesting licensee must be relocated to implement band reconfiguration, the expense associated with relocating the licensee to the Guard Band will be borne by Nextel. Otherwise, the expense shall be borne by the relocating licensee.

O. 800 MHz Application Freeze

87. In the *800 MHz R&O*, we envisioned maintaining a stable spectral status quo during the

[210] *See 800 MHz R&O*, 19 FCC Rcd 15054 ¶ 157.

[211] *Id.*

[212] *Id.*

[213] *See 800 MHz R&O*, 19 FCC Rcd 15057 ¶ 162.

[214] *See* Letter from Robert A. Mazer, Esq., Counsel to Motient Corporation (Motient), to Marlene H. Dortch, Secretary, Federal Communications Commission (FCC) (filed Dec 8, 2004).

[215] *See* Comments of Motient Corporation at 5 (filed Dec. 2, 2004).

[216] *See 800 MHz R&O*, 19 FCC Rcd 15054-55 ¶¶ 157-158.

[217] *Id.*

retuning of each region. To ensure a stable spectral status quo in a particular NPSPAC region, we concluded that we would freeze the acceptance of new 800 MHz applications beginning when we issue the *Public Notice* announcing the date when voluntary negotiation of relocation agreements must be concluded in that region until thirty working days after the completion of mandatory negotiations in that region.[218] We now recognize, however, that the spectrum environment in a NPSPAC region can be affected by stations up to seventy miles from the region boundaries. Accordingly, the referenced Public Notice freezing the acceptance of applications will apply to systems within, and up to seventy miles outside, the boundaries of the NPSPAC region.

P. Nextel's 900 MHz Operations

88. In the *800 MHz R&O*, we allowed 900 MHz PLMR licensees to initiate CMRS operations on their currently authorized spectrum or to assign their authorizations to others for CMRS use.[219] We did so, in part, in the recognition that this would give Nextel the ability to shift some of its 800 MHz operations to 900 MHz while 800 MHz band reconfiguration was being accomplished.[220] Although Section 22.917 of our Rules[221] places out-of-band emission limits on Cellular A and B block systems adjacent to the 900 MHz SMR band, and allows us to increase those limits if interference results, Nextel has requested a statement that the rule would, in fact, apply to protect Nextel's 900 MHz operations. Although we believe the rule is clear on its face, we accede to the request and state that it does apply to cellular systems affecting Nextel's 900 MHz operations.[222]

Q. Applications During the Transition Period

89. In the *800 MHz R&O*, we updated our Part 90 rules to reflect the band plan we adopted after reconfiguration of the 800 MHz band.[223] Specifically, we updated the channel plan and re-designated channels among the various pools (public safety, B/ILT or SMR).[224] Nonetheless, we note that during the transition to a reconfigured 800 MHz band, licensees will continue to operate in accordance with the prior band plan. Furthermore, we note that we permit applicants during the transition period to file applications until we announce an application freeze for a particular NPSPAC region.[225] On our own motion, we clarify that applicants filing before release of the freeze public notice must file for channels available pursuant to the prior band plan unless the application effects a channel change consistent with the band reconfiguration plan.[226] This distinction is particularly important to applicants in the border

[218] *See 800 MHz R&O,* 19 FCC Rcd 15078 ¶ 204.

[219] *See 800 MHz R&O,* 19 FCC Rcd 15127 ¶¶ 336-337.

[220] *See 800 MHz R&O,* 19 FCC Rcd 15127 ¶ 336.

[221] *See* 47 C.F.R. § 22.917(d).

[222] *Id.*

[223] *See 800 MHz R&O,* 19 FCC Rcd 15048-56 ¶¶ 149-161 and Appendix C.

[224] *800 MHz R&O,* 19 FCC Rcd 15161-78, 15180-86, Appendix C, 47 C.F.R. §§ 90.613 and 90.617.

[225] *800 MHz R&O,* 19 FCC Rcd 15078 ¶ 204.

regions which must apply for channels under the previous 800 MHz band plan until we adopt a new band plan for the border regions.[227] Consequently, in order to provide guidance to applicants that file during the transition period, we are amending our rules to indicate that applicants filing an application before the announcement of an application freeze within a NPSPAC region, should specify channels based on the band plan in effect prior to adoption of the *800 MHz R&O* unless the applicant files a waiver request demonstrating that the application is necessary in order to accomplish band reconfiguration.

R. Comments Outside the Scope of the Public Notice

90. Certain parties filing comments in response to the *Public Notice* issued on October 22, 2004[228] addressed issues unrelated to the matters Nextel had raised in its *ex parte* communications. Inasmuch as those comments were outside the scope of the Public Notice, we have not treated them here. Moreover, we have not addressed in this *Order* each issue raised in said *ex parte* communications. Thus, in the interest of compiling a complete record, we will consider those comments as petitions for reconsideration of the *800 MHz R&O*, together with such other petitions for reconsideration as may be timely filed. In so doing, we are not precluding such parties from filing petitions for reconsideration in addition to the comments they may have filed in response to the *Public Notice*.

IV. CONCLUSION

91. As we stated in the *800 MHz R&O*, there may be no matter within our jurisdiction more crucial to Homeland Security and the overall general safety of life and property than assuring that public safety communications systems are free from unacceptable interference and have adequate capacity.[229] The orders we issue today provide the 800 MHz land mobile radio community with a clearer path to that important goal.

V. PROCEDURAL MATTERS

A. Supplemental Final Regulatory Flexibility Analysis

92. The Regulatory Flexibility Act (RFA)[230] requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[231] The RFA generally defines "small entity" as having the same meaning as the terms "small

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[226] For instance, prior to reconfiguration of a particular NPSPAC region, a NPSPAC licensee filing an application (other then for band reconfiguration) would need to apply for channels in the 821-824 MHz/866-869 MHz portion of the band. Only after a freeze on applications is lifted and the NPSPAC block is relocated would the NPSPAC licensee be eligible to apply for channels in the 806-809 MHz/851-854 MHz portion of the band.

[227] *See 800 MHz R&O*, 19 FCC Rcd 15063 ¶ 176.

[228] *See* n.5 *supra.*

[229] *800 MHz R&O*, 19 FCC Rcd 15128 ¶ 338.

[230] The RFA, *see* 5 U.S.C. §§ 601-612, 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).

[231] *See* 5 U.S.C. § 605(b).

business," "small organization," and "small governmental jurisdiction."[232] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[233] 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).[234] We note that the *Report and Order* in this proceeding included a Final Regulatory Flexibility Analysis in which we provided a description and estimate of the number of small entities to which the rules will apply.[235] We incorporate by reference that list of entities, which consist of Governmental Licensees, Public Safety Radio Licensees, Wireless Telecommunications, Business, Industrial and Land Transportation Licensees, and Specialized Mobile Radio Licensees.

93. In this *Order on Reconsideration* we clarify and revise portions of the *Public Safety Order* to further create a spectrum climate that is conducive to the efficient implementation of the 800 MHz band reconfiguration and operations of 800 MHz band licensees. Accordingly, we

- Explicitly require Nextel to submit its 700 MHz Guard Band licenses to the Commission for cancellation.
- Modify provisions relating to the letter of credit to provide that the letter of credit will serve as a security against default, and will not constitute the corpus of band reconfiguration funds absent a default. We also provide that up to ten financial institutions may issue the letter or letters of credit under certain conditions and provide that we will consider waiver of the conflict of interest provisions governing the Trustee.
- Clarify the scope of the acknowledgment that Nextel must file with the Commission as part of its acceptance of the terms and provisions of the *800 MHz R&O.*
- Clarify the entities from which Nextel must obtain a Letter of Cooperation, committing such entities to make changes necessary to implement 800 MHz band reconfiguration.
- Analyze more recent and comprehensive data on the spectrum holdings of Nextel and revising, accordingly, the credit Nextel receives for spectrum it must surrender as part of the band reconfiguration process.
- Establish interim received power level thresholds that non-cellular systems must maintain in order to claim protection against unacceptable interference during band reconfiguration. These interim threshold levels will remain in effect until band reconfiguration in a particular 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) region is complete at which time the threshold levels adopted in the *800 MHz R&O* go into effect.

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[232] 5 U.S.C. § 601(6).

[233] 5 U.S.C § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[234] 15 U.S.C. § 632.

[235] *See 800 MHz R&O* at Appendix A.

- Set out provisions for abating interference to public safety systems that do not meet the interim received power level thresholds during the period in which said interim received power level thresholds are in effect.

- Clarify and amplify certain actions falling within the *800 MHz R&O* requirement that parties conduct their relocation negotiations in good faith.

- Modify the eighteen-month benchmark so that, by that time, Nextel shall have relocated all non-Nextel and non-SouthernLINC incumbents from the former General Category channels 1-120 in at least twenty NPSPAC regions, and shall have initiated relocation negotiations with all NPSPAC licensees in said regions.

- Clarify that mobile-only systems operating on a secondary basis on former General Category Channels 1-120 may continue to operate on said channels on a secondary basis.

- Clarify when public safety and Critical Infrastructure Industry (CII) licensees gain exclusive access to channels vacated by "Enhanced Specialized Mobile Radio" (ESMR) licensees as a part of band reconfiguration.

- Specify that non-public safety and non-CII incumbents operating on Channels 231-260 may continue to operate on these channels.

- Clarify that a Commission-certified coordinator must coordinate channels vacated by ESMR licensees and applied for after completion of band reconfiguration of a given NPSPAC region.

- Decline to impose a two percent limit on administrative costs associated with incumbent relocation.

- Elaborate on the duties and authority of the Transition Administrator.

- Clarifying which Economic Area (EA) licensees are eligible for relocation to channels above 817 MHz/ 862 MHz.

- Declining to afford relocating licensees their choice of channels, provided that they are relocated to comparable facilities.

- Declining to require that relocating licensees be assigned channels in any particular sequence, but leaving such determination to the Transition Administrator.

- Defining the parameters governing the voluntary relocation of CMRS licensees to the Guard Band.

- Clarify the extent to which Nextel may be involved in the physical process of retuning incumbent systems.

- Prohibit "high site" systems above 817 MHz/862 MHz.

- Clarify that relocation of EA licensees does not constitute issuance of "new" licenses.

- Clarify that license modifications necessary to implement band reconfiguration do not implicate the Commission's "unjust enrichment" rule.

- Modify the rules affecting the "freeze" on 800 MHz license modification during reconfiguration of a given NPSPAC region.
- Clarify the applicability of Section 22.917 of the Rules to cellular systems causing interference to 900 MHz systems.

94. We note that, of the substantive rule changes, Section 90.175 is deregulatory because applications filed to implement band reconfiguration will not be subject to frequency coordination and Section 90.685 only applies to the Transition Administrator. Changes to Sections 90.613, 90.615, 90.617, 90.621, 90.685, and 90.693 are designed to more accurately reflect the Commission's 800 MHz band plan. The Commission certifies, pursuant to the RFA, that the clarifications and rule changes contained in this *Supplemental Order and Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities, including businesses with fewer than 25 employees.

95. **Report to Congress**. The Commission will send a copy of this Supplemental Order and Order on Reconsideration, including this Supplemental Final Regulatory Flexibility Analysis (SFRFA), in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act.[236] In addition the Commission will send a copy of the *Supplemental Order and Order on Reconsideration* including a copy of this Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.[237] A summary of this *Supplemental Order and Order on Reconsideration* and this certification will also be published in the Federal Register.[238]

B. Paperwork Reduction Act Analysis

96. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose no new or modified reporting or recordkeeping requirements or burdens to the public, including business with fewer than 25 employees.

VI. ORDERING CLAUSES

97. IT IS ORDERED that, pursuant to the authority of Sections 1, 4(i), 303(f) and (r), 309, 316, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(f) and (r), 309, 316, and 332, the *800 MHz R&O* is modified to the extent described herein.

98. IT IS FURTHER ORDERED that Nextel Communications, Inc. is hereby ORDERED to surrender its spectrum authorizations in the 746-747 MHz, 776-777 MHz 762-764 MHz and 792-794 MHz bands on or before **THIRTY DAYS FROM PUBLICATION OF THIS *ORDER* IN THE FEDERAL REGISTER.**

99. IT IS FURTHER ORDERED that the rule changes set forth in Appendix A WILL BECOME EFFECTIVE **THIRTY DAYS AFTER PUBLICATION OF THIS *ORDER* IN THE FEDERAL REGISTER.** This action is taken pursuant to Sections 1, 4(i), 303(f) and (r), 309, 316 and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(f) and (r), 309, 316, and 332.

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[236] *See* 5 U.S.C. § 801(a)(1)(A).

[237] *See* 5 U.S.C. § 605(b).

[238] *Id.*

100. IT IS FURTHER ORDERED that the Supplemental Final Regulatory Flexibility Analysis, required by Section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, and as set forth in herein is ADOPTED.

101. IT IS FURTHER ORDERED that the Commission's Consumer Information and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Supplemental Order and Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary