states that the Commission must both fully protect land-based operations and not hamper the deployment of land-based systems designed to serve the population centers that are within either the GSAs afforded incumbent BRS/EBS licensees or holders of the BRS BTA authorizations auctioned in 1996.[971] Nextel argues that if a Gulf Service Area is indeed established, its boundaries should end well before the shoreline, and should exclude the larger of a land-based BRS/EBS licensee's authorized GSA or the area twelve miles from the shoreline at mean high tide.[972] Similarly, Sprint states that the unique propagation characteristics of radio signals over large bodies of water render any RF activity in the Gulf region a potential interference threat to land-based operations.[973]

382. WCA urges the Commission to refrain from determining how much spectrum should be licensed within the Gulf Service Area and to refrain from scheduling any auction unless there is a demonstrable interest in utilizing the Gulf of Mexico based facilities.[974] WCA points out that the Commission itself in the *NPRM* has recognized that it has insufficient data to resolve issues concerning the amount of spectrum to license in the Gulf Service Area, and absolutely nothing was submitted in response to the *NPRM* or the *FNPRM* that addressed the issue.[975] WCA takes the position that refraining from determining how much spectrum to license in the Gulf and when to do so would be fully consistent with the Commission's decision to defer any auction of broadband PCS spectrum in the Gulf. WCA notes that the Commission concluded that there was no basis in the record for actually licensing PCS in the Gulf despite the adoption of applicable rules.[976]

383. *Discussion.* We agree with WCA that refraining from determining how much spectrum to license in the Gulf of Mexico and when to do so is the prudent course of action. The record does not demonstrate a demand for BRS or EBS operations in the Gulf of Mexico at this time. The record is not sufficiently developed to resolve issues concerning the amount of spectrum to license in the Gulf Service Area. At this point, no parties have demonstrated an interest in providing BRS or EBS in the Gulf of Mexico. As such, we do not see a need to create a Gulf Service Area for BRS or EBS. We believe, at this time, that we should reverse the decision to create a Gulf Service Area for BRS or EBS. We will entertain recreating a Gulf Service Area, for BRS and EBS, once parties demonstrate an interest in providing service in the Gulf of Mexico. Thus at this point we terminate the Gulf Service proceeding, which was incorporated into the *NPRM*.[977] We reserve the right to revisit the Gulf Service Area issue for BRS and EBS should future circumstances warrant.

---

[971] *Id.*

[972] Nextel Comments at 13.

[973] Sprint Comments at 10.

[974] WCA Reply Comments at 37.

[975] *Id.* at 37-38.

[976] *Id.* at 38.

[977] Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, *Notice of Proposed Rulemaking*, WT Docket No. 02-68, 17 FCC Rcd 8446 (2002) (*Gulf Notice* or *Gulf of Mexico MDS NPRM* or *Gulf NPRM*). That proceeding was incorporated alongside the matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Services in the 2150-2162 and 2500-2690 MHz Bands.

V. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis of *BRS/EBS 3rd MO&O and 2nd R&O*

384. The Regulatory Flexibility Act (RFA)[978] requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[979] Accordingly, we have prepared a Final Regulatory Flexibility Analysis concerning the possible impact of the rule changes contained in this *BRS/EBS 3rd MO&O and 2nd R&O* on small entities. The Final Regulatory Flexibility Analysis is set forth in Appendix B.

B. Final Regulatory Flexibility Act Certification of *Big LEO Order on Reconsideration*

385. For the reasons described below, we now certify that the policies and rules adopted in the *Big LEO Order on Reconsideration* will not have a significant economic impact on a substantial number of small entities. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[980] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[981] 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 U.S. Small Business Administration (SBA).[982]

386. In this *Big LEO Order on Reconsideration*, the Commission adopts specific PFD limits for MSS downlink operations in the 2496-2500 MHz band. If the MSS providers intend to operate at power levels that exceed those PFD limits, or if actual operations routinely exceed those PFD limits, the MSS operators must obtain approval from BRS systems operating in the same region that are affected by these PFD limits. These rules will help to ensure that MSS-BRS sharing in that band will not result in harmful interference to the BRS.

387. We find that our actions will not affect a substantial number of small entities because only MSS operators in the 2496-2500 MHz band will be affected. In particular, only one Big LEO MSS licensee currently is authorized to provide MSS in the 2496-2500 MHz band in United States. We find that this licensee is not a small business. Small businesses often do not have the financial ability to become MSS system operators due to high implementation costs associated with launching and operating satellite systems and services. Therefore, we certify that the requirements of the *Big LEO Order on*

---

[978] *See* 5 U.S.C. § 601–612. The RFA has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[979] 5 U.S.C. § 605(b).

[980] 5 U.S.C. § 601(6).

[981] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the 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."

[982] 15 U.S.C. § 632.

Reconsideration will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of this *Order*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A).

C. Paperwork Reduction Analysis

388. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

389. In this present document, we have assessed the effects of changes in the pre-transition data request, self-transition notification, Initiation Plans, Post-Transition Notifications, and transition costs, and find that in most instances the effect on entities with fewer than 25 employees will be minor. We anticipate that entities with fewer than 25 employees will be most affected by the changes to the pre-transition data request and the post-transition notification. The changes to the pre-transition data request are relatively minor, were requested by petitioners, and are designed to ease the transition. The changes to the post-transition notification eases the paperwork burden on all affected BRS and EBS licensees.

D. Further Information

390. For further information regarding the *Big LEO Order on Reconsideration and AWS Fifth Memorandum Opinion and Order*, please contact Howard Griboff, Policy Division, International Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, at 202-418-0657 or via the Internet at Howard.Griboff@fcc.gov or Jamison Prime, Policy and Rules Division, Office of Engineering and Technology, Federal Communications Commission, 445 12th Street, S.W., Washington, DC 20554, at 202-418-7474 or via the Internet at Jamison.Prime@fcc.gov. For further information concerning the *BRS/EBS Third Memorandum Opinion and Order and Second Report and Order*, contact Nancy Zaczek, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, at (202) 418-2487 or via the Internet to Nancy.Zaczek@fcc.gov.

VI. ORDERING CLAUSES

391. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 7, 10, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333 and 706 of the Communications Act of 1934, 47 U.S.C. §§ 151, 152, 154(i), 157, 160, 201, 214, 301, 302, 303, 307, 308, 309, 310, 319, 324, 332, 333, and 706, that this *Order on Reconsideration and Fifth Memorandum Opinion and Order, Third Memorandum Opinion and Order and Second Report and Order* is hereby ADOPTED.

392. IT IS FURTHER ORDERED that he Petitions for Reconsideration filed in these proceedings ARE GRANTED to the extent indicated and are otherwise DENIED.

393. IT IS FUTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, that the

"Request for Waiver" filed by W.A.T.C.H. TV Company on April 29, 2005 IS GRANTED.

394. IT IS FURTHER ORDERED, that the proceeding entitled Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, WT Docket No. 02-68 IS TERMINATED.

395. IT IS FURTHER ORDERED that the Final Regulatory Flexibility Analysis and the Final Regulatory Flexibility Certification ARE ADOPTED.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Part 25 and Part 27 of Title 47 of the Code of Federal Regulations are amended as follows:

I. PART 25 – SATELLITE COMMUNICATIONS

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: 47 U.S.C. 701-744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, and 332 of the Communications Act, as amended. 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, and 332, unless otherwise noted.

2. Amend Section 25.208 by adding a new paragraph (v) to read as follows:

§ 25.208 Power flux density limits

*****

(v) In the band 2496-2500 MHz, the power flux-density at the Earth's surface produced by emissions from non-geostationary space stations for all conditions and all methods of modulation shall not exceed the following values:

(1) -144 dB (W/m^2) in 4 kHz for all angles of arrival between 0 and 5 degrees above the horizontal plane;

-144 dB (W/m^2) + 0.65(δ -5) in 4 kHz for all angles of arrival between 5 and 25 degrees above the horizontal plane; and

-131 dB (W/m^2) in 4 kHz and for all angles of arrival between 25 and 90 degrees above the horizontal plane.

(2) -126 dB (W/m^2) in 1 MHz for all angles of arrival between 0 and 5 degrees above the horizontal plane;

-126 dB (W/m^2) + 0.65(δ -5) in 1 MHz for all angles of arrival between 5 and 25 degrees above the horizontal plane; and

-113 dB (W/m^2) in 1 MHz and for all angles of arrival between 25 and 90 degrees above the horizontal plane.

These values are obtained under assumed free-space propagation conditions.

*****

3. Amend Section 25.213 by revising paragraph (b) to read as follows:

§ 25.213 Inter-Service coordination requirements for the 1.6/2.4 GHz mobile-satellite service

*****

(b) If a Mobile-Satellite Service space station operator in the 2496-2500 MHz band intends to operate at powers levels that exceed the PFD limits in § 25.208(v), or if actual operations routinely exceed these PFD limits, we require the Mobile-Satellite Service operator to receive approval from each operational BRS system in the affected geographical region.

*****

II. PART 27 – MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

1. The authority citation for Part 27 continues to read as follows:

AUTHORITY: 47 U.S.C. 154 and 303, unless otherwise noted.

2. Section 27.4 is amended by adding the following definition to read as follows:

§ 27.4 Terms and definitions.

*****

Commercial EBS licensee. A licensee authorized to operate on EBS channels pursuant to the provisions of former §§ 27.1201(c) or 74.990 through 74.992 of this Chapter, and that does not meet the eligibility requirements of § 27.1201(a) of this part.

*****

3. Section 27.5(i) is amended by revising paragraphs (1), (2)(ii), (2)(iii), and (3) to read as follows:

§ 27.5 Frequencies.

*****

(i) ***

(1) Pre-transition frequency assignments.

BRS Channel 1: 2150-2156 MHz or 2496-2500 MHz
BRS Channel 2: 2156-2162 MHz or 2686-2690 MHz
BRS Channel 2A: 2156-2160 MHz
EBS Channel A1: 2500-2506 MHz
EBS Channel B1: 2506-2512 MHz
EBS Channel A2: 2512-2518 MHz
EBS Channel B2: 2518-2524 MHz
EBS Channel A3: 2524-2530 MHz
EBS Channel B3: 2530-2536 MHz
EBS Channel A4: 2536-2542 MHz
EBS Channel B4: 2542-2548 MHz

EBS Channel C1: 2548-2554 MHz
EBS Channel D1: 2554-2560 MHz
EBS Channel C2: 2560-2566 MHz
EBS Channel D2: 2566-2572 MHz
EBS Channel C3: 2572-2578 MHz
EBS Channel D3: 2578-2584 MHz
EBS Channel C4: 2584-2590 MHz
EBS Channel D4: 2590-2596 MHz
BRS Channel E1: 2596-2602 MHz
BRS Channel F1: 2602-2608 MHz
BRS Channel E2: 2608-2614 MHz
BRS Channel F2: 2614-2620 MHz
BRS Channel E3: 2620-2626 MHz
BRS Channel F3: 2626-2632 MHz
BRS Channel E4: 2632-2638 MHz
BRS Channel F4: 2638-2644 MHz
EBS Channel G1: 2644-2650 MHz
BRS Channel H1: 2650-2656 MHz
EBS Channel G2: 2656-2662 MHz
BRS Channel H2: 2662-2668 MHz
EBS Channel G3: 2668-2674 MHz
BRS Channel H3: 2674-2680 MHz
EBS Channel G4: 2680-2686 MHz
I Channels: 2686-2690 MHz

(2) ***

(i) ***

(ii) Middle Band Segment (MBS): The following channels shall constitute the Middle Band Segment:

EBS Channel A4: 2572-2578 MHz
EBS Channel B4: 2578-2584 MHz
EBS Channel C4: 2584-2590 MHz
EBS Channel D4: 2590-2596 MHz
EBS Channel G4: 2596-2602 MHz
BRS/EBS Channel F4: 2602-2608 MHz
BRS/EBS Channel E4: 2608-2614 MHz

(iii) Upper Band Segment (UBS): The following channels shall constitute the Upper Band Segment:

BRS Channel KH1: 2614.00000-2614.33333 MHz
BRS Channel KH2: 2614.33333-2614.66666 MHz
BRS Channel KH3: 2614.66666-2615.00000 MHz
EBS Channel KG1: 2615.00000-2615.33333 MHz
EBS Channel KG2: 2615.33333-2616.66666 MHz
EBS Channel KG3: 2615.66666-2616.00000 MHz

BRS Channel KF1: 2616.00000-2616.33333 MHz
BRS Channel KF2: 2616.33333-2616.66666MHz
BRS Channel KF3: 2616.66666-2617.00000 MHz
BRS Channel KE1: 2617.00000-2617.33333 MHz
BRS Channel KE2: 2617.33333-2617.66666 MHz
BRS Channel KE3: 2617.66666-2618.00000 MHz
BRS Channel 2: 2618-2624 MHz
BRS/EBS Channel E1: 2624-2629.5 MHz
BRS/EBS Channel E2: 2629.5-2635 MHz
BRS/EBS Channel E3: 2635-2640.5 MHz
BRS/EBS Channel F1: 2640.5-2646 MHz
BRS/EBS Channel F2: 2646-2651.5 MHz
BRS/EBS Channel F3: 2651.5-2657 MHz
BRS Channel H1: 2657-2662.5 MHz
BRS Channel H2: 2662.5-2668 MHz
BRS Channel H3: 2668-2673.5 MHz
BRS Channel G1: 2673.5-2679 MHz
BRS Channel G2: 2679-2684.5 MHz
BRS Channel G3: 2684.5-2690 MHz

Note to paragraph (i)(2): No 125 kHz channels are provided for channels in operation in this service. The 125 kHz channels previously associated with these channels have been reallocated to Channel G3 in the upper band segment.

(3) During the transition (see §§ 27.1230-27.1239 of this part) EBS and BRS licensees may exchange channels to effectuate the transition of the 2.5 GHz band in a given BTA.

*****

4. Amend § 27.14 by adding a new paragraph (e) to read as follows:

§ 27.14 Construction requirements; Criteria for comparative renewal proceedings.

*****

(e) BRS and EBS licensees must make a showing of "substantial service" no later than May 1, 2011. Incumbent BRS licensees must file their "substantial service" showing with their renewal application. "Substantial service" is defined as service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal. Substantial service for BRS and EBS licensees is satisfied if a licensee meets the requirements of paragraph (e)(1) or (e)(2) of this section. If a licensee has not met the requirements of paragraph (e)(1) or (e)(2) of this section, then demonstration of "substantial service" shall proceed on a case-by-case basis. All substantial service determinations will be made on a license-by-license basis. Except for BTA licenses, BRS licensees must file their "substantial service" showing with their renewal applications. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

(1) A BRS or EBS licensee has provided "substantial service" by:

(i) Constructing six permanent links per one million people for licensees providing fixed point-

to-point services;

(ii) Providing coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services;

(iii) Providing service to "rural areas" (a county (or equivalent) with a population density of 100 persons per square mile or less, based upon the most recently available Census data) and areas with limited access to telecommunications services:

(A) for mobile service, where coverage is provided to at least 75% of the geographic area of at least 30% of the rural areas within its service area; or

(B) for fixed service, where the BRS or EBS licensee has constructed at least one end of a permanent link in at least 30% of the rural areas within its licensed area.

(iv) Providing specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; or

(v) Providing service to niche markets or areas outside the areas served by other licensees.

(2) An EBS licensee has provided "substantial service" when:

(i) the EBS licensee is using its spectrum (or spectrum to which the EBS licensee's educational services are shifted) to provide educational services within the EBS licensee's GSA;

(ii) the EBS licensee's license is actually being used to serve the educational mission of one or more accredited public or private schools, colleges or universities providing formal educational and cultural development to enrolled students; or

(iii) the level of service provided by the EBS licensee meets or exceeds the minimum usage requirements specified in § 27.1214.

(3) An EBS or BRS licensee may be deemed to provide substantial service through a leasing arrangement if the lessee is providing substantial service under paragraph (e)(1) of this section. The EBS licensee must also be otherwise in compliance with this Chapter (including the programming requirements in § 27.1203 of this subpart).

5. Amend § 27.53 by revising the introductory text of paragraph (l) to read as follows:

§ 27.53 Emission limits.

*****

(l) For BRS and EBS stations, the power of any emissions outside the licensee's frequency bands of operation shall be attenuated below the transmitter power (P) measured in watts. BRS and EBS stations that are not in compliance with the standards below, after receiving a documented interference complaint from an adjacent channel licensee, have 60 days to coordinate with the affected licensee and meet a mutual resolution before both parties employ a more rigorous emission mask.

*****

6. Amend § 27.1201 by removing and reserving paragraph (c), revising paragraph (a) introductory text, and adding a new paragraph (d) to read as follows:

§ 27.1201 EBS Eligibility.

(a) A license for an Educational Broadband Service station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended.

*****

(b) ***

(d) This paragraph applies to EBS licensees and applications licensed or filed pursuant to the provisions of former §§ 27.1201(c) or 74.990 through 74.992 of this Chapter, and that do not meet the eligibility requirements of paragraph (a) of this section. Such licensees may continue to operate pursuant to the terms of their existing licenses, and their licenses may be renewed, assigned, or transferred, so long as the licensee is otherwise in compliance with this Chapter. Applications filed pursuant to the provisions of former §§ 27.1201(c) or 74.990 through 74.992 of this Chapter may be processed and granted, so long as such applications were filed prior to **[insert effective date of new rules].**

7. Amend § 27.1202 by revising paragraph (c) to read as follows:

§ 27.1202 Cable/BRS cross-ownership.

*****

(c) Applications for new stations, station modifications, assignments or transfers of control by cable operators of BRS stations shall include a showing that no portion of the GSA of the BRS station is within the portion of the franchise area actually served by the cable operator's cable system, or of any entity indirectly affiliated, owned, operated, controlled by, or under common control with the cable operator. Alternatively, the cable operator may certify that it will not use the BRS station to distribute multichannel video programming.

*****

8. Amend § 27.1203 by revising paragraph (b) to read as follows:

§ 27.1203 EBS programming requirements.

*****

(b) Educational Broadband Service stations are intended primarily through video, data, or voice transmissions to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students. Authorized

educational broadband channels must be used to further the educational mission of accredited schools offering formal educational courses to enrolled students.

*****

9. Amend § 27.1213 by revising paragraph (c)(2) to read as follows:

§ 27.1213 Designated entity provisions for BRS in Commission auction commencing prior to January 1, 2004.

*****

(c) ***

(2) *Conditions and obligations*. See §1.2110(g)(4) of this chapter.

*****

10. Amend § 27.1214 by revising paragraphs (b)(1) and (c) and adding new paragraph (e) to read as follows::

§ 27.1214 EBS spectrum leasing arrangements and grandfathered leases.

*****

(b) ***

(1) The licensee must reserve a minimum of 5% of the capacity of its channels for educational uses consistent with § 27.1203(b) and (c) of this part, and may not enter into a spectrum leasing arrangement involving this reserved capacity. In addition, before leasing excess capacity, the licensee must provide at least 20 hours per licensed channel per week of EBS educational usage. This 5% reservation and this 20 hours per licensed channel per week EBS educational usage requirement shall apply spectrally over the licensee's whole actual service area. However, regardless of whether the licensee has an educational receive site within its GSA served by a booster, the licensee may lease excess capacity without making at least 20 hours per licensed channel per week of EBS educational usage, provided that the licensee maintains the unabridgeable right to recapture on one months' advance notice such capacity as it requires over and above the 5% reservation to make at least 20 hours per channel per week of EBS educational usage.

*****

(c) All spectrum leasing arrangements involving EBS spectrum must afford the EBS licensee an opportunity to purchase or to lease dedicated or common EBS equipment used for educational purposes in the event that the spectrum leasing arrangement is terminated.

*****

(e) The maximum permissible term of an EBS spectrum leasing arrangement entered into on or after **[insert effective date of this rule]** (including the initial term and all renewal terms that commence automatically or at the sole option of the lessee) shall be 30 years. In furtherance of the educational purposes for which EBS spectrum is primarily allocated, any spectrum leasing arrangement in excess of

15 years that is entered into on or after **[insert effective date of this rule]** must include terms which provide the EBS licensee on the 15th year and every 5 years thereafter, with an opportunity to review its educational use requirements in light of changes in educational needs, technology, and other relevant factors and to obtain access to such additional services, capacity, support, and/or equipment as the parties shall agree upon in the spectrum leasing arrangement to advance the EBS licensee's educational mission.

11. Add new § 27.1216 to read as follows:

§ 27.1216 Grandfathered E and F group EBS licenses.

(a) Except as noted in paragraph (b) of this section, grandfathered EBS licensees authorized to operate E and F group co-channel licenses are granted a geographic service area (GSA) on **[insert effective date of rule]**. The GSA is the area bounded by a circle having a 35 mile radius and centered at the station's reference coordinates, and is bounded by the chord(s) drawn between intersection points of that circle and those of respective adjacent market, co-channel licensees.

(b) If there is more than 50 percent overlap between the calculated GSA of a grandfathered EBS license and the protected service area of a co-channel BRS license, the licensees shall not be immediately granted a geographic service area. Instead, the grandfathered EBS license and the co-channel BRS licensee must negotiate in good faith to reach a solution that accommodates the communication needs of both licensees. If the co-channel licensees reach a mutually agreeable solution on or before **[insert date ninety days from the effective date of this rule]**, then the GSA of each co-channel license shall be as determined pursuant to the agreement of the parties. If a mutually agreeable solution between co-channel licensees is not reached on or before **[insert date ninety days from effective date of this rule]**, then each co-channel licensee shall receive a GSA determined pursuant to paragraph (a) of this section and Section 27.1206(a) of this part.

12. Revise § 27.1221(a) to read as follows:

§ 27.1221 Interference protection.

(a) Interference protection will be afforded to BRS and EBS on a station-by-station basis based on the heights of the stations in the LBS and UBS and also on height benchmarking, although the heights of antennas utilized are not restricted.

*****

13. Revise § 27.1230 to read as follows:

§ 27.1230 Conversion of the 2500-2690 MHz band.

BRS and EBS licensees in the 2500-2690 MHz band on the pre-transition A-I Channels will be transitioned from the frequencies assigned to them under § 27.5(i)(1) of this part to the frequencies assigned to them under § 27.5(i)(2) of this part. The transition, which will be undertaken by one or more proponent(s), will occur in the following five phases: initiating the transition process (see § 27.1231), planning the transition (see § 27.1232), reimbursing transition costs (see §§ 27.1233 and 27.1237-1239), terminating existing operations in transitioned markets that do not comport with § 27.5(i)(2) of this part (see § 27.1234), and filing the post-transition notification (see § 27.1235). Licensees may also self-transition (see § 27.1236).

14. Revise § 27.1231 to read as follows:

§ 27.1231 Initiating the transition.

(a) *Transition areas.* Unless paragraph (b) of this section applies, the transition will occur by Basic Trading Area (BTA). BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, that identifies 487 BTAs based on the 50 States; it also includes the following additional BTA-like areas: American Samoa; Guam, Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands, for a total of 493 BTAs. The Mayaguez/Aguadilla-Ponce BTA-like area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincon, Sabana Grande, Salinas, San German, Santa Isabel, Villalba, and Yauco. The San Juan BTA-like area consists of all other municipios in Puerto Rico. The BTA associated with the Gulf of Mexico will not be transitioned.

(b) *Overlapping GSAs.* When a Geographic Service Area (GSA) overlaps two or more BTAs:

(1) The proponents of the adjacent BTAs may agree on how to transition a GSA that overlaps their respective BTAs.

(2) If an agreement has not been reached between or among the proponents of the adjacent BTAs:

(i) each proponent must transition all of the facilities associated with the GSA that are inside the GSA and inside the proponent's BTA if all of the adjacent BTAs are transitioning; or

(ii) the proponent of the BTA that is transitioning must transition all of the facilities associated with the GSA that are within the GSA but outside the BTA, if the adjacent BTA is not transitioning.

(c)(1) *Proponent(s).* The proponent or co-proponent must:

(i) be a BRS or EBS licensee or BRS or EBS lessee;

(ii) send a Pre-Transition Data Request (see paragraph (d) of this section) and a Transition Notice (see paragraph (e) of this section) to every BRS and EBS licensee in the BTA, using the contact information in the Commission's Universal Licensing System; and

(iii) be first to file an Initiation Plan (see paragraph (f) of this section) with the Secretary of the Commission.

(2) Before filing an Initiation Plan, BRS or EBS licensees or BRS or EBS lessees may agree to be co-proponents. After the Initiation Plan is filed the proponent may accept a co-proponent at its sole discretion.

(d) *Pre-Transition Data Request.* The Pre-Transition Data Request must include the potential proponent's full name, postal mailing address, contact person, e-mail address, and phone and fax numbers.

(1) BRS and EBS licensees that receive a Pre-Transition Data Request must provide the following information to the potential proponent within 45 days of receiving the Pre-Transition Data Request:

(i) The BRS or EBS licensee's full name, postal mailing address, contact person, e-mail address, and phone and fax number.

(ii) The location (by street address and by geographic coordinates) of every constructed EBS receive site that, as of the date of receipt of the Pre-Transition Data Request, is entitled to a replacement downconverter (see § 27.1233(a) of this part). The response must:

(A) Specify whether the downconverting antenna is mounted on a structure attached to the building or on a free-standing structure;

(B) Specify the approximate height above ground level of the downconverting antenna; and

(C) Specify, if known, the adjacent channel D/U ratio that can be tolerated by any receiver(s) at the receive site.

(iii) The location (street address and geographic coordinates) of the main station or booster serving each EBS receive site entitled to protection, including:

(A) The make and model of the antenna for that main station or booster, along with the radiation pattern if it is not included within the Commission's database;

(B) The ground elevation, above mean sea level (AMSL), of the building or antenna supporting structure on which the main station or booster transmission antenna is installed;

(C) The height above ground level (AGL) of the center of radiation of the transmission antenna;

(D) The orientation of the main lobe of the transmission antenna;

(E) Any mechanical beamtilt or electrical beamtilt not reflected in the radiation pattern provided or included within the Commission's database;

(F) The bandwidth of each channel or subchannel, the emission type for each channel or subchannel, and the EIRP measured in the main lobe for each channel or subchannel; and

(G) The make and model of the receive antenna installed at that site, along with the radiation pattern if it is not included within the Commission's database.

(iv) The number and identification of EBS video programming or data transmission tracks the EBS licensee is entitled to receive in the MBS and whether the EBS licensee will accept fewer tracks in the MBS (see § 27.1233(b) of this part).

(v) Whether it will seek or has sought a wavier from the Commission as a Multichannel Video Programming Distributor (MVPD).

(2) BRS and EBS licensees that do not respond to the Pre-Transition Data Request within 45 days of its receipt may not object to the Transition Plan.

(e) *The Transition Notice.* The potential proponent(s) must send a Transition Notice to all BRS

and EBS licensees in the BTA(s) being transitioned. The potential proponent(s) must include the following information in the Transition Notice:

(1) the potential proponent(s)'s full name; postal mailing address, contact person, e-mail address, and phone and fax numbers;

(2) the identification of the BRS and EBS licensees that will be transitioned;

(3) copies of the most recent response to the Pre-Transition Data Request for each participant in the process; and

(4) a certification that the potential proponent(s) has the funds available to pay the reasonably expected costs of the transition based on the information in the Pre-Transition Data Request.

(f) *Initiation Plan.* To initiate a transition, a potential proponent(s) must submit an Initiation Plan to the Commission at the Office of the Secretary in Washington, DC within 30 months of **[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

(1) An Initiation Plan must contain the following information:

(i) a list of the BTA(s) that the proponent(s) is transitioning;

(ii) a list by call sign of all of the BRS and EBS licensees in the BTA(s) that are being transitioned;

(iii) a "best estimate" of when the transition will be completed;

(iv) a statement indicating that an agreement has been concluded with the proponent(s) of the adjoining or adjacent BTA(s) when a licensee or licensees in an adjacent or adjoining BTA must be transitioned to avoid interference to licensees in the BTA being transitioned, or in lieu of an agreement, the proponent(s) may provide an alternative means of transitioning the licensees in an adjacent or adjoining BTA;

(v) a statement indicating that an agreement has been concluded with another proponent(s) on how a BTA will be transitioned when there are two or more proponents seeking to transition the same BTA and they agree to be co-proponents before the Initiation Plan is filed, and a statement that identifies the specific portion of the BTA each proponent will be responsible for transitioning; and

(vi) a certification that the proponent or joint proponents have the funds available to pay the reasonable expected costs of the transition based on the information contained in the Pre-Transition Data Request (see paragraph (d) of this section).

(2) A proponent, at its own discretion, may withdraw from transitioning a BTA by notifying the Commission and all affected BRS and EBS licensees in the BTA that it is withdrawing the Initiation Plan.

(3) A proponent may amend an Initiation Plan after it has been filed with the Commission to correct minor or inadvertent errors.

(g) *MVPD waiver requests.* MVPD licensees that seek to opt-out of the transition must seek a waiver within 60 days after the proponent files the Initiation Plan or on or before April 30, 2007,

whichever occurs first.

15. Amend §27.1232 by revising paragraph (a), the introductory text of paragraph (b), paragraph (c)(1), the first sentence of paragraph (d)(1), and the first two sentences of paragraph (d)(2), and adding new paragraphs (d)(3) and (d)(4) to read as follows:

§ 27.1232 Planning the Transition.

(a) *The Transition Planning Period.* The Transition Planning Period is a 90-day period that commences on the day after the proponent(s) files the Initiation Plan with the Commission.

(b) *The Transition plan.* The proponent(s) must provide to each BRS and EBS licensee within a BTA, a Transition Plan no later than 30 days prior to the conclusion of the Transition Planning Period.

*****

(c) ***

(1) Accept the counterproposal, modify the Transition Plan accordingly, and send the modified Transition Plan to all EBS and BRS licensees in the BTA;

*****

(d) ***

(1) *Safe harbor No. 1.* This safe harbor applies when the default high-power channel assigned to each channel group is authorized to operate after the transition with the same transmission parameters (coordinates, antenna pattern, height of center radiation, EIRP) as the downstream facilities before the transition. ***

*****

(2) *Safe harbor No. 2.* This safe harbor applies when an EBS licensee has channel-shifted its single video programming or data transmission track to spectrum licensed to another licensee. Under § 27.5(i)(2) of this part, that track must be on the high-power channel licensed to the EBS licensee upon completion of the transition. ***

*****

(3) *Safe harbor No. 3.* This safe harbor applies when a four-channel group is shared among multiple licensees in a given geographic area. Absent an agreement otherwise, a proponent may:

(i) Secure a 6 MHz MBS channel for each licensee in exchange for the non-MBS channels assigned to the group. Following the channel swap(s) necessary to secure those additional MBS channels, the Transition Plan can provide for the licensing of the remaining channels in the LBS, UBS, and Guard Bands on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment);

(ii) Provide for pro rata segmentation of the default MBS channel for the group, provided that the proponent commits to provide each of the licensees with the technology necessary for its EBS video programming or data transmissions to be digitized, transmitted and received utilizing the provided bandwidth. The non-MBS channels would be divided among the sharing licensees on a pro rata basis

(with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment); or

(iii) Assign the default MBS channel assigned to the channel group to one of the licensees, if that licensee is the only one that elects to migrate video programming or data transmission tracks to the MBS. The remaining spectrum assigned to the group may be allocated among the licensees on a pro rata basis, with the 6 MHz in the MBS counting against that licensee's portion. To the extent necessary, the non-MBS spectrum can be disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment. If the proponent chooses to effectuate a channel swap to provide more than one channel in the MBS, the remaining channels assigned to the group (after considering that one or more LBS/UBS channels and associated Transition Band channels will have been swapped away to provide the additional MBS channel) can be allocated among the licensees on a pro rata basis (with channel(s) in each segment being disaggregated when and if necessary to provide each with its pro rata share of the spectrum in each segment).

(4) *Safe harbor No. 4.* This safe harbor applies when an EBS licensee uses one or more of its channels for studio-to-transmitter links. The proponent may provide for one of the following options:

(i) the use of the LBS and/or UBS band for the point-to-point transmission of the EBS video or data (through superchannelization of the licensee's contiguous LBS or UBS channels), provided the proponent commits to retune the existing point-to-point equipment to operate on those channels or to replace the existing equipment with new equipment tuned to operate on those channels and the proposal complies with the LBS/UBS technical and interference protection rules;

(ii) the migration of the EBS programming to the MBS by retuning the existing point-to-point equipment to operate in the MBS or replacing it with equipment tuned to operate in the MBS; or

(iii) the replacement of the point-to-point link with point-to-point equipment licensed to the EBS licensee in alternative spectrum, so long as the replacement facilities meet the definition of "comparable facilities" set out in §101.75(b) of this Chapter.

16. Amend § 27.1233 by removing paragraph (c) and revising paragraphs (a)(1)(i) and (b)(3)(ii) to read as follows:

§ 27.1233 Reimbursement costs of transitioning.

(a) ***

(1)***

(i) a reception system was installed at that site on or before the date the EBS licensee receives its Pre-Transition Data Request (see § 27.1231(d) of this subpart);

*****

(b) ***

(3) ***

(ii) *Adjacent Channel D/U Ratio.* The actual adjacent channel D/U must equal or exceed the lesser of 0 dB or the actual pre-transmission D/U ratio. However, in the event that the receive site uses

receivers or is upgraded by the proponent(s) as part of the Transition Plan to use receivers that can tolerate negative adjacent channel D/U ratios, the actual adjacent channel D/U ratio at such receive site must equal or exceed -10 dB. Provided that the receive site receiver in not upgraded and cannot tolerate -10 dB, the adjacent channel D/U ratio would be 0dB.

*****

17. Amend § 27.1235 by revising the introductory text and paragraph (a) and adding a new paragraph (d) to read as follows:

§ 27.1235 Post-transition notification.

The proponent(s) must certify to the Commission at the Office of the Secretary, Washington DC, that the Transition Plan has been fully implemented.

(a) The notification must provide the identification of the licensees that have transitioned to the band plan in § 27.5(i)(2) of this part and the specific frequencies on which each licensee is operating.

*****

(d) A BRS or EBS licensee must file any objection to the post-transition notification within 30 days from the date the post-transition notification is placed on Public Notice.

18. Amend Subpart M by adding new §§ 27.1236- 27.1239 to read as follows:

§ 27.1236 Self-transitions.

(a) If an Initiation Plan is not filed within 30 months of INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER for a BTA, BRS and EBS licensees in that BTA may self-transition by relocating to their default channel locations specified in § 27.5(i)(2) of this part and complying with §§ 27.50(h), 27.53, 27.55 and 27.1221of this part.

(b) To self-transition, a BRS or EBS licensee must:

(1) Notify the Secretary of the Commission on or before 90 days after the Initiation Plan must be filed with the Commission that it will self-transition (see paragraph (a) of this section);

(2) Send a Self-Transition Notification (see paragraph (c) of this section) to other BRS and EBS licensees in the BTA where the self-transitioning licensee's GSA geographic center point is located that it is self-transitioning;

(3) Notify other licensees whose GSAs overlap with the self-transitioning licensee that it is self-transitioning.

(4) Address interference concerns with other BRS and EBS licensees in the BTA that are also self-transitioning;

(5) File a modification application with the Commission, and

(6) Complete the self-transition within 57 months of INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.

(c) *Self-Transition Notification.* The Self-Transition Notification must include the EBS licensee's full name, postal mailing address, contact person, e-mail address, and phone and fax numbers. A Self-Transitioning EBS licensee must provide the following information to all BRS and EBS licensees located in the BTA where the self-transitioning licensees GSA geographic center point is located:

(1) The location (by street address and by geographic coordinates) of every constructed EBS receive site that, as of the date the Self-Transition Notification is sent, is entitled to a replacement downconverter (see § 27.1233(a) of this part). The response must:

(i) Specify whether the downconverting antenna is mounted on a structure attached to the building or on a free-standing structure;

(ii) Specify the approximate height above ground level of the downconverting antenna; and

(iii) Specify, if known, the adjacent channel D/U ratio that can be tolerated by any receiver(s) at the receive site.

(2) The location (street address and geographic coordinates) of the main station or booster serving each EBS receive site entitled to protection, including:

(i) The make and model of the antenna for that main station or booster, along with the radiation pattern if it is not included within the Commission's database;

(ii) The ground elevation, above mean sea level (AMSL), of the building or antenna supporting structure on which the main station or booster transmission antenna is installed;

(iii) The height above ground level (AGL) of the center of radiation of the transmission antenna;

(iv) The orientation of the main lobe of the transmission antenna;

(v) Any mechanical beamtilt or electrical beamtilt not reflected in the radiation pattern provided or included within the Commission's database;

(vi) The bandwidth of each channel or subchannel, the emission type for each channel or subchannel, and the EIRP measured in the main lobe for each channel or subchannel; and

(vii) The make and model of the receive antenna installed at that site, along with the radiation pattern if it is not included within the Commission's database.

(3) The number and identification of EBS video programming or data transmission tracks the EBS licensee is entitled to receive in the MBS (see § 27.1233(b) of this part).

§ 27.1237 Pro rata allocation of transition costs.

(a) *Self-transitions.* EBS licensees that self-transition may seek reimbursement for their costs to replace eligible downconverters (see § 27.1233(a)) and to migrate video programming and data transmission tracks (see § 27.1233(b)) from BRS licensees and lessees, EBS lessees, and commercial EBS licensees in the BTA where the center point of the EBS licensee's GSA is located. In addition, BRS licensees and lessees, EBS lessees, and commercial EBS licensees in the LBS or UBS must reimburse the self-transitioning EBS licensee a pro rata share of the eligible costs of transitioning EBS licensees, based

on the formula in paragraph (c) of this section. Eligible costs are listed in § 27.1238 of this part.

(b) *Proponent-driven transitions.* BRS licensees and lessees, entities that lease EBS spectrum for a commercial purpose, and commercial EBS licensees must pay their own transition costs. In addition, except for MVPD operators that opt-out of the transition, BRS licensees and lessees, EBS lessees, and commercial EBS licensees in the LBS or UBS must reimburse the proponent a pro rata share of the eligible costs of transitioning EBS licensees, based on the formula in paragraph (c) of this section. Eligible costs are listed in § 27.1238 of this part.

(c) *Formula.* The pro rata share shall be based on the following formula: $R = \frac{L \times LP}{T \times TP}$

(1) R equals the pro rata share;

(2) L equals the amount of spectrum used by a BRS licensee or lessee or commercial EBS licensee or lessee to provide a commercial service, either directly or through a lease agreement with an EBS or BRS licensee;

(3) T equals the total amount of spectrum licensed or leased for commercial purposes in the BTA;

(4) LP equals the population of the geographic service area or BTA served by the BRS licensee or lessee or commercial EBS licensee or lessee based on the data in the 2000 United States Census; and

(5) TP equals the population of the BTA based on the data in the 2000 United States Census.

§ 27.1238 Eligible costs.

(a) The costs listed in paragraphs (b) – (f) of this Section are eligible costs.

(b) *Pre-transition costs*:

(1) Engineering/Consulting

(i) Evaluation of equipment;

(ii) RX site identification;

(iii) EBS Programming plan covering the BTA;

(iv) Market Analysis (MHz per POP Study);

(v) RF study (interference analysis); and

(vi) Transition Plan creation and support;

(2) Project management (may be sourced external);

(3) Filing fees;

(4) Legal fees;

(5) Site acquisition fees-contractor; and

(6) Arbitrator fee;

(c) *Transmission facility--analog conversion costs:*

(1) Transmitter upgrading or retuning;

(2) Combiner re-tuning or new;

(3) Power divider/circulator adjacent channel combiner hardware;

(4) STL/fiber relocation;

(5) Miscellaneous material costs (including cabling and connectors);

(6) Contract labor:

(i) Tower;

(ii) Building modifications;

(iii) Electrical/HVAC; and

(iv) Mechanical

(7) Engineering:

(i) Structural; and

(ii) Pathway Interference Analysis.

(8) Equipment disposal/shipping

(9) Program Management (third party or internal costs to manage the BTA conversion); and

(10) Travel and Per Diem Cost.

(d) *Transmission facility—digital conversion costs:*

(1) New transmitter or retuning;

(2) Digital compression equipment-TX site (including encoders, controller, and software);

(3) Combiners-new or retune;

(4) Power divider/circulator adjacent channel combiner hardware;

(5) Cabinets, cabling, feedline and connectors;

(6) STL – fiber digital upgrade;

(7) Installation cost due to adding additional broadcast antenna (4 or more digital channels required);

(8) Contract labor:

(i) Tower;

(ii) Building modifications;

(iii) Electrical/HVAC; and

(iv) Mechanical.

(9) Proof of performance testing (may be contracted);

(10) Engineering:

(i) Structural; and

(ii) Path engineering analysis.

(11) Equipment disposal/shipping;

(12) Training;

(13) Program management (third party or internal costs to manage BTA conversion);

(14) Travel and per diem costs.

(e) *Qualified receive-sites only-modifications (analog and digital):*

(1) Digital set top boxes;

(2) Downconverters (with filtering)/antennas (replacement downconverters);

(3) Contract labor:

(i) Antenna change/DC install (antenna change may be necessary); and

(ii) Electrical; and mechanical

(4) Project management (third party or internal costs to manage the BTA conversion);

(5) Proof of performance testing (may be contracted);

(6) Mini headend (cost effective distribution method):

(i) Modulators, combiners;

(ii) Equipment racks; and

(iii) Amplifiers

(7) Cable, connectors; and

(8) Training.

(f) *Miscellaneous transition fees.*

(1) Filing fees;

(2) Arbitrator fee; and

(3) Legal fees.

§ 27.1239 Reimbursement obligation.

(a) A proponent may request reimbursement from BRS licensees and lessees, EBS lessees, and commercial EBS licensees in a BTA after the Transition Notification has been filed with the Secretary of the Commission and the proponent has accumulated the documentation to substantiate the full and accurate cost of the transition. A self transitioning licensee may request reimbursement from BRS licensees and lessees, EBS lessees, and commercial EBS licensees in a BTA where its GSA geographic center point is located after it has completed the self-transition and has filed a modification application with the Commission and has accumulated the documentation to substantiate the full and accurate cost of the transition.

(b) If a license is assigned, transferred, partitioned, or disaggregated, all parties to the assignment, transfer, disaggregation, or partition are jointly and severally liable for paying the reimbursement obligation until that obligation is paid.

APPENDIX B

Final Regulatory Flexibility Analysis

(For Third Memorandum Opinion and Order and Second Report and Order)

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[983] an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Further Notice of Proposed Rule Making (FNPRM)* was incorporated therein. The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. No comments were submitted specifically in response to the IRFA; we nonetheless discuss certain general comments below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[984]

Need for, and Objectives of the Rules:

On July 29, 2004, the Commission released the *BRS/EBS R&O & FNPRM*. In the *BRS/EBS R&O*, the Commission adopted a band plan that restructured the 2500-2690 MHz band into upper and lower-band segments for low-power operations (UBS and LBS, respectively), and a mid-band segment (MBS) for high-power operations, in order to reduce the likelihood of interference caused by incompatible uses. The Commission also designated the 2495-2500 MHz band for use in connection with the 2500-2690 MHz band.[985] Through the adoption of the new band plan, the Commission provided incentives for the development of low-power cellularized broadband use and, accordingly, renamed MDS and ITFS as the "Broadband Radio Service" and "Educational Broadband Service," respectively, to more accurately describe the kinds of the services anticipated in this band. In order to facilitate the transition to the new band plan, the *BRS/EBS R&O* adopted a market-oriented, transition mechanism that enables incumbent licensees to develop regional plans for moving to new spectrum assignments in the restructured band plan. The *BRS/EBS R&O* also adopted service rules that give licensees increased flexibility, reduce administrative burdens on both licensees and the Commission, and promotes regulatory parity.

In this *Third Memorandum Opinion and Order and Second Report and Order* (*3rd MO&O and 2nd R&O*) we adopt a number of changes concerning the rules governing the 2500-2690 MHz band, for the Broadband Radio Service (BRS) and the Educational Broadband Service (EBS). The rules we adopt today include: requiring licensees to transition based on Basic Trading Areas (BTAs), rather than Major Economic Areas (MEAs) as specified in the *BRS/EBS R&O*; permitting licensees to self-transition if a proponent does not file an Initiation Plan by a date certain or withdraws an Initiation Plan and another

[983] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, (SBREFA) Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[984] *See* 5 U.S.C. § 604.

[985] *See* Review of the Spectrum Sharing Plan Among Non-Geostationary Satellite Service Systems in the 1.6/2.4 GHz Bands, *Report and Order, Fourth Report and Order, and Further Notice of Proposed Rulemaking*, IB Docket No. 02-364, 19 FCC Rcd 13356, 13358 ¶ 2 (2004). *See also* ¶¶ 6-19 *supra*.

proponent does not come forward by a date certain; requiring all commercial licensees, in a proponent-driven transition, to reimburse the proponent a pro rata share of the cost of transitioning a BTA to the new band plan; requiring commercial licensees to pay their own costs if they self-transition, but permitting non-commercial EBS licensees to seek reimbursement from commercial licensees; establishing a geographic service area for grandfathered E and F channel EBS licensees, and allowing such licensees to modify or assign their licenses; eliminating the overlap between a grandfathered EBS licensee and a BRS site-based incumbent by "splitting the football; eliminating the rule that limits EBS licensees to four channels in a given geographic area; eliminating the wireless cable exception to the EBS eligibility rules; altering, where possible, the regulatory fee structure for the BRS services to establish a tiered regulatory fee structure based on market size/MHz; adopting a substantial service standard for BRS and EBS licensees, with safe harbors; and requiring all licensees to establish substantial service by May 1, 2011.

We believe the rules we adopt today will both encourage the enhancement of existing services using this band and promote the development of new innovative services to the public, such as providing wireless broadband services, including high-speed Internet access and mobile services. We also believe that our new rules will allow licensees to adapt quickly to changing market conditions and the marketplace, rather than to government regulation, in determining how this band can best be used.

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

No comments were submitted specifically in response to the IRFA.

Description and Estimate of the Number of Small Entities to Which the 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 the proposed rules.[986] The RFA generally defines the term "small entity" as having the same meaning as the terms, "small business," "small organization," and "small governmental jurisdiction."[987] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[988] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[989] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[990] Nationwide,

[986] 5 U.S.C. § 603(b)(3).

[987] 5 U.S.C. § 601(6).

[988] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the 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." 5 U.S.C. § 601(3).

[989] 15 U.S.C. § 632.

[990] 5 U.S.C. § 601(4).